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PRIVATIZING WORKPLACE PRIVACY

*Paul M. Secunda**

Perhaps "the" question in this age of workplace technological innovation concerns the amount of privacy employees should have in electronic locations in the workplace. An important related question is whether public-sector and private-sector employees, who have different legal statuses under the state action doctrine, should enjoy the same level of workplace privacy. Recently, in the Fourth Amendment workplace privacy case of City of Ontario v. Quon*, the United States Supreme Court considered both of these questions.* Quon *involved alleged privacy violations by a city police department when it audited an officer's text messages from his city-issued pager.*

In a cryptic decision, Justice Kennedy held for a unanimous Court that assuming the officer had a reasonable expectation of privacy in the pager, the City's search of the pager was reasonable under two possible legal tests. First, under the plurality test enunciated by the Supreme Court in O'Connor v. Ortega*, it was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope. Second, under the test outlined by Justice Scalia in his concurring opinion in* O'Connor*, it was reasonable because it would be considered "reasonable and normal" in the private-sector workplace. To varying degrees, both of these legal tests suggest that questions of workplace privacy in the public and private sectors should be treated the same.*

Rather than elevating private-sector privacy rights to the public-sector level, however, Quon *suggests that public employee workplace privacy rights*

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* Associate Professor of Law, Marquette University Law School. This Article derives from a paper delivered at the *The Constitutionalization of Labor and Employment Law?* Conference at the University of Wisconsin Law School on October 28, 2011. Many thanks to Matt Bodie, Alexander De Becker, and Rachel Centinario for providing thoughtful comments and valuable feedback on earlier drafts of this Article. Participants at a faculty workshop at the University of Iowa Law School also provided many helpful comments. I wish to express my particular gratitude to Professor Carin Clauss, who assisted immensely in organizing this Conference during my semester as a visiting professor at the University of Wisconsin Law School in fall 2011.

should be reduced to the level of employees in the private sector. Maintaining that public-sector workers are entitled to greater levels of privacy protections based on the text of the Constitution, the power of the government as employer, and the critical oversight role public employees play in American democracy, this Article argues for a new, two-step workplace privacy analysis which first focuses on the purpose of the search and then applies presumptively the Fourth Amendment's warrant and probable cause requirements to those searches undertaken for investigatory purposes.

INTRODUCTION

Conventional wisdom has long held that public employees with federal constitutional protections have stronger workplace rights than their private-sector counterparts. For instance, Samuel Issacharoff observed in 1990 that, "[s]ince the 1960s, the public sector has been the source of dramatic expansions in employee rights to free expression, due process, and privacy."[1] That this "dramatic expansion" occurred solely in the public sector stemmed from the fact that federal constitutional claims are only able to be brought against public employers as a result of the state action doctrine.[2]

In the workplace privacy context,[3] this state of affairs meant that it was generally believed that public employees under the Fourth

1 Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 616 (1990) (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 626 (1989)) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE (1990)); *see also* Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 3 (1991) (maintaining that positive changes in American workplace law at that time were based on "bringing . . . constitutional values to the private sector workplace").

2 Under the state action doctrine, only injuries attributed to the "state" are subject to constitutional provisions, such as the search and seizure provisions of the Fourth Amendment. *See* Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 330 (1993) ("[T]he idea [is] that the Constitution is especially concerned with the limitation of 'public' power and, by the same token, that it is not ordinarily concerned with the regulation of other, 'private,' sources of power."); *see also* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 903 (3d Cir. 1983) (Becker, J., dissenting from denial of rehearing en banc) ("[T]he [panel] opinion ignores the state action requirement of [F]irst [A]mendment jurisprudence, particularly by its repeated, and, in my view, inappropriate citation of public employee cases, and by its implicit assumption that a public policy against government interference with free speech may be readily extended to private actors in voluntary association with one another." (citation omitted)).

3 As will be discussed in greater detail below, "workplace privacy" as used in this Article refers solely to employee privacy interests in physical and electronic locations in the workplace. This definition has been selected because it is most closely aligned

Amendment[4] had greater expectations of privacy than their private-sector counterparts.[5] Without federal constitutional protections, private-sector employees must instead rely on either the common law of torts (currently being restated in Chapter 7 of the *Restatement of Employment Law*)[6] or on various other federal and state legislative enactments,[7] for their workplace privacy rights.

