CONSTITUTIONAL LAW—SEARCH AND SEIZURE—WARRANTLESS SEARCH OF PUBLIC EMPLOYEE WORK AREA FOR WORK-RELATED PURPOSES AND SEIZURE OF PERSONAL PROPERTY DOES NOT VIOLATE FOURTH AMENDMENT—*O'Connor v. Ortega*, 480 U.S. 709 (1987).

The fourth amendment to the United States Constitution 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."[1] In the 1960's, the Warren Court interpreted the fourth amendment in a way that resulted in greater protection for defendants.[2] Near the end of Chief Justice Warren's tenure, however, urban violence, unrest on college campuses, soaring crime rates, political assassinations and criticism of the Court resulted in a noticeable erosion of defendants' rights.[3] Subsequently, the Court began to restrict many important decisions that bolstered defendants' rights.[4] It created an array of exceptions to the fourth amendment and its exclusionary rule,[5] the result being that "reasonableness" and "probable cause" developed into two distinct standards for scrutinizing the validity of searches and seizures.[6] Indeed, it appears that the

---

[1] U.S. CONST. amend. IV.

[2] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (lewd books and pictures which were unlawfully seized in defendant's home were inadmissible as evidence because the exclusionary rule of the fourth amendment is applicable through the fourteenth amendment).

[3] Note, *The United States Supreme Court's Erosion of Fourth Amendment Rights: The Trend Continues*, 30 S.D.L. REV. 574, 575 (1985).

[4] *See* Illinois v. Gates, 462 U.S. 213 (1983) (magistrate may issue warrant based on totality of the circumstances); Delaware v. Prouse, 440 U.S. 648 (1979) (officers may stop a car based on reasonable suspicion rather than probable cause).

[5] The exclusionary rule was originally limited to federal proceedings and was first applied by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914). It is a remedy created by the judiciary which supplements the fourth amendment by excluding evidence from a defendant's trial if it is obtained through an illegal search and seizure. Note, *supra* note 3, at 579. In recent years, however, the effectiveness of this rule has been diminished by the Court. *See* Michigan v. Long, 463 U.S. 1032 (1983) (reasonable belief that suspect is armed and dangerous may justify a search for weapons in a vehicle's passenger compartment despite that the suspect is no longer inside the vehicle); United States v. Mendenhall, 446 U.S. 544 (1980) (search and seizure of a defendant by Drug Enforcement Agency officials deemed reasonable despite being based solely on suspicions perpetuated by the use of drug courier profiles).

[6] *See* note, *supra* note 3, at 575. Advocates of traditional interpretation believe that the warrant clause governs fourth amendment searches and seizures, thus making the reasonableness clause of secondary importance. *See, e.g.*, LANDYNSKI,

Court manifested a commitment to give greater deference to public officials at the expense of individual liberties.[7]

The judicial tendency to limit the scope of the fourth amendment is exemplified by the 1986 decision of *O'Connor v. Ortega*.[8] In *O'Connor*, the Court limited the number of situations where a public employee has a reasonable expectation of privacy in his office, including his desk and file cabinets, and provided public employers with greater latitude when conducting a search of such property.[9] Magno Ortega, a physician, was employed as Chief of Professional Education at Napa State Hospital (Napa), a public facility located in the state of California.[10] Ortega was responsible for supervising new physicians that were participating in the hospital's psychiatric residency programs.[11] In July 1981, Ortega was investigated for allegedly mismanaging his department.[12] Napa officials became concerned over Ortega's improper acquisition of a computer for the residency program.[13] In addition, charges were made that Ortega had sexually assaulted two female employees and that he had subjected a resident to wrongful disciplinary action.[14]

On July 30, 1981, Ortega left the hospital for a two-week

SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42-44 (1966). As a result, authorities must demonstrate to a magistrate that probable cause exists in order to attain a search warrant. *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 548-49 (2d ed. 1987). Probable cause is found when a reasonable person would infer from the facts and circumstances that a felony was committed. *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963). The "reasonable person" test views the fourth amendment's two clauses as operating independently. *See* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 282 (1984). Consequently, searches may be reasonable, and thus constitutional, even if executed without a warrant. *See* Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) ("nothing in the [f]ourth [a]mendment . . . requires . . . searches be conducted pursuant to warrants.").

7 *See supra* note 5 and accompanying text.

8 480 U.S. 709 (1987).

9 *See id.* The holding in *O'Connor* is hardly novel given the fourth amendment line of decisions. The tendency has been to grant greater discretion to public officials despite the negative impact on correlative individual freedoms. *See* Note, *supra* note 3, at 586.

10 Ortega v. O'Connor, 764 F.2d 703, 704 (9th Cir. 1985), *rev'd*, 480 U.S. 709 (1987).

11 *O'Connor*, 480 U.S. at 712.

12 *Ortega*, 764 F.2d at 704.

13 *O'Connor*, 480 U.S. at 712.

14 *Id.* The officials suspected that they were misled into believing that the computer was donated, when in fact it may have been financed with the coerced contributions from residents. *Id.*

vacation while these allegations were being investigated.[15] It was, however, requested by Dr. Dennis O'Connor, the Executive Director of Napa, that Ortega refrain from returning to the hospital property until the conclusion of the inquiry.[16] After his vacation, Ortega was placed on administrative leave pending the investigation's outcome.[17]

Employees selected by Dr. O'Connor conducted a search of Ortega's office.[18] The hospital officials later contended that the search was made in accordance with a hospital policy of executing "a routine inventory . . . in the office of a terminated employee."[19] At the time the search was conducted, however, Ortega was neither terminated nor scheduled to leave his position at Napa.[20] Moreover, Napa did not have a policy of conducting an inventory of the offices of those employees on administrative leave.[21]

Although the officials conducting the search knew that Ortega had moved the computer to his home,[22] the search of his office was extremely thorough.[23] The officials searched through some of Ortega's personal belongings and appropriated several items for investigatory purposes.[24] An inventory of the office was never prepared.[25] Instead, all office papers were placed in boxes

---

[15] *Id.* Dr. O'Connor originally suggested that Ortega take paid administrative leave for the duration of the investigation but, as an alternative, permitted him vacation time. *Id.*

[16] *Id.* Dr. O'Connor had asked Ortega not to return to the premises without his written approval. *Ortega*, 764 F.2d at 704.

[17] *Ortega*, 764 F.2d at 704.

[18] *O'Connor*, 480 U.S. at 713. This panel included "an accountant, a physician, and a [h]ospital security officer," and was headed by the Hospital Administrator. *Id.* It was the Hospital Administrator who made the decision to enter Ortega's office. *Id.* Dr. Ortega had occupied his office for seventeen years, had his name on the door, was locked when he was not present and no one else had a key. *Ortega*, 764 F.2d at 704.

