INTRODUCTION

The fourth amendment to the United States Constitution\(^1\) developed as a response to the needs of colonists previously subjected to general warrants.\(^2\) These warrants, known as writs of assistance, allowed British officials unlimited authority to search for goods imported in violation of British tax laws.\(^3\) Originally drafted to avoid these abusive searches, the United States Supreme Court expanded the fundamental purpose of the fourth amendment to protect the privacy and security of individuals from arbitrary governmental searches and seizures.\(^4\)

The application of the fourth amendment's prohibition against arbitrary or unreasonable searches and seizures has traditionally created a division among the members of the Supreme Court.\(^5\) Controversy regarding fourth amendment interpretation has involved both the determination of legitimate privacy expectations\(^6\) and the establishment of a standard with which to review the reasonableness of the search.\(^7\) The decision reached by the Supreme Court in *O'Connor v. Ortega*\(^8\) has fueled these controversies.

The *Ortega* plurality reversed and remanded the Ninth Circuit

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\(^1\) U.S. CONST. amend. IV. The fourth amendment provides: The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*


\(^3\) *Id.*

\(^4\) Stanford, 379 U.S. at 481.

\(^5\) Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

\(^6\) *Id.*

\(^7\) See Oliver v. United States, 466 U.S. 170, 179 (1984) (holding that a person does not have a legitimate privacy expectation in an "open field" because such an area is accessible to the public); Katz v. United States, 389 U.S. 347, 353 (1967) (holding that reasonable privacy expectations exist in connection with a conversation conducted from a public telephone booth).

\(^8\) Camara, 387 U.S. at 534-35 (determining the need for a warrant when making building inspections); See v. Seattle, 357 U.S. 541, 546 (1957) (holding that a search of a business requires a warrant to meet the constitutional standard of reasonableness).

Court of Appeals decision\(^9\) which held that the warrantless search and seizure of a government employee's desk and office was unconstitutional under the fourth amendment.\(^10\) The standard of reasonableness that the Court adopted for the search exposes a government employee to warrantless searches and seizures by a supervisor under a multitude of circumstances.\(^11\)

An analysis of the Ortega decision provides an opportunity to examine fourth amendment cases involving privacy expectations,\(^12\) warrant and probable cause requirements,\(^13\) and alternate standards of reasonableness regarding searches and seizures.\(^14\) This Note will compare these cases with the Court’s analysis and holding in Ortega.\(^15\) Finally, this note will assert that the Court’s approach in Ortega has resulted in its failure to identify an unreasonable search and seizure.\(^16\)

FACTS AND HOLDING

Dr. Magno Ortega, a psychiatrist, was Chief of Professional Education at Napa State Hospital ("Hospital") for 17 years.\(^17\) In July, 1981, Ortega became the subject of an investigation regarding his management of the Hospital's psychiatric residency program.\(^18\) The investigation also concerned possible improprieties in Ortega's procurement of a computer used in the residency program, alleged sexual harassment by Dr. Ortega of hospital employees, and disciplinary measures used by Ortega.\(^19\) During this investigation, Dr. Dennis O'Connor, Executive Director of the Hospital, requested that Ortega stay off Hospital grounds.\(^20\)

\(^{9.}\) Ortega v. O'Connor, 764 F.2d 703, 707 (9th Cir. 1985).
\(^{10.}\) Ortega, 107 S. Ct. at 1504.
\(^{11.}\) See infra notes 316-19 and accompanying text.
\(^{12.}\) See infra notes 80-119 and accompanying text.
\(^{13.}\) See infra notes 120-84 and accompanying text.
\(^{14.}\) See infra notes 185-296 and accompanying text.
\(^{15.}\) See infra notes 227-319 and accompanying text.
\(^{16.}\) See infra notes 280-319 and accompanying text.
\(^{18.}\) Id.
\(^{19.}\) Id. The Ninth Circuit Court provided the following account regarding the computer:

On August 17, 1981, a hospital staff member informed O'Connor that Ortega had told his secretary that he had taken the computer to his home. O'Connor apparently believed that the computer belonged to the hospital, though Ortega had in fact acquired the computer with his own funds and with funds donated by resident physicians. Although Ortega routinely took the computer home over weekends, O'Connor became concerned and directed four hospital officials to enter Ortega's office and investigate the matter.

Ortega v. O'Connor, 764 F.2d 703, 704 (9th Cir. 1985).
\(^{20.}\) Ortega, 107 S. Ct. at 1495-96.
At some point during the investigation, a group of Hospital employees conducting the investigation entered and searched Dr. Ortega's locked office. Various reasons were offered for conducting the search. Hospital officials originally claimed that the purpose of the search was to inventory state property, a routine Hospital practice following the termination of an employee. At that time, however, Dr. Ortega had not yet been terminated, but was on administrative leave. Officials later claimed that the search was conducted to secure state property. In either event, the investigating officials entered Ortega's office numerous times and seized several items from his desk and files, including Ortega's personal property. Personal items seized were not separated from state property, but boxed and placed in storage for Dr. Ortega to retrieve. Some items were later presented at Ortega's administrative disciplinary hearing.

Ortega remained on administrative leave until his employment was terminated by the Hospital on September 22, 1981. After his dismissal, Dr. Ortega brought suit in the Federal District Court for the Northern District of California under 42 U.S.C. section 1983.

21. Id. at 1496, 1509.
22. Id. at 1496.
23. Id.
24. Id. The Court noted that "[o]n July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation." Upon request, O'Connor permitted Ortega two weeks vacation rather than administrative leave. Two weeks later, O'Connor notified Ortega that the investigation was not finished. Ortega was then placed on administrative leave. Ortega remained on leave until his termination. Id.
25. Id.
26. Id. The items allegedly taken were:
   (a) Purely personal correspondence from friends and family.
   (b) Photographs of friends, acquaintances, and family.
   (c) Medical files and correspondence from private patients unconnected to Napa State Hospital.
   (d) Appointment books and personal notes, as well as official appointments.
   (e) Personal financial records and accounts.
   (f) A file . . . containing teaching aids and notes.
   (g) Personal souvenirs, gifts and presents belonging to Ortega.
   (h) Copyrighted manuscript.
Ortega, 764 F.2d at 705 n.1.
27. Ortega, 107 S. Ct. at 1496.
28. Id. An administrative disciplinary proceeding involving Dr. Ortega was conducted before a hearing officer of the California State Personnel Board. The credibility of a former resident physician testifying on Ortega's behalf was impeached by the presentation of a Valentine's card, a photograph, and a book of poetry. These items had all been sent to Ortega by the former resident and were subsequently seized during the investigation. Id.
29. Id.
30. Ortega, 764 F.2d at 703.
31. Ortega, 107 S. Ct. at 1496. Section 1983 provides:
Dr. Ortega alleged that the search of his office violated the fourth amendment. Ortega also filed state claims for invasion of privacy and breach of good faith and fair dealings. In addition to Dr. O'Connor, other Hospital officials who participated in the investigation were named as defendants.

The district court granted the defendants' motion for summary judgment. The court held that the search of Ortega's office was reasonable under the fourth amendment, and it barred the state claims because Ortega had failed to comply with the California Tort Claims Act.

The district court reached this decision by relying on Chenkin v. Bellevue Hospital Center. In Chenkin, a federal court held that random inventory searches of employees exiting a state medical center were reasonable under the fourth amendment as a means to control pilferage. The district court in California followed the Chenkin holding and concluded that the search of Ortega's office was proper based on a need to secure state property.

The Ninth Circuit affirmed the grant of summary judgment against Dr. Ortega on the state claims. The court, however, reversed the summary judgment granted the state on the fourth amendment claim. Instead, the court granted summary judgment for Dr. Ortega on the fourth amendment issue, and remanded the case to the district court for determination of damages.

