Are Technical Difficulties at the Supreme Court Causing a "Disregard of Duty"?

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Abstract:

Recent U.S. Supreme Court cases involving technology-related issues indicate that several Justices are embarrassingly ignorant about computing and communication methods that many Americans take for granted. Indeed, some Justices admit they are behind the times. Yet, as members of the nation's highest court, they are increasingly asked to set legal precedents about these very technologies. The implications are profound for U.S. media law because, with the advent of the Digital Age, speech and expression have become intertwined with technology. The article argues that it is crucial for our most important decision-makers to keep pace with the times; otherwise, they may make poor legal decisions or avoid hearing important cases because they do not grasp the issues involved. In fact, such missteps may already be occurring. A few possible solutions are offered.

Rezumat:

Cauze recente ale Curții Supreme a Statelor Unite ale Americii implicând problematici de natură tehnologică indică aspectul că o serie de membri ai corpului judiciar sunt jenant de ignoranți în ce privește tehnologica informației și metodelor de comunicație pe care mulți americani le cunosc ca atare. Într-adevăr, unii membri ai corpului judiciar admit că sunt în urma vremurilor. Totuși, ca membri ai celei mai înalte instanțe, sunt din ce în ce mai mult solicitați să dezlege și să stabilească precedente legale privind aceste varii tehnologii. Implicațiile sunt profunde pentru legislația americană privind media, deoarece, odată cu apariția erei digitale, discursul și modul de exprimare au devenit întrepătrunse cu tehnologia. Articolul pune în discuție faptul că este esențial pentru cei mai importanți factori de decizie să țină pasul cu vremurile; în caz contrar, aceștia se pot afla în situația de a lua decizii juridice nefericite sau de a evita să audieze cazuri importante deoarece aceștia nu vor înțelege problematica din cauză. În fapt, aceste direcții greșite deja s-au produs. Câteva posibile soluții au fost oferite.

Keywords: technology, communication, U.S. Supreme Court, digital age, media law, judge

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INTRODUCTION

If you are in America and not yet acquainted with cell phones, computers and the Internet, you must have spent the past decade under a rock - or be a member of the United States Supreme Court. Supreme Court Justices lately have displayed a startling level of ignorance about computing and communication methods that many Americans take for granted. Justice Clarence Thomas "generally characterizes the Court as being in a 'catch up mode in the area of technology.'"[2] Some even seem complacent with being stuck in the past. Justice Antonin Scalia admits he is "Mr. Clueless" when it comes to new media[3]. Yet, as members of the nation's highest court, they are increasingly asked to set legal precedents about these very technologies[4].

With the advent of the Digital Age, speech and expression have become intertwined with technology, leading to profound implications for the First Amendment, media law, and communications policy. In the United States, sixty-one percent of people get their news online[5], seventy- eight percent of people use the Internet[6], and the number of wireless connections is equal to ninety-one percent of the population owning cell phones[7]. Justice Anthony Kennedy, writing for the Court, has stated that the ubiquity of these new media tools means that some people may consider them "necessary instruments for self-expression, even self-identification."[8] But he has also implied that the Court may lack "the knowledge and experience"[9] to make "[a] broad holding"[10] on constitutional issues involving technology. Journalists and scholars who follow the Court have expressed

[2] Roy M. Mersky & Kumar Percy, *The Supreme Court Enters the Internet Age: The Court and Technology*, LLRX (June 1, 2000), http://www.llrx.com/features/supremect.htm.

[3] Jordan Fabian, *Chairman to Justices: "Have Either of Y'all Ever Considered Tweeting or Twitting?*" Hillicon Valley: The Hill's Tech. Blog (May 21, 2010, 3:30 PM), http://thehill.com/blogs/hillicon-valley/technology/99209-chairmanto-justices-have-either-of- yall-ever-considering-tweeting-or-twitting-(quoting Justice Scalia's testimony at a House judiciary subcommittee hearing; video footage is also provided).

[4] David Kravets, *All Rise: Supreme Court's Geekiest Generation Begins*, WIRED (Oct. 1, 2010, 6:59 AM), http://www.wired.com/threatlevel/2010/10/supremecourt-2010-2011-term ("The U.S. Supreme Court begins a new term Monday with a slew of technology and civil rights issues queued on its docket, some of which could have far-reaching implications for the Freedom of Information Act, copyright, warrantless searches of private residences, the 'state secrets' privilege and freedom of expression").

[5] Kathryn Zickuhr, *Generations 2010: Getting News Online*, PEW INTERNET & AMERICAN LIFE PROJECT, 23 (Dec. 16, 2010), http://www.pewinternet.org/Reports/2010/Generations-2010/Trends/Onlinenews. aspx (citing Dec. 28, 2009 – Jan. 19, 2010 survey of 2,259 adults).

[6] *World Internet Project Report*, CTR. FOR THE DIGITAL FUTURE AT THE USC ANNENBERG SCH. FOR COMMC'N & JOURNALISM (Mar. 2010), http://www.digitalcenter.org/pages/site_content.asp?intGlobalId=42 (follow "To view the press release and highlights of the report" link).

[7] *CTIA-The Wireless Association Announces Semi-Annual Wireless Industry Survey Results,* CTIA-THE WIRELESS ASS'N (Mar. 23, 2010), http://www.ctia.org/media/press/body.cfm/prid/1936.

[8] City of Ontario v. Quon, 130 S.Ct. 2619, 2629 (2010)*, available at* http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf.

[9] *Id.* at 10 ("In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth . It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises.…") (citation omitted).

[10] *Id.* at 11 ("A broad holding … might have implications for future cases that cannot be predicted.").

concern about the Court's inexperience with emerging technologies. Amar Toor of *The Huffington Post* and *Switched* asked, "[I]sn't it somewhat worrisome that arguably the most important people in America are making major decisions about something so embarrassingly foreign to them?"[11]

Judge Donald Shelton, a trial judge in Michigan's Washtenaw County Trial Court who has authored several law journal articles on judges and technology, said it is critical for jurists to keep up with the changes:

[N]ew technology has been used to create another revolution in information availability and transmission. The Internet is certainly an obvious example and is in many ways the catalyst for this as yet unfinished information revolution. The World Wide Web really is worldwide and now extends, at least in our society, into virtually every household in some way.