[19] *O'Connor*, 480 U.S. at 713.

[20] *Ortega*, 764 F.2d at 705. Ortega was simply on administrative leave until the conclusion of the investigation. *Id.*

[21] *O'Connor*, 480 U.S. at 713.

[22] *Id.* In his dissent, Justice Blackmun emphasized that "the record demonstrates . . . that ensuring that the computer had not been removed from the [h]ospital was not a reason for the search." *Id.* at 735 (Blackmun, J., dissenting).

[23] *Id.* at 713.

[24] *Ortega*, 764 F.2d at 704. Among the items seized were "a Valentine's card, a photograph, a book of poetry all sent to Dr. Ortega by a former resident physician . . . [as well as] billing documentation of one of Ortega's private patients under the California Medical program." *O'Connor*, 480 U.S. at 713. Some of these articles were later used in a hearing to impeach a witness who testified on Ortega's behalf. *Id.*

[25] *O'Connor*, 480 U.S. at 714.

and stored for Ortega to retrieve.[26] Ortega was eventually terminated on September 22, 1981.[27]

Ortega subsequently filed suit against various hospital officials in the United States District Court under section 1983 of the Civil Rights Act,[28] claiming that the search of his office violated the fourth amendment.[29] Both parties moved for summary judgment and the hospital's motion was granted.[30] On appeal, the Ninth Circuit of the United States Court of Appeals affirmed in part and reversed in part after concluding that Ortega possessed a reasonable expectation of privacy in his office.[31] The United States Supreme Court granted certiorari[32] and reversed the appellate court's decision.[33] The Supreme Court remanded the case, instructing the district court to determine both the validity of the search and seizure as well as the reasonableness of the inception and scope of the search.[34]

The Warren Court's policy of liberally interpreting the fourth amendment for maximum protection of defendants' rights was initially established in the 1961 case of *Mapp v. Ohio*.[35] In

---

[26] *Id.* The investigators made no attempts to separate Ortega's belongings from government property because, as one agent emphasized, "[t]rying to sort State from non-State, . . . was too much to do, so I gave it up and boxed it up." *Id.* at 713-14 (quoting Joint Appendix at 62, O'Connor v. Ortega, 480 U.S. 707 (1987) (No. 85-530)).

[27] *Id.* at 712-13.

[28] *Id.* at 714. Section 1983 provides that:

> 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 property proceeding 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.

42 U.S.C. § 1983 (1982). Ortega also brought "pendent state claims for invasion of privacy and breach of covenant of good faith and fair dealings." *Ortega*, 764 F.2d at 705.

[29] *Ortega*, 764 F.2d at 705.

[30] *O'Connor*, 480 U.S. at 714. The District Court, relying on Chenkin v. Bellevue Hosp. Center, 479 F. Supp. 207 (S.D.N.Y. 1979), found that the search was necessary to secure state property within the office. *Id.*

[31] *Ortega*, 764 F.2d at 706-07. The Court of Appeals held that the record justified a grant of partial summary judgment for Ortega on the issue of liability for an unlawful search, and it remanded the case to the District Court for a determination of damages. *Id.* at 707.

[32] 474 U.S. 1018 (1985).

[33] *O'Connor*, 480 U.S. at 714.

[34] *Id.* at 729.

[35] 367 U.S. 643 (1961).

Mapp, the appellant was convicted in an Ohio state court for possessing lewd and lascivious materials in violation of an Ohio law.[36] The evidence used to obtain this conviction, however, was seized after police officers forcibly entered Mapp's premises and conducted a search of her personal belongings and papers without a warrant.[37]

On appeal, the Supreme Court held that the exclusionary rule of the fourth amendment is applicable to the states through the due process clause of the fourteenth amendment.[38] Justice Clark, writing for the majority, reiterated that the fourth amendment applies to "all invasions on the part of the government and its employe[e]s of the sanctity of a man's home and the privacies of life."[39] Justice Clark advocated a liberal interpretation of the constitutional provisions relating to personal security.[40] He emphasized that the courts must guard against attempts to encroach on citizens' rights.[41] Moreover, the majority noted that federal and state cooperation will be served best by adherence to the same criteria.[42] The Court reasoned that to rule otherwise would

---

[36] *Id.* (citation omitted).

[37] *Id.* at 644-45. At the time of the search, Mapp had demanded that the authorities show her a search warrant. *Id.* at 644. An officer then presented a paper which he claimed to be a valid warrant. *Id.* At trial, however, no warrant was produced by the prosecution. *Id.* at 645. The state, relying on *Wolf v. Colorado*, 338 U.S. 25 (1949), asserted that the fourteenth amendment did not prohibit admission of evidence appropriated by unreasonable search and seizure if state proceedings and state crimes were involved. *See id.* at 645-46. The Ohio Supreme Court implied that the articles might have been illegally seized, but they nevertheless, were deemed admissible because "there was no evidence that any of the incriminating evidence . . . was taken from defendant's person by the use of brutal or offensive physical force against defendant." *Id.* (quoting State v. Mapp, 170 Ohio St. 427, 431, 166 N.E.2d 387, 390 (1960)).

[38] *Id.* at 655-57. The Supreme Court reversed the Ohio Supreme Court, and on reexamination of the factual grounds on which the Supreme Court decided *Wolf v. Colorado* acknowledged that the *Wolf* court had recognized "the enforceability of the right to privacy against the [s]tates," but found the case's failure to require state application of the exclusionary rule unacceptable. *Id.*

[39] *Id.* at 646 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). In *Boyd*, the Supreme Court voided an act designed to amend customs revenue laws. Boyd v. United States, 116 U.S. 616, 617 (1886). The revenue law permitted the judiciary to require that defendants produce their private books, invoices and papers in court during a revenue controversy. *Id.* at 618. The Court concluded that the act was repugnant to the fourth and fifth amendments. *See id.* at 638.

[40] *Mapp*, 367 U.S. at 647 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[41] *Id.* (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[42] *Id.* at 658. Justice Clark emphasized this need to adhere to a single standard with regard to the fourth amendment and its exclusionary rule by pointing out that a double standard, one state and one federal, would mean that "a federal prosecutor may make no use of evidence illegally seized, but a state's attorney across the

create a dual standard which would reduce the fourth amendment to "a form of words."[43]

Six years after *Mapp*, the Supreme Court in *Camara v. Municipal Court* recognized that a search warrant was not necessary when the burden of obtaining a warrant "is likely to frustrate the governmental purpose behind the search."[44] *Camara* involved a suit by a homeowner who was charged with violating a provision of the San Francisco Housing Code.[45] The homeowner refused to allow building officials to conduct a warrantless inspection of his dwelling.[46] He subsequently sought a writ of prohibition arguing that the search could only be conducted pursuant to a warrant procedure, and that a warrant could only be issued when there was probable cause to suspect that a given building contained housing code violations.[47] The United States Supreme Court rejected the homeowner's contention that specific probable cause was necessary to search a given dwelling.[48] The majority reasoned that a warrantless code inspection of a place is reasonable if there is probable cause to believe that violations exist within the general area and if the need to search transcends the resulting invasion of privacy.[49] According to the Court, a determination of probable cause may be based on a dwelling being effected by the legislative and administrative requirements under the given municipal program being enforced.[50] The Court concluded that while the probable cause standard might have been satisfied, the homeowner, nonetheless, had a constitutional right to require that the inspectors procure a warrant.[51] The Court found that, in this case, there was no emergency that required

---

street may, although he supposedly is operating under the enforceable prohibitions of the same [a]mendment." *Id.* at 657.