In its analysis, the Ninth Circuit asserted that Dr. Ortega had an

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

32. Ortega, 107 S. Ct. at 1496.
33. Ortega, 764 F.2d at 705.
34. Id. at 703.
36. Ortega, 764 F.2d at 705.
37. Id. See CAL. GOV'T CODE § 905.2 (West 1980) (permitting recovery of money or damages on express contract, or for an injury for which the state is liable, if the provisions of Chapter 1 and 2 of Part 3 of Division 3.6 are complied with).
41. Ortega, 764 F.2d at 707.
42. Id.
43. Id.
expectation of privacy in his office that invoked fourth amendment protection against unreasonable searches and seizures. This assertion was predicated on the court's findings that the office was secured by a locked door, the desk and office contained personal effects as well as confidential patient information, and the office had never been entered without Ortega's permission. The circuit court also determined that the Hospital had never conducted searches that might have defeated Dr. Ortega's expectation of privacy in his office. The court concluded by stating that the search appeared to have been conducted for no other reason than to obtain evidence relating to Dr. Ortega's investigation. Therefore, the Ninth Circuit held that the search was not reasonable under the fourth amendment.

Following the decision by the Ninth Circuit, the defendants appealed to the United States Supreme Court. The Supreme Court granted certiorari and reversed the holding of the circuit court. Justice O'Connor, in a plurality opinion, determined that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets, but stated that the record was insufficient to support the finding of a privacy expectation in his office. Justice O'Connor stated that, due to the variety of public sector work environments, the determination of privacy expectations must be made on a case-by-case basis. The plurality concluded that Ortega's privacy expectations in his office could not be determined without further knowledge of work-related reasons the investigators may have had for entering the office.

In reaching its decision, the plurality criticized the Ninth Circuit for unexplainedly concluding that the search was unreasonable under the fourth amendment. The Court stated that a determination must be made as to whether the search was unreasonable, which in turn requires determining a standard of reasonableness applicable to the search.

To derive a standard of reasonableness, the plurality balanced the intrusion on an individual's fourth amendment privacy interests
against the government's interests allegedly justifying the search.\textsuperscript{56} Unable to identify the type of search involved, the Court articulated a standard applicable to an intrusion by a public employer for either investigative or noninvestigative purposes.\textsuperscript{57} In formulating this standard, the plurality dispensed with the probable cause requirement\textsuperscript{58} and stated that a warrant could not be required for an employer's work-related search of an employee's office, desk, or file cabinets.\textsuperscript{59} Instead, it was held that work-related public employer intrusions for either an investigative or noninvestigative purpose shall be judged by a standard requiring both the inception and scope of the search to be "reasonable."\textsuperscript{60}

Under this standard, Justice O'Connor stated that the search will be initially justified "when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file."\textsuperscript{61} Justice O'Connor added that the scope of the search will be permissible 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]."\textsuperscript{62}

The plurality concluded that the district court was in error because the search conducted by hospital officials could not be justified by a need to secure state property.\textsuperscript{53} The summary judgment granted for Ortega by the Ninth Circuit was also held in error because the search may have been justified under the standard of reasonableness set forth.\textsuperscript{64} Thus, the court remanded the case for a determination of the justification for the search and seizure, and an evaluation of the reasonableness of the inception and scope of the search.\textsuperscript{65}

Justice Scalia's concurrence expressed disagreement with the plurality's instruction to lower courts that privacy expectations for a
public employee's business office be determined on a case-by-case basis. The concurrence asserted that the offices of government employees, as well as drawers and files within those offices, are generally protected by the fourth amendment. Nevertheless, Justice Scalia agreed with the plurality that warrantless government searches to retrieve work-related materials or to investigate workplace misfeasance are reasonable. Justice Scalia concluded that the evidence presented could not support a summary judgment invalidating the search.

Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, in dissent, agreed with Justice Scalia that Dr. Ortega had an expectation of privacy in his office as well as his desk and file cabinets. The dissent also maintained that the plurality erred by turning directly to a balancing of interests. Justice Blackmun argued that it should initially be determined whether the facts of the case justify an exception to the warrant and probable-cause requirements of the fourth amendment. According to Blackmun, the Court's direct use of a balancing test was a significant error because the circumstances did not support dispensing with the need for a warrant based on probable cause.

The plurality's balancing of the public employer's and employee's respective interests was also criticized in the dissenting opinion. Justice Blackmun argued that the standard formulated by the plurality was based on "assumed" facts and was, therefore, detached from the actual circumstances. Justice Blackmun maintained that this detachment resulted in the plurality's failure to balance the competing interests of the employer and employee with respect to the circumstances which led to the exception to the warrant and probable cause requirements.

BACKGROUND

An individual is protected from unreasonable government searches and seizures by exercising the provisions of the fourth amendment.
The United States Supreme Court stated in *United States v. Chadwick*\(^7\) that the coverage afforded by the fourth amendment is protection from unreasonable government intrusions into legitimate privacy expectations.\(^7\)

**DETERMINATION OF PRIVACY EXPECTATIONS**

The breadth of fourth amendment protection, applicable to the states through the fourteenth amendment,\(^8\) was defined in *Katz v. United States*.\(^6\) In *Katz*, the defendant objected to evidence which led to an indictment charging him with transmitting wagering information over the phone.\(^2\) The evidence had been obtained by federal agents who had attached an electronic listening and recording device to the exterior of a public telephone booth which the defendant had used in placing his calls.\(^3\)

The United States Supreme Court refuted the government's argument that the search should not be subject to fourth amendment standards.\(^4\) The Supreme Court asserted that the "Fourth Amendment protects people — and not simply 'areas' — against unreasonable searches and seizures . . . ."\(^5\) The Court further provided that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."\(^6\)

Based on this reasoning, the Court determined that the defendant had justifiable privacy expectations with respect to the telephone booth.\(^7\) Because the electronic surveillance constituted a fourth amendment search and seizure, it was subject to the constitutional standards of that amendment.\(^8\) The Court stated that the search and seizure could not be considered an exception to the constitutional requirement for a warrant based on probable cause.\(^9\) Because the federal agents had ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment,"\(^10\) the surveil-
lance was held to be unreasonable.\textsuperscript{91}

Justice Harlan's concurring opinion in \textit{Katz} outlined a two-step requirement for determining whether reasonable privacy expectations exist.\textsuperscript{92} According to Justice Harlan, if a person (1) exhibits an actual or subjective expectation of privacy and (2) if that expectation is one which society is prepared to recognize as reasonable, that person is protected from fourth amendment violations.\textsuperscript{93} The establishment of a "reasonable" or "legitimate" privacy expectation has consistently been held by the Supreme Court as a requisite to fourth amendment protection.\textsuperscript{94}

Privacy expectations in an administrative context have been ascertained by the Supreme Court and circuit courts in a fashion similar to \textit{Katz}.\textsuperscript{95} The United States Supreme Court in \textit{Mancusi v. DeForte}\textsuperscript{96} followed \textit{Katz}\textsuperscript{97} in analyzing fourth amendment protection with respect to the warrantless government search of a private office.\textsuperscript{98} In \textit{Mancusi}, state officials conducted a search resulting in the seizure of union records after the union refused to comply with a subpoena.\textsuperscript{99} The defendant, a union official, claimed that the material was inadmissible in state proceedings because it had been seized illegally.\textsuperscript{100}

The Supreme Court assessed the existence of a privacy expectation with respect to DeForte's office.\textsuperscript{101} In a majority opinion, Justice Harlan referred to \textit{Katz} in stating that the "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in

\begin{footnotesize}
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  \item For a warrant consists of "advance authorization by a magistrate upon a showing of probable cause." \textit{Id.} at 358.
  \item \textit{Id.} at 359.
  \item \textit{Id.} at 360-61 (Harlan, J., concurring).
  \item \textit{Id.} at 361; see United States v. Jacobsen, 466 U.S. 109, 122 (1984).
  \item Hudson v. Palmer, 468 U.S. 517, 525 (1984) (applicability of fourth amendment depends on whether a justifiable, reasonable or legitimate privacy expectation exists); United States v. Chadwick, 433 U.S. 1, 7 (1977) (stating that the fourth amendment protects people from unreasonable government intrusions into legitimate privacy expectations); Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (stating that capacity to claim fourth amendment protection depends on whether there is a reasonable expectation of freedom from governmental intrusion); Terry v. Ohio, 392 U.S. 1, 9 (1968) (stating that the fourth amendment protects people when a reasonable expectation of privacy exists).
  \item See infra notes 96-119 and accompanying text.
  \item 392 U.S. 364 (1968).
  \item \textit{Id.} at 368.
  \item \textit{Id.} at 365.
  \item \textit{Id.}
  \item \textit{Id.} at 365-66. The "exclusionary rule," created by the United States Supreme Court in \textit{Weeks v. United States}, 232 U.S. 383 (1914), provides that evidence seized in violation of the fourth amendment must be excluded from trial. \textit{Id.} at 398.
  \item \textit{Mancusi}, 392 U.S. at 367-70.
\end{itemize}
\end{footnotesize}
which there was a reasonable expectation of freedom from govern-
mental intrusion.”

