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## Fourth Amendment--Work-Related Searches by Government Employers Valid on Reasonable Grounds

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## FOURTH AMENDMENT—WORK- RELATED SEARCHES BY GOVERNMENT EMPLOYERS VALID ON “REASONABLE” GROUNDS

**O'Connor v. Ortega, 107 S. Ct. 1492 (1987).**

### I. INTRODUCTION

In *O'Connor v. Ortega*,<sup>1</sup> a plurality of the United States Supreme Court continued an expansion of the “few specifically established and well-delineated exceptions”<sup>2</sup> to the fourth amendment requirement that an unconsented search be supported by a warrant based upon probable cause. In *O'Connor*, the Court affirmed the United States Court of Appeals for the Ninth Circuit decision<sup>3</sup> that a state government employee has a reasonable expectation of privacy in his desk and file cabinets at his place of work.<sup>4</sup> However, the Court reversed the lower court's summary judgment that the government employer's extensive unconsented search of the employee's office, desk, and file cabinets violated his fourth amendment rights.<sup>5</sup> In arriving at an appropriate standard to review the search of a government employee's work area, a plurality of the Court attempted to balance the intrusions on the privacy interests of the individual against the government's need to conduct its business in an efficient and proper manner,<sup>6</sup> holding that “public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.”<sup>7</sup> The plurality noted further that the search must be reasonable both at its inception and in its scope.<sup>8</sup> This Note reviews the *O'Connor* opinions and concludes that the holding that a government employee has a

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<sup>1</sup> 107 S. Ct. 1492 (1987)(plurality opinion).

<sup>2</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>3</sup> *O'Connor v. Ortega*, 764 F.2d 703 (9th Cir. 1985).

<sup>4</sup> 107 S. Ct. at 1499 (plurality opinion).

<sup>5</sup> *Id.* at 1504 (plurality opinion).

<sup>6</sup> *Id.* at 1499 (plurality opinion).

<sup>7</sup> *Id.* at 1502 (plurality opinion).

<sup>8</sup> *Id.* at 1502-03 (plurality opinion).

legitimate expectation of privacy in his desk and file cabinets is consistent with the basic principles of the fourth amendment. However, this Note suggests that the plurality's announced departure from the warrant and probable cause protections of the fourth amendment is an unnecessary and ominous limitation of individual liberty from unconsented searches. The predictable results of the announced reasonableness standard are confusion over what "reasonable under all the circumstances" actually limits and a corresponding increase in arbitrary intrusions into the legitimate privacy interests of government employees.

## II. FACTS

On July 30, 1981, Dr. Magno Ortega, a physician and a psychiatrist for seventeen years at Napa State Hospital, was requested by Dr. Dennis O'Connor,<sup>9</sup> the hospital's Executive Director, to take a paid administrative leave of his position as Chief of Professional Education.<sup>10</sup> The justification for the request was to facilitate the investigation of Dr. Ortega regarding possible work-related misconduct concerning the acquisition of a personal computer,<sup>11</sup> alleged incidents of sexual harassment of two female hospital employees, and inappropriate disciplinary action taken against one of the hospital's residents.<sup>12</sup>

The four member investigative team selected by Dr. O'Connor was comprised of hospital personnel, including the hospital administrator, Richard Friday, and an internal hospital security guard.<sup>13</sup> Mr. Friday initiated the search of Dr. Ortega's office at a unidentified point in time during the investigation, the purpose of which was disputed by the parties.<sup>14</sup> Dr. Ortega asserted the search was under-

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<sup>9</sup> *Id.* at 1495 (plurality opinion). Dr. O'Connor was supported in his request by other hospital officials. *Id.* (plurality opinion).

<sup>10</sup> *Id.* at 1496 (plurality opinion). Dr. Ortega, as Chief of Professional Education at the hospital, had primary responsibility for the training and education of physicians in psychiatric residency programs. *Id.* at 1495 (plurality opinion).

<sup>11</sup> *Id.* (plurality opinion). There was speculation by hospital officials that Dr. Ortega had misled Dr. O'Connor that the computer had been donated to him and that the residents had been coerced into actually paying for it. *Id.* (plurality opinion).

<sup>12</sup> *Id.* (plurality opinion). Dr. Ortega requested and was permitted to take two weeks paid vacation in lieu of the administrative leave. However, when the two-week period ended on August 14, 1981, Dr. Ortega was informed by Dr. O'Connor that the investigation was not yet complete and that Dr. Ortega was being placed on paid administrative leave. During the time period up to September 22, 1981, when Dr. Ortega's employment was terminated, Dr. Ortega was requested not to enter the hospital grounds. *Id.* (plurality opinion).

<sup>13</sup> *Id.* at 1496. (plurality opinion).

<sup>14</sup> *Id.* (plurality opinion).

taken to secure evidence to be used against him in administrative disciplinary hearings.<sup>15</sup> The hospital initially claimed the search to be a routine inventory of state property in the office of a terminated employee.<sup>16</sup> However, Dr. Ortega's employment had not been terminated when the search was undertaken, and the hospital had no policy of inventorying state property of employees who are on administrative leave.<sup>17</sup>

The repeated searches of Dr. Ortega's office of seventeen years were extensive.<sup>18</sup> The investigators seized several personal items from Dr. Ortega's files and desk, including a photograph, a book of poetry, and a Valentine's Day card, all of which had been given to Dr. Ortega by a former resident physician.<sup>19</sup> Also seized were the billing files of one of Dr. Ortega's private patients under the California Medicaid program.<sup>20</sup> There was no formal inventory undertaken of state property in Dr. Ortega's office.<sup>21</sup> Rather, the contents of the office, with the exception of the personal items seized, were boxed up and put into storage for Dr. Ortega's subsequent retrieval.<sup>22</sup>

Dr. Ortega brought an action in the United States District Court for the Northern District of California against the hospital and Dr. O'Connor under 42 U.S.C. § 1983,<sup>23</sup> alleging that the search of his office and the seizure of his personal items violated his fourth amendment right to be free from an unreasonable search and seizure. On cross-motions for summary judgment, the district court granted judgment for the petitioners.<sup>24</sup> The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, granting summary judgment for Dr. Ortega regarding the liability

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<sup>15</sup> *Id.* (plurality opinion).

<sup>16</sup> *Id.* (plurality opinion). The computer that was the object of part of the investigation was also believed to have been taken home by Dr. Ortega. *Id.* (plurality opinion).

<sup>17</sup> *Id.* The hospital subsequently modified their previously stated purpose to a need to secure state property. *Id.* (plurality opinion).

<sup>18</sup> *Id.* (plurality opinion).

<sup>19</sup> *Id.* (plurality opinion). The personal items seized were subsequently used to impeach the credibility of the former resident who had come forward to testify on Dr. Ortega's behalf at his termination proceeding. *Id.* (plurality opinion).

<sup>20</sup> *Id.* (plurality opinion).

<sup>21</sup> *Id.* (plurality opinion). One of the investigators claimed the task would have been too difficult given the amount of papers in the office. *Id.* (plurality opinion).

<sup>22</sup> *Id.* (plurality opinion).

<sup>23</sup> 42 U.S.C. § 1983 (1981).

<sup>24</sup> *Id.* (plurality opinion). The district court relied upon *Chenkin v. Bellevue Hosp. Center, New York City Health & Hosps. Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979), concluding there was a legitimate need to secure state property. *O'Connor*, 107 S. Ct. at 1496 (plurality opinion).

for an unlawful search.<sup>25</sup> The court of appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office and remanded the case for a determination of damages.<sup>26</sup> The United States Supreme Court granted certiorari to consider, first, whether the respondent had a reasonable expectation of privacy in his work area and, second, the appropriate fourth amendment standard to use in determining the reasonableness of a government employer search of an area in which a government employee does have a reasonable expectation of privacy.<sup>27</sup>

### III. SUPREME COURT OPINIONS

#### A. PLURALITY OPINION

In *O'Connor v. Ortega*,<sup>28</sup> a divided United States Supreme Court reversed the appellate court's grant of summary judgment holding that the facts must be further analyzed under a standard of "reasonableness" to determine whether any violation of Dr. Ortega's fourth amendment rights had occurred.<sup>29</sup> Justice O'Connor delivered the plurality's opinion.<sup>30</sup> She emphasized that although a public employee may have a legitimate expectation of privacy in his desk and file cabinets,<sup>31</sup> "[w]hat is reasonable depends on the context within which a search takes place."<sup>32</sup> Justice O'Connor stated that determining the standard of reasonableness with which to judge a government search of an employee's work area requires a balancing of the government's objectives alleged to justify the search against the intrusiveness of the search upon the individual's fourth amendment rights.<sup>33</sup>

Justice O'Connor began her analysis by examining the privacy rights of government employees in the workplace.<sup>34</sup> She stated that

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<sup>25</sup> *O'Connor v. Ortega*, 764 F. 2d 703 (9th Cir. 1985).

<sup>26</sup> *O'Connor v. Ortega*, 107 S. Ct. at 1496 (plurality opinion).

<sup>27</sup> *Id.* at 1495 (plurality opinion).

<sup>28</sup> 107 S. Ct. 1492 (plurality opinion).

<sup>29</sup> *Id.* at 1504 (plurality opinion).

<sup>30</sup> Justice O'Connor was joined by Chief Justice Rehnquist, Justice White, and Justice Powell.

<sup>31</sup> *Id.* at 1499 (plurality opinion).

<sup>32</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

<sup>33</sup> *Id.* (plurality opinion).

<sup>34</sup> *Id.* at 1497 (plurality opinion). Justice O'Connor noted that state government employees receive fourth amendment rights through the fourteenth amendment and that, in past decisions, the fourth amendment has been held applicable to the actions of numerous government actors. See *New Jersey v. T.L.O.*, 469 U.S. at 334-35 (school officials); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)(building inspectors); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13 (1978)(Occupational Safety and Health Act inspectors). *O'Connor*, 107 S. Ct. at 1497 (plurality opinion).

an individual's privacy and personal security interests suffer regardless of whether the search is in connection with an investigation of a criminal violation or a statutory or regulatory violation.<sup>35</sup> She further added that "it would be 'anomolous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'"<sup>36</sup> Justice O'Connor concluded, therefore, that the fourth amendment restrictions were applicable to government employers or supervisors who desired to search their employee's private property.<sup>37</sup>

Having determined the applicability of the fourth amendment to the private property of government employees, Justice O'Connor asserted that the standard for determining whether Dr. Ortega's fourth amendment rights have been infringed is whether the search of his office " 'infringed an expectation of privacy that society is prepared to consider reasonable.' "<sup>38</sup> Although she admitted that there was no explicit criteria to determine society's expectations of privacy, Justice O'Connor noted that prior cases had involved factors such as the intention of the framers of the fourth amendment, the individual's use of the land, and the general mores of society.<sup>39</sup>

Justice O'Connor attempted to delineate the different privacy interests at force in the workplace context. She stated that both the reasonableness of an expectation of privacy and the applicable standard with which to assess the reasonableness of a search can change according to the context of a situation.<sup>40</sup> Therefore, Justice O'Connor stated, workplace context must be clearly defined. She reasoned that certain areas of the workplace such as the "hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace."<sup>41</sup> Moreover, Justice O'Connor emphasized, these areas did not become personal areas through the actions of an employee.<sup>42</sup>

Justice O'Connor acknowledged that prior decisions of the

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<sup>35</sup> *Id.* (plurality opinion)(citing *New Jersey v. T.L.O.*, 469 U.S. at 335).