[43] *Id.* at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

[44] 387 U.S. 523, 533 (1967).

[45] *Id.* at 525.

[46] *Id.*

[47] *Id.* at 525, 534. The writ was denied by the California Superior Court, and on appeal the order was affirmed by the District Court of Appeals. *Id.* at 525.

[48] *Id.* at 536-38, 540.

[49] *Id.* at 536-38. The Court cited several factors that tended to justify these area inspections, among them being the longstanding acceptance of such inspections by the judiciary and community, the public interest in alleviating dangerous conditions and the minimal invasions of privacy that they perpetuate. *Id.* at 537.

[50] *Id.* at 538. The Court suggested that factors capable of perpetuating probable cause would be "the passage of time, nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but . . . not . . . specific knowledge of the condition of a particular dwelling." *Id.*

[51] *Id.* at 540.

immediate access.[52]

Shortly after its holding in *Camara*, the Supreme Court, in *Terry v. Ohio*,[53] adopted the balancing-of-interests test to satisfy the requirement of probable cause.[54] Terry was convicted of possessing a concealed weapon in violation of an Ohio law.[55] At trial, the prosecution entered into evidence two revolvers and several bullets which had been seized from Terry and a codefendant.[56] The evidence was obtained when a detective stopped and frisked Terry and the codefendants after suspecting that they were about to commit a robbery.[57]

In affirming the conviction, the United States Supreme Court construed the fourth amendment to allow a police official to conduct a limited search for weapons on a criminal suspect without probable cause.[58] The Court balanced the government's interest in making the search against the privacy interests of the citizen.[59] The majority observed that the reasonableness of a search and seizure will depend on whether the action was justified at its inception, and if its scope was appropriate in light of the surrounding circumstances.[60] Accordingly, the Court concluded that where police officers suspect criminal activity they must be afforded latitude to permit a reasonable search for weapons to assure the protection of the officer.[61]

---

52 *Id.* No emergency was apparent because inspectors had taken three trips to the dwelling in order to get the appellant's permission to conduct a search. *Id.*

53 392 U.S. 1 (1968).

54 *Id. Camara* merely established a less stringent probable cause test and instituted a subjective "balancing-of-interests" test for determining the extent of fourth amendment protection. *See Camara*, 387 U.S. at 540.

55 *Terry*, 392 U.S. at 4 & n.1 (citation omitted). The state court of appeals affirmed the convictions. *Id.* at 8.

56 *Id.* at 5. The officer removed guns from the overcoats of petitioner Terry and Richard Chilton, one of the co-defendants, and no weapons were found on Katz, the other co-defendant. *Id.* at 7. Terry and Chilton were prosecuted together. *Id.* at 5 n.2. They retained the same attorney, and made a motion to suppress the firearms. *Id.*

57 *Id.* at 6-7. The officer was suspicious after observing that the three suspects were "scouting" a storefront window in a covert manner. *Id.* at 6.

58 *Id.* at 27.

59 *Id.* at 20-21.

60 *Id.* at 19-20. The Court emphasized that the police officers must be able to present "specific and articulable facts" which can justify the intrusion when considered in the aggregate. *Id.* at 21.

61 *Id.* at 27. Chief Justice Warren pointed out that "the issue is whether a reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger." *Id.* Consequently, "due weight must be given . . . to the specific reasonable inferences . . . [drawn] from the facts in light of [personal] experience." *Id. See also* Ybarra v. Illinois, 444 U.S. 85, 93 (1979) (police officer is al-

One week later, in *Mancusi v. DeForte*,[62] the Court announced that employees, under certain conditions, have a reasonable expectation of privacy in their offices against entry by the police.[63] The Court apparently extended the reasonableness standard to the workplace by implying that an employee does not have an expectation of privacy within his office against entry by superiors and fellow workers.[64] *Mancusi* involved a police search of the office of Frank DeForte a teamsters' union officer who was convicted of conspiracy, coercion, and extortion through misuse of his position.[65] Union documents from DeForte's office were admitted into evidence at trial and he was convicted.[66] The police, however, had gained access to the union office and took the documents without a warrant.[67] The Supreme Court held that employers have standing to object to searches of their offices.[68] Despite the fact that DeForte shared the office with others, the

---

lowed to execute a pat down search for weapons when he reasonably believes such weapons may be on a criminal suspect).

62 392 U.S. 364 (1968).

63 *Id.* at 369.

64 *See id.*

65 *Id.* at 365.

66 *Id.*

67 *Id.* The police searched the offices and seized the documents after the union had refused to comply with the County District Attorney's subpoena duces tecum. *Id.* In a federal habeas corpus proceeding, the United States Court of Appeals for the Second Circuit concluded that DeForte had standing to challenge the introduction of the evidence since his right to privacy was violated. United States v. Mancusi, 379 F.2d 897, 905, *aff'd*, 392 U.S. 364 (1968). The Court of Appeals emphasized that "[w]hile much has been written on the [f]ourth [a]mendment's guaranty of the individual's right to be secure in his 'home,' it is now well established that the freedom from unreasonable searches and seizures extends to one's place of business as well." *Id.* at 903.

68 *Mancusi*, 392 U.S. 364, 369 (1968). The Court decided to hear the case to determine whether respondent had standing to challenge the admission of evidence against him and whether the search was "unreasonable" under the fourth amendment. *Id.* at 367, 370. In examining the standing issue, Justice Harlan first explained that the fourth amendment protection extends to commercial premises. *Id.* at 367. Second, the Justice posited that the fourth amendment protection is not limited to the people who hold title to the premises. *Id.* Justice Harlan pointed out that the legal possession requirement was dismissed as a prerequisite to standing in fourth amendment cases in Jones v. United States. *Id.* at 369 (citing Jones v. United States, 362 U.S. 257, 265-67 (1960)). Consequently, the Justice stated that anyone legitimately on the premises where a search occurs has standing to challenge its legality when evidence obtained from the search may be used against them. *Id.* at 368; *see also* Jones v. United States, 362 U.S. 257, 267 (1960).