Justice Harlan concluded that the crucial issue was whether the circumstances would reveal that DeForte’s office was an area in which reasonable privacy expectations existed.

The record revealed that DeForte’s office was a large room shared with other union officials. It was not certain from what part of the office the records were taken, but the defendant had custody of the records at the time of seizure. The Court also noted that the defendant spent “a considerable amount of time in the office.”

Based on these circumstances, the Court held that the defendant had fourth amendment standing to object to the seizure. Justice Harlan stated that DeForte was “entitled to expect that he would not be disturbed except by personal or business invitees, and that the records would not be taken except with his permission or that of his union superiors.” Even though DeForte had only a minimal expectation of absolute privacy, his office was nevertheless protected by the fourth amendment.

The Third Circuit Court of Appeals in Gillard v. Schmidt also addressed the issue of whether the plaintiff, a school guidance counselor, enjoyed a right to privacy in his desk. The desk, located in a locked office suite shared with other counselors, had been searched by a school board member. The search was conducted in an attempt to link the counselor to the creation of a satirical cartoon directed at the school board.

The circuit court maintained that fourth amendment protection may only be claimed if the area searched was one in which the individual had “‘a reasonable expectation of freedom from governmental intrusion.’” In reaching its determination, the court observed that the desk contained confidential student records and was located in an area secured by a locked door. Because no school regulation or ac-

102. Id. at 368 (citing Katz v. United States, 389 U.S. 347, 352 (1967)).
103. Id.
104. Id.
105. Id. at 368-69.
106. Id.
107. Id. at 369.
108. Id.
109. Id. at 370.
110. Id. at 369.
111. 579 F.2d 825 (3d Cir. 1978).
112. Id. at 827.
113. Id. at 826.
114. Id.
115. Id. at 828 (citing United States v. Speights, 557 F.2d 362, 363 (3d Cir. 1977)).
116. Id.
excepted practice existed which would dispel an expectation of privacy, the court held that the counselor had a reasonable expectation of privacy in his school desk.\footnote{117}

As \textit{Katz} and subsequent cases illustrate, privacy expectations which trigger fourth amendment protection exist in a multitude of settings.\footnote{118} Once these expectations are established, the remaining question becomes whether the search and seizure is "unreasonable" under fourth amendment standards.\footnote{119}

\textbf{Reasonableness of the Search: Warrant and Probable Cause Requirements}

The fourth amendment requires that searches must be reasonable under all the circumstances.\footnote{120} A search supported by a warrant based on probable cause\footnote{121} is the standard of reasonableness established by the framers of the fourth amendment.\footnote{122} The United States Supreme Court has thus adopted the notion that searches con-

\footnote{117. \textit{Id.} \textit{See United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).} In \textit{Blok}, police had arrested the defendant and searched her desk located in the government office where she was employed. Police seized evidence during the warrantless search. \textit{Id.} at 1019-20. The circuit court stated that "her official superiors might reasonably have searched the desk for official property needed for official use." \textit{Id.} at 1021. The court, however, stated that this search "was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed." \textit{Id.} at 1021 (quoting the finding of the Municipal Court of Appeals for the District of Columbia). \textit{But see United States v. Collins, 349 F.2d 863 (2d Cir. 1965).} In \textit{Collins}, the circuit court held that a warrantless search of a customs employee's desk was a reasonable exercise of the government's power as an employer to supervise and investigate the employee's duties. \textit{Id.} at 867-88. The search was conducted as a result of strong suspicions and the discovery of incriminating evidence indicating that the employee had been stealing on the job. \textit{Id.} The circuit court distinguished the situation from \textit{Blok}, where the crime under investigation was unrelated to the employee's duties. \textit{Id.} at 868.

\footnote{118. \textit{See supra} notes 82-117 and accompanying text.}

\footnote{119. \textit{Mancusi, 392 U.S. at 370.}}

\footnote{120. \textit{United States v. Jacobsen, 466 U.S. 109, 115 (1984) (stating that "[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"); Terry v. Ohio, 392 U.S. 1, 19 (1968) (asserting that the central fourth amendment inquiry is the reasonableness under all the circumstances of the particular governmental invasion).}}

\footnote{121. \textit{See Texas v. Brown, 460 U.S. 730 (1983).} The Court in \textit{Brown} defined probable cause as:

\[\textit{A} \text{flexible, commonsense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime, it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.} \textit{Id.} at 742 (citations omitted).\]

\footnote{122. \textit{Id.} at 744-45 (Powell, J., concurring); \textit{New Jersey v. T.L.O., 469 U.S. 325, 352 (1985) (Blackmun, J., concurring) (stating that "the elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers").}}
ducted without a warrant based on probable cause are *per se* unreasonable.\(^{123}\)

This notion was exemplified by the Supreme Court in *United States v. Chadwick*,\(^{124}\) a case which examined the reasonableness of a warrantless search of a footlocker.\(^{125}\) Federal narcotics agents, suspecting that the locker contained a controlled substance, arrested the defendants and seized the footlocker.\(^{126}\) Approximately an hour and a half later, the padlocked locker was opened by the agents.\(^{127}\) The locker was found to contain large amounts of marijuana,\(^{128}\) and the defendants were subsequently arrested for possession of marijuana with intent to distribute.\(^{129}\)

The defendants claimed that the search was a violation of the fourth amendment and sought to have the marijuana excluded as evidence.\(^{130}\) The majority determined that important fourth amendment privacy interests were at stake with respect to the footlocker.\(^{131}\) The Court concluded that, absent an emergency situation, the search for criminal evidence was unreasonable because it lacked the safeguards that accompany a judicial warrant.\(^{132}\)

Fourth amendment prohibition against unreasonable searches and seizures protects against warrantless intrusions not only in criminal contexts as in *Chadwick*, but in civil contexts as well.\(^{133}\) In *Camara v. Municipal Court*, fourth amendment protection relating to an administrative search was addressed by the United States Supreme Court.\(^{134}\) *Camara* involved a challenge to a municipal code which imposed criminal sanctions for refusal to permit warrantless

\(^{123}\) New Jersey v. T.L.O., 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part) (stating that warrantless searches are *per se* unreasonable subject to a few specific exceptions); United States v. Place, 462 U.S. 696, 701 (1983) (stating that the Court has viewed a seizure of private property as *per se* unreasonable unless it is accomplished pursuant to a warrant issued upon probable cause); Mancusi v. DeForte, 392 U.S. 364, 370 (1968) (stating that “a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant”) (quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967)); Katz v. United States, 389 U.S. 347, 357 (1967) (stating that searches conducted outside the judicial process are *per se* unreasonable under the fourth amendment); Agnello v. United States, 269 U.S. 20, 33 (1925) (stating that “absence of any judicial approval is persuasive authority that [the search of a private dwelling] is unlawful”).