<sup>36</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. at 335).

<sup>37</sup> *Id.* (plurality opinion).

<sup>38</sup> *Id.* (plurality opinion)(quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

<sup>39</sup> *Id.* (plurality opinion)(citing *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

<sup>40</sup> *Id.* (plurality opinion).

<sup>41</sup> *Id.* (plurality opinion).

<sup>42</sup> *Id.* (plurality opinion). Justice O'Connor mentioned, for example, an employee's placing of a photograph in a desk or the posting of a letter on an employee bulletin board as incidents that would not diminish the workplace context of those areas. *Id.* (plurality opinion). Justice O'Connor added, however, that some items, such as luggage, a briefcase, or a handbag, that are brought into the workplace are not part of the work-

Court in *Mancusi v. DeForte*<sup>43</sup> and *Oliver v. United States*<sup>44</sup> have recognized the reasonable expectations of privacy an employee may have regarding warrantless searches of his office by the police.<sup>45</sup> Justice O'Connor stated that "[a]s with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the [Fourth] Amendment.'" <sup>46</sup> She noted that in *Mancusi* the Court held that a union employee in a shared union office "would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors."<sup>47</sup>

Citing *Mancusi* and *Oliver*, Justice O'Connor rejected the contention of the Solicitor General and petitioners that a government employee can never have a valid expectation of privacy in a workplace setting.<sup>48</sup> She asserted that fourth amendment rights are not lost simply because one is employed by the government.<sup>49</sup> Justice O'Connor cautioned that "[t]he operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official."<sup>50</sup> Justice O'Connor noted that legitimate regulations or general office practices can diminish reasonable expectations of privacy in offices of both the government as well as the private sector.<sup>51</sup> The plurality opinion further suggested that the activities in a typical government office will include many intrusions of a private office by co-workers, superiors, consensual visitors, and the general public.<sup>52</sup> In effect, Justice O'Connor reasoned that the

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place context; therefore, the standard used for a workplace search would not necessarily apply. *Id.* (plurality opinion).

<sup>43</sup> 392 U.S. 364 (1968).

<sup>44</sup> 466 U.S. 170 (1984) (the Court in *Oliver*, which held that "open fields" did not come under the protection of the fourth amendment, discussed the fourth amendment protection of homes and offices as examples of areas of individual privacy that society has recognized as reasonable).

<sup>45</sup> *O'Connor*, 107 S. Ct. at 1498 (plurality opinion). Justice O'Connor noted that *Mancusi* clearly extended an expectation of privacy to an individual in his office at a union's headquarters. *Id.* (plurality opinion).

<sup>46</sup> *Id.* (plurality opinion) (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)).

<sup>47</sup> *Id.* (plurality opinion) (quoting *Mancusi*, 392 U.S. at 369).

<sup>48</sup> *Id.* (plurality opinion).

<sup>49</sup> *Id.* (plurality opinion).

<sup>50</sup> *Id.* (plurality opinion) (emphasis in original).

<sup>51</sup> *Id.* (plurality opinion).

<sup>52</sup> *Id.* (plurality opinion). Justice O'Connor agreed with Justice Scalia, who stated in his concurrence that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Id.* (plurality opinion) (emphasis in

employment relation or the nature of the office can waive any reasonable expectation of privacy in a workplace.<sup>53</sup> Because of the possibility of an employee having no reasonable expectation of privacy and the wide range of work environments that exist in the public sector, Justice O'Connor concluded that whether a public employee has a reasonable expectation of privacy in his workplace is a decision to be made on a "case-by-case basis."<sup>54</sup>

Justice O'Connor next considered the evidence that Dr. Ortega had a reasonable expectation of privacy in his private office.<sup>55</sup> In reviewing the lower court's record, Justice O'Connor revealed that Dr. Ortega occupied his private office for seventeen years and that he kept personal files, personal correspondence, personal financial records, teaching aids and notes, medical files and correspondence from private patients not connected to the hospital, and personal gifts and momentos there.<sup>56</sup> Justice O'Connor noted that the hospital files on residence training were kept outside the office<sup>57</sup> and also that nothing besides personal items were seized.<sup>58</sup> She further commented that the absence of a hospital policy discouraging employees from keeping personal items in their desks or file cabinets supported the validity of Dr. O'Connor's assertion of privacy.<sup>59</sup> Justice O'Connor concluded that the court of appeals' holding that Dr. Ortega had a reasonable expectation of privacy "at least in his desk and file cabinets" was correct.<sup>60</sup>

Justice O'Connor rejected the Ninth Circuit's analysis that concluded that Dr. Ortega's fourth amendment rights had been violated merely because he had a reasonable expectation of privacy in his office.<sup>61</sup> She stressed that finding that Dr. Ortega had a reasonable expectation of privacy in his government office is only the start of the analysis of whether there was a violation of his fourth amend-

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original). However, she went on to state that, as a result of an office's accessibility to other employees or the public, there can be situations in which no expectation of privacy would be considered reasonable. *Id.* (plurality opinion).

<sup>53</sup> *Id.* (plurality opinion). Justice O'Connor cited *Katz v. United States*, 389 U.S. 347, 351 (1967), in which the Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *O'Connor*, 107 S. Ct. at 1498 (plurality opinion).

<sup>54</sup> 107 S. Ct. at 1498 (plurality opinion).

<sup>55</sup> *Id.* (plurality opinion).

<sup>56</sup> *Id.* at 1499 (plurality opinion).

<sup>57</sup> *Id.* (plurality opinion).

<sup>58</sup> *Id.* (plurality opinion).

<sup>59</sup> *Id.* (plurality opinion). Justice O'Connor was careful to stress that the lack of a policy against keeping personal items in a work area does not create a reasonable expectation of privacy if one does not already exist. *Id.* (plurality opinion).

<sup>60</sup> *Id.* (plurality opinion).

<sup>61</sup> *Id.* (plurality opinion).



ment rights.<sup>62</sup> Justice O'Connor asserted that the reasonableness of a search depends upon the context in which it is undertaken.<sup>63</sup> According to Justice O'Connor, arriving at an appropriate standard with which to analyze a particular class of searches "requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" <sup>64</sup> The applicable interests at stake for the employer in a search of an employee's office, the plurality added, are the desire for a productive, efficient office and the related needs of supervision and control.<sup>65</sup> Against the interests of the employer, Justice O'Connor continued, the legitimate privacy interests of the employee must be balanced.<sup>66</sup>

Justice O'Connor acknowledged that, except in a small class of exceptional circumstances, a valid search warrant is the requirement for an unconsented search of an individual's private property.<sup>67</sup> She noted that the narrow circumstances that have justified dispensing with the traditional warrant requirement are those in which obtaining a warrant has been "likely to frustrate the governmental purpose behind the search."<sup>68</sup> As an example of such a situation, Justice O'Connor noted that the Court in *New Jersey v. T.L.O.*<sup>69</sup> held that a warrant was not required in a school environment because it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>70</sup>

Justice O'Connor then reviewed the limited case law dealing with work-related searches by public employers.<sup>71</sup> She concluded that the lower court decisions could be summarized as standing generally for the proposition that "any 'work related' search by an em-

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<sup>62</sup> *Id.* (plurality opinion).

<sup>63</sup> *Id.* (plurality opinion)(citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

<sup>64</sup> *Id.* (plurality opinion)(quoting *United States v. Place*, 462 U.S. 696, 703 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

<sup>65</sup> *Id.* (plurality opinion).

<sup>66</sup> *Id.* (plurality opinion).

<sup>67</sup> *Id.* (plurality opinion)(citing *Mancusi v. DeForte*, 392 U.S. at 370; *Camara v. Municipal Court*, 387 U.S. at 528-29).

<sup>68</sup> *Id.* (plurality opinion)(quoting *Camara v. Municipal Court*, 387 U.S. at 533). Justice O'Connor cited *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), in support of her proposition that a warrant can be dispensed of when it imposes severe burdens. *O'Connor*, 107 S. Ct. at 1500 (plurality opinion). In *Marshall*, the Court held a warrant requirement valid only after "concluding that warrants would not 'impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, or [would not] make them less effective.'" *O'Connor*, 107 S. Ct. at 1500 (plurality opinion)(quoting *Marshall v. Barlow's, Inc.*, 436 U.S. at 316).

<sup>69</sup> 469 U.S. 325 (1985).

<sup>70</sup> *O'Connor*, 107 S. Ct. at 1500 (plurality opinion).

<sup>71</sup> *Id.* (plurality opinion).

ployer satisfies the Fourth Amendment reasonableness requirement.”<sup>72</sup> In addition, she noted that some lower courts have suggested foregoing a “probable cause” standard in favor of a lesser standard.<sup>73</sup>

Justice O'Connor then argued that although public employees can have substantial privacy interests in “private objects” they bring to the workplace, the “realities of the workplace . . . strongly suggest that a warrant requirement would be unworkable.”<sup>74</sup> In support of this proposition, Justice O'Connor stressed the differences she perceived between a search for evidence to be used in a law enforcement proceeding and the routine needs of co-workers and superiors in a workplace to enter an office for reasons unrelated to criminal misconduct.<sup>75</sup> She reasoned that the government agency's legitimate desire to achieve efficiency can create a pressing need to obtain a file or correspondence from an absent co-worker's office.<sup>76</sup> By analogy, Justice O'Connor inferred that the facts of the instant case could be viewed as arising from a “need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee malfeasance.”<sup>77</sup>

Justice O'Connor concluded that a warrant requirement for a work-related search would be “unduly burdensome” and would “seriously disrupt the routine conduct of business.”<sup>78</sup> Furthermore, she asserted that the warrant procedures are “unwieldly” and would be unreasonable requirements for a supervisor to become familiar with.<sup>79</sup> Justice O'Connor emphasized that the concern that expansion of constitutional issues that can be challenged in government

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<sup>72</sup> *Id.* (plurality opinion). See *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) (holding that searches and seizures by public employers are reasonable under the fourth amendment if they are “work related”); *United States v. Collins*, 349 F.2d 863, 868 (2nd Cir. 1965) (concluding that a search and seizure was valid because it was conducted pursuant to “the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee”).

<sup>73</sup> *O'Connor*, 107 S. Ct. at 1500 (plurality opinion). See *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975) (utilized a “reasonable cause” standard); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (suggesting that a search for official property required for official use would be an exception to the warrant requirement). Justice O'Connor further noted that the lower court cases that have implied that a warrant was required have been for a search that concerned criminal misconduct, *United States v. Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), and a search that was not work related, *Gillard v. Schmidt*, 579 F.2d 825, 829 (3rd Cir. 1978).

<sup>74</sup> *O'Connor*, 107 S. Ct. at 1500 (plurality opinion).

<sup>75</sup> *Id.* (plurality opinion).

<sup>76</sup> *Id.* (plurality opinion).

<sup>77</sup> *Id.* (plurality opinion).

<sup>78</sup> *Id.* (plurality opinion).