In *Jones*, the defendant was the occupant in an apartment where the owner had given him a key. *Id.* at 259. Police searched the apartment while Jones was present and found narcotics in a bird's nest lying outside one of the widows. *Id.* While Jones had less of an expectation of privacy in the area where the nest was found, he nonetheless had standing to challenge the search. *Id.* at 267.

Court recognized that it was a private area where he was "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."[69] Consequently, the Court concluded that the warrantless entry by the police was unreasonable.[70]

In 1983, the Supreme Court in *Illinois v. Lafayette*[71] utilized the reasonable cause standard to justify warrantless inventory searches incident to an arrest.[72] Lafayette was arrested for disturbing the peace and was taken into police custody.[73] A warrantless search of his shoulder bag was made in order to inventory his possessions.[74] The search produced ten amphetamine pills.[75] Lafayette was charged with violating the Illinois Controlled Substances Act.[76] After a pretrial hearing, however, the trial court ordered that the pills be suppressed.[77] The sup-

---

[69] *Mancusi*, 392 U.S. at 369. Justice Harlan concluded that DeForte had a reasonable expectation that only these workers, or personal or business invitees would have access to the office, and that his papers would be left undisturbed unless these employees or union superiors consented to their appropriation. *Id.*

[70] *Id.* Justice Harlan rejected the state's argument that the warrantless entry was justified as falling within the exception to the requirement outlined in Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). *Id.* at 370.

[71] 462 U.S. 640 (1983).

[72] *Id.* Since 1968, lower federal courts, under the auspices of the Supreme Court, have attempted to expand on the implicit admission within *Mancusi* that an employer may have a right to reasonable entry and control over office materials by adopting a policy that any work-related search by an employer is feasible under the fourth amendment if reasonable cause exists. *See* United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (surveillance undertaken by Internal Revenue Service (IRS) agents to determine whether an IRS employee was violating a conflict of interest statute deemed permissible under the fourth amendment because the investigative activity was substantially related to the employee's job responsibilities); United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975) (conviction of postal worker for theft of packages held valid despite that the conviction was based on postal inspectors seizing such packages during a warrantless search of an employee's locker; this search was executed after postal inspectors had reasonable suspicion and the locker was subject to "regulation of inspection" as condition of employment, and such searches were bargained for under labor union contract).

[73] *Id.* at 641. The arrest took place at approximately 10:00 p.m. near the town Cinema in Kankakee, Illinois. The respondent had been involved in a dispute with the theater's manager. *Id.*

[74] *Id.* at 641-42.

[75] *Id.* at 642.

[76] *Id. See* ILL. REV. STAT. ch. 56 1/2 ch. 1402(b) (1985). The statute provides in part that "it is unlawful for any person knowingly to possess a controlled or counterfeit substance." *Id.* at § 1402. An individual violating this act by possession of "any controlled or counterfeit substance is guilty of a class 4 felony." *Id.* at § 1402(b).

[77] *Lafayette*, 462 U.S. at 642. At the pretrial hearing, the state unsuccessfully argued that the shoulder bag search was permissible under South Dakota v. Opper-

pression was affirmed by an appellate court,[78] and the United States Supreme Court granted certiorari.[79] Thereafter, the Supreme Court reversed and remanded.[80]

Chief Justice Burger, writing for the Court, determined that a warrantless inventory of Lafayette's personal effects prior to incarceration was permissible under the fourth amendment.[81] The Court reasoned that the search was a "routine procedure incident to incarcerating an arrested person."[82] Observing that the justification for the search was not based on probable cause, the Court concluded that the warrantless search was reasonable police procedure which served a legitimate government interest.[83] The Chief Justice asserted that there was "no need to consider the existence of less intrusive means of protecting the police and the property in their custody."[84]

---

man, 428 U.S. 364 (1976). *Id.* In *Opperman*, the Supreme Court held that a police inventory of the contents within an impounded automobile, when done pursuant to departmental procedure, does not constitute an unreasonable search which violates the fourth amendment. *Opperman*, 428 U.S. at 376.

[78] People v. Lafayette, 99 Ill. App. 3d 830, 425 N.E.2d 1383 (Ill. App. Ct. 1981). The appellate court reasoned that a suppression order was appropriate because the officer did not fear for his safety during the search, and that the preservation of the suspect's property as well as defenses to claims of lost or stolen possessions could be attained in less intrusive ways. *Id.* at 835, 425 N.E.2d at 1386. The state supreme court denied discretionary review. *Lafayette*, 462 U.S. at 643.

[79] 459 U.S. 986 (1982). The Supreme Court granted certiorari to determine whether police officials have the authority to search the personal possessions carried by an individual who has been placed under arrest. *See Lafayette*, 462 U.S. at 642-43. The Court found that this was necessary because this question constantly presents itself to law enforcement officials and police in the execution of their duties. *Id.* at 643.

[80] *Lafayette*, 462 U.S. at 649. The Court remanded the case for proceedings consistent with its holding that the inventory search was reasonable under the fourth amendment. *Id.*

[81] *Id.* at 648.

[82] *Id.* at 644.

[83] *Id.* at 646-48. The Court observed that intrusion on an individual's fourth amendment rights must be balanced against the government's interest in disarming criminal suspects and obtaining evidence. *See id.* at 644 (quoting United States v. Robinson, 414 U.S. 218, 235 (1973) (police officers may search a suspect who is under arrest, and are not limited by standards governing a protective frisk of the person which is inherent to an investigative stop). The Court asserted that inventory searches serve to prevent suspects from injuring themselves or others with personal items while being detained and also deter false claims, stealing and careless treatment of possessions taken from arrestees. *Id.* at 646.

The Chief Justice then concluded that a police officer may search areas within an arrestee's immediate control. *Id.* at 644. *See also* Chimel v. California, 395 U.S. 752 (1969) (police officers may conduct a warrantless search of areas where weapons or evidentiary items might be found without violating the fourth amendment).

[84] *Id.* at 647. *See also* United States v. Robinson, 414 U.S. 218, 235 (1973).

Two years later, in *New Jersey v. T.L.O.*,[85] the Court applied the reasonable cause standard to condone the search and seizure of personal property by public officials unaffiliated with law enforcement. A high school teacher discovered T.L.O. and another girl smoking in a campus lavatory.[86] Since smoking violated a school rule, the teacher escorted the students to the office of Theodore Choplick, the Assistant Vice Principal.[87] T.L.O. subsequently denied that she had been smoking and as a result, Choplick demanded to inspect her purse.[88] Opening it, he discovered a pack of cigarettes and rolling papers.[89] Choplick continued to search the purse and discovered items which implicated T.L.O. in marijuana dealing.[90] Choplick turned this evidence over to the police and the state subsequently filed charges against T.L.O.[91] T.L.O. sought to suppress the evidence by arguing that Choplick's search violated the fourth amendment.[92] The juvenile court denied this motion and sentenced T.L.O. to a one-year probationary period.[93] The lower court's decision was later va-

---

85 469 U.S. 325 (1985).