….

What, say the judges, does all this have to do with us? Everything! As an institution, the judicial system has traditionally been loath to embrace new ideas. The validity of the concept of stare decisis rests on a steadfast belief in the value of the status quo…. While judges may resist the use of technological advances within the court itself, we cannot avoid the impact of these scientific and information revolutions on the substance of what we do.[12]

It is particularly crucial for our most important decision-makers, Supreme Court Justices, to have at least a rudimentary understanding of technologies most Americans cannot imagine living without. If the Court cannot grasp how business inventions have changed since the Industrial Revolution, or how communication methods have evolved since Alexander Graham Bell, then they might make decisions that misapply the law due to a misunderstanding of the facts about technology. The Court may also be unwilling to hear certain technology related cases, since they have discretionary review and may not grasp the importance of the issues involved. In fact, some Court analysts argue that such missteps have already occurred. As legal journalist Lyle Denniston -who has covered the Court for 50 years -noted:

The [United States Supreme] Court has said explicitly that it does not yet have a broad enough understanding of new electronic technology to make major pronouncements on the constitutional issues that are arising around it. Last term, for example, it moved cautiously in evaluating privacy on pagers that government agencies provide to their employees. [This term,] it simply left another new issue to develop in the lower courts when it denied review in *Ohio v. Smith*.[13]

Justices' attitudes about technology urgently need to change. While legal issues related to patent or bankruptcy develop slowly and semi-logically over time, technology changes at an alarming pace. Moore's Law -computer processing

[11] Amar Toor, *Supreme Court Justices Aren't Big Texters*, SWITCHED (April 22, 2010, 10:05 AM), http://www.switched.com/2010/04/22/supreme-court-justicesarent-big-texters002F.

[12] Hon. Donald E. Shelton, *Technology, Popular Culture and the Court System -Strange Bedfellows?,* NAT'L CTR. FOR ST. CTS.: FUTURE TRENDS IN ST. CTS., 63 (2006), *available at* http://contentdm.ncsconline.org/cgibin/showfile.exe?CISOROOT=/juries&CISOPTR=217&filename=218.pdf.

[13] Lyle Denniston, *Cell phone data: Not private?*, SCOTUSBLOG (Oct. 4, 2010, 3:36 PM), http://www.scotusblog.com/2010/10/cell-phone-data-not-private. *State v. Smith*, 124 Ohio St.3d 163 (2009), *cert. denied*, 131 S.Ct. 102 (2010), is an Ohio Supreme Court case holding that police may not search a cell phone incident to an arrest.

power doubles every two years[14] -has no comparison in other legal fields. But, some Justices currently seem fine with being ignorant of technology in a way they would be ashamed to be ignorant of patent or bankruptcy law. This complacency is unsettling.[15] As Justice Stephen Breyer said of the Internet: "It's not something that's going to go away."[16]

I. Recent blunders

Perhaps it should come as no surprise that the Supreme Court is not up-to-date on the latest technological breakthroughs. Since its inception in 1789, it seems the Court invariably has been behind the times. For example, in a 2000 article, law professors Roy Mersky and Kumar Percy revealed:

The Court has never been at the forefront of technology, and Court officials do not believe it should be. There is still no external e-mail in the Court, and it may be the only federal entity that has a person answer the telephone 24 hours a day rather than relying on a voicemail system. Until as recently as 1969, the Justices were still using carbon paper to send drafts to each other. Oral arguments are now tape-recorded, but that practice started in 1955, decades after the invention of sound recording, radio, and television.[17]

The situation may be getting worse. While technological innovation has been speeding up, "it seems that [Justices] are getting further and further behind," said Julie Gottlieb, a lawyer who writes *Social Media News Law* blog.[18] In recent years, several Justices made a variety of blunders suggesting a profound ignorance about how popular everyday technologies function, which resulted in ridicule in the media, blogosphere and legal community.

Justices' attitudes about technology urgently need to change. While legal issues related to patent or bankruptcy develop slowly and semi-logically over time, technology changes at an alarming pace

At a November, 2009 oral argument on applying intellectual property law, Chief Justice John Roberts, who reportedly drafts his opinions with pen and paper instead of a keyboard,[19] compared using a software program on a computer with using a typewriter and a phonebook.[20] He also referred to an Internet search engine as a "search station."[21] The misstatements caused anxiety among intellectual property attorneys. For example, patent attorney Brett Trout raised concerns on his legal blog: "Typewriters?

[14] Michael Kanellos, *Moore's Law to roll on for another decade*, CNET (Feb. 10, 2003, 2:27 PM), http://news.cnet.com/2100-1001-984051.html.

[15] *See* Toor, *supra* note 11.

[16] Fabian, *supra* note 3 (quoting Justice Breyer's testimony at a House judiciary subcommittee hearing).

[17] Mersky & Percy, *supra* note 2.

[18] Julie Gottlieb, *Supreme Court Technology Gap Widens*, SOC. MEDIA L. NEWS (Feb. 6, 2010), http://socialmedialawnews.com/2010/06/02/supreme-courttechnology-gap-widens. *See generally* Mersky & Percy, *supra* note 2; Toor, *supra* note 11.

[19] Kimberly Atkins, *Technical Difficulties at the Supreme Court*, DC DICTA (Apr. 19, 2010, 1:30 PM) http://lawyersusaonline.com/dcdicta/2010/04/19/technicaldifficulties-at-the-supreme-court-2.

[20] Transcript of Oral Argument at 34, Bilski v. Kappos, 561 U.S., 130 S.Ct. 3218 (2010) (No. 08-964), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-964.pdf (quoting Roberts, C.J., "That's like saying if you use a typewriter to type out the – the process, then it is patentable. … That's just saying instead of looking at the — in the Yellow Pages, you look on the computer.").

[21] *Id.* at 36.