<sup>79</sup> *Id.* (plurality opinion). Justice O'Connor continued that supervisors are distinguishable from other parties who have been required to satisfy the warrant requirement

offices could threaten the office's proper function.<sup>80</sup>

Justice O'Connor, having dispensed with a warrant requirement for a work-related search, next analyzed whether the standard of "probable cause" alone would be too burdensome for government employers to meet.<sup>81</sup> Conceding that probable cause is not as clear an issue as the warrant requirement, she noted, however, that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."<sup>82</sup> Justice O'Connor added that for administrative searches an administrative warrant issued on the basis of a reasonable legislative or administrative standard, rather than a finding of probable cause, has been held valid by the Court.<sup>83</sup> Further, the plurality noted that there are a multitude of contexts that can arise in which a public employer will have a desire to intrude upon the privacy of an employee.<sup>84</sup> She stressed that the fourth amendment standard of reasonableness to be determined is limited "only" for the employer intrusions outlined.<sup>85</sup>

Justice O'Connor then reiterated the strong government interest in the operation of an efficient workplace.<sup>86</sup> She emphasized that the "work of these [government] agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or a piece of office correspondence."<sup>87</sup> Furthermore, she contended that given that traditional probable cause analysis has developed in the criminal investigatory context, there is little logic to support the use of probable cause in a noninvestigatory work-related situation.<sup>88</sup> Therefore, Justice O'Connor reasoned, "public employers must be given wide latitude to enter employee offices for work related,

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in that the supervisors are not in the business of investigating violations of criminal law. *Id.* at 1501 (plurality opinion).

<sup>80</sup> *Id.* (plurality opinion)(citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

<sup>81</sup> *Id.* (plurality opinion).

<sup>82</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

<sup>83</sup> *Id.* (plurality opinion). See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

<sup>84</sup> *O'Connor*, 107 S. Ct. at 1501 (plurality opinion).

<sup>85</sup> *Id.* (plurality opinion). Justice O'Connor described the facts of the case at bar as concerning either a work-related investigatory search for evidence of employee malfeasance or a work-related noninvestigatory intrusion. *Id.* (plurality opinion).

<sup>86</sup> *Id.* (plurality opinion).

<sup>87</sup> *Id.* (plurality opinion).

<sup>88</sup> *Id.* (plurality opinion). Justice O'Connor also stressed that probable cause lacks meaning in a routine inventory of state property. *Id.* (plurality opinion).

noninvestigatory reasons.”<sup>89</sup>

According to the plurality, requiring a standard of probable cause for a search to investigate a public employee’s misfeasance would not only impose “intolerable burdens on public employers,” but also would result in “tangible and often irreparable damage to the agency’s work, and ultimately to the public interest.”<sup>90</sup> Supporting this position, Justice O’Connor reasserted the importance of the proper operation and efficiency of government agencies both to the agencies as well as to the public interest.<sup>91</sup> She further emphasized the distinctions between the interests involved in a criminal investigation and those present in an investigation of work-related misfeasance.<sup>92</sup> Whereas enforcing criminal law is in the interest of law enforcement agents, Justice O’Connor believed that “ensuring that the work of the agency is conducted in a proper and efficient manner” is the overriding concern of the government agent.<sup>93</sup>

In addition, Justice O’Connor stated that, as with school teachers, supervisors in most government agencies possess neither the training nor the experience to make informed, quick judgments as to whether a probable cause standard is satisfied.<sup>94</sup> She stressed that while law enforcement officers are expected to learn the intricacies of the standard, it would be unrealistic to require the same training of government employers and supervisors.<sup>95</sup> The plurality therefore stated that a “reasonableness” standard would be more appropriate because it would allow proper “regulation of the employee’s conduct ‘according to the dictates of reason and common sense.’ ”<sup>96</sup>

Justice O’Connor again alluded to the employee’s privacy interests, but asserted that they are far less compelling than the privacy interests that can be found in the home.<sup>97</sup> She stated further that the intrusions at issue are “relatively limited invasion[s]” of an employee’s privacy.<sup>98</sup> Moreover, Justice O’Connor reasoned, the sole

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<sup>89</sup> *Id.* (plurality opinion).

<sup>90</sup> *Id.* at 1502. (plurality opinion).

<sup>91</sup> *Id.* (plurality opinion).

<sup>92</sup> *Id.* at 1501 (plurality opinion)(citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(Blackmun, J., concurring in judgment)).

<sup>93</sup> *Id.* at 1502 (plurality opinion). Justice O’Connor noted the reasoning from *New Jersey v. T.L.O.* that the time taken to develop probable cause was time taken away from the essential task of education. *Id.* (plurality opinion). See *New Jersey v. T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in judgment).

<sup>94</sup> *O’Connor*, 107 S. Ct. at 1502 (plurality opinion).

<sup>95</sup> *Id.* (plurality opinion).

<sup>96</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. at 343).

<sup>97</sup> *Id.* (plurality opinion).

<sup>98</sup> *Id.* (plurality opinion)(quoting *Camara v. Municipal Court*, 387 U.S. at 537).

purpose of providing employee offices is to give the employees a place to do their work.<sup>99</sup> If employees wanted to keep anything private, the plurality continued, they could simply leave their personal items at home.<sup>100</sup>

Justice O'Connor stressed that government employers possess "special needs" beyond those of normal law enforcement to make intrusions on employee privacy for work-related noninvestigatory reasons or for investigations of employee misfeasance.<sup>101</sup> As a result, she concluded, the probable cause standard is impracticable.<sup>102</sup> In addition, Justice O'Connor stated a standard of reasonableness will neither unduly burden a government agency's efforts to run efficiently, nor allow arbitrary intrusions of an employee's privacy.<sup>103</sup> Therefore, Justice O'Connor announced, the appropriate standard for government intrusions of a public employee's fourth amendment right to privacy in the workplace for work-related noninvestigation purposes and for investigations of employee misfeasance is "reasonableness under all the circumstances."<sup>104</sup>

Justice O'Connor added that the standard of reasonableness must be satisfied with regards both to the inception of the search and to the scope of the intrusion. Specifically, the plurality stated that "[d]etermining the reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the . . . action was justified at its inception,'<sup>105</sup>; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' "<sup>106</sup> Justice O'Connor further added that a government employer's investigatory search to prove employee misfeasance or an intrusion for a noninvestigatory work-related reason would be justified at their inception provided that reasonable grounds exist to suggest that the intrusions will achieve the desired objectives. According to Justice O'Connor, the scope of the search will be justified

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<sup>99</sup> *Id.* (plurality opinion).

<sup>100</sup> *Id.* (plurality opinion).

<sup>101</sup> *Id.* (plurality opinion).

<sup>102</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)).

<sup>103</sup> *Id.* (plurality opinion).

<sup>104</sup> *Id.* (plurality opinion).

<sup>105</sup> *Id.* at 1503 (plurality opinion)(quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967); and *New Jersey v. T.L.O.*, 469 U.S. at 341). *Id.* (plurality opinion). Justice O'Connor noted that the standard of reasonableness announced does not address whether an "individualized suspicion" is a necessary element because the individualized suspicion was present for Dr. Ortega. *Id.* (plurality opinion). See *New Jersey v. T.L.O.*, 469 U.S. at 342, n.8.

<sup>106</sup> *O'Connor*, 107 S. Ct. at 1503. (plurality opinion)

when the "measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of . . . the nature of the [misconduct]." <sup>107</sup>

The plurality next addressed whether the search of Dr. Ortega's office met the standard of reasonableness that had been set forth. Justice O'Connor noted that because no evidentiary hearings had been held, <sup>108</sup> the record was insufficient to determine the reasonableness of the search. <sup>109</sup> Justice O'Connor asserted that an evidentiary hearing was necessary as the parties had, and continued to have, a material dispute over the initial justification for the search of Dr. Ortega's office. <sup>110</sup>

Justice O'Connor stated that the petitioners had continuously maintained that the intrusion was necessary to secure state-owned property in Dr. Ortega's office. <sup>111</sup> She also noted that the petitioners had originally maintained that the search was a routine inventory of property and in accordance with standard hospital procedures for a departing, terminated, or separated employee. <sup>112</sup> However, the plurality stated that Dr. Ortega had not been terminated from employment at the time of the initial search and that the record did not disclose whether the policy applied to persons placed upon administrative leave. <sup>113</sup> Justice O'Connor also noted Dr. Ortega's contention that the search was to discover evidence with which to establish a basis for his termination. <sup>114</sup> She conceded, as Dr. Ortega contended, that no inventory had been taken of the property in his office, and the items that were seized in the search eventually were used in the administrative proceedings. <sup>115</sup> Justice O'Connor con-

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<sup>107</sup> *Id.* (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. at 342).

<sup>108</sup> *Id.* (plurality opinion). The district court granted summary judgment for the defendants, and the court of appeals reversed, granting summary judgment as to the liability for the search and remanding for a determination of the damages sustained by Dr. Ortega. *Id.* (plurality opinion).

<sup>109</sup> *Id.* (plurality opinion).

<sup>110</sup> *Id.* (plurality opinion).

<sup>111</sup> *Id.* (plurality opinion). In a deposition, the leader of the investigative team, Mr. Friday, suggested that the search was initiated to "make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our resident's files were protected, and that sort of stuff." *Id.* (plurality opinion).

<sup>112</sup> *Id.* (plurality opinion). This was asserted by the petitioners in their motion for summary judgment in the district court. The district court accepted that assertion and granted the petitioner's motion based upon *Chenkin v. Bellevue Hosp. Center, New York City Health & Hosps. Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979), a fourth amendment case challenging an inspection policy. *O'Connor*, 107 S. Ct. at 1503 (plurality opinion).

<sup>113</sup> *O'Connor*, 107 S. Ct. at 1503 (plurality opinion).

<sup>114</sup> *Id.* (plurality opinion).

<sup>115</sup> *Id.* at 1504 (plurality opinion). Further support for Dr. Ortega's position came

cluded that the summary judgment granted to the petitioners by the district court was in error because of its reliance on a hospital policy that was nonexistent and because of the factual matters that were in dispute.<sup>116</sup> Additionally, Justice O'Connor stated that the district court did not provide any findings concerning the scope of the search that was undertaken.<sup>117</sup>

Justice O'Connor finally considered the court of appeals' granting of summary judgment for Dr. Ortega and concluded that it was incorrect.<sup>118</sup> She stated that although the court recognized that there was no policy applicable to the search undertaken by the hospital, the analysis must consider whether the search was reasonable even in the absence of such a policy.<sup>119</sup> In addition, Justice O'Connor asserted that "[a] search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of its justification."<sup>120</sup> Because the facts as presented by the petitioners could possibly meet the standard as articulated, Justice O'Connor concluded that the court of appeals' granting of summary judgment was inappropriate and that the case must be remanded to the district court.<sup>121</sup>

#### B. CONCURRING OPINION

Justice Scalia concurred with the plurality, concluding that the case should be reversed and remanded. However, Justice Scalia disagreed with both the rationale and the fourth amendment standard set forth.<sup>122</sup> He argued that, contrary to the plurality's contention, fourth amendment protections of privacy are not a question of "whether [an] office is 'so open to fellow employees or the public that no expectation of privacy is reasonable.'"<sup>123</sup> Justice Scalia stated that the plurality has provided no guide as to how "open" an office must be before it loses any privacy rights.<sup>124</sup> Moreover, Jus-

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from a statement made by Dr. O'Connor that the search was "to look for contractual [sic] and other kinds of documents that might have been related to the issues' involved in the investigation." *Id.* (plurality opinion).