\(^{125}\) *Id.* at 4.

\(^{126}\) *Id.*

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 5.

\(^{129}\) *Id.*

\(^{130}\) *Id.* See *supra* note 100 (defining the exclusionary rule).

\(^{131}\) *Id.* at 11.

\(^{132}\) *Id.*


\(^{134}\) *Camara*, 387 U.S. at 525.
building inspections. Camara had refused to allow a warrantless inspection of his residence. Pending trial on a criminal charge for the violation, Camara brought an action alleging that the municipal code was contrary to the fourth amendment.

Writing for the majority, Justice White stated that, with few exceptions, a search of private property without consent or authorization by a valid search warrant is unreasonable. The majority conceded that a routine inspection of the physical condition of private property was a less hostile intrusion than a police search for criminal evidence. Nevertheless, the majority refuted arguments attempting to justify the warrantless administrative searches.

The majority asserted that the initial inquiry in determining the reasonableness of a search is whether the intrusions may be made without a warrant. Justice White recognized that an exception to the constitutional requirement for a warrant is not determined by asking whether public interest justifies the search in question. The issue, rather, is "whether the authority to search should be evidenced by a warrant. . ."

In Camara, the Court was not convinced that the inspections would be unsuccessful if a warrant was required. The majority found public interest arguments as inadequate justification for creating an exception to the constitutional requirement for a warrant.

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135. Id. at 525. Section 503 of the San Francisco Housing Code stated that:

[A]uthorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Id. at 526 (quoting SAN FRANCISCO, CAL., CODE § 503 (19--)) section 507 of the Code imposed penalties for anyone refusing to comply with Code provisions. Id. at 527.

136. Id. at 525.

137. Id.

138. Id. at 528-29.

139. Id. at 530 (discussing Frank v. Maryland, 359 U.S. 360 (1959)). In Frank, the Court upheld the conviction of a homeowner who had refused to allow a health official to conduct a warrantless inspection of his premises. Frank, 359 U.S. at 373. In Camara, Justice White stated that:

To the Frank majority, municipal fire, health, and housing inspection programs "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion," because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances.

Camara, 387 U.S. at 530 (citations omitted).
based on probable cause. The warrantless intrusions were therefore held unreasonable because they lacked the traditional safeguards guaranteed by the fourth amendment.

The Supreme Court also addressed administrative searches in *Marshall v. Barlow's, Inc.* At issue was the reasonableness of inspections for violations of Occupational Safety and Health Act ("OSHA") regulations. Barlow's, Inc. had refused to allow the warrantless entry of an OSHA inspector into the non-public area of its electrical and plumbing installation business. The corporation subsequently sought an injunction against OSHA inspections. A three-judge court granted the injunction and held that the fourth amendment required a warrant for the inspections. The Secretary of Labor appealed and challenged the judgment.

In a majority opinion, Justice White stated that a warrant would be needed to conduct the inspections unless a recognized exception to the warrant requirement would apply. The Secretary argued that warrantless inspections offered the advantage of surprise, an element essential to proper OSHA enforcement. The Court, however, was unconvinced that the warrant requirement would seriously burden the inspection system or make the inspections less effective. The Court concluded that the inspection needs were insufficient to abandon the "constitutional requirement that for a search to be reasonable a warrant must be obtained."

The constitutional standard of reasonableness therefore requires that a search and seizure be conducted pursuant to a warrant based on probable cause. When the search fails to meet this standard, it

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145. *Id.* at 533-34.
146. *Id.* at 534.
148. *Id.* at 309-10.
149. *Id.* at 310.
150. *Id.*
151. *Id.* (citing Barlow's, Inc. v. Usery, 424 F. Supp. 437, 442 (1976)).
153. *Id.* at 312-13.
154. *Id.* at 316.
155. *Id.*
156. *Id.* at 324. In discussing the probable cause requirement, the Court stated: [An] entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."
157. *Id.* at 320-21 (quoting *Camara,* 387 U.S. at 538).
is generally deemed unreasonable and thus a violation of the fourth amendment. However, searches and seizures are not always subject to the warrant and probable cause requirements.

WARRANT AND PROBABLE CAUSE EXCEPTIONS

In Chadwick, Camara, and Marshall, the government unsuccessfully argued that the constitutional mandate for reasonable searches would not be sacrificed by creating an exception to the warrant requirement. Warrant or probable cause exceptions, however, have been recognized by the Court in "a few specifically established and well-delineated situations." An overview of these situations reveals a common thread as to when the Court will waive the warrant and probable cause requirements.

The "automobile exception" was created by the United States Supreme court in Carroll v. United States. The defendants in Carroll were convicted of transporting liquor in violation of the National Prohibition Act. The trial court had admitted in evidence liquor seized during a warrantless search of the defendants' vehicle. The defendants challenged the conviction on grounds that the search violated the fourth amendment.

In a seven to two decision, the Supreme Court held that the warrantless search of the auto was reasonable within the meaning of the fourth amendment. The Court reasoned that the ability to quickly move a car out of the jurisdiction in which the warrant must be obtained made it impractical to require a warrant. Rather, the appropriate standard of reasonableness was determined by the Court as the requirement that the officer have probable cause for believing

158. See supra note 123 and accompanying text.
159. See infra notes 160-82 and accompanying text.
160. Marshall, 436 U.S. at 315; Chadwick, 433 U.S. at 6-7; Camara, 387 U.S. at 531-32.
162. See infra notes 163-84 and accompanying text.
163. 267 U.S. 132, 153-56 (1925). See Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Justice Stewart wrote: "It is settled, of course, that a stop and search of a moving automobile can be made without a warrant. That narrow exception to the warrant requirement was first established in Carroll v. United States." Id. at 269 (citations omitted).
164. Carroll, 267 U.S. at 134.
165. Id.
166. Id.
167. Id. at 153-62. The Court stated: "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched without a warrant, we come now to consider under what circumstances such search may be made." Id. at 153.
168. Id.
the auto contained liquor.\textsuperscript{169} The Court concluded that based on the circumstances the officers had probable cause to search the auto.\textsuperscript{170}

In \textit{Terry v. Ohio},\textsuperscript{171} the Court dispensed with both warrant and probable cause requirements.\textsuperscript{172} \textit{Terry} involved a warrantless "frisk" search or "pat-down" of persons suspected of "casing a job, a stick-up."\textsuperscript{173} Defendant Terry was charged with carrying a concealed weapon after the frisk revealed a .38-caliber revolver in his overcoat.\textsuperscript{174} Terry challenged the search and seizure as being a violation of the fourth amendment.\textsuperscript{175}

In a majority opinion, Justice Warren stated that, whenever practicable, police must obtain judicial approval prior to conducting a search and seizure.\textsuperscript{176} The majority maintained that "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . ."\textsuperscript{177} However, Justice Warren pointed out that the police conduct in question necessitated the need for quick response based upon "on-the-spot observations."\textsuperscript{178} In holding that the frisk search was not in violation of the fourth amendment,\textsuperscript{179} the majority asserted that it would be impractical to subject the police conduct in question to warrant and probable cause requirements.\textsuperscript{180}

The Court, therefore, has abandoned warrant and probable cause when those requirements become "impractical" under the circumstances.\textsuperscript{181} Such circumstances exist during emergencies or when the need for either requirement will frustrate the purpose for which the search was intended.\textsuperscript{182} When the Court dispenses with the need for

\textsuperscript{169} Id. at 155-56.
\textsuperscript{170} Id. at 162.
\textsuperscript{171} 392 U.S. 1 (1968).
\textsuperscript{172} Id. at 20.
\textsuperscript{173} Id. at 6. Terry and codefendant Richard Chilton were both arrested, indicted, tried, and convicted together. Id. at 5 n.2. Chilton, however, died following the grant of the writ upon a joint petition. Id. Only Terry's conviction was reviewed by the Court.
\textsuperscript{174} Id. at 7.
\textsuperscript{175} Id. at 7-8.
\textsuperscript{176} Id. at 20.
\textsuperscript{177} Id.
\textsuperscript{178} Id. Chief Justice Warren described the conduct as "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." Id.
\textsuperscript{179} Id. at 30-31.
\textsuperscript{180} Id. at 20. Chief Justice Warren stated that the police conduct involved "historically has not been, and as a practical matter could not be, subjected to the warrant procedure." Id. Rather, the conduct was subjected to the fourth amendment's general requirement that searches and seizures must be reasonable. Id. Warren stated, however, that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context." Id.
\textsuperscript{181} See supra notes 163-80 and accompanying text.
\textsuperscript{182} \textit{Camara}, 387 U.S. at 533. The Court has created exceptions to the warrant re-
a warrant, probable cause may remain to serve as the standard of reasonableness as in *Carroll.* When probable cause cannot apply, the Court must adopt another standard for measuring the reasonableness of the search at hand.