86 *Id.* at 328.

87 *Id.* Smoking on campus violated a provision of the school's handbook. *Id.* at 377 n.16 (Stevens, J., concurring in part and dissenting in part).

88 *Id.*

89 *Id.* Choplick would not have noticed the rolling papers if he had not removed the cigarettes. *See id.* In his experience, rolling papers are closely related to the use of marijuana and as a result he suspected that further examination would reveal more proof of drug use. *Id.*

90 *Id.* These items included some marijuana, a pipe, several empty plastic bags, an amount of cash in one-dollar bills, a list of students who apparently owed T.L.O. money and a couple of letters suggesting that T.L.O. was involved in drug dealing. *Id.*

91 *Id.* at 328-29.

92 *Id.* at 329. T.L.O. also sought to suppress a confession which she had given claiming that this confession was inadmissible because it was the product of an unlawful search. *Id.*

93 State *ex rel* T.L.O., 178 N.J. Super. 329, 343, 425 A.2d 1327, 1334 (Law Div. 1980), *vacated*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982) (per curiam), *rev'd*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd*, 469 U.S. 325 (1985). The court found the search to be reasonable. *Id.* at 342-43, 428 A.2d at 1334. According to the court when the teacher witnessed T.L.O. smoking, the school official was obligated to investigate and thus was justified in searching the purse. *Id.* at 343, 428 A.2d at 1334. The court concluded that because Choplick saw the marijuana and other related articles, it justified a complete search of the purse. *Id.*; Harris v. United States, 390 U.S. 234 (1968) (no warrant required for police seizure of car registration which was admitted into evidence and led to conviction of defendant, because the discovery of the card was not the result of a search, but of a custodial inventory); State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968) (no warrant required for examination of fingerprints on hubcap because it was seized as instrument of crime and thus not a search within fourth amendment protection).

cated by the Superior Court of New Jersey Appellate Division[94] and then reversed by the New Jersey Supreme Court.[95]

The United States Supreme Court granted certiorari "to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities."[96] Reasoning that the fourth amendment is applicable to the states through the fourteenth amendment, and that school officials are state agents, the Court determined that the fourth amendment applies to searches executed by public school officials.[97] Justice White, writing for the majority, rejected New Jersey's assertion that fourth amendment restrictions applied only to law enforcement officials.[98] The Justice observed that the fourth amendment had been applied consistently to the activities of state officials in both criminal and civil cases.[99] The Court rejected the argument that the in loco parentis doctrine[100] excluded school officials from the purview of the fourth amendment.[101]

The Court, addressing the degree of suspicion required to justify a school search, concluded that the fourth amendment requires a balancing of the state's need to search against the poten-

---

[94] State *ex rel* T.L.O., 185 N.J. Super. 279, 280, 448 A.2d 493, 493 (App. Div. 1982) (per curiam), *rev'd*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd*, 469 U.S. 325 (1985).

[95] State *ex rel* T.L.O., 94 N.J. 331, 350, 463 A.2d 934, 944 (1983), *rev'd*, 469 U.S. 325, 348 (1985).

[96] *T.L.O.*, 469 U.S. at 327.

[97] *T.L.O.*, 469 U.S. at 333-37. In reaching this conclusion, Justice White cited West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Barnette*, the Court reasoned that "[t]he [f]ourteenth [a]mendment . . . protects the [rights of] citizens against the [s]tate itself and all of its creatures—Board of Education not excepted." *Id.* at 637.

[98] *T.L.O.*, 469 U.S. at 335.

[99] *Id.* *See* Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (housing officials must obtain a warrant based on probable cause to conduct a code-enforcement inspection of a dwelling in the absence of exigent circumstances which would permit immediate entry); *see also* Marshall v. Barlow's Inc., 436 U.S. 307, 312-13 (1978) (Occupational Safety and Health Administration officials require a warrant to enter private areas within an employment facility in order to inspect for safety hazards and regulatory violations). The Court in *T.L.O.* emphasized that "it would be 'anomalous to say that the individual and his private property are fully protected by the [f]ourth [a]mendment only when the individual is suspected of criminal behavior.' " *T.L.O.*, 469 U.S. at 335 (quoting Camara v. Municipal Court, 387 U.S. 523, 530 (1967)).

[100] "In loco parentis" is defined as one "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[101] *T.L.O.*, 469 U.S. at 336-37.

tial intrusion on personal liberty.[102] The Court reasoned that this inquiry would determine "the standard of reasonableness governing any specific class of searches."[103] Accordingly, Justice White explained that in this case the balance was between the social interest in maintaining discipline within the school and the student's right to privacy.[104]

The Court determined that fourth amendment restraints on government searches must be relaxed in the school environment.[105] The Justice reasoned that the warrant requirement is impractical in the school setting because it inhibits the efficiency of disciplinary procedures.[106] Consequently, the Court regarded the probable cause requirement as unnecessary,[107] and concluded that the legality of a student search depends on its reasonableness under the circumstances.[108]

Utilizing the reasonableness test, the Court held that the search of T.L.O.'s purse was constitutional.[109] According to the Justice, Choplick's initial search of T.L.O.'s purse was justified because her possession of cigarettes was relevant to the charge of smoking.[110] Further, the Court found that the subsequent discovery of rolling papers constituted grounds for reasonable sus-

---

[102] *Id.* at 337 (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). Justice Brennan advocated ending the Court's analysis by concluding that the fourth amendment applies to school officials and that the search was extensive. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part). The Justice stressed that "the [f]ourth [a]mendment's protections should not be defaced by 'a balancing process that overwhelms the individual's protection against unwarranted official intrusion . . .'" *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 570 (Brennan, J., dissenting)).

[103] *Id.* Apparently, the *T.L.O.* Court disregarded probable cause analysis in favor of the balancing-of-interests test originally featured in *Camara* and *Terry* to determine a reasonableness standard for school searches. *See id.*

[104] *Id.* at 339. Justice White pointed out the difficulty in preserving discipline and order since drug use, violence, and other crimes have created substantial problems within the schools. *Id. See also* 1 NATIONAL INST. OF EDUC., U.S. DEP'T. OF HEALTH, EDUC. AND WELFARE, VIOLENT SCHOOLS, SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS (1978). *See T.L.O.*, 469 U.S. at 340. Justice White also noted that "school children may find it necessary to carry . . . legitimate . . . items, and there is not reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." *Id.* at 339.