<sup>116</sup> *Id.* (plurality opinion).

<sup>117</sup> *Id.* (plurality opinion).

<sup>118</sup> *Id.* (plurality opinion).

<sup>119</sup> *Id.* (plurality opinion).

<sup>120</sup> *Id.* (plurality opinion).

<sup>121</sup> *Id.* (plurality opinion).

<sup>122</sup> *Id.* (Scalia, J., concurring).

<sup>123</sup> *Id.* at 1505 (Scalia, J., concurring)(quoting *id.* at 1498 (plurality opinion)).

<sup>124</sup> *Id.* (Scalia, J., concurring). Justice Scalia stated that the standard advanced by the

tice Scalia rejected the plurality's direction that the issue of whether a reasonable expectation of privacy existed should be determined on a "case-by-case" basis.<sup>125</sup> Justice Scalia stressed the continuing difficulties created for the police, the courts, and the citizens by a case-by-case factual analysis to determine fourth amendment standards for protection of privacy.<sup>126</sup>

Justice Scalia stated that he disagreed with the plurality, as their standard would result in Dr. Ortega losing his reasonable expectation of privacy simply because the hospital officials had "extensive 'work-related reasons to enter [his] office.'" <sup>127</sup> According to Justice Scalia, the issue of privacy rights in an office had been settled in *Mancusi v. DeForte*,<sup>128</sup> in which it was stated that an employee's "personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded."<sup>129</sup> Justice Scalia continued that whether the government or a private entity is the employer should not effect the analysis of whether an employee has a legitimate expectation of privacy in the workplace.<sup>130</sup> He emphasized that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer."<sup>131</sup>

Justice Scalia further disagreed with the plurality's reasoning that the nature of an expectation of privacy changed according to whether the searcher was a law enforcement officer or a supervisor.<sup>132</sup> He contended that the status of the searcher speaks to whether the search was reasonable, not to whether there was a

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plurality was so devoid of content that it would lead to increased uncertainty in the field. *Id.* (Scalia, J., concurring).

<sup>125</sup> *Id.* (Scalia, J., concurring).

<sup>126</sup> *Id.* (Scalia, J., concurring). See *Oliver v. United States*, 466 U.S. 170, 181 (1984) ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.").

<sup>127</sup> 107 S. Ct. at 1505 (Scalia, J., concurring) (quoting *id.* at 1498 (plurality opinion)). Justice Scalia added that a father's fourth amendment rights are not diminished in his home by a family's movement throughout the house, and, similarly, a tenant's rights are not extinguished by a landlord's right of entry onto the premises. *Id.* (Scalia, J., concurring).

<sup>128</sup> 392 U.S. 364 (1968). In this case, the Court held that an employee's office at the union headquarters was protected by the fourth amendment, although, implicitly, the protection excluded union "higher ups." *O'Connor*, 107 S. Ct. at 1505 (Scalia, J., concurring).

<sup>129</sup> 107 S. Ct. at 1505 (Scalia, J., concurring).

<sup>130</sup> *Id.* (Scalia, J., concurring).

<sup>131</sup> *Id.* (Scalia, J., concurring) (emphasis in original).

<sup>132</sup> *Id.* (Scalia, J., concurring).



fourth amendment protection of a reasonable expectation of privacy.<sup>133</sup> Justice Scalia asserted determining the reasonableness of a given intrusion is a matter for a more "global" analysis.<sup>134</sup> Justice Scalia concluded that he would hold that "the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter."<sup>135</sup> He added that because Dr. Ortega's office was undisputedly private and there were no special circumstances presented to suggest a deviation from the normal rule, he would hold that the lower court rulings that Dr. Ortega was protected by the fourth amendment were correct.<sup>136</sup>

Justice Scalia then stated that the key issue of the case was whether the search of Dr. Ortega's office was reasonable; to answer that question, the status of the searchers is relevant.<sup>137</sup> While Justice Scalia acknowledged that generally a valid warrant based upon probable cause has been required to justify an unconsented search, he noted that "special needs, beyond the normal need for law enforcement"<sup>138</sup> have provided grounds for an exception to the rule. Justice Scalia asserted that the case of government employers is one with "special needs."<sup>139</sup> He noted that government employers have the same needs for quick access to employees' offices and desks for work-related purposes as their private counterparts. Thus, Justice Scalia concluded, when a search is "to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment."<sup>140</sup> As with the plurality, Justice Scalia found the record wanting as to the purpose of the search of Dr. Ortega's office, and consequently agreed that the lower court's ruling for summary judgment should be re-

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<sup>133</sup> *Id.* (Scalia, J., concurring).

<sup>134</sup> *Id.* (Scalia, J., concurring). Justice Scalia cites an example in which a firefighter intrudes upon a household in an effort to fight a fire. Justice Scalia advocates that the analysis must then ask whether that intrusion was reasonable as opposed to whether a tenant has a reasonable expectation of privacy from intrusions by his landlord. *Id.* (Scalia, J., concurring).

<sup>135</sup> *Id.* (Scalia, J., concurring). Justice Scalia added that a qualifier was necessary to provide for the situation in which a government employee's office is completely open to the public and hence has no expectation of privacy. *Id.* at 1505-06 (Scalia, J., concurring). See *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>136</sup> *O'Connor*, 107 S. Ct. at 1506 (Scalia, J., concurring).

<sup>137</sup> *Id.* (Scalia, J., concurring).

<sup>138</sup> *Id.* (Scalia, J., concurring) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring in judgment)).

<sup>139</sup> *Id.* (Scalia, J., concurring).

<sup>140</sup> *Id.* (Scalia, J., concurring).

versed and remanded.<sup>141</sup>

### C. DISSENTING OPINION

Justice Blackmun dissented from the plurality's opinion.<sup>142</sup> He stressed that Dr. Ortega had a reasonable expectation of privacy in his office, that there existed no factual dispute as to the nature of the investigatory search, and that there were no "special needs"<sup>143</sup> that justified dispensing with the warrant and probable cause standard.<sup>144</sup> Justice Blackmun stated that the traditional standard had clearly not been satisfied prior to the search of Dr. Ortega's work area, and, thus, his fourth amendment rights had been violated.<sup>145</sup>

According to Justice Blackmun, the plurality's problems were a result of their "failure or unwillingness to realize that the facts here are clear."<sup>146</sup> Thus, Justice Blackmun applied the traditional standard of "special need" articulated in *New Jersey v. T.L.O.* and concluded that Dr. Ortega's fourth amendment rights were clearly violated. He noted that because the plurality contended that there was a factual dispute about whether the search was investigatory in nature or routine, the plurality felt compelled to announce a new standard of reasonableness for work-related intrusions that stood alone from the case at bar.<sup>147</sup>

Justice Blackmun, in particular, disagreed with the plurality's analysis because he believed the issues involved in *O'Connor* had not been adjudicated extensively.<sup>148</sup> He asserted that proper fourth amendment analysis had always included a fact-based examination and that it was inappropriate for the plurality to formulate a new standard without considering the facts of the instant case.<sup>149</sup> Justice Blackmun conceded that there have been reservations expressed concerning the use of a case-by-case type of factual analysis for determining fourth amendment standards.<sup>150</sup> However, he suggested that, given the multitude of scenarios that could be imagined in the workplace context, a case-by-case type of analysis might be justi-

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<sup>141</sup> *Id.* (Scalia, J., concurring).

<sup>142</sup> Justice Blackmun was joined by Justices Brennan, Marshall, and Stevens in dissent.

<sup>143</sup> *O'Connor*, 107 S. Ct. at 1506 (Blackmun, J., dissenting)(citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(Blackmun, J., concurring in judgment)).

<sup>144</sup> *Id.* (Blackmun, J., dissenting).

<sup>145</sup> *Id.* (Blackmun, J., dissenting).

<sup>146</sup> *Id.* (Blackmun, J., dissenting).

<sup>147</sup> *Id.* (Blackmun, J., dissenting).

<sup>148</sup> *Id.* (Blackmun, J., dissenting).

<sup>149</sup> *Id.* (Blackmun, J., dissenting).

<sup>150</sup> *Id.* at 1506-07 n.2. (Blackmun, J., dissenting). See *Oliver v. United States*, 466 U.S. 170, 181 (1984).

fied.<sup>151</sup> Justice Blackmun stated that in developing a standard for a type of workplace intrusion, the Court must be guided by a "concrete set of facts" to arrive at a rule that embraces a specific circumstance.<sup>152</sup>

Justice Blackmun further asserted that by removing the facts from their analysis, the plurality failed to follow the constraints of prior authority and articulated an unprincipled, possibly biased standard in contrast with the long held fourth amendment standard requiring a warrant based upon probable cause for an unconsented search.<sup>153</sup> Indeed, Justice Blackmun went so far as to say that "the plurality has assumed the existence of hypothetical facts from which its standard follows."<sup>154</sup>

In support of his contention that what occurred was clearly a search of an investigatory nature, Justice Blackmun briefly reviewed the factual record.<sup>155</sup> He stressed that it is not clear how the search of Dr. Ortega's office can be described as one for inventory purposes.<sup>156</sup> Justice Blackmun reiterated the plurality's concession that the search could not have been undertaken pursuant to the hospital policy of inventorying property of all terminated employees as Dr. Ortega had not been terminated at the time the searches occurred.<sup>157</sup> In addition, he noted that there was no hospital policy to inventory state property in the offices of employees on administrative leave.<sup>158</sup>

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<sup>151</sup> *O'Connor*, 107 S. Ct. at 1507 n.2 (Blackmun, J., dissenting)(citing *California v. Carney*, 471 U.S. 386, 400 (1985)(Stevens, J., dissenting)("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication."); *New Jersey v. T.L.O.*, 469 U.S. 325, 366-67 (1985)(Brennan, J., concurring in part and dissenting in part)("I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures" (emphasis in original))).

<sup>152</sup> *Id.* (Blackmun, J., dissenting). See *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

<sup>153</sup> *O'Connor*, 107 S. Ct. at 1507 n.3 (Blackmun, J., dissenting). Justice Blackmun suggested that when facts are abandoned in the analysis of a case, judicial "predilections" surface and greatly influence the formation of the resulting standard that is articulated. He noted Justice Cardozo's warning that below every person's conscious there are 'other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.' " *Id.* (Blackmun, J., dissenting)(quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921)).

<sup>154</sup> *Id.* at 1507 (Blackmun, J., dissenting).

<sup>155</sup> *Id.* at 1507 (Blackmun, J., dissenting). Justice Blackmun questioned how, given the record, the plurality could assert a factual dispute existed. *Id.* (Blackmun, J., dissenting).

<sup>156</sup> *Id.* (Blackmun, J., dissenting).

<sup>157</sup> *Id.* (Blackmun, J., dissenting).