**Reasonableness of the Search — Alternate Standards**

The standard of reasonableness depends on the context within which the search is conducted. When a warrant based on probable cause cannot apply, the Court has adopted a reasonableness standard by balancing the need to search against the invasion which results from that search.

In *Terry v. Ohio,* the Court held that the reasonableness of a "frisk search" could not be measured by warrant and probable cause requirements. To determine the applicable standard, the Court initially examined the governmental interests in conducting the search. These interests included a general concern in the prevention and detection of crime. The Court also considered the more important and immediate interest of allowing an officer to protect himself from the use of a concealed weapon. Those governmental interests were then balanced against the brief and limited intrusion requirement in emergency situations. Warrantless searches have been allowed in the following cases: *United States v. Brignoni-Ponce,* 422 U.S. 873, 880 (1975) (holding that stop-check of auto by Border Patrol was reasonable in the interest of detecting illegal aliens); *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 298 (1967) (holding that search resulting in seizure of incriminating evidence following pursuit of robbery suspect was reasonable because of the danger presented to the police and the public); *Schmerber v. California,* 384 U.S. 757, 772 (1966) (holding that warrantless extraction of blood of suspected drunken driver to measure blood-alcohol level was reasonable due to fact that the alcohol level in the blood begins to diminish shortly after drinking stops).


183. See *New Jersey v. T.L.O.,* 469 U.S. 325, 349 (1986). The Court stated that "[o]rdinarily, a search — even one that may permissibly be carried out without a warrant — must be based upon probable cause to believe that a violation of the law occurred." *Id.* See * supra* notes 163-70 and accompanying text.

184. See *infra* notes 185-205 and accompanying text.

185. *T.L.O.,* 469 U.S. at 337.


187. See * supra* notes 172-80 and accompanying text.

188. *Terry,* 392 U.S. at 22.

189. *Id.*

190. *Id.* at 23-24.
on the rights of the individual being searched. This balancing resulted in a standard which allows an officer to conduct a "reasonable search for weapons" when reason exists to believe an individual is armed and dangerous.

The balancing test was also utilized by the United States Supreme Court in New Jersey v. T.L.O. In that case, T.L.O. had denied violating no smoking rules that were in effect in the state school she attended. The assistant vice principal proceeded to search T.L.O.'s purse to confirm suspicions of the no smoking violation. The search ultimately revealed that the purse contained marijuana and drug-related paraphernalia. T.L.O. sought to have the evidence excluded from delinquency proceedings, contending that the search violated the fourth amendment.

To determine the standard of reasonableness applicable to the search of the purse, the Court immediately turned to the balancing test. In a plurality opinion, Justice White balanced the student's privacy interest against the school faculty's frequent needs for immediate and effective disciplinary action. In striking a balance, the Court adopted a standard of reasonableness that required neither a warrant nor probable cause. Justice White concluded that the ap-

191. Id. at 24-25. The Court recognized that a limited search of outer clothing constituted a brief but severe intrusion upon personal security. Id.
192. Id. at 27. In Camara, the Court determined that public building inspections required a warrant. Camara, 387 U.S. at 534. The concept of probable cause as it applies in a criminal context, however, was found to be inapplicable to city-wide inspection programs. Id. at 535. The Court stated that the only effective method of seeking code compliance was through the periodic inspections of all structures. Id. at 535-36. The Court then resorted to a balancing test to evaluate the reasonableness of such "area inspections," and thus whether probable cause existed. Id. at 536-37. Several factors were weighed by the Court in reaching its determination that area code-enforcement inspections were reasonable. Id. at 538. The Court cited the historical acceptance of area enforcement programs as well as the prevention of dangerous building conditions. Id. at 537. In addition, it was noted that the inspections were impersonal in nature and resulted in only a limited invasion of privacy. Id. Having resolved that area inspections were reasonable under the fourth amendment, the Court concluded that probable cause to conduct an area inspection therefore exists when reasonable administrative standards are satisfied. Id. at 538-39. The Court disagreed with the suggestion that varying the probable cause test from the standard applied in criminal cases would decrease fourth amendment protection by authorizing a "synthetic search warrant." Id. The Court asserted that reasonableness is the ultimate standard and stated that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Id. at 539.
194. Id. at 328.
195. Id.
196. Id.
197. Id. at 329.
198. Id. at 337.
199. Id. at 339.
200. Id. at 340-41.
Search and seizure applicable standard was one which would allow school teachers and administrators to regulate their conduct according to the "dictates of reason and common sense."\textsuperscript{201}

In a concurring opinion, Justice Blackmun agreed with the plurality's standard of reasonableness.\textsuperscript{202} His concurrence, however, criticized the plurality in utilizing the balancing test to create an exception to the warrant and probable cause requirements.\textsuperscript{203} Justice Blackmun stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balance of interests for that of the Framers."\textsuperscript{204} Justice Blackmun nevertheless concluded that the school setting justified an exception to the warrant and probable cause requirements.\textsuperscript{205}

Summary of Fourth Amendment Protection

In analyzing the legality of a search, the Court must first determine whether fourth amendment privacy expectations exist.\textsuperscript{206} The Court must then incorporate the facts to determine the standard against which the actual search will be measured.\textsuperscript{207} In accordance with the fourth amendment language, reasonableness will generally require the search to be conducted pursuant to a judicial warrant.

\begin{itemize}
\item \textsuperscript{201} Id. at 343.
\item \textsuperscript{202} Id. at 353 (Blackmun, J., concurring).
\item \textsuperscript{203} Id. at 351 (Blackmun, J., concurring). Justice Blackmun stated: "I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we were confronted with 'a special law enforcement need for greater flexibility.'" \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring) (citations omitted) (quoting \textit{Florida v. Royer}, 460 U.S. 491, 514 (1983)) (Blackmun, J., dissenting)).
\item \textsuperscript{204} \textit{T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring).
\item \textsuperscript{205} Id. at 353 (Blackmun, J., concurring). \textit{See also} \textit{Winston v. Lee}, 470 U.S. 753, 766 (1985). In \textit{Winston}, the balancing test was utilized to determine reasonableness even though probable cause existed to conduct the search. The defendant had suffered from a gunshot wound, apparently inflicted by a store owner whom Lee was charged with attempting to rob. \textit{Winston}, 470 U.S. at 755-56. The state sought and obtained a motion to compel surgery to remove the bullet which had lodged into Lee's chest. \textit{Id.} at 756-7. The United States Supreme Court granted certiorari to consider whether a state could compel a suspect to undergo this type of search for criminal evidence. \textit{Id.} at 758. There was no question that probable cause existed to conduct the search, and that all procedural avenues had been available to Lee. \textit{Id.} at 763. The Court, however, asserted that the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach where the individual's privacy and security interests are balanced against society's interests in conducting the search. \textit{Id.} at 760. After considering the surgical risks involved, in conjunction with the fact that substantial additional evidence existed in the state's favor, the Court held that the proposed search would be unreasonable under the fourth amendment. \textit{Id.} at 766.
\item \textsuperscript{206} \textit{See supra} notes 80-119 and accompanying text.
\item \textsuperscript{207} \textit{See supra} notes 120-205 and accompanying text.
\end{itemize}
based upon probable cause.\textsuperscript{208} In special situations where practicality dictates that such requirements cannot apply, the Court must derive another standard which meets the reasonableness command of the fourth amendment.\textsuperscript{209}

Once a standard of reasonableness is formulated, it remains to be determined whether the search involved satisfies that standard.\textsuperscript{210} The Court has described this determination as being a two-fold inquiry.\textsuperscript{211} First, it must be considered "whether the . . . action was justified at its inception;\textsuperscript{212}" second, it must be determined whether the actual search "was reasonably related in scope to circumstances which justified the interference in the first place."\textsuperscript{213} Application of this dual test completes the determination of whether the search complies with the constitutional command for reasonableness.