[105] *See T.L.O.*, 469 U.S. at 340. Justice Powell considered the providing of education to be the government's most important function, and he emphasized the need to protect students. *Id.* at 350 (Powell, J., concurring).

[106] *Id.* at 340.

[107] *Id.* at 340-41. The Court contended that "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . " *Id.* at 340.

[108] *Id.* at 341.

[109] *Id.* at 343.

[110] *Id.* at 345.

picion that T.L.O. possessed marijuana, thus allowing the additional search which revealed evidence of drug involvement.[111]

As previous case history indicates, the Supreme Court has reduced the need for compliance with the warrant clause and probable cause standard in various situations.[112] In determining that the underlying meaning of the fourth amendment is that searches be reasonable, and by applying a balancing-of-interests test to conclude what is reasonable, the Court created a climate in which a greater number of searches and seizures will be deemed acceptable under the fourth amendment. *O'Connor v. Ortega* represents the most recent step in that direction. In *O'Connor*, the Court addressed whether a public employee has a reasonable expectation of privacy in certain work areas, and attempted to ascertain the appropriate standard for searches executed by public employers in places where employees have an expectation of privacy.[113]

Justice O'Connor, announcing the judgment of the Court, observed that searches and seizures by public employers of their employees' private property are limited by the fourth amendment.[114] The Justice, in a plurality opinion, stressed that individuals do not surrender their fourth amendment rights merely because they are government employees.[115] However, the plurality observed that there are situations where an expectation of

---

[111] *Id.* at 347. Justice Brennan failed to accept the majority's reasonable cause analysis and instead contended that Choplick did not have probable cause to continue his search of T.L.O.'s purse because his suspicion concerning the presence of marijuana was based exclusively on the discovery of the rolling papers. *Id.* at 368-69 (Brennan, J., concurring in part and dissenting in part).

[112] *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving border patrols may stop a vehicle and briefly investigate upon reasonable suspicion that the vehicle may contain illegal aliens); *see also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (police officers may stop vehicles at checkpoints located as far as one hundred miles inside the United States on less than reasonable cause that the vehicle's occupants are illegal aliens because the checkpoint procedure applies to all drivers).

[113] *See* 480 U.S. 709, 711-12 (1987).

[114] *Id.* at 715. Justice O'Connor noted that "it would be 'anomalous 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.' " *Id.* (quoting Marshall v. Barlow's Inc., 436 U.S. 307, 312-13 (1978); Camara v. Municipal Court, 387 U.S. 523, 530 (1967)).

[115] *Id.* at 717. Justice O'Connor authored the plurality opinion and was joined by Chief Justice Rehnquist, Justice White and Justice Powell. *Id.* at 711. Justice Scalia filed an opinion concurring in the judgment. *Id.* at 729 (Scalia, J., concurring). Justice Blackmun wrote a dissenting opinion and was joined by Justice Brennan, Justice Marshall and Justice Stevens. *Id.* at 732 (Blackmun, J., dissenting).

privacy may be unreasonable.[116] According to the Justice, one such situation is where a government office is so accessible to others that an expectation of privacy is unjustified.[117] Thus, Justice O'Connor posited that the reasonableness of an expectation of privacy will differ according to the type of workplace,[118] and the issue of whether public employees possess such an expectation must be determined on a case-by-case basis.[119] The Court concluded that Ortega had a reasonable expectation of privacy in his office, and thus had a right to privacy in his file cabinets and desk.[120]

The plurality then addressed the need to determine an appropriate standard for searches conducted by a government employer in areas where employees have a reasonable expectation of privacy.[121] Justice O'Connor submitted that the reasonableness of a search depends on the context in which it occurs,[122] and requires balancing employee privacy rights against the need to maintain control and promote efficiency in the workplace.[123] The Justice posited that requiring a search warrant to enter an employee's office, file cabinets or desk for a work-related purpose is unreasonable because it would inhibit business operations.[124] Finding public employers are often "entrusted with a tremendous responsibility," Justice O'Connor asserted that "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."[125] The Justice suggested that the delay in entry created by invocation of the probable cause standard would be inefficient and detrimental to the public interest.[126] Reasoning that the pri-

---

116 *Id.* The expectations held by public employees, like the expectations of private sector employees, can be diminished by established practices, procedure or by regulation. *Id.*

117 *Id.* at 718.

118 *See O'Connor*, 480 U.S. at 718.

119 *Id.*

120 *Id.* at 718. The evidence indicated that Ortega did not permit others to use his office equipment and that he was assigned the office for seventeen years where he kept an array of personal items that were unrelated to hospital affairs. *Id.*

121 *Id.* at 719.

122 *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

123 *Id.*

124 *Id.* at 722. Justice O'Connor emphasized that "the imposition of a warrant requirement would conflict with 'the common-sense realization that government offices could not function if every . . . decision became a constitutional matter.'" *Id.* (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

125 *Id.* at 724.

126 *Id.* at 723-24. *See T.L.O.*, 469 U.S. at 353. *See also* Colorado v. Bertine, 479 U.S. 367 (1987) (reasonable police regulations concerning inventory procedures

vacy interests of employees were substantially less in the workplace than those found at home, the Justice concluded that the use of the probable cause standard was unnecessary and would place "intolerable burdens on public employers."[127] The Court held that the invasion of a public employee's privacy interests should be evaluated by a test of reasonableness for noninvestigatory, work-related purposes and for investigating work-related misconduct.[128] The Court added that the intrusion must be reasonable in both its inception and scope.[129]

Justice O'Connor concluded that summary judgment was inappropriate because a controversy existed concerning the motive and scope of the search.[130] The Justice noted that the decision below was based on acceptance of the controverted fact that there was a hospital policy permitting searches to inventory property held by employees on administrative leave.[131] Justice O'Connor emphasized that the absence of such a policy would not automatically render the search illegal under the reasonable cause test.[132] The Justice stated that, a search to recover state property is valid if based on a reasonable belief that there is state property that needs to be secured.[133]

Justice Scalia wrote a concurring opinion.[134] He disagreed, however, with Justice O'Connor's conclusion that the extent of fourth amendment protection in the public workplace is to be determined on a case-by-case basis.[135] Justice Scalia observed that the plurality opinion provided neither standards to evaluate the reasonableness of an employee's expectation of privacy in the workplace, nor guidelines to establish the creteria for a proper

---

that are administered in good faith satisfy the fourth amendment); and Illinois v. Lafayette, 426 U.S. 640 (1983) (warrantless inventory of an individual's personal effects after arrest and prior to incarceration does not offend the fourth amendment if conducted as part of a routine administrative procedure).

127 *O'Connor*, 480 U.S. at 724.

128 *Id.* at 725-26.