Search stations? It was not just the Chief Justice who appeared unaware of how software and the Internet work. None of the Supreme Court Justices in the case appeared to possess a familiarity with the workings of modern technology."[22] In another post, Mr. Trout noted that "some of the other comments made by the Justices during oral argument are a little concerning. The fate of future technology development rests in the hands of decision makers whose frame of reference is radio characters from the 50's, typewriters and search 'stations.'"[23] Mr. Trout goes on to say:

With billions of dollars hanging in the balance in cases like [this], it is imperative that courts fully inform themselves about the technologies at issue and the ramifications various judicial rulings will have not only on the specific technology at issue in the case, but on technology as a whole. Uncertainty in this decision-making process or the appearance of a less than fully informed judiciary encourages untoward actions in the industry and discourages desirable conduct.[24]

During a March 2010 oral argument for *Citizens United*, a case discussing whether a movie about Hillary Clinton was protected free speech or political advocacy that violated campaign finance laws, Justice Kennedy was clearly confused about how e-readers, such as the Kindle, work. He seemed unaware that the devices receive content via wireless cellular networks and instead seemed to think it was beamed down from outer space by satellites.[25] The misunderstanding resulted in a tangential line of discussion not pertinent to the legal issue at hand[26] - a critical waste of time given that Supreme Court oral arguments are limited to a half-hour per side.[27] *Slate*'s Dahlia Lithwick, a lawyer who has won awards for her Supreme Court coverage, recounted the incident:

At this point, a horrified Anthony Kennedy gets even paler than his usual pale self: "Is it the Kindle where you can read a book? I take it that's from a satellite. So the existing statute would probably prohibit that under your view? … If this Kindle device where you can read a book which is campaign advocacy, within the 60- to 30-day period, if it comes from a satellite, it can be prohibited under the Constitution and perhaps under this statute?" …

[When the attorney responds] Justice Breyer keeps trying to shake [him] over his head–like an Etch A Sketch–to erase the noxious image of government-sponsored book banning and get him to stop chatting about issues that are not before the court.[28]

Similarly, at an oral argument in April 2010 that addressed whether police officers had an expectation of privacy in personal text messages sent on city-issued pagers, a few of the Justices seemed to struggle with the technology involved. Justice Kennedy wondered what would happen if a text message were sent to someone at the same time he was communicating with someone

[22] Brett Trout, *The United States Supreme Court v. Technology*, BLAWG IT (Apr. 20, 2010), http://blawgit.com/2010/04/20/the-united-states-supreme-court-vtechnology.

[23] Brett Trout, *Bilski Oral Argument*, BLAWG IT, (Nov. 10, 2009), http://blawgit.com/2009/11/10/bilski-oral-argument.

[24] Trout, *The United States Supreme Court v. Technology, supra* note 22.

[25] Transcript of Oral Argument at 28, Citizens United v. Fed. Election Comm'n, 558 U.S. __, 130 S.Ct. 876 (2010) (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

[26] *See id.*

[27] SUP. CT. R. 28, 3, *available at* http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf ("Unless the Court directs otherwise, each side is allowed one-half hour for argument.").

else. "[Does] he ha[ve] a voicemail saying that your call is very important to us; we'll get back to you?" Justice Kennedy asked, eliciting laughter from those in attendance.[29]

Chief Justice Roberts and Justice Scalia both displayed surprise and confusion over the idea of a service provider, believing incorrectly that text messages are transmitted directly from user-to-user without going through any kind of switchboard or service provider. "I thought, you know, you push a button; it goes right to the other thing[,]" Chief Justice Roberts said.[30] "You mean it doesn't go right to the other thing?" Justice Scalia asked.[31]

Justice Scalia then asked whether the messages could be printed out in hard copy. "Could Quon print these — these spicy little conversations and circulate them among his buddies?" he asked.[32] Afterward, the *Wall Street Journal* poked fun at the Justices on its Law Blog:

The Supreme Court justices [sic] are a bright bunch. But chances are you're not going to see them at next January's CES show or ever watch them on a Web video demonstrating how to create apps for the iPhone.

That much was driven home, it seems, during today's oral arguments ….

[T]he Court asked some questions of the lawyers, which, well, the justices' [sic] kids and grandkids could have answered while sleepwalking.[33]

II. Why it matters

These are just a few examples. The Justices' tech-cluelessness was not merely a comical gaffe; it was incredibly important in the three abovementioned cases. The technologies involved were a key part of the cases' facts, but the Justices' fundamental assumptions of how the technologies work appeared flawed.[34]

Granted, the Supreme Court is not alone when it comes to judicial technophobia. Indeed, some judges revel in their technological ignorance. As Judge Shelton stated in 2001, some judges "pride themselves on their lack of technological skills and wear it like a badge of honor, often stating one of the following refrains: 'I'm an oldfashioned judge,' … 'I can't even program my VCR,' 'I'm too busy deciding right and wrong to worry about learning new machinery.'"[35] Five years later, Judge Shelton was still despairing that "many judges are not only reluctant but even hostile to the use of computer technology that is commonplace throughout the rest of our society."[36]

Supreme Court Justices, however, are not ordinary judges. They have to rule on every subject under the sun. They are

[28] Dahlia Lithwick. *The Supreme Court Reviews Hillary: The Movie*, SLATE (March 24, 2009, 7:23 PM) http://www.slate.com/id/2214514.

[29] Transcript of Oral Argument at 44, City of Ontario v. Quon, 130 S.Ct. 2619, 560 U.S. __ (2010) (No. 08-1332), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf.

[30] *Id.* at 49.

[31] *Id.*

[32] *Id.*

[33] Ashby Jones, *Our Tech-Savvy Supreme Court*, WALL ST. J. L. BLOG (Apr. 19, 2010, 5:56 PM), http://blogs.wsj.com/law/2010/04/19/our-tech-savvy-supremecourt.

[34] *See, e.g.,* Bianca Bosker, *Sexting Case Befuddles Supreme Court: 'What's The Difference Between Email And A Pager?'*, HUFFINGTON POST (April 21, 2010, 12:21 PM), http://huff.to/9B3lqG ("In [Quon], it seems an intimate familiarity not only with constitutional law and legal precedents, but also with the ins-and-outs of WSPs and SMS, are crucial to the case. Yet it should be noted that the Justices' queries may not signal their confusion, but rather their efforts to clarify specific, key details pertaining to the 'sexting' exchange.").