\textbf{ANALYSIS}

In \textit{O'Connor v. Ortega},\textsuperscript{214} the United States Supreme Court determined that Dr. Ortega had a reasonable expectation of privacy in his desk,\textsuperscript{215} but not in his office. The search of Ortega's desk was therefore subject to fourth amendment standards.\textsuperscript{216} Unable to decide whether a noninvestigative work-related search or an investigation of employee misconduct\textsuperscript{217} had been conducted, the plurality established a standard of reasonableness applicable to both.\textsuperscript{218}

This standard was derived by balancing the legitimate privacy interests of public employees against the management interests of government employers.\textsuperscript{219} Finding the traditional warrant\textsuperscript{220} and probable cause requirements inappropriate,\textsuperscript{221} the plurality held:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{208} See supra notes 120-59 and accompanying text.
\item \textsuperscript{209} See supra notes 185-205 and accompanying text.
\item \textsuperscript{210} See \textit{Katz}, 389 U.S. at 354 (stating that the remaining questions for decision is whether the search and seizure conducted in the case complied with constitutional standards).
\item \textsuperscript{211} \textit{Terry}, 392 U.S. at 319-20.
\item \textsuperscript{212} \textit{Id}.
\item \textsuperscript{213} \textit{Id}. See United States v. Place, 462 U.S. 696, 710 (1983) (concluding that a 90 minute detention of luggage exceeded the permissible limits of an investigation conducted on less than probable cause).
\item \textsuperscript{214} 107 S. Ct. 1492 (1987).
\item \textsuperscript{215} See supra note 51 and accompanying text.
\item \textsuperscript{216} See supra notes 80-119 and accompanying text.
\item \textsuperscript{217} \textit{Ortega}, 107 S. Ct. at 1501.
\item \textsuperscript{218} \textit{Id}.
\item \textsuperscript{219} \textit{Id}. at 1501-02.
\item \textsuperscript{220} \textit{Id} at 1500-01.
\item \textsuperscript{221} \textit{Id} at 1501-02. The plurality stated:
\item [\textit{[I]}t is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable
\end{itemize}
\end{footnotesize}
[P]ublic 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 of the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable..."222

The Court, however, declined to determine whether the search of Ortega's office and desk met this standard.223 Rather, the Court remanded the case stating that justification for the intrusion would depend on a further determination of the actual reasons for conducting the search.224

A review of the Court's decision indicates that its failure to recognize the investigative nature of the search resulted in its improper finding that Dr. Ortega had no legitimate privacy expectations in his office.225 Furthermore, the Court's failure to examine the specific facts of Dr. Ortega's case and to characterize the search as investigative resulted in the misapplication of a standard of reasonableness which can be generally applied to a variety of employer searches.226

ASSessing Dr. Ortega's Privacy Expectations

The plurality relied on "undisputed evidence" in determining that Dr. Ortega had a reasonable expectation of privacy in his desk and files.227 Justice O'Connor provided the following account:

The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for seventeen years and he kept materials in his office, which included personal correspondence, medical files, and correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos.228

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cause has little meaning for a routine inventory conducted by public employ- ers for the purpose of securing state property.

_id. at 1501. The plurality, in deriving a standard of reasonableness for investigations of work-related employee misconduct, stated that "a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employ- ers." _id. at 1502.
222. _id. at 1502-03.
223. _id. at 1503.
224. _id. at 1504.
225. See _infra_ notes 235-78 and accompanying text.
226. See _infra_ notes 279-318 and accompanying text.
228. _Id._
The plurality's acceptance of Dr. Ortega's privacy expectations in his desk follows *Gillard v. Schmidt*\(^{229}\) wherein the Ninth Circuit determined that a right to privacy existed in a school counselor's desk.\(^{230}\) In a situation resembling that in *Gillard*, Dr. Ortega's desk contained confidential records and was secured in a locked area.\(^{231}\) Furthermore, Ortega's desk was located in his private office\(^{232}\) rather than in a shared suite as was the counselor's desk in *Gillard*.\(^{233}\) Finally, the *Ortega* plurality noted that no Hospital administrative policies were in force to discourage employees from storing personal items in their desk and files, which would have dispelled any privacy expectations that otherwise might have existed.\(^{234}\)

The privacy expectations that the Court found in Dr. Ortega's files and desk were sufficient in this instance to allow Ortega to exercise his fourth amendment rights.\(^{235}\) The plurality's failure to recognize a similar legitimate privacy expectation in Dr. Ortega's office, however, merits discussion for purposes of clarifying fourth amendment protection with respect to an employee's place of work.\(^{236}\)

Based on *Mancusi v. DeForte*, the plurality asserted that government employees may have reasonable expectations of privacy with respect to their place of work.\(^{237}\) The *Ortega* plurality, however, referred to *Mancusi* wherein the Supreme Court "suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors."\(^{238}\) Justice O'Connor stated that some privacy expectations, due to the "operational realities of the workplace," may be considered unreasonable where the search is conducted by supervisors rather than law enforcement officers.\(^{239}\)

Justice O'Connor also stated that government offices are inherently open to access by fellow employees, supervisors, and the general public.\(^{240}\) The plurality suggested that some offices may be so

\(^{229}\) 579 F.2d 825 (3d Cir. 1978).
\(^{230}\) See supra notes 111-17 and accompanying text.
\(^{231}\) See supra note 20.
\(^{232}\) Ortega, 107 S. Ct. at 1496.
\(^{233}\) See supra note 113 and accompanying text.
\(^{234}\) Id.
\(^{235}\) Id.,
\(^{236}\) See supra notes 51-53 and accompanying text.
\(^{237}\) See infra notes 238-78 and accompanying text.
\(^{238}\) Ortega, 107 S. Ct. at 1498.
\(^{239}\) Id.
\(^{240}\) Id.