129 *Id.* at 726. The plurality stated: "The search will be permissible in its 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].'" *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

130 *Id.* at 726-728. Justice O'Connor noted that the petitioners claimed the search was executed in accordance with a hospital inventory policy, while respondent asserted that the entry was investigatory in nature. *Id.* at 727-28.

131 *Id.*

132 *Id.* at 728-29.

133 *Id.* at 728.

134 *Id.* at 729 (Scalia, J., concurring).

135 *Id.* at 729-30 (Scalia, J., concurring).

inquiry.[136]

Justice Scalia stated that privacy, not solitude, is safeguarded by the fourth amendment.[137] The Justice asserted that constitutional protection against unreasonable searches does not disipate because a public employer enjoys the privilege of reasonable entry.[138] The Justice found that the fourth amendment had been violated in the case at bar because the office in question was assigned to Ortega and there were no circumstances requiring immediate entry.[139]

Justice Scalia posited that the issue was whether Napa's search was reasonable.[140] The Justice recognized that generally, warrantless searches violated the fourth amendment, but observed that "special needs" may exist which render warrants and probable cause unnecessary.[141] The Justice reasoned that such special needs exist for the government employer, who like other employers, requires access to employee offices for work-related purposes.[142] Justice Scalia concluded that because the evidence was ambiguous, it could not be shown that the hospital investigators lacked such a valid purpose.[143] He therefore agreed with the plurality that the case should be reversed and remanded on that issue.[144]

In a dissenting opinion, Justice Blackmun condemned the plurality's rejection of the warrant and probable cause standard and its adoption of the reasonableness test.[145] He contended

---

136 *Id.* Justice Scalia stressed that he "object[s] to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty." *Id.* at 730 (Scalia, J., concurring).

137 *Id.* at 730.

138 *Id.* at 731 (Scalia, J., concurring).

139 *Id.* at 731-32 (Scalia, J., concurring).

140 *Id.* at 732 (Scalia, J., concurring).

141 *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

142 *Id.* Justice Scalia stated that he "would hold that government searches 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 [f]ourth [a]mendment." *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 741-42 (Blackmun, J., dissenting). Justice Blackmun asserted that the plurality's balancing of employer and employee interests was erroneous. *Id.* at 743 (Blackmun, J., dissenting). He found that despite claiming that its analysis is limited to non-investigatory, work-related intrusions, the plurality has announced a broad standard applicable to all public employer searches. *Id.* at 746 (Blackmun, J., dissenting). Moreover, the plurality haphazardly arrives at a substitute for probable cause. *Id.* No rationale is given for the balancing-of-interests test, thus the plurality never justifies why probable cause would not adequately safeguard the public em-

that the Court would only resort to the reasonableness standard and its balancing test if obtaining a warrant based on probable cause would defeat the purpose of the search.[146] Justice Blackmun recognized that a public employer is not expected to have a warrant for each entry into an employee's work area,[147] but asserted that this does not justify rejecting the warrant requirement for all employer searches.[148] Agreeing with Justice Scalia, he noted that protection against unreasonable searches "does not disappear merely because the government has the right [of reasonable intrusion]."[149]

Justice Blackmun concluded that there were no special needs to justify the hospital's failure to comply with the warrant requirement.[150] Observing that the search of Ortega's office was not for inventory purposes, but, in reality, an investigatory search which occurred when Ortega was on leave and barred from the hospital grounds, the Justice reasoned that the hospital officials had ample time to obtain a warrant.[151] Justice Blackmun asserted that the grant of partial summary judgment to Ortega was proper.[152]

Justice Blackmun also expressed concern over what he perceived to be the plurality's implicit abandonment of judicial scrutiny in favor of a subjective reasonableness standard.[153] He asserted that if the hospital officials had been compelled to specify their reasons for the search before a magistrate, this would have diminished the infringement on Ortega's privacy by preventing "general rummaging through the doctor's office, desk, and file cabinets."[154] Justice Blackmun concluded that implementation of the reasonableness standard retards the fourth amendment rights of public employees and curtails scrutiny of

---

ployer's interest in situations such as the one in *O'Connor*. *Id.* at 746-47 (Blackmun, J., dissenting). *See also T.L.O.*, 469 U.S. at 363-64 (Brennan, J., concurring in part and dissenting in part).

146 *O'Connor*, 480 U.S. at 741 (Blackmun, J., dissenting).

147 *Id.* at 745 & n.9 (Blackmun, J., dissenting).

148 *Id.* at 745 (Blackmun, J., dissenting). Justice Blackmun pointed out that "[t]he warrant requirement is perfectly suited for many work-related searches, including the instant one." *Id.* (footnote omitted).

149 *Id.* at 738 (Blackmun, J., dissenting) (quoting Scalia on pg 731).

150 *Id.* at 742-43 (Blackmun, J., dissenting).

151 *Id.* at 742 (Blackmun, J., dissenting).

152 *Id.* at 743 (Blackmun, J., dissenting).

153 *See id.* at 743-44 (Blackmun, J., dissenting). Blackmun suggested that this was a significant error because no special need existed that could justify a failure to apply the warrant probable cause standards. *Id.* at 744 (Blackmun, J., dissenting).

154 *Id.* at 743-44 (Blackmun, J., dissenting).

searches because it allows greater flexibility concerning what is permissible.[155]

The plurality failed to address several noteworthy issues within its opinion. The first of these relates to the special needs exception to the warrant requirement. Justice O'Connor noted that the Court has held that the warrant requirement was appropriate only when it "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.' "[156] She also observed that it would be unrealistic to expect managers of government institutions to discern the subtleties of the probable cause test.[157] In *O'Conner v. Ortega*, however, adherence to the warrant and probable cause requirements would not have been unduly burdensome to the hospital investigators since there was no compelling need for immediate entry.[158] Under these circumstances, it is doubtful that obtaining a warrant would have caused "irreparable damage to the [hospital's] work, and ultimately to the public interest."[159] Consequently, the Court's application of the balancing test to conclude that the lack of a hospital policy "did not necessarily make the search unlawful,"[160] and it serves to liberalize the special needs test. The plurality has apparently undermined precedents set forth in *Camara*[161] and *Mancusi*[162] by suggesting that entry into the office of a government employee by a public offical without a warrant may be permissible regardless of whether there is reason for immediate intrusion.[163] Unfortunately, the plurality failed to outline the parameters of the employer's right to make such searches. This makes it difficult to distinguish between instances

---

155 *See id.* at 746-48 (Blackmun, J., dissenting).

156 *Id.* at 720 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978)). *See generally* New Jersey v. T.L.O., 469 U.S. 325 (1985).

157 *O'Connor*, 480 U.S. at 724-25.

158 *See id.* at 742 (Blackmun, J., dissenting).

159 *Id.* at 724. *See* New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring).

160 *O'Connor*, 480 U.S. at 728.