<sup>158</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that in addition to concluding incorrectly that the hospital had an inventory policy that applied to the search at

Justice Blackmun also disputed the plurality's assertion that the lack of a hospital policy to support the inventorying of an employee's office when that employee has been placed on administrative leave does not necessarily make the purpose untrue.<sup>159</sup> He acknowledged the evidence of a concern by the hospital over the whereabouts of a computer and also some work files of Dr. Ortega but stressed that these concerns were not supported by the record as the real reason for the intrusion.<sup>160</sup>

Justice Blackmun stated that the leader of the "investigative team," Mr. Friday, was on the record as denying that the computer had anything to do with the purpose of the initial search.<sup>161</sup> Similarly, Justice Blackmun added that Dr. O'Connor stated the computer was a focus of the investigation in regards to its acquisition but was not the primary purpose of the intrusion into Dr. Ortega's office.<sup>162</sup>

While Justice Blackmun conceded that there was deposition testimony to the effect that the intrusion of Dr. Ortega's office was undertaken in part to separate personal from state property,<sup>163</sup> he emphasized that this contention was "overwhelmingly contradicted" by other testimony and by the actual search itself.<sup>164</sup> Justice Blackmun noted that Dr. O'Connor had repeatedly referred to the people who searched Dr. Ortega's office as "investigators."<sup>165</sup> He also noted that even when Dr. O'Connor was speaking of the search as an inventory, he referred to the proceedings as an investigation.<sup>166</sup> Justice Blackmun stated that, as the plurality recognized, no formal inventory was ever taken of the contents of Dr. Ortega's office.<sup>167</sup> Furthermore, he stated that the items that were seized after the extensive search were highly personal and used later in termination hearings to impeach a witness who appeared on Dr. Ortega's behalf. Lastly, Justice Blackmun highlighted the fact that the search was

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issue, the district court also erroneously stated that Dr. Ortega had notice and opportunity to witness the search. *Id.* at 1507 n.4. (Blackmun, J., dissenting).

<sup>159</sup> *Id.* at 1507-08 (Blackmun, J., dissenting).

<sup>160</sup> *Id.* at 1508 (Blackmun, J., dissenting).

<sup>161</sup> *Id.* (Blackmun, J., dissenting).

<sup>162</sup> *Id.* (Blackmun, J., dissenting).

<sup>163</sup> *Id.* (Blackmun, J., dissenting).

<sup>164</sup> *Id.* (Blackmun, J., dissenting).

<sup>165</sup> *Id.* (Blackmun, J., dissenting).

<sup>166</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun quoted Dr. O'Connor:

Basically what we were trying to do is to remove what was obviously State records or records that had to do with his program, his department, any of the materials that would be involved in running the residency program, around contracts, around the computer, around the areas that we were interested in investigating.

*Id.* (Blackmun, J., dissenting).

<sup>167</sup> *Id.* (Blackmun, J., dissenting).

conducted at night<sup>168</sup> and subsequent to the obtaining of legal advice.<sup>169</sup> He concluded that the search was both exceptional in nature and undertaken for the purpose of investigating Dr. Ortega. As a result, Justice Blackmun stated that no significant factual dispute existed in the case.<sup>170</sup>

Justice Blackmun next examined the plurality's analysis of a public employee's fourth amendment rights in his workplace.<sup>171</sup> He stressed that he agreed with the important conclusion of the plurality that Dr. Ortega did have a reasonable expectation of privacy in his desk and file cabinets.<sup>172</sup> Furthermore, Justice Blackmun noted that the plurality was correct in conceding that Dr. Ortega also had a reasonable expectation of privacy in his office.<sup>173</sup> Justice Blackmun recognized other areas of agreement with the plurality such as the statement that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."<sup>174</sup> He further stated his agreement with the plurality's assertion that, in some circumstances, an employee's expectation of privacy can be diminished through the "operational realities" of the work environment.<sup>175</sup> However, Justice Blackmun stated he was in sharp disagreement with the observation by the plurality that a public employee could forfeit all of his expectations of privacy as a result of routine office intrusions.<sup>176</sup> Justice Blackmun criticized the plurality's suggestion as being inconsistent with the expectations of privacy that have traditionally been afforded to offices.<sup>177</sup> Occasional business-related visitors, Justice Blackmun asserted, are the norm in our society and as such have been implicitly recognized in prior fourth amendment decisions protecting the office.<sup>178</sup>

Justice Blackmun accepted the plurality's view that the expectation of privacy for an employee is contingent on the nature of the

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<sup>168</sup> *Id.* (Blackmun, J., dissenting).

<sup>169</sup> *Id.* (Blackmun, J., dissenting).

<sup>170</sup> *Id.* (Blackmun, J., dissenting).

<sup>171</sup> *Id.* (Blackmun, J., dissenting).

<sup>172</sup> *Id.* (Blackmun, J., dissenting).

<sup>173</sup> *Id.* (Blackmun, J., dissenting). *See id.* at 1498.

<sup>174</sup> *Id.* at 1508 (Blackmun, J., dissenting)(quoting *id.* at 1498).

<sup>175</sup> *Id.* (Blackmun, J., dissenting)(quoting *id.* at 1498).

<sup>176</sup> *Id.* (Blackmun, J., dissenting).

<sup>177</sup> *Id.* (Blackmun, J., dissenting). *See* *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment"); *Hoffa v. United States*, 385 U.S. 293, 301 (1966)(an "office" included in a litany of areas protected by the fourth amendment).

<sup>178</sup> *O'Connor*, 107 S. Ct. at 1509 (Blackmun, J., dissenting)(citing *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984); *Hoffa v. United States*, 385 U.S. 293, 301 (1966)).

proposed intrusion.<sup>179</sup> He stated that traditional fourth amendment protection is applicable in different degrees according to the context of the privacy asserted.<sup>180</sup> However, Justice Blackmun quoted with approval Justice Scalia's assertion that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer."<sup>181</sup> Justice Blackmun concluded that whereas an employee might not have an expectation of privacy against a co-worker visiting his office occasionally, he would be protected against an after-hours search of his locked private office by an "investigative team seeking materials to be used against him at a termination proceeding."<sup>182</sup> Justice Blackmun asserted that the plurality has not sufficiently acknowledged the reality of the workplace in modern society.<sup>183</sup> Emphasizing the long hours at work experienced by many, Justice Blackmun noted that such a routine has created a necessity of overlap between home and work life.<sup>184</sup> He elaborated that personal calls, visitors, and business reg-

<sup>179</sup> *Id.* (Blackmun, J., dissenting).

<sup>180</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun cited *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (opening a retail store to the public does not mean the store has given up an expectation of privacy against unconsented searches and seizures). *Id.* (Blackmun, J., dissenting).

<sup>181</sup> *Id.* (Blackmun, J., dissenting) (quoting *id.* at 1498 (Scalia, J., concurring) (emphasis in original)).

<sup>182</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun also quoted a recently reported statement by Attorney General Edwin Meese embodying the general idea that a person has an expectation of privacy in materials left in his office. Responding to a question concerning a search of government employee's offices and seizure of material related to an alleged illegal diversion of government funds to a Central American group, the Attorney General stated: "I'm not sure we would have any opportunity or any legal right to get those personal papers. There was certainly no evidence of criminality that would have supported a search warrant at the time. I don't think public employees' private documents belong to the Government." *Id.* at 1509 n.5 (Blackmun, J., dissenting) (quoting *N.Y. Times*, Dec. 3, 1986, at 11, col. 3.). Justice Blackmun further cited cases to support his contention that an employee's workplace is protected by the fourth amendment. *See, e.g.,* *Gillard v. Smith*, 579 F.2d 825, 829 (3rd Cir. 1978) (search of a desk); *United States v. McIntyre*, 582 F.2d 1221, 1224 (9th Cir. 1978) (conversations at desk); *but see, Williams v. Collins*, 728 F.2d 721, 728 (5th Cir. 1984) ("It is by no means certain that Williams had a reasonable expectation of privacy in his government-furnished desk, in relation to the possibility of his supervisors entering the desk as part of an investigation of William's job performance or as part of an office inventory."). Lastly, Justice Blackmun noted the cases that have held that there is no expectation of privacy based upon the existence of a regulation permitting searches. *See United States v. Spreights*, 557 F.2d 362, 364-65 (3rd Cir. 1977) (summarized line of decisions); *United States v. Donato*, 269 F. Supp. 921 (E.D. Pa. 1967), *aff'd*, 379 F.2d 288 (3rd Cir. 1967) (upheld warrantless search of employee locker at U.S. Mint pursuant to regulations). Justice Blackmun stated that the issue of a regulation was not before the Court. *O'Connor*, 107 S. Ct. at 1509 n.5 (Blackmun, J., dissenting).

<sup>183</sup> 107 S. Ct. at 1509 (Blackmun, J., dissenting).

<sup>184</sup> *Id.* at 1509-10 (Blackmun, J., dissenting). Justice Blackmun cited *R. KANTER*,

ularly takes place at the typical office.<sup>185</sup> Thus, Justice Blackmun chastised the plurality's opinion as one that "reveals . . . a certain insensitivity to the 'operational realities of the workplace. . . .'"<sup>186</sup>

The dissent concluded that Dr. Ortega "clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here."<sup>187</sup> Moreover, he admonished courts which might face a similar issue to determine the reasonable expectation of privacy in relation to the intrusion at hand.<sup>188</sup>

Justice Blackmun then reviewed the plurality's analysis as to what constituted a fourth amendment standard of reasonableness.<sup>189</sup> He criticized the plurality's conclusion that a balancing of the "privacy interests of the employee against the public employer's

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WORK AND FAMILY IN THE UNITED STATES: A CRITICAL REVIEW AND AGENDA FOR RESEARCH AND POLICY 31-32 (1977) and R. BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 288-89 (1985). In *HABITS OF THE HEART*, the authors stressed the pressure placed upon the family unit by the long hours spent at work striving for success. *O'Connor*, 107 S. Ct. at 1509-10 (Blackmun, J., dissenting).

<sup>185</sup> 107 S. Ct. at 1510 (Blackmun, J., dissenting). Justice Blackmun remarked on the blurring of the line between home and work caused by the entrance of women into the workforce in modern times. *Id.* at 1510 n.6 (Blackmun, J., dissenting). See BNA SPECIAL REPORT, *WORK & FAMILY: A CHANGING DYNAMIC* 1, 3, 13-15 (1986).

The myth of "separate worlds"—one of work and the other of family life—long harbored by employers, unions, and even workers themselves has been effectively laid to rest. Their inseparability is undeniable, particularly as two-earner families have become the norm where they once were the exception and as a distressing number of single parents are required to raise children on their own. The import of work-family conflicts—for the family, for the workplace, and, indeed, for the whole of society—will grow as these demographic and social transformations in the roles of men and women come to be more fully clarified and appreciated.

BNA SPECIAL REPORT, *WORK & FAMILY: A CHANGING DYNAMIC* 13-15 (1986).

<sup>186</sup> *O'Connor*, 107 S. Ct. at 1510 (Blackmun, J., dissenting)(quoting *id.* at 1498). Justice Blackmun argued also that the plurality's implicit contention that the ownership of much of the elements of the workplace would lessen the employees' expectation of privacy is in error. He derives the implication from the plurality's description of what constitutes the workplace context ("the hallways, cafeteria, offices, desks, and file cabinets"), as opposed to the employee's "closed personal luggage, a handbag or a briefcase." *Id.* at 1510 n.7 (Blackmun, J., dissenting)(quoting *id.* at 1497). Justice Blackmun emphasized that earlier decisions of the Court have settled that expectations of privacy under the fourth amendment are not dependent upon ownership of the area. *Id.*; see e.g., *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)(the protection of the fourth amendment is contingent upon the individual having a reasonable expectation of privacy, not upon owning the property that is invaded); *Katz v. United States*, 389 U.S. 347, 353 (1967)(fourth amendment protects people, not simply "areas"). Although Justice Blackmun conceded that the fact of ownership is relevant to the appropriate level of an employee's reasonable expectation of privacy, it does not act to deny fourth amendment protections to an individual. *O'Connor*, 107 S. Ct. at 1510 n.7 (Blackmun, J., dissenting).