[35] Donald E. Shelton*, Teaching Technology to Judges*, 40 JUDGE'S J., 42 (Winter 2001), *available at* http://works.bepress.com/donald_shelton/4.

[36] Shelton, Technology, Popular Culture and the Court System – Strange Bedfellows?, supra note 12, at 63.

expected to be the best and the brightest legal minds in the country. As members of the highest court in the land, they have the final say on rulings that affect all citizens. Accordingly, they need to make shrewd decisions. It is incumbent upon them to acquire at least elementary knowledge about the subjects they are considering. That does not mean they need to be experts who know the technical details about every obscure subject, but they should at least have basic knowledge about common topics.[37]

If the Court were to hear a case about Toyota, for example, no one would expect them to have as much knowledge as a mechanical engineer. But, they would be expected to have at least a layman's understanding of what an automobile is and how it operates.

To provide a real world example: a century ago, the Supreme Court had to decide whether a tomato is a fruit or vegetable.[38] As expected, the Justices relied heavily on expert testimony.[39] However, if a Justice had asked, "What is a tomato?" he would have become a laughingstock. Some of the questions asked by the Court about technology during its past session are akin to asking what a tomato is used for or how is it grown. This gives currency to the popular notion that the Court is out of touch with ordinary people.[40]

Although it is not practical for the Justices to know everything about our modern ways of communicating and computing, the escalating number of disputes involving technology makes it incumbent upon them -and other jurists -to demonstrate at least a layman's understanding of these methods and devices. For Justices to fully understand the speech and expression issues involved, they must also understand the medium through which the speech is transmitted. As media scholar Marshall McLuhan theorized, "The medium is the message."[41]

Even if litigants clearly explained the relevant technology, there remains the problem of how the Justices perceive this technology in the real world. Indeed, Justices acknowledge that they consult their own knowledge and experience -informed, in part, by their day-today

[37] Orin Kerr, *Supreme Court Justices Are Generalists*, VOLOKH CONSPIRACY (June 20, 2011, 2:38 AM), http://volokh.com/2011/06/20/supreme-court-justices-aregeneralists ("The Justices are generalists. They're smart people, but they're people, not gods. Because the Supreme Court reviews such a dizzying array of federal legal questions, the Justices spend their time on lots of pretty arcane and specific issues ranging from tax, ERISA, and bankruptcy questions to civil rights cases and commercial cases to criminal cases and jurisdictional cases. In that environment, the Justices don't specialize much. They have a general idea of most general areas of federal law, at least after a few years on the Court, but they're mostly generalists. In a sense, the Justices are like most litigators. They become quasi-specialists about cases and issues because they have to be, but they're not experts in the fields of law that they decide. When a case is on the docket, the Justices jump into the issue and learn about it. They try to figure out what is happening, and then they vote.").

[38] *See* Nix v. Hedden, 149 U.S. 304 (1893), *available at* http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=149&invol=304 (holding that a tomato is a vegetable).

[39] *Id.* at 305 ("At the trial the plaintiff's counsel … called two witnesses, who had been for thirty years in the business of selling fruit and vegetables ….").

[40] *See, e.g.,* Cal Thomas, *Justices Out of Touch With Real*, *Virtual Worlds*, WICHITA EAGLE, Jul. 6, 2011, http://www.kansas.com/2011/07/06/1922376/calthomas-justices-out-of-touch.html (quoting Chief Justice Roberts) ("I don't think any of us have a Facebook page or a tweet -whatever that is."); *see also* Gregg Easterbrook, *The Founding Fathers v. the Supreme Court*, REUTERS, May 19, 2010, http://reut.rs/9z7Rdm (indicating that the Court is "a geriatric institution whose members are out of touch with the country's culture and concerns.").

[41] MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1st ed., McGraw Hill 1964).

understanding of how certain technologies work -to determine what is reasonable when applying a subjective standard such as "reasonable expectation of privacy."[42] Rebecca Tushnet, a former Supreme Court clerk who is now a Georgetown Law professor specializing in technological issues, states: "Of course, understanding factual predicates is important in resolving any case, including facts about technology and its uses …. In my experience the issue is more of understandinghow different social groups experience the world than of the details of the technologies in themselves."[43]

With the Federal Communications Commission now aggressively attempting to regulate the Internet,[44] cyber bullying testing the limits of free speech in schools,[45] and bloggers seeking the same rights as journalists,[46] the Court will "almost certainly play a key role in any number of… cases involving a broad swath of tech issues" and the First Amendment.[47] It is crucial for our most important decision makers to have at least a rudimentary understanding of technologies most Americans use daily. Without a proper understanding, they might make decisions that misapply the law and, in turn, create bad policy.

It has happened before. In a law journal article on common carrier regulation for telecommunication companies, Professor James Speta of the Northwestern University School of Law discovered that "[t]he earliest cases refused to find that telegraph and telephone companies were common carriers, because the courts could not conceive of them as 'carriers' of anything."[48] Professor Speta cites the decision in *Grinnell v. W. Union Tel. Co.*, 113 Mass. 299, 301-02 (1873):

The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves …. A telegraph company is entrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity…[49]

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[42] *See, e.g.*, *Quon*, 130 S.C.t at 2629 (2010) ("In Katz, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth.").

[43] E-mail Interview with Rebecca Tushnet, Professor, Geo. U. L. Ctr. (Aug. 12, 2010) (on file with author).

[44] Austin Carr, *FCC Pushes for Net Neutrality and Internet Regulation: What Happens Next?*, FAST COMPANY (May 6, 2010), http://www.fastcompany.com/1639209/fcc-pushes-for-net-neutrality-and-internet-regulation-what-happens-next ("Net neutrality,considered a centerpiece initiative for FCC chair Julius Genachowski, would effectively stop Internet providers from slowing or blocking access to Web sites. … The Federal Communications Commission may not have the authority to regulate broadband access. A federal appeals court decision in April ruled against the FCC's attempt to impose 'network neutrality' regulations ….").