161 387 U.S. 523 (1967) (housing officials must obtain a warrant based on probable cause to conduct a code-enforcement inspection of a dwelling in the absence of exigent circumstances which would permit immediate entry). *See supra* notes 44-52 and accompanying text for a discussion of *Camara*.

162 392 U.S. 364 (1968) (warrantless entry by government agents into the office of a union official and appropriation of documents within that office held unreasonable under the fourth amendment despite that the union refused to comply with a subpoena issued for these documents. *See supra* notes 62-70 and accompanying text for a discussion of *Mancusi*.

163 *O'Connor*, 480 U.S. 709.

where a special need exists, making warrants superfluous, and circumstances where compliance with both the warrant and probable cause requirements is necessary.

Justice Blackmun perceived a discrepancy in the plurality's failure to explain its implementation of a substitute for probable cause in the workplace.[164] Indeed, the balancing test is applied without explanation.[165] The plurality failed to elaborate why the balancing of public employer versus public employee interests lead to the reasonableness test originally utilized in *T.L.O.*[166] The Court also failed to explain its reasons for concluding that the probable cause standard would be ineffective in protecting the public employer given the circumstances in the case at bar.[167]

The Court further created uncertainty through ambiguous application of the two-prong reasonableness test previously established in *Terry*.[168] Because the investigators were aware that Dr. Ortega had removed his hospital computer, they had no reasonable basis for believing that a search of his office would yield evidence of misconduct. Consequently, these officials entered Dr. Ortega's office and seized his property on mere allegations of improper behavior. Furthermore, this search was excessive as drawers, cabinets and his desk were opened and his private property was confiscated.[169]

In concluding that this search may have been reasonable, the plurality diminished the clarity of the *Terry* test while providing no new alternatives. Generally, the plurality advocated an overbroad application of the test that results in a loss of value as a method of measuring the reasonableness of public employer searches. Because the inventory purpose of the search was questionable and any investigatory motives were based on unsubstantiated charges, the plurality effectively broadened the inception concept of the *Terry* test to the point where its application was worthless in determining when the execution of a search would be unreasonable. The plurality also upset the analysis of the

---

164 *Id.* at 745-47 (Blackmun, J., dissenting).

165 *See id.* at 747 (Blackmun, J., dissenting).

166 *Id.* at 745-47 (Blackmun, J., dissenting). For a discussion of *T.L.O.*, 469 U.S. 325 (1985). *See supra* notes 85-111.

167 *O'Connor*, 480 U.S. at 746-47 & n.14 (Blackmun, J., dissenting). *See T.L.O.*, 469 U.S. at 363-64 (Brennan, J., concurring in part and dissenting in part).

168 *Terry* established that a search will be deemed reasonable if the investigatory action was justified at its inception, and its scope was appropriate given the events which initially permitted the interference. *Terry*, 392 U.S. at 19-20. For a discussion of *Terry see supra* notes 53-61 and accompanying text.

169 *See O'Connor*, 480 U.S. at 713.

scope of the search in *Terry* by tacitly accepting a very weak nexus between the comprehensive nature of the search and the hospital's alleged objective of recovering state property. This allows a greater number of excessive searches to be deemed reasonable, and increasingly inhibits consideration of the scope of a search in determining when a search and seizure is unconstitutional.

Moreover, the plurality decision will create confusion regarding the judiciary's role monitoring searches and seizures by a public employer. *Camara* established that public officials were required to obtain a warrant prior to conducting a search of private areas.[170] The plurality decision, however, undermines this practice since it suggests that a warrantless search and seizure of personal property by public officials may be reasonable.[171] Consequently, the result is a doctrinal conflict which needs to be resolved in order to clarify the role of judicial officials in fourth amendment controversies.

The decision raises questions regarding when a public employee may have a reasonable expectation of privacy in the public workplace. Other Supreme Court decisions have implied that an individual will have an expectation of privacy in the absence of a policy allowing government officials to conduct warrantless searches and seizures.[172] *O'Connor* suggests, however, that it might have been reasonable for hospital officials to search Ortega's office and appropriate his property without a warrant despite the fact that the hospital may have lacked a policy that would have justified such an entry.[173] These conflicting principles must be reconciled so that public employees may be better prepared to comprehend the extent of their privacy rights within the workplace.

O'Connor v. Ortega may be viewed as another example of the Supreme Court's propensity to limit individual rights by providing public officials with greater discretion to search and seize property. By concluding that the search of Ortega's office could

---

170 For a discussion of *Camara see supra* notes 44-52 and accompanying text.

171 *See O'Connor*, 480 U.S. at 728.

172 *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640 (1983) (warrantless inventory of an individual's personal effects after arrest and prior to incarceration does not offend the [f]ourth [a]mendment if conducted as part of a routine administrative procedure); South Dakota v. Opperman, 428 U.S. 364 (1976) (police inventory of the contents of an impounded automobile deemed permissible under the [f]ourth [a]mendment since the search was executed in accordance with departmental procedure).

173 *O'Connor*, 480 U.S. at 728. Justice O'Connor asserted that "the absence of a [h]ospital policy did not necessarily make the search unlawful." *Id.*

have been reasonable under the circumstances, the Court manifested a desire to diminish the importance of the work-related and investigatory-purpose exceptions to the warrant requirement.[174] Its broad application of the *Terry* test implies that searches of an excessively intrusive degree may be permissible without authorization.[175] This may tend to reduce fourth amendment protection by permitting a greater number of spontaneous searches and seizures by public employers.

Furthermore, *O'Connor v. Ortega* may be viewed as a judicial attempt to curtail improper activities within the public workplace.[176] The Court's decision is not of great consequence when taken alone, but when considered in light of other decisions on search and seizure since *Mapp*,[177] the opinion reflects a general insensitivity toward individual expectations of privacy. This attitude should not prevail over the privacy rights granted by the fourth amendment.

Moreover, the Court's opinion in *O'Connor v. Ortega* shows a disregard for precedent and fourth amendment rights because it condones a broad analysis to determine what is reasonable under all the circumstances.[178] In so doing, the Court permits an excessively intrusive search and seizure of a public employee's property to be justified by mere allegation. Such searches are not subject to the warrant and probable cause requirements because they "impose intolerable burdens on public employers."[179] Therefore *O'Connor v. Ortega* limits fourth amendment protections by granting government employers greater latitude in conducting searches which may impinge upon personal privacy rights.

Michael J. Pescatore

---

174 *See id.*

175 *See id.* at 725-28.

176 Justice O'Connor emphasized that "public employers have a direct and overriding interest in ensuring that . . . work . . . is conducted in a proper and efficient manner." *Id.* at 724.

177 For a discussion of *Mapp see supra* notes 35-43 and accompanying text.

178 *See O'Connor*, 480 U.S. at 725-26.

179 *See id.* at 724.