<sup>187</sup> 107 S. Ct. at 1510 (Blackmun, J., dissenting).

<sup>188</sup> *Id.* (Blackmun, J., dissenting).

<sup>189</sup> *Id.* (Blackmun, J., dissenting).

interests justifying the intrusion" was the appropriate analysis.<sup>190</sup> Justice Blackmun stated that the traditional standard of reasonableness as laid out in the fourth amendment requires a warrant based upon probable cause.<sup>191</sup> He stressed that only in the exceptional circumstance in which there were "special needs" rendering the traditional requirements as "impracticable" had the warrant and probable cause standard given way to a "balancing of interests" analysis.<sup>192</sup> Justice Blackmun explained that the practical test of when the traditional fourth amendment standard can be foregone in favor of a balancing of interests analysis results when the obtaining of a warrant based upon probable cause would completely frustrate the efforts of the investigating party.<sup>193</sup>

Justice Blackmun stated that he had similarly criticized the Court in *New Jersey v. T.L.O.*<sup>194</sup> for omitting the crucial "special needs" inquiry.<sup>195</sup> However, Justice Blackmun asserted that in *New Jersey v. T.L.O.*, the Court was justified in utilizing a "balancing" analysis because a "special need" was present in the school context.<sup>196</sup> He reiterated his reasoning from *T.L.O.* that a teacher in a secondary school must be able to maintain discipline in order to effectively conduct classes and that effectiveness will not be achieved if a warrant based upon probable cause is required for every situation in which a search is appropriate.<sup>197</sup> Justice Blackmun noted the "special need" of educators to act without delay when there is a threat of violence or disruption of the educational process as justifying the adoption of a lesser standard than a warrant requirement or a finding of probable cause.<sup>198</sup>

Justice Blackmun then remarked that the plurality had repeated the error of the Court in *T.L.O.*<sup>199</sup> Although the plurality noted the

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<sup>190</sup> *Id.* (Blackmun, J., dissenting).

<sup>191</sup> *Id.* at 1511 (Blackmun, J., dissenting).

<sup>192</sup> *Id.* (Blackmun, J., dissenting)(citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(Blackmun, J., concurring in judgment)). See *United States v. Place*, 462 U.S. 696, 721-22 and n.1 (1983)(Blackmun, J., concurring in judgment).

<sup>193</sup> *O'Connor*, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

<sup>194</sup> 469 U.S. at 351 (Blackmun, J., concurring in judgment).

<sup>195</sup> *O'Connor*, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

<sup>196</sup> *Id.* (Blackmun, J., dissenting). See *New Jersey v. T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in judgment).

<sup>197</sup> *O'Connor*, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

<sup>198</sup> *Id.* (Blackmun, J., dissenting). See *New Jersey v. T.L.O.*, 469 U.S. at 352-53 (Blackmun, J., concurring in judgment)(in which Justice Blackmun stated: "The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirements, and in applying a standard determined by balancing the relevant interests.").

<sup>199</sup> 107 S. Ct. at 1514 (Blackmun, J., dissenting).



“special need” inquiry, Justice Blackmun argued that there was insufficient analysis devoted to determining whether there was any “special need” present before the plurality went on to a balancing test.<sup>200</sup> In *O'Connor*, however, Justice Blackmun stressed that the omission was critical, as there was no “special need” discernible from the facts presented that would make the acquisition of a warrant based on probable cause “impracticable.”<sup>201</sup> Justice Blackmun reiterated that the facts suggested that while Dr. Ortega was on administrative leave and not permitted to enter the hospital grounds, a search of his office was commenced that was investigatory in nature with the primary purpose of obtaining evidence of Dr. Ortega’s management improprieties.<sup>202</sup> Justice Blackmun reasoned that obtaining a search warrant from a magistrate would not have acted to frustrate the hospital management goals of “an effective institution devoted to training and healing, to which the disciplining of [h]ospital employees contributed.”<sup>203</sup>

Moreover, Justice Blackmun stated that the search of Dr. Ortega’s office was a situation in which enlisting the aid of an impartial magistrate would have been a particularly appropriate check of the intrusions into Dr. Ortega’s privacy.<sup>204</sup> He added that having to articulate both the justification and the explicit items the searchers hoped to find would have acted to prevent the indiscriminant “rummaging through the doctor’s office, desk and file cabinets.”<sup>205</sup> Therefore, Justice Blackmun concluded that because no “special need” existed justifying dispensing with the traditional fourth amendment standard of a warrant based on probable cause, and because the petitioners would have failed to meet this standard, the holding of the court of appeals that the petitioners violated Dr. Ortega’s fourth amendment rights should be affirmed.<sup>206</sup>

Justice Blackmun next addressed the balancing analysis of the plurality in regards to the warrant requirement, stating that even if he accepted the plurality’s contention that there was a “special need” to dispense with the traditional warrant and probable cause

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<sup>200</sup> *Id.* (Blackmun, J., dissenting).

<sup>201</sup> *Id.* (Blackmun, J., dissenting).

<sup>202</sup> *Id.* (Blackmun, J., dissenting).

<sup>203</sup> *Id.* (Blackmun, J., dissenting).

<sup>204</sup> *Id.* (Blackmun, J., dissenting). See *United States v. United States District Court*, 407 U.S. 297, 317 (1972) (“The historical judgment, which the Fourth Amendment accepts, is that unreviewed discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy. . . .”).

<sup>205</sup> *O'Connor*, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

<sup>206</sup> *Id.* at 1511-12 (Blackmun, J., dissenting).

standard, the plurality's balancing was "seriously flawed."<sup>207</sup> Again he asserted that the plurality had erred by removing the facts from their analysis and arriving at conclusions based upon "assumed" facts.<sup>208</sup>

Justice Blackmun criticized the plurality for "sweeping with a broad brush" with their announced conclusion that because a warrant requirement would "seriously disrupt the routine conduct of business and would be unduly burdensome,"<sup>209</sup> it would not be required for public employer searches of employee offices, desks, or file cabinets.<sup>210</sup> Justice Blackmun noted that the reasoning advanced by the plurality for their conclusion was based on maintaining the efficient operation of government agencies.<sup>211</sup> Further, he noted that the plurality claimed the warrant requirement would be too "unwieldy" to employers unfamiliar with it.<sup>212</sup>

Justice Blackmun emphasized that the Court in the past had not deviated from the traditional fourth amendment standard except in situations in which there was no other alternative.<sup>213</sup> Although the Court on occasion has found it necessary to adopt a new standard, he added, "[t]he warrant and probable-cause requirements . . . continue to serve as a model in the formulation of the new standard."<sup>214</sup> In support of this proposition, Justice Blackmun cited *Terry v. Ohio*,<sup>215</sup> a case that considered whether a brief on-the-spot stop of persons by police officers justified adopting a lesser standard than the warrant based on probable cause. He stressed that the Court in *Terry* attempted to arrive at a standard that maintained in principle the "neutral scrutiny of a judge" that a warrant requirement provides.<sup>216</sup>

Justice Blackmun emphasized that the plurality's conclusion that a warrant would not be required in a search by an employer

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<sup>207</sup> *Id.* at 1512 (Blackmun, J., dissenting).

<sup>208</sup> *Id.* (Blackmun, J., dissenting).

<sup>209</sup> *Id.* (Blackmun, J., dissenting)(quoting *id.* at 1500).

<sup>210</sup> *Id.* (Blackmun, J., dissenting).

<sup>211</sup> *Id.* (Blackmun, J., dissenting).

<sup>212</sup> *Id.* (Blackmun, J., dissenting).

<sup>213</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun described the requirement as "a nexus between this other standard, the employee's privacy interests, and the government purposes to be served by the search." *Id.* (Blackmun, J., dissenting).

<sup>214</sup> *Id.* at 1512 n.8 (Blackmun, J., dissenting).

<sup>215</sup> 392 U.S. 1, 20 (1968).

<sup>216</sup> *O'Connor*, 107 S. Ct. at 1512 (Blackmun, J., dissenting). See *Terry v. Ohio*, 392 U.S. at 21, 27. Justice Blackmun also cited *Camara v. Municipal Court*, 387 U.S. 523 (1967), as a case in which the balancing analysis that was utilized resulted in the warrant standard being retained as a requirement for health inspectors. *O'Connor*, 107 S. Ct. at 1512.(Blackmun, J., dissenting).

could only be arrived at when the analysis was removed, as it was, from a concrete factual situation.<sup>217</sup> He acknowledged that a warrant should not be required for every "routine entry into an employee's workplace;"<sup>218</sup> however, the dissent admonished the view that this fact justified dispensing with a warrant for every work-related search.<sup>219</sup> Justice Blackmun stated that the warrant requirement would be appropriate for many employer searches, including the one of Dr. Ortega's office.<sup>220</sup>

Furthermore, Justice Blackmun stressed that the plurality has not articulated how the new standard will maintain the "neutral scrutiny of a judge."<sup>221</sup> Instead, noted Justice Blackmun, the plurality completely neglected to relate the announced "reasonableness under all the circumstances" standard with any of the principles behind the warrant standard.<sup>222</sup> Justice Blackmun concluded that "the plurality's general result [was] preordained because, cut off from a particular factual setting, it cannot make the necessary distinctions among types of searches, or formulate an alternative to the warrant requirement that derives from a precise weighing of competing interests."<sup>223</sup>

Next, Justice Blackmun noted that the plurality's analysis of an alternative to the probable cause standard began with a contradiction.<sup>224</sup> Although the plurality stated that the new standard announced was "only" applicable to a "noninvestigatory work-related intrusion" and an "investigatory search for evidence of suspected work-related employee misfeasance," Justice Blackmun suggested that it would be difficult to imagine a search that would not fall within one of these broad general categories.<sup>225</sup> Moreover, argued Justice Blackmun, given that the standard announced by the plurality to be utilized on remand was for both the "inventory" and "in-

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<sup>217</sup> 107 S. Ct. at 1512 (Blackmun, J., dissenting).

<sup>218</sup> *Id.* at 1512-13 (Blackmun, J., dissenting); see e.g., *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 203-04 (2d Cir. 1984) (government strip searches of correctional workers held to be allowable without a warrant in certain situations because of the important government interest in maintaining security in prisons).

<sup>219</sup> 107 S. Ct. at 1512-13 (Blackmun, J., dissenting).

<sup>220</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun noted that the plurality did not elaborate on their assertion that obtaining a warrant would be "unduly burdensome." He stated that the facts suggest the reverse would have been true. He also took exception to the inference by the plurality that a warrant is not appropriate outside of the criminal arena, citing *Camara v. Municipal Court*, 387 U.S. 523, 530-31 (1967). *O'Connor*, 107 S. Ct. at 1513 n.10 (Blackmun, J., dissenting).