[45] Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES, June 28, 2010, at A1, A12-13, *available at* http://www.nytimes.com/2010/06/28/style/28bully.html ("[Cyber bullying] issues have begun their slow climb through state and federal courts, but so far, rulings have been contradictory, and much is still to be determined.").

[46] Jane Kirtley, *Web v. Journalism: Court Cases Challenge Long-Held Principles*, 62 NIEMAN REPORTS, Winter 2008, at 54, 56, *available at* http://hvrd.me/h5WIKW ("Whether existing shield laws in the states will cover bloggers and other nonmainstream journalists remains an open question and very much depends on the particular statutory language and the courts' interpretation of it.").

[47] Brian Heater, *Where Does Elena Kagan Stand on Net Neutrality?*, PC MAGAZINE (May 10, 2010, 2:40 PM), http://www.pcmag.com/article2/0,2817,2363577,00.asp.

[48] James Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L. J., 225, 261 (2002).

[49] *Id.* at n. 183 (ellipses in original).

The courts eventually allowed telephone companies to be regulated as common carriers, a legal concept that dates to medieval England.[50]

As it stands now, the law has not caught up with the modern age, and the gap could widen under the current Court. In 1986, Congress imposed restrictions on law enforcement access to the Internet and wireless technology out of concern for protection of privacy.[51] At that time, "cell phones were still oddities, the Internet was mostly a way for academics and researchers to exchange data, and the World Wide

Web … did not exist."[52] Consequently, our current laws do not even begin to address the technological advances of the past 25 years and courts have struggled with how to analyze privacy rights in the context of ever-evolving technology.[53] "The law is not clear on when search warrants are required for the government to read stored e-mail,

what legal standards apply to GPS technology that tracks people's whereabouts in real time and other critical questions."[54]

Judge Shelton argues that this lack of legal clarity must change. "If [the justice system] is to be effective, indeed if it is to continue to be relevant, [it] must at least try to keep pace with the dramatic changes in our society,"[55] Otherwise, as Gottlieb explains, the consequences could be dire:

New technologies are going to continue to arise, and laws governing these technologies will follow. As citizens, we rely on the Supreme Court to make sure that the unscrupulous don't take advantage of technology to achieve their corrupt ends. How can the court [sic] adequately protect against something they simply can't grasp?[56]

Even having just one technologically-challenged Justice on the nine-member Court could have serious consequences, as many cases are decided by one-vote margins.[57]

Another possible repercussion of the Court's technological illiteracy is the possible reluctance of plaintiffs to bring important cases before the Court. It may already be happening in lower-level courts. For example, while "well-known problems" exist with U.S. laws against spamming, the real problem is technologically unsavvy judges, who make it difficult to litigate such cases, according to John Levine, author of *Internet for Dummies* and *Spam for Dummies*.[58]

Because of the depth and expanse of knowledge of statutes and e-mail technology required "to understand the evidence and evaluate the credibility of

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[50] *Id.* at 254-55.

[51] Editorial, *Dial-Up Law in a Broadband World*, N.Y. TIMES, Apr. 9, 2010, at A26, *available at* http://www.nytimes.com/2010/04/09/opinion/09fri1.html (citing the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510-2522).

[52] *Dial-Up Law in a Broadband World*, N.Y. TIMES, Apr. 9, 2010, at A26, *available at* http://www.nytimes.com/2010/04/09/opinion/09fri1.html.

[53] See *id.* (noting that "[i]n the absence of strong federal law, the courts have been adrift on many important Internet privacy issues.").

[54] *Id.*

[55] Shelton, Technology, Popular Culture and the Court System -Strange Bedfellows?, supra note 12, at 65.

[56] Gottlieb, *supra* note 18.

[57] Bill Mears, *5-4 Votes Nudge Supreme Court to the Right*, CNN (July 2, 2007), http://edition.cnn.com/2007/US/law/07/02/scotus.review/index.html ("Of the 72 cases decided since October, fully a third were decided by 5-4 votes. Compare that with the previous session, when only 15 percent of the cases in the previous term were decided by one-vote margins. And, while 45 percent of the cases in the previous term were unanimous, only a quarter were so easily resolved this term.").

[58] Mike Masnick, *So Few Spam Lawsuits Because Judges Don't Understand Technology?*, TECHDIRT (May 10, 2010, 8:41 PM), http://www.techdirt.com/articles/20100510/1451319362.shtml (quoting John Levine).

the lawyers' arguments on each side" in these types of cases, "the only cases likely to be filed are very easy ones."[59]

Judge Shelton concurs: "Commercial disputes traditionally decided by judges on arcane principles of contract law now often involve technology and 'cyberspace' issues that are truly foreign to many judges. One result has been that many technology-driven commercial enterprises have created their own dispute resolution forums outside the courthouse, and even in cyberspace."[60]

Even if such cases were to make their way through the court system, all the way up to the Supreme Court, they may never even be heard. Because the Supreme Court, unlike lower courts, has discretionary review, Justices are not required to hear cases. Instead, Justices decide which cases to hear. In a typical year, more than 10,000 cases are appealed to the Court and fewer than 100 are heard.[61] Every appeal faces daunting odds of getting its day in the Supreme Court. If Justices cannot appreciate why a particular case is important, they are even more unlikely to hear a case.[62] Consequently, cases involving technological issues may face the worst odds of being addressed by the current Court, despite the fact that the legal questions they raise may be the most pressing given their novelty and the lack of precedents.

III. "Disregard of Duty"

Some legal scholars contend damage has already occurred because f the Court's technical difficulties. Last term, for instance, the Court had the opportunity to provide a much-needed update on privacy law. As the Ninth Circuit U.S. Court of Appeals noted, *Quon* represented a "new frontier for Fourth Amendment jurisprudence that has been little explored"[63] since personal communications technology had advanced considerably since the Court's last major privacy decision in 1987.[64] Although the Court's ruling would only directly affect government workplaces, it was expected that it would have an impact on the private workplace as well.[65] The Court, however, declined to address the broader issues on electronic privacy involved in the case and instead made a narrow ruling that applied only to the parties involved. In his majority opinion, Justice Kennedy explained, "The judiciary risks error by elaborating too fully on the Fourth

[59] *Id.*

[60] Shelton, Technology, Popular Culture and the Court System -Strange Bedfellows?, supra note 12, at 64.