\(^{241}\) Id. The plurality stated that "it is the nature of government offices that others — such as fellow employees, supervisors, consensual visitors, and the general public — may have frequent access to an individual's office." Id.
open that no reasonable privacy expectation can exist,\textsuperscript{242} thus necessi-
tating privacy determinations on a case-by-case basis.\textsuperscript{243} Justice
O'Connor concluded that privacy expectations in Dr. Ortega's office
could not be determined without knowledge of "the extent to which
Hospital officials may have had work-related reasons to enter [the]
office...."\textsuperscript{244}

Fourth amendment protection against an unreasonable search, however, should not disappear because the office is "open,"\textsuperscript{245} or be-
cause the government can reasonably intrude in its capacity as an
employer.\textsuperscript{246} The \textit{Mancusi} Court did state that, under the circum-
stances present in that case, the employee's privacy expectations with
respect to union records may have been subordinate to the approval
of a search for such records by his employer.\textsuperscript{247} Allowing an em-
ployer the superior right to work-related files does not eliminate le-
gitimate privacy expectations against all employer searches.\textsuperscript{248}

The Court in \textit{Katz} provided that some privacy expectations in
the home or office may be reasonable while other privacy expecta-
tions may not.\textsuperscript{249} The two-part test formulated by Justice Harlan in
\textit{Katz} for assessing privacy expectations requires that a person exhibit
a subjective expectation of privacy that society is prepared to recog-
nize as reasonable.\textsuperscript{250} An application of this test effectively elimi-
nates any privacy expectations that cannot objectively be considered
legitimate or reasonable.\textsuperscript{251} As a result, an employee may have no
reasonable privacy expectation with respect to routine entries by fel-
low employees or supervisors.\textsuperscript{252}

Proper determination of reasonable privacy expectations there-
fore turns upon the nature of the search.\textsuperscript{253} As a result, it appears
that the plurality's failure to incorporate the facts and characterize
the intrusion proved fatal to privacy expectations in Dr. Ortega's of-
lice.\textsuperscript{254} If the Court had determined the investigative nature of this
search, the objective component of legitimate privacy expectations

\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 1498-99.
\textsuperscript{245} See id. at 1509 (Blackmun, J., dissenting).
\textsuperscript{246} Id. at 1505 (Scalia, J., concurring).
\textsuperscript{247} Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968).
\textsuperscript{248} See infra notes 260-68 and accompanying text.
\textsuperscript{250} Katz, 389 U.S. at 361 (Harlan, J., concurring).
\textsuperscript{251} See id.
\textsuperscript{252} Ortega, 107 S. Ct. at 1509 (Blackmun, J., dissenting).
\textsuperscript{253} Id.
\textsuperscript{254} See infra notes 255-68 and accompanying text.
would have been satisfied.255

The investigators claimed that the search of Ortega's office was conducted to inventory state property.256 This purpose was readily discounted by the Court due to the apparent absence of an administrative policy allowing such a search of offices of those on administrative leave.257 The plurality suggested that the search may have been justified by a need to secure a computer thought to be state property.258 However, testimony given by the investigators also eliminated this motive as possible justification.259

The search was conducted at night,260 and resulted in the seizure of Dr. Ortega's personal belongings as well as state property.261 No inventory was conducted, and the only items retained were personal items262 later used to impeach the credibility of a witness testifying on Ortega's behalf.263 As the dissent concluded, the search "was plainly exceptional and investigatory in nature."264

It is evident that Dr. Ortega had a subjective privacy expectation in his office.265 An objective privacy expectation, one which society would recognize as reasonable, was also present.266 In accordance with the dissent, legitimate privacy expectations exist "as to an after hours search of [an employee's] locked office by an investigative team seeking materials to be used against [the employee] at a termination proceeding."267 Therefore, a reasonable privacy expectation in Dr.

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255. See supra notes 249-52 and accompanying text.
256. Ortega, 107 S. Ct. at 1496.
257. Id. at 1496, 1503. Justice O'Connor responded to the defendant's initial contention that the search was a routine inventory of a terminated employee conducted pursuant to Hospital policy. Justice O'Connor noted that "[a]t the time of the search . . . the Hospital had not yet terminated Dr. Ortega's employment." Id. at 1496.
258. Id. at 1504.
259. Id. at 1508 (Blackmun, J., dissenting). The dissent provided the following discussion regarding the defendant's need to secure the computer:

The record evidence demonstrates, however, that ensuring that the computer had not been removed from the Hospital was not a reason for the search. Mr. Friday, the leader of the "investigative team," stated that the alleged removal of the computer had nothing to do with the decision to enter Dr. Ortega's office. Dr. O'Connor himself admitted that there was little connection between the entry and an attempt by petitioners to ascertain the location of the computer. The search had the computer as its focus only insofar as the team was investigating practices dealing with its acquisition.

Id.
260. Id.
261. Id. at 1496.
262. See supra note 26.
263. Ortega, at 1496, 1508 (Blackmun, J., dissenting).
264. Id. at 1508 (Blackmun, J., dissenting).
265. Id. at 1496 (filing the action under 42 U.S.C. § 1983, Dr. Ortega alleged that the search of his office was in violation of the fourth amendment).
266. See supra notes 249-55 and accompanying text.
Ortega’s office was clearly present with respect to the circumstances involved. Justice Scalia supported the plurality’s reasonableness determination, yet argued that a legitimate privacy expectation existed in Ortega’s office. His concurrence advocated an approach for assessing office-related privacy expectations other than on a case-by-case basis. Justice Scalia stated that government offices should, as a general rule, be protected against unreasonable searches by either supervisors or law enforcement officers. Under this approach, routine work-related intrusions would be considered reasonable intrusions into legitimate privacy expectations. A person could not, therefore, claim fourth amendment protection against such intrusions.

Justice Scalia’s approach is more practical than a case-by-case analysis because it centralizes the inquiry as to whether fourth amendment protection applies to the search at hand. Rather than initially determining whether legitimate privacy expectations exist with respect to the search, the single determination is whether the intrusion can be considered reasonable under the circumstances. Avoiding a case-by-case analysis serves to reduce the difficulties created for lower courts, police, and citizens as a result of the inevitable fluctuation of fourth amendment standards. Under either approach, however, an office such as Ortega’s is constitutionally protected against unreasonable searches even though it may be accessible to supervisors and co-workers.

ESTABLISHING A STANDARD OF REASONABLENESS

After determining that legitimate privacy expectations exist, a standard of reasonableness must be determined for the search at hand. The reasonableness of the search is dependent upon the circumstances involved. Due to the variety of office settings and contexts in which intrusions by either supervisors or co-workers may

268. See supra notes 257-67 and accompanying text.
269. Ortega, 107 S. Ct. at 1505 (Scalia, J., concurring).
270. Id. at 1506 (Scalia, J., concurring).
271. Id. at 1505 (Scalia, J., concurring).
272. Id. Justice Scalia qualified this rule for those “unusual” instances when an office is open to “unrestricted public access.” Id. at 1505-06 (Scalia, J., concurring).
273. Id.
274. See supra note 79 and accompanying text.
275. See supra notes 272-74 and accompanying text.
277. Id. at 1505 (Scalia, J., concurring).
278. See supra notes 238-74 and accompanying text.
279. See supra notes 122-205 and accompanying text.
280. See supra note 120 and accompanying text.
occur, fourth amendment protection must be closely scrutinized with respect to the circumstances of each situation.\textsuperscript{281} The plurality stated that an employee’s privacy expectations must be addressed on a case-by-case basis because of the variety of public sector work environments.\textsuperscript{282} The applicable standard of reasonableness must ideally be approached on a similar level, particularly if that standard is determined by a balancing test which incorporates those privacy interests.\textsuperscript{283} The plurality’s failure to acknowledge the actual circumstances therefore created problems not only in assessing Ortega’s privacy expectations,\textsuperscript{284} but also in deriving a standard of reasonableness applicable to the search.\textsuperscript{285}

If the Court had followed traditional fourth amendment analysis, it would have first determined whether it should have created an exception to the warrant and probable cause requirements.\textsuperscript{286} Had this approach been taken, the Court would have reached a different result.\textsuperscript{287} In Ortega, no impracticalities or urgent circumstances existed that would have “frustrated” the purposes of the search as in Carroll \textit{v. United States} or Terry \textit{v. Ohio}.\textsuperscript{288} The requirement for a warrant based on probable cause would not have affected the Hospital’s goal of maintaining an efficient workplace through effective disciplinary actions.\textsuperscript{289} Once the need for a warrant had been realized, the search would have been unjustified at its inception and the Court’s analysis would have ended.\textsuperscript{290} The investigators’ failure to meet the traditional fourth amendment standard of reasonableness would have resulted in an affirmation of the Ninth Circuit Court of Appeal’s holding.\textsuperscript{291}