<sup>221</sup> 107 S. Ct. at 1513 (Blackmun, J., dissenting).

<sup>222</sup> *Id.* at 1513 n.11 (Blackmun, J., dissenting).

<sup>223</sup> *Id.* at 1513 (Blackmun, J., dissenting).

<sup>224</sup> *Id.* (Blackmun, J., dissenting).

<sup>225</sup> *Id.* (Blackmun, J., dissenting).

vestigatory" searches described by the plurality, the plurality has announced a standard that will apply to all public employer work-related searches.<sup>226</sup>

Justice Blackmun also criticized the plurality for their use of a balancing of interests analysis to dispense with the probable cause standard.<sup>227</sup> He asserted that, as with the analysis required to justify a lesser standard than a warrant requirement, probable cause requires the same critical search for alternatives.<sup>228</sup> Justice Blackmun emphasized that the plurality did not attempt to satisfy that requirement for either an inventory or an investigatory search.<sup>229</sup> Justice Blackmun conceded that public employers have a valid interest in eliminating work-related misfeasance and maintaining efficiency.<sup>230</sup> He further conceded that public employees may have limited expectations of privacy at work. However, Justice Blackmun stressed that, even if these facts are true, the plurality has not explained why the standard they arrived at "*necessarily* leads to the standard borrowed from *New Jersey v. T.L.O.*, as opposed to other imaginable standards."<sup>231</sup> Lastly, Justice Blackmun continued, the plurality did not explain why probable cause, which has been "characterized by this Court as a 'practical, nontechnical conception,'" <sup>232</sup> would not provide adequate protection for public employers in a case like *O'Connor*.<sup>233</sup>

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<sup>226</sup> *Id.* (Blackmun, J., dissenting).

<sup>227</sup> *Id.* (Blackmun, J., dissenting).

<sup>228</sup> *Id.* (Blackmun, J., dissenting). See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Justice Blackmun chastised the plurality for simply giving conclusory assertions instead of explaining the balancing that was alleged to have occurred. He cited in support of his critical assessment the statements of the plurality that the probable cause requirement would "impose intolerable burdens on public employers"; that government employers would suffer "tangible and often irreparable damage"; and finally that employers cannot be expected "to learn the subtleties of the probable cause standard." *O'Connor*, 107 S. Ct. at 1514 n.13 (Blackmun, J., dissenting). Justice Blackmun emphasized that "[s]uch assertions cannot pass for careful balancing on the facts of this case, given that the search was conducted during Dr. Ortega's administrative leave . . . with the advice of counsel, and by an investigating party that included a security officer." *Id.* at 1514 n.13 (Blackmun, J., dissenting).

<sup>229</sup> 107 S. Ct. at 1513 n.12 (Blackmun, J., dissenting).

<sup>230</sup> *Id.* at 1513 (Blackmun, J., dissenting).

<sup>231</sup> *Id.* at 1513-14 (Blackmun, J., dissenting)(emphasis in original).

<sup>232</sup> *Id.* (Blackmun, J., dissenting)(quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

<sup>233</sup> *Id.* (Blackmun, J., dissenting). See *New Jersey v. T.L.O.*, 469 U.S. 325, 363-64 (1985)(Brennan, J., concurring in part and dissenting in part). Justice Blackmun further asserted that the plurality did little to tailor the standard of reasonableness that was derived from *T.L.O.*, which involved a very different factual situation, and that even if he accepted the plurality's announced standard, he would conclude that the petitioners have failed to meet it. He stated that, assuming that the petitioners had an individualized suspicion of mismanagement by Dr. Ortega, the scope of the search in which only

In conclusion, Justice Blackmun recognized that new areas of fourth amendment analysis have surfaced that require careful analysis.<sup>234</sup> He admonished the Court to examine closely the practical realities of the situation presented along with the interests involved before abandoning the traditional safeguards of the fourth amendment for a new standard derived from a balancing test.<sup>235</sup> Justice Blackmun asserted that "[b]y ignoring the specific facts of this case, and by announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches."<sup>236</sup>

#### IV. DISCUSSION AND ANALYSIS

The plurality decision in *O'Connor v. Ortega* represented an effort by members of the Supreme Court to carve out a broad exception, for the benefit of government employers, to the traditional fourth amendment protections of searches provided by a warrant requirement and a probable cause standard. However, the plurality failed to adequately distinguish the individual privacy interests infringed upon in an investigatory search for evidence of employee misfeasance and in a routine work-related intrusion. As a result, the plurality arrived at a ill-defined "reasonableness under all of the circumstances" standard for virtually all employer workplace privacy intrusions. The "reasonableness" standard announced by the plurality would appear to provide adequate protection for government employees from the minimally intrusive routine work-related office entries by their government employers. Nevertheless, the standard does not provide adequate protection of public employees' legiti-

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Dr. Ortega's personal items were obtained bore no reasonable relationship to the interests articulated to justify the intrusion at the outset. Although Justice Blackmun acknowledged that the plurality had not considered the seizures an issue, he stated that they should be relevant in determining the reasonableness of the scope of the search. *O'Connor*, 107 S. Ct. at 1513 n.14 (Blackmun, J., dissenting).

<sup>234</sup> 107 S. Ct. at 1513 (Blackmun, J., dissenting). Justice Blackmun noted the recent cases of *Shoemaker v. Handel*, 795 F.2d 1136, 1141-43 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986), in which the administrative search exception to the warrant requirement and probable cause standard was arrived at in part because of the heavily regulated horse-racing industry, and *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986), in which the urinalysis testing of United States Customs Service employees without probable cause or reasonable suspicion was held to be a violation of the employees' fourth amendment rights. *O'Connor*, 107 S. Ct. at 1514 n.15 (Blackmun, J., dissenting).

<sup>235</sup> 107 S. Ct. at 1514 (Blackmun, J., dissenting).

<sup>236</sup> *Id.* (Blackmun, J., dissenting).

mate privacy interests in the context of a government employer's highly intrusive search of an employee's office for evidence of work-related misfeasance. The employee's resulting lack of any semblance of traditional fourth amendment protection in the face of such a search reflects the plurality's unprecedented and seriously flawed opinion.

A majority of the Court correctly held that Dr. Ortega enjoyed a reasonable expectation of privacy and was protected against unreasonable searches in his office, desk, and file cabinets by the fourth amendment.<sup>237</sup> The basic purpose of the fourth amendment is to protect the privacy interests of individuals against arbitrary intrusions by the government.<sup>238</sup> Whether an individual's privacy interest is protected by the fourth amendment depends on whether the interest is one "that society is prepared to recognize as legitimate."<sup>239</sup> An individual's office has long been recognized as an area that receives fourth amendment protection. In *Hoffa v. United States*,<sup>240</sup> the Court stressed that "[w]hat the Fourth Amendment protects is the security a man relies upon when he places . . . his property within a constitutionally protected area, be it his home or his office . . . ."<sup>241</sup> The Supreme Court has further stated that an individual's expectation of privacy in an office is "based upon societal expectations that have deep roots in the history of the [fourth] [a]mendment."<sup>242</sup>

Although the long-held standards of reasonableness under the fourth amendment require a warrant and a finding of probable cause,<sup>243</sup> Justice O'Connor asserted that a "balanc[ing] [of] the na-

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<sup>237</sup> *Id.* at 1504 (Scalia, J., concurring) and *id.* at 1506 (Blackmun, J., dissenting). The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>238</sup> *T.L.O.*, 469 U.S. 325, 335 (1985). Because the harm to an individual can occur regardless of whether the government action is to investigate a criminal violation or some other statutory or regulatory standard, the Court has held that fourth amendment protections are not limited to investigations of criminal offenses by criminal authorities. *See id.* (public school officials held to fourth amendment standards); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13 (1978) (Occupational Safety and Health inspectors held to fourth amendment standards); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (firemen held to fourth amendment standards); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (building inspectors held to fourth amendment standards).

<sup>239</sup> *T.L.O.*, 469 U.S. at 338 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

<sup>240</sup> 385 U.S. 293 (1966).

<sup>241</sup> *Hoffa*, 385 U.S. at 301.

<sup>242</sup> *O'Connor*, 107 S. Ct. at 1498 (plurality opinion) (quoting *Oliver*, 466 U.S. 170, 178 n.8 (1980)).

<sup>243</sup> *United States v. United States District Court*, 407 U.S. 297, 316 (1972) (govern-

ture and quality of the intrusion . . . against the importance of the governmental interests alleged”<sup>244</sup> was required to determine the appropriate standard with which to analyze a public employer search. The Court has utilized a balancing of interests analysis in the past to arrive at lesser standards if there has been either an extraordinary government interest<sup>245</sup> or a very limited intrusion of an individual’s legitimate privacy interests.<sup>246</sup>

Justice O’Connor recognized that the government employers’ need for “supervision, control and the efficient operation of the workplace” were compelling government interests present in *O’Connor*.<sup>247</sup> Although it can be argued that the efficiency of government agencies is a vital national concern justifying such an analysis, Justice O’Connor’s balancing of interests that resulted in the bypassing of the traditional warrant and probable cause standards for a standard of “reasonableness under all the circumstances” was flawed in several respects.

Although Justice O’Connor noted that in fourth amendment analysis “[w]hat is reasonable depends on the context within which a search takes place,”<sup>248</sup> she shaped a standard that was only justifiable in a very non-intrusive context. In an effort to formulate a standard that was applicable to both routine work-related government employer entries of employee’s work areas and to government employer investigative searches for evidence of employee misfeasance, Justice O’Connor neglected to consider adequately the “nature and quality” of the latter intrusion. Indeed, when a public employee’s livelihood and reputation are at stake as a result of the stigma connected with a termination based on misfeasance, employer investigations are highly analogous to criminal proceedings. Viewed in that light, the “nature and quality” of an investigative search of a government employee’s work area is a severe intrusion of reasonable expectations of privacy that does not justify dispensing easily with the traditional warrant requirement.

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ment electronic listening devices held subject to fourth amendment requirements of a warrant and probable cause).

<sup>244</sup> *O’Connor*, 107 S. Ct. at 1499 (plurality opinion).

<sup>245</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)(routine automobile stops without a warrant or probable cause along the U.S. border seen as only practical method to control drug smuggling and entry of illegal aliens); *Terry v. Ohio*, 392 U.S. 1, 24 (1968)(police officer’s need to determine whether suspect is armed and dangerous justified a brief stop-and-frisk without a warrant or probable cause).

<sup>246</sup> *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)(housing code inspections not required to be supported by the traditional level of probable cause to obtain a search warrant).

<sup>247</sup> 107 S. Ct. at 1499 (plurality opinion).

<sup>248</sup> *Id.* at 1499 (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. at 337).

Justice O'Connor described the contexts as intrusions related to the retrieval of "correspondence, or a file or report," and, alternatively, as intrusions related to an "investigation into suspected employee misfeasance;" however, in consideration of the applicability of the warrant requirement, she failed to treat the contexts individually, instead referring to both as "work-related purpose[s]." <sup>249</sup> In keeping with that categorization, Justice O'Connor concluded that the warrant standard of the fourth amendment would "seriously disrupt the routine conduct of business and would be unduly burdensome." <sup>250</sup> Although it can be conceded that requiring a warrant of a public employer who needs to retrieve a file or correspondence from the office of an absent employee would be "unduly burdensome," Justice O'Connor provided no reasoning as to how a warrant requirement would unduly burden an employer who is investigating an employee for suspected work-related misfeasance.