[61] SUPREME COURT OF THE UNITED STATES, THE JUSTICES' CASELOAD, http://www.supremecourt.gov/about/justicecaseload.aspx (last visited Oct. 9, 2011).

[62] *Choosing Cases*, WASH. POST (1999), http://www.washingtonpost.com/wpsrv/national/longterm/supcourt/history/choosing.htm (paraphrasing Justice Rehnquist, ho said important factors include whether the legal issue could have significance eyond the two parties in the case).

[63] Quon v. Arch Wireless, 529 *F*.3d 892, 904 (9th Cir. 2008).

[64] Orin Kerr, *Will the Supreme Court Rethink Public Employee Privacy Rights in Quon?*, VOLOKH CONSPIRACY (Dec. 14, 2009, 10 PM), http://volokh.com/2009/12/14/will-the-supreme-court-rethink-public-employeeprivacy-rights-in-quon (stating "The announcement of the cert grant in City of Ontario v. Quon means that the Supreme Court will revisit for the first time the splintered decision in O'Connor v. Ortega, 480 U.S. 709 (1987), that created the modern framework of public employee privacy rights. That raises the possibility that the Court might change the basic legal standard that lower courts have applied since O'Connor, shaking up the rules in this area that have long been considered settled.").

[65] Liz Halloran, *Text-Message Case Could Redefine Workplace Privacy*, NPR (Dec. 15, 2009), http://n.pr/77n9aA (stating "Though most legal analysts predict little private-sector ripple effect from a high court decision on the Quon case, the justices' opinion could help private employers shape their policies for use of workissued communications equipment.").

Amendment implications of emerging technology before its role in society has become clear …. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."[66]

A *Harvard Law Review* article noted the "perplexing irony" of Justice Kennedy's musings about the difficulty of crafting privacy standards for new technology, especially given that the case turned on text messages sent on "two-way pager devices that were issued to employees a decade ago and that would likely be deemed antiquated by today's teenagers and young professionals," who largely tend to use cell phones for texting.[67]

Moreover, the *Harvard Law Review* article disparaged the ruling for providing "no helpful guidance" to lower courts in resolving similar cases.[68] "[The Court's] reluctance to devise an intelligible principle for Fourth Amendment rights regarding technology will have the negative effect of causing lower courts to rely on *O'Connor* to an even greater extent, [allowing] judges .... to reach whatever conclusion they want" in cases involving technology and the Fourth Amendment.[69]

Marc Rotenberg, a Georgetown Law professor and president of Electronic Privacy Information Center, was also dismayed by the Court's caution:

[T]he court could have done what it has done in the past and updated constitutional safeguards in light of new technology…. The Supreme Court missed an important opportunity in the *Quon* case to update the law and protect privacy as new technologies evolve. The court's reluctance to assess these privacy issues also means that it will have less influence on other high courts that address similar questions.[70]

While the *New York Times* and *Washington Post* both praised the Court's restraint,[71] some legal observers pointed out that was only the result of the Court's lack of understanding about the technology involved. George Washington law professor Orin Kerr, an Internet privacy expert and former clerk for Justice Kennedy, noted that the number of questions asked about how the pagers and other technologies work during the hearing reinforced the need for caution.[72]

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[66] City of Ontario v. Quon, 130 S.Ct. 2619, 2629-30 (2010), *available at* http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf.

[67] *Fourth Amendment - Reasonable Expectation of Privacy: City of Ontario v. Quon*. 124 HARV. L. REV. 179, 185 (2010) *available at* http://www.harvardlawreview.org/media/pdf/vol_12401city_ontario_v_quon.pdf. *See also id.* ("Pagers are undoubtedly not an "emerging technology" with which the Court must "proceed with care"; presumably, societal norms with respect to pagers are as developed as they will ever be. Similarly, while mobile devices have become more advanced over time, societal norms with respect to text messaging are arguably developed enough for the Court to decide whether sending text messages on government-issued devices constitutes activity covered by the Fourth Amendment.").

[68] Id.

[69] *Id.*

[70] Marc Rotenberg, Letter, *Privacy and Text Messages*, N.Y. TIMES, June 23, 2010, at A26, *available at* https://www.nytimes.com/2010/06/23/opinion/l23privacy.html.

[71] Editorial, *Privacy in the Cellular Age*, N.Y. TIMES, June 19, 2010, at A20, a*vailable at* http://nyti.ms/p6QyDO ("Justice Kennedy wisely resisted using the case to impose a sweeping new privacy doctrine on electronic communication …."); Editorial, *Police Were Right to Monitor Personal Use of Office Cellphone*, WASH. POST, July 12, 2010, http://wapo.st/cpEsig ("Holding off from making broad pronouncements in the midst of a rapidly changing technology environment is a wise display of restraint by the court.").

[72] *Cf.* Orin Kerr, *The Fourth Amendment, New Technologies, and the Case for Caution*, VOLOKH CONSPIRACY (Apr. 20, 2010, 12:40 PM), http://volokh.com/category/city-of-ontario-v-quon ("The difficulty some of the Justices had with pager technology in *City of Ontario v. Quon* … [is] why judges should be cautious about applying the Fourth Amendment to new technologies.").