The \textit{Ortega} plurality, however, balanced general privacy interests of a federal employee against a government employer’s management interests and concluded that the warrant requirement would be im-

\begin{itemize}
  \item \textsuperscript{281} \textit{See Ortega}, 107 S. Ct. at 1506-07 n.2 (Blackmun, J., dissenting); \textit{see supra} note 120 and accompanying text.
  \item \textsuperscript{282} \textit{Ortega}, 107 S. Ct. at 1498.
  \item \textsuperscript{283} \textit{See id.} at 1501-02.
  \item \textsuperscript{284} \textit{See supra} notes 235-69 and accompanying text.
  \item \textsuperscript{285} \textit{See infra} notes 300-310 and accompanying text.
  \item \textsuperscript{286} \textit{See supra} notes 120-59 and accompanying text.
  \item \textsuperscript{287} \textit{See infra} notes 288-91 and accompanying text.
  \item \textsuperscript{288} \textit{See Ortega}, 107 S. Ct. at 1511 (Blackmun, J., dissenting). The dissent asserted that no “special need” existed under the circumstances to justify an exception to the warrant and probable cause requirements. \textit{See also supra} notes 160-84 and accompanying text.
  \item \textsuperscript{289} \textit{Ortega}, 107 S. Ct. at 1511 (Blackmun, J., dissenting). This goal was the interest which the plurality used in justifying work-related intrusions. \textit{Id.} at 1501.
  \item \textsuperscript{290} \textit{See supra} notes 157-59. \textit{See also} \textit{O’Connor}, 107 S. Ct. at 1511-12 (Blackmun, J., dissenting).
  \item \textsuperscript{291} \textit{See Ortega}, 107 S. Ct. at 1511-12 (Blackmun, J., dissenting). \textit{See supra} notes 41-48 and accompanying text.
\end{itemize}
practical for work-related searches.\(^{292}\) This conclusion was premised on "the common-sense realization that government offices could not function if every employment decision became a constitutional matter."\(^{293}\) The balancing test was also applied by the plurality to determine a standard of reasonableness for the two types of searches that might have been conducted—either an inventory search or a search for evidence of employee misconduct.\(^{294}\) Rather than requiring probable cause for either search, the Court concluded that these intrusions "should be judged by the standard of reasonableness under all the circumstances."\(^{295}\)

The plurality's application of the balance test appears to present several difficulties.\(^{296}\) An overall balancing test can initially be perceived as a substitution of the Court's standards for those mandated in the constitution.\(^{297}\) Under the balancing procedure, warrant and probable cause lose their status as constitutional requirements and become more readily dispensable.\(^{298}\)

With the apparent exception of \textit{New Jersey v. T.L.O.},\(^{299}\) the balancing test has been applied to derive an alternate standard only after warrant and probable cause requirements are deemed impractical.\(^{300}\) But assuming the circumstances in \textit{Ortega} dictate an exception to warrant and probable cause requirements, the balancing test requires the incorporation of those circumstances which created the need for the exception.\(^{301}\)

For example, the Court in \textit{Terry} realized that the necessarily swift police action could not be subject to either a warrant or probable cause requirement.\(^{302}\) In determining whether the search was reasonable, an appropriate standard was determined by weighing general crime prevention interests and the safety of the officer under the circumstances against the relatively limited intrusion on privacy interests that accompanied the frisk search.\(^{303}\) Those interests

\(^{292}\) \textit{Ortega}, 107 S. Ct. at 1500-01.

\(^{293}\) \textit{Id.} at 1501 (citing Connick v. Myers, 461 U.S. 138, 143 (1983)).

\(^{294}\) \textit{Ortega}, 107 S. Ct. at 1501. The plurality categorized the search as either being "noninvestigatory work-related" or "an investigatory search for evidence of suspected work-related employee misfeasance." \textit{Id.}

\(^{295}\) \textit{Id.} at 1502.

\(^{296}\) See infra notes 297-315 and accompanying text.

\(^{297}\) See \textit{Ortega}, 107 S. Ct. at 1511 (Blackmun, J., dissenting).

\(^{298}\) See \textit{supra} notes 120-59 and accompanying text.

\(^{299}\) See \textit{supra} notes 193-205 and accompanying text.

\(^{300}\) See \textit{supra} notes 185-92 and accompanying text.

\(^{301}\) \textit{Ortega}, 107 S. Ct. at 1512 (Blackmun, J., dissenting). See infra notes 302-06 and accompanying text.

\(^{302}\) \textit{Terry} v. Ohio, 392 U.S. 1, 20 (1968).

\(^{303}\) See \textit{supra} notes 187-91 and accompanying text.
unique to the search led to a suitable standard of reasonableness.  

Similarly, the Court in *Camara* determined an alternate standard by balancing the privacy interest infringement created by the limited and impersonal building inspections against the public need for safe building conditions.  

Again, the interests incorporated in the balancing test were unique to the situation, and resulted in an exception to the probable cause requirement.

Rather than relying on the actual facts, the plurality in *Ortega* balanced competing government employer and employee general interests in dispensing with the requirement for either a warrant or probable cause. The particular circumstances creating this exception were not identified.  

While the need for a warrant is no doubt impractical for many employer intrusions, the abstract approach adopted by the *Ortega* plurality in analyzing employer searches will allow unjustified warrantless intrusions. Furthermore, the search categories subject to the Courts' reasonableness standard are so broad they can arguably encompass any employer search.

The plurality and dissent both state that fourth amendment jurisprudence with respect to employer searches and seizures is undeveloped. The Court in this instance should have remanded the case for further fact determination rather than announcing a standard which not only was reached in error but is also applicable to numerous employer searches. As a result, a public employee is now subject to a multitude of unreasonable employer searches.

Justice Blackmun underscored this problem in stating that "the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches."

Due to the variety of employer searches, the determination of

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304. See supra note 192 and accompanying text.
305. See supra note 192.
306. See supra note 192.
307. *Ortega*, 107 S. Ct. at 1512 (Blackmun, J., dissenting). The interests of the government employee mainly include that employee's privacy interests. See supra notes 182-83 and accompanying text. It becomes apparent that an application of the circumstances to properly assess those privacy expectations, another flaw in the plurality's analysis, is therefore necessary in reaching a suitable standard of reasonableness. See *Ortega*, 107 S. Ct. at 1513 (Blackmun, J., dissenting).
308. Id.
309. See supra notes 285-88 and accompanying text. See also *Ortega*, 107 S. Ct. at 1513 (Blackmun, J., dissenting).
311. See id. at 1500, 1514.
312. See supra notes 286-309 and accompanying text.
313. See supra note 310 and accompanying text.
314. See supra notes 310-13 and accompanying text.
reasonableness standards must arguably be approached on a case-by-case basis. This methodology is doubtless the most exacting, but possesses the potential for unequal administration of justice inherent in any individualized scrutiny. The Court should therefore make a concerted effort by properly examining factual settings to accurately define and categorize government searches and seizures that are exempt from the warrant and probable cause requirements. Standards of reasonableness for these searches should be derived with respect to the warrant and probable cause standard. This approach, in conjunction with a general rule providing legitimate privacy expectations in government offices, will allow for equitable treatment of both the public employer and employee.

CONCLUSION

The Ortega decision is contrary to previous Supreme Court decisions and analyses regarding the fourth amendment. The plurality's failure to recognize the investigative nature of the search resulted in an improper assessment of legitimate privacy expectations and a standard of reasonableness inapplicable to the search of Ortega's office. Due to the variety of situations in which employer intrusions occur, fourth amendment analysis of such searches must closely incorporate the facts involved. The Ortega decision failed to adopt this approach, resulting in a standard of reasonableness which applies to most searches conducted by a public employer. This standard, however, should not apply to the search of Dr. Ortega's office, an intrusion that should properly be subject to the traditional fourth amendment standard of reasonableness.

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316. Id. at 1506 n.2 (Blackmun, J., dissenting).
317. See id.
318. See supra note 277 and accompanying text.
319. See supra notes 307-10 and accompanying text.
320. See supra notes 300-06 and accompanying text.
321. See supra notes 271-76 and accompanying text.