Justice O'Connor's reliance on the Court's reasoning in *New Jersey v. T.L.O.* <sup>251</sup> as to the inapplicability of the warrant requirement for government employer investigative searches was unfounded. In *T.L.O.*, the Court similarly held that a warrant requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." <sup>252</sup> A government employer, however, cannot reasonably be seen to have disciplinary needs analogous to a school official who is dealing with school children. Government employers and employees are in a business relationship between adults, and formal proceedings are the rule rather than the exception. <sup>253</sup> That is contrary to the context of the school environment in which adult instructors supervise children of varying ages and maturity levels and frequently function in a quasi-parental role that by nature lacks formality. Unlike a school context, there are no persuasive government needs to conduct an investigative search of an employee's work area in an informal manner. Furthermore, given that an important government need arises to undertake the drastic action of an investigatory search of an employee in a "swift" fashion, the government employer would be justified to conduct the search under the "well defined exception" to the warrant requirement of an "exigent need." <sup>254</sup>

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<sup>249</sup> *Id.* at 1500 (plurality opinion).

<sup>250</sup> *Id.* (plurality opinion)

<sup>251</sup> 469 U.S. 325 (1985).

<sup>252</sup> *T.L.O.*, 469 U.S. 325, 340 (1985).

<sup>253</sup> See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (public employers held to fifth amendment due process standards in employee terminations).

<sup>254</sup> See *supra* note 245 and accompanying text.



Additionally, in her balancing analysis related to the warrant requirement, Justice O'Connor erred in her assertion that public employees' legitimate privacy interests are limited solely to the "private objects" they bring to work.<sup>255</sup> As Justice Blackmun emphasized, "privacy interests protected by the Fourth Amendment do not turn on ownership . . . ." <sup>256</sup> Rather, the fourth amendment protects individuals' legitimate expectations of privacy in areas such as an office, not simply their interest in private objects that are placed there.<sup>257</sup>

Justice O'Connor's conclusion that a probable cause standard will "impose intolerable burdens" and will result in "tangible and often irreparable damage" to a government employer was similarly flawed by the deficiency of weight given to the individual's legitimate privacy expectations against highly intrusive investigatory searches. Justice O'Connor asserted that violations of employee privacy interests, like those of individuals subject to housing inspections in *Camara v. Municipal Court*,<sup>258</sup> "involve[d] a relatively limited invasion" of individual privacy.<sup>259</sup> However, the reasoning that investigatory searches by government employers can be analogized to the administrative searches at issue in *Camara* is baseless. The Court in *Camara* premised its assertion on the fact that the searches were "neither personal in nature nor aimed at discovery of evidence of a crime. . . ." <sup>260</sup> On the contrary, government employer investigatory searches that intrude into an area in which employees admittedly have a reasonable expectation of privacy to discover evidence of employee misfeasance can only be seen as a personal intrusion. As occurred in *O'Connor*, the unconsented search of an employee's desk can also expose highly personal items such as correspondence or a journal. Furthermore, as noted in connection with the warrant requirement analysis above, investigative searches by government employers to locate evidence of employee misfeasance are highly analogous to criminal proceedings in both form and substance.

The broad right of government employers to make investigative searches of their employees' work areas is seen by the plurality as

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<sup>255</sup> *O'Connor*, 107 S. Ct. at 1500 (plurality opinion).

<sup>256</sup> *O'Connor*, 107 S. Ct. at 1510 n.7 (Blackmun, J., dissenting).

<sup>257</sup> See e.g., *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984) ("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment."); *Katz v. United States*, 389 U.S. 347, 359 (1967) ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

<sup>258</sup> 387 U.S. 523.

<sup>259</sup> *O'Connor*, 107 S. Ct. at 1502 (plurality opinion) (citing *Camara*, 387 U.S. at 537).

<sup>260</sup> *Camara*, 387 U.S. at 537.

necessary to further the employers' efforts to monitor employee work performance or to investigate suspected employee misfeasance. However, traditional methods utilized to achieve those objectives are highly effective and suggest the limited nature of additional relevant information or evidence that could be found in an investigatory search. To arrive at a well-reasoned, supportable justification for the government to intrude on an individual's reasonable expectation of privacy, alternative methods of achieving the government's objectives must be considered. Several of the less intrusive and highly effective alternatives not addressed by the plurality in arriving at their lesser standard of "reasonableness" are worthy of consideration.

Traditional strategies for investigating employee performance that are of limited intrusiveness yet can provide significant relevant information include: observing the employee in the workplace performing assigned tasks; monitoring and evaluating the employee's work-product while in process and at completion; questioning the suspected employee's co-workers; and interviewing the employee. Through the use of such methodology the government employer is likely to obtain sufficient relevant evidence of the validity of their suspicions. The only additional resulting value of an investigatory search to an employer will most certainly be, as was the case in *O'Connor*, to gain "access to *private* materials that would not otherwise be available to the government."<sup>261</sup>

In addition, the items of the highest probative value to the government employer are going to be primarily "employment-related papers and documents."<sup>262</sup> As these materials must be turned over to the government employer on demand,<sup>263</sup> the employer has broad access to evidence of suspected employee misfeasance. Should the employee refuse to relinquish any of the requested materials, the issue of an investigative search would be moot, as the employee could then be justifiably terminated.<sup>264</sup>

Finally, lower courts have upheld government employer's policies that limit employees' reasonable expectations of privacy. In *United States v. Bunkers*,<sup>265</sup> a warrantless search of a postal worker's

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<sup>261</sup> Brief Amicus Curiae (Joel I. Klein) for Respondent at 35, *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987)(No. 85-530)(emphasis in original).

<sup>262</sup> *Id.*

<sup>263</sup> *Wilson v. United States*, 221 U.S. 361, 380 (1911)(public employee's work held not to be privileged information against public employer's investigation).

<sup>264</sup> *Gardner v. Broderick*, 392 U.S. 273, 278 (1968)(police officers refusal to comply with inquiries specifically related to performance of official duties and not related to criminal prosecution was held to be valid grounds for discharge).

<sup>265</sup> 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975).

locker to look for stolen mail was upheld because of the existence of a regulation outlining the government's right to search employee lockers.<sup>266</sup> Similarly, in *United States v. Donato*,<sup>267</sup> a warrantless search was upheld pursuant to a government regulation that established that United States Mint employees were not to consider their lockers private.<sup>268</sup> Thus, if a government employer, such as the hospital officials in *O'Connor*, decided that there was a need to have broad access to employee work areas, that could be effectively accomplished through employee regulations. However, when the need to conduct an investigative search is an isolated incident in an unregulated government work environment, the government employee would appear to be deserving of the traditional fourth amendment protections.

The legitimate needs of a government employer to maintain employee performance and efficiency can be accomplished almost entirely through a combination of the aforementioned alternatives without any need for investigative searches. Thus, for the extremely limited situations in which a government employer has a legitimate need to search an employee's office or desk, the warrant standard would be necessary to fulfill its purpose of checking unrestrained executive discretion with the objective standards of a magistrate.<sup>269</sup> As stated in *United States v. United States District Court*,<sup>270</sup> "[t]he warrant clause of the Fourth Amendment is not dead language. . . . It is not an inconvenience to be somehow 'weighed' against claims of . . . efficiency."<sup>271</sup>

The "long-prevailing standards" of probable cause<sup>272</sup> also should not be discarded lightly for the highly intrusive government employer investigative search context. Probable cause not only has direct support in the text of the fourth amendment; it has been represented by the Court as "the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable.'"<sup>273</sup> Because of the analogous nature of investigatory searches for evidence

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<sup>266</sup> *Id.* at 1219, 1220.

<sup>267</sup> 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3rd Cir. 1967).

<sup>268</sup> *Id.* at 923-24.

<sup>269</sup> See *United States v. United States District Court*, 407 U.S. 297, 317 (1971)(citing N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 79-105 (1937)).

<sup>270</sup> 407 U.S. 297 (1971).

<sup>271</sup> *Id.* at 315 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

<sup>272</sup> *Dunaway v. New York*, 442 U.S. 200, 208 (1979)(quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

<sup>273</sup> *Id.* (custodial detention by police of a criminal suspect without probable cause held to be a violation of the fourth amendment).

of employee misfeasance to criminal proceedings, probable cause will provide the same important threshold test in the government employer investigatory search context. Probable cause, in contrast to the plurality's loosely defined "reasonableness" standard, has been described by the Court as a "practical," "non-technical," and "easily applied" "common sense test"<sup>274</sup> and should therefore be adhered to.

The guidelines suggested by Justice O'Connor for practical usage of the announced "reasonableness" standard provide little clarity as to the standard's limitations on investigatory searches by government employers. Justice O'Connor noted that a search "will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence" of employee misfeasance and "will be permissible in scope when the 'measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'"<sup>275</sup> However, the attempt to clarify the practical meaning of a "reasonableness" standard through references to "reasonable grounds" and "measures reasonably related to the objectives" is redundant and adds no substance to the vacuous standard announced.

In addition, as noted by Justice Blackmun, the plurality gave no rationale as to how the announced standard captures any of the traditional protections of the warrant requirement.<sup>276</sup> As Justice Blackmun reasoned, the new standard appears to be simply an alternative standard to probable cause.<sup>277</sup> Unlike the warrant and probable cause standards, however, the "reasonableness" standard has no well-defined body of precedent or clear guidelines to support its application.

The conclusion of Justice O'Connor that the warrant and probable cause standards can be bypassed for the context of government employer investigatory searches in favor of a "reasonableness under all the circumstances" standard is overbroad in its reach and unclear as to its substance. The plurality has created an unwise exception to traditional fourth amendment protections.

## V. CONCLUSION

In *O'Connor v. Ortega*, a plurality of the United States Supreme Court announced that in the context of government employer intru-

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<sup>274</sup> *Illinois v. Gates*, 462 U.S. 213, 235-36, 238-39 (1983).

<sup>275</sup> *O'Connor*, 107 S. Ct. at 1503 (plurality opinion).

<sup>276</sup> *Id.* at 1513 (Blackmun, J., dissenting).

<sup>277</sup> *Id.* (Blackmun, J., dissenting).

sions of employee's expectations of privacy, for work-related noninvestigatory searches as well as work-related investigations of employee misfeasance, a "reasonableness of all the circumstances" standard is appropriate for an analysis of whether the employee's fourth amendment rights had been violated.

The plurality persuasively reasoned that the efficiency interests of the government employers as well as the limited expectations of privacy of the employees supported a "reasonableness" standard for work-related noninvestigatory intrusions. However, in the context of government employer investigatory searches, the plurality created an unprecedented and unnecessarily broad exception to the traditional fourth amendment requirements of a warrant issued on the basis of a finding of probable cause. The announced standard of "reasonableness under all the circumstances" for such a highly intrusive context will generate confusion as to its limits and, furthermore, will fail to adequately protect individual privacy for government employees as provided for in the fourth amendment.<sup>278</sup>

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<sup>278</sup> *O'Connor*, 107 S. Ct. at 1499-1503 (plurality opinion).