"Judges who attempt to use the Fourth Amendment to craft broad regulatory rules covering new technologies run an unusually high risk of crafting rules based on incorrect assumptions of context and technological practice."[73]

A more tech-savvy bench would not have needed to tread so lightly and could have provided much needed guidance on the issue. Justice Scalia admitted the ruling was vague.[74] In his concurrence, he said his fellow Justices refusal to address Fourth Amendment issues was "indefensible," and that "[t]he-times-they-are-a-changin' is a feeble excuse for disregard of duty."[75] A month after the Court handed the ruling down, the United States Court of Appeals for the Eleventh Circuit criticized the ruling for "a marked lack of clarity."[76] Consequently, the Court of Appeals narrowed an earlier ruling to remove a finding that there was no expectation of privacy in the contents of email.[77]

Since the ruling, the Court appears to still be timid about taking on constitutional issues raised by new technology. This term, for example, it declined to hear a case involving privacy of cell phones seized by police. As legal journalist Lyle Denniston reported, the Court is "reluctant to get deeply involved in exploring new issues about privacy in the Digital Age," noting that the Court "turned aside an appeal by the state of Ohio, asking the Justices to give police wider authority to check out the contents of a private cell phone they obtained during an arrest."[78]

IV. Fixing the problem

Many Supreme Court observers have attributed the Justices' unfamiliarity with technology to the Justices' age. "Based on their ages alone, it's not surprising that many of the Justices are not techno-philes," observed Kashmir Hill, who writes for the popular legal blog *Above The Law*.[79] (The average age of Supreme Court Justices is 69;[80] the typical retirement age in the United States is 65.) In a blog post entitled "Yes, the justices [sic] are old," *The Economist* concurred: "It takes time for comprehension of a new technology to work its way through the government. The legislative branch tends to be younger than the executive, in turn likely to be younger than the judicial."[81]

Plenty of older Americans, however, have acclimated to the Digital Age, including a number of judges. In fact, many courts and jurists are quite digitally literate. For example, last year, courts in Ohio and Colorado imposed rules regarding the use of smart phones, email, blogs, Twitter, and other social media in hearings.[82] Meanwhile, the United States

[73] *Id.*

[74] City of Ontario v. Quon, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring in part and concurring in the judgment) (noting that the Court's decision was "less than the principle of law necessary to resolve the case and guide private action").

[75] *Id.*

[76] Rehberg v. Paulk, 611 F.3d 828, 844 (11th Cir. 2010), *cert. granted*, 131 S.Ct. 1678 (2011) (No. 10-788).

[77] *Id.* at 846-47.

[78] Denniston, *supra* note 13; *see also* State v. Smith, 124 Ohio St.3d 163 (2009), *cert. denied*, 131 S.Ct. 102 (2010)

[79] Kashmiri Hill, *The Supreme Court Talks About an Employee's Right to Private Sexting*, TRUE/SLANT (April 19, 2010, 5:23 PM), http://trueslant.com/KashmirHill/2010/04/19/the-supreme-court-talks-about-anemployees-right-to-private-sexting.

[80] Devin Dwyer, Elena Kagan Hearings and Politics of Life Tenure on Supreme Court, ABC NEWS (July 1, 2010), http://abcn.ws/bUNvV9.

[81] B.G., *Yes, the justices are old*, THE ECONOMIST (April 23, 2010, 1:26 PM), http://www.economist.com/blogs/babbage/2010/04/judges_and_technology.

[82] Eric P. Robinson, *Trial Judges Impose Penalties for Social Media in the Courtroom*, CITIZEN MEDIA L. PROJECT, HARVARD UNIV. BERKMAN CTR. FOR INTERNET & SOC'Y (Mar. 3, 2010), http://www.citmedialaw.org/blog/2010/trialjudges-impose-penalties-social-media-courtroom.

Court of Appeals for the Ninth Circuit has allowed cameras to broadcast its hearings since 1991 - something the Supreme Court has long resisted.[83] One of the Ninth Circuit's members, Chief Judge Alex Kozinski, purports to build his own computers and has written video game reviews for the *Wall Street Journal*.[84] Undoubtedly, Supreme Court Justices, all of whom are Ivy League educated,[85] have the mental acuity to learn new technology skills.

Unfortunately, some Justices appear to lack the will. During a congressional subcommittee meeting last year, Justice Scalia admitted he did not know about the popular social networking service Twitter. "I don't even know what it is …. But, you know, my wife calls me 'Mr. Clueless,'" he said.[86] Current Court members need to take the initiative to change themselves. While technological advances have forced workers in many industries to retool or retire, the Justices cannot be required to change because they enjoy lifelong appointments.[87]

Fortunately, the Justices need not even leave their ivory tower for assistance. Many Justices rely heavily on their law clerks to do everything from research to writing their opinions.[88] Clerks tend to be techliterate 20- and 30-somethings fresh out of law school,[89] which may explain why the Justices' blunders occur in the off-the-cuff environment of oral arguments rather than in written opinions. But, ultimately, technology is best learned through hands-on usage, not from reading a legal memo. Some Justices have taken the initiative:

Justice Thomas admitted that he might be a Luddite if not for the "force of time and the shame inflicted by my law clerks." He added that each year's new crop of clerks brings more computer skills into the Court. [Justice] Kennedy stated that the Court purchases the new computer systems that the clerks need, "in part so that they are marketable when they leave, and in part so we can use their skills." In exchange, the clerks also teach the Justices who want to learn how to use computers.[90]

Perhaps the other Justices who still live in the 20th Century can follow the lead of Justice Breyer, who said he learned about Twitter by sitting down with his son for a lesson.

Remember when we had that disturbance in Iran? My son said, "Go look at this." And oh, my goodness. I mean, there were some Twitters, I called them, there were people there with photographs as it went on. And I sat there for two hours absolutely hypnotized. And I thought, "My goodness, this is now, for better or for worse … not the same world." It's instant and people react instantly.[91]

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[83] Al Tomkins, *A Case for Cameras in the Courtroom*, POYNTER ONLINE (Aug. 21, 2002, 4:17 PM), http://www.poynter.org/uncategorized/1990/a-case-forcameras-in-the-courtroom.

[84] Michael R. Blood, *Judge wants investigation into his Web porn*, MSNBC (June 12, 2008), http://on.msnbc.com/rlBDD1.

[85] Larry Abramson, *The Harvard-Yalification of the Supreme Court*, NPR (May 16, 2010), http://www.npr.org/templates/story/story.php?storyId=126802460 ("If Elena Kagan is confirmed to a seat on the Supreme Court, it will lead to an Ivy League clean sweep: Each of the justices will have attended law school at either Harvard or Yale.").

[86] Fabian, *supra* note 3.

[87] Easterbrook, *supra* note 40 ("The United States is the sole developed nation that confers lifelong status to its topmost court ….").

[88] Stuart Taylor Jr. & Benjamin Wittes, *Of Clerks and Perks*, THE ATLANTIC (July-Aug. 2006), http://www.theatlantic.com/magazine/archive/2006/07/of-clerksand-perks/4959 (reporting that Justices "delegated a shocking amount of the actual opinion writing to their clerks.").

[89] *Choosing Cases*, *supra* note 62 ("These clerks, most often four to a justice, usually are recent law school graduates and typically the cream of their Ivy League schools."); and Mersky & Percy, *supra* note 2("[E]ach year's new crop of clerks brings more computer skills into the Court.").

[90] Mersky & Percy, *supra* note 2.

[91] Fabian, *supra* note 3 (video of Justice Breyer's testimony).

Justice Breyer, obviously, has some catching up to do on the Digital Age. But, his awareness of the impact of services such as Twitter is a start. It is also better than being complacent with being "clueless."[92] As Justice Breyer noted about the Internet: "It's not something that's going to go away."[93]

For Justices who shun self-improvement when it comes to technology, the burden falls on litigants to help them. Hearings, pleadings, and briefs are not just to cite law and rules, but to educate, explain, and persuade.[94] Given that the Court's ignorance has been welldocumented in the mainstream media,[95] attorneys should not assume that Justices know even the most elementary facts when technology is involved. Advocates must teach the Justices how technology works using terms and examples that even a technophobe could grasp. Advocates who lose a case before the Court because the Justices do not understand how something works are arguably liable for malpractice, if such knowledge would have changed the outcome of the case.

It should be noted, however, that one *Quon* brief went into exquisite detail about how pager service providers work,[96] making the Justices' questions about technology that much more surprising. It appears that litigants can only do so much when it comes to educating the Court, if Justices disregard their homework.

There is another way to improve the Court, although it will take much more time. Going forward, future appointees should be vetted for their tech savvy. President Barack Obama has said that "the kind of [Justice who] I'm looking for … has a sense of what's happening in the real world."[97] Perhaps he can nominate someone who has realworld experience with information technology. "As technology rapidly changes, someone who understands the tech economy and how technology works would be very valuable in determining how to uphold the intentions of our founding fathers while embracing the innovation of our sons and daughters," wrote Ed Black, president of Computer and Communications Industry Association, in a letter to President Obama following the recent retirement of Justice John Paul Stevens.[98] Having a litmus test that gauges a nominee's present knowledge may be impractical if not pointless given the rapid rate of technological change. More importantly, Court nominees should at least demonstrate genuine open-mindedness to learning about technology.

Justice Elena Kagan, the former U.S. Solicitor General who was appointed to replace Stevens, is expected to boost the Court's tech intelligence. "She likely has

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[92] *See* Fabian, supra note 3, and text accompanying note 85 (noting Justice Scalia's self-deprecating references to his lack of technical knowledge).

[93] Fabian, *supra* note 3.

[94] *See, e.g.,* Amicus brief of the American Association on Mental Retardation, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452) (This brief explained what mental retardation and living with it is like. The brief was considered instrumental in the Court's ruling that executing the mentally retarded violates the Eighth Amendment.).

[95] *See supra* notes 2-4, 11-14 and accompanying text.

[96] Brief of Respondents at 6, City Ontario v. Quon, 130 S.Ct. 2619 (No. 08-1332), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1332_RespondentBrief.pdf (explaining that a pager message passes through a service provider's server, where it is stored, before being passed on to another pager).

[97] *Obama: Aim for fundamental change*, DETROIT FREE PRESS (Oct. 3, 2008), http://www.freep.com/article/20081003/OPINION01/810030434/1069/OPINION01.

[98] Heather Greenfield, *CCIA Asks President For Tech Savvy Supreme Court Nominee*, COMPUTER & COMMC'NS INDUS. ASS'N (April 14, 2010), http://www.ccianet.org/index.asp?sid=5&artid=151&evtflg=False.

tech experience, as evidenced of her being asked by the Supreme Court to offer an opinion as solicitor general in the Cablevision case," said Francine Ward, a Silicon Valleybased lawyer who specializes in social media law, in reference to litigation involving a cable company's server-based video recording system.[99] "She has the requisite knowledge."[100] As Dean of Harvard Law School from 2003 to 2009, Kagan also "was instrumental in beefing up the school's Berkman Center for Internet & Society."[101]

However, even Justice Kagan's reputed tech expertise pales in comparison to other judges, such as Chief Judge Alex Kozinski, who has received consideration for a Supreme Court appointment in the past.[102] Nonetheless, Court analysts are optimistic that a tech-savvy Justice will eventually be appointed. "We'll get there," *The Economist* predicted.[103] "Someday America will have a justice [sic] who is, if not a digital native, at least a digital immigrant." In the meantime, perhaps Justice Scalia should spend more time playing with his twenty-nine grandchildren[104] - playing online, that is.

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[99] E-mail Interview with Francine Ward, attorney (May 28, 2010) (on file with author).

[100] *Id.*

[101] Eriq Gardner, *Why Hollywood Should Be Very Nervous About Elena Kagan*, THE HOLLYWOOD REPORTER (Dec. 21, 2010, 2:58 PM), http://www.hollywoodreporter.com/blogs/thr-esq/hollywood-nervous-elena-kagan- 63877.

[102] Blood, *supra* note 84 ("Kozinski … has been mentioned as a possible Supreme Court candidate ….").

[103] B.G.,THE ECONOMIST, *supra* note 81.

[104] Robb London, *At HLS, Scalia Offers Vigorous Defense of Originalism: School Celebrates His 20 Years on the High Court in Two-Day Event*, HARV. L. TODAY (Feb. 2007), http://www.law.harvard.edu/news/today/hlt_feb07_scalia.php (quoting Justice Scalia as having twenty-nine grandchildren).