Yet, this understanding that public employees have more privacy protection in the workplace than their private-sector counterparts has been placed in considerable doubt by two recent developments. First, the startling pace of workplace technological innovation has made it

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with the privacy interests protected by the Fourth Amendment in the public workplace. Workplace privacy, as used in this Article, does not refer to a myriad of other potential privacy and autonomy interests that exist at, and away from, the workplace. *See generally infra* Part II.A.

4 The Fourth Amendment, in pertinent part, states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. This ban on "unreasonable search and seizures" was made applicable to the action of states and their agents by operation of the due process clause of the Fourteenth Amendment. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (holding the Fourth Amendment to be enforceable against states through the Due Process Clause but failing to provide an exclusionary remedy for state violations); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states). The Court has also long held that the Fourth Amendment applies to the government when it acts in its employer capacity. *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) ("[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer . . . ."); O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.").

5 *See* Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 176 (1995) ("[P]ublic sector employees enjoy greater explicit protection of their privacy rights than private sector employees do.").

6 RESTATEMENT (THIRD) OF EMP'T LAW ch. 7, intro. note (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf ("[Chapter 7] concerns the protections afforded through the common law to employee privacy and autonomy interests that supplement constitutional, statutory and regulatory protections accorded those interests.").

7 For example, the Federal Fair Credit Reporting Act (FCRA) protects employees and prospective employees from criminal background checks conducted by third-party agencies. 15 U.S.C. §§ 1681–1681t (2006). *See* Lewis v. Ohio Prof'l Elec. Network, L.L.C., 190 F. Supp. 2d 1049 (S.D. Ohio 2002) (applying the FCRA and analyzing its applicability to specific circumstances). As far as state law, an increasing number of states have off-duty conduct statutes that protect lawful employee activities outside of work. *See, e.g.*, CAL. LAB. CODE § 96(k) (West 2011); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2009); N.D. CENT. CODE §§ 14-02.4-01–03 (2011); N.Y. LAB. LAW § 201-d(2) (McKinney 2009).

more likely that government employers will utilize technologically advanced methods to intrude upon their employees' workplace privacy interests.[8] The second development is the recent decision by the U.S. Supreme Court in *City of Ontario v. Quon*,[9] validating the use by government employers of some of these very same technological methods to invade public employees' privacy interests.

In *Quon*, a SWAT officer for the City of Ontario in California alleged Fourth Amendment privacy violations in relation to a police department's audit of text messages sent to and from his work pager.[10] The City discovered that the officer had been using the pager for non-work-related purposes and that some of the messages were sexually explicit.[11] As a result of the investigation, the officer was found to have violated city work rules and allegedly disciplined.[12]

Writing for a unanimous Court,[13] Justice Kennedy maintained that even if the employee had a reasonable expectation of privacy in his employer-provided pager, the City's search of the pager was reasonable under two possible legal tests.[14] First, under the plurality test enunciated in *O'Connor v. Ortega*,[15] it was reasonable because it was motivated by a legitimate work-related purpose and was not excessive

8 *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 259 (2011) ("[A]s scientific and technological advances make their way into the government's investigative arsenal, the frequency and scope of administrative searches will only expand."); *see also* Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177, 208 (Wis. 2010) (Bradley, J., concurring) ("During the last several decades, technological advancements have revolutionized document storage and electronic communication.").

9 130 S. Ct. 2619 (2010).

10 *Id.* at 2625–26. The officer also sued the wireless company that turned over the text messages to the city under the Stored Communications Act, 18 U.S.C. §§ 2701–12 (2006). *Quon*, 130 S. Ct. at 2626. Those claims were not considered by the Supreme Court, *id.* at 2627, and are, in any event, beyond the scope of this Article.

11 *Id.* at 2626 ("Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related . . . .").

12 *Id.*

13 Although a unanimous decision on the merits, Justices Stevens and Scalia concurred separately. Justice Stevens wrote to observe that the majority opinion in *Quon* had appropriately punted on the issue of the standard for determining when public employees should have a reasonable expectation of privacy in the workplace context. *See id.* at 2633 (Stevens, J., concurring). Justice Scalia concurred to criticize the majority for addressing issues not necessary to decide the case and to state his continued adherence to the approach he outlined in *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). *See id.* at 2634–35 (Scalia, J., concurring in part and concurring in the judgment).

14 *Id.* at 2628–29 (majority opinion).

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

in scope.[16] Second, under the test outlined by Justice Scalia in his concurring opinion in that same case, it was reasonable because it would be considered "reasonable and normal" in the private-sector workplace.[17]

Significantly, the Court in *Quon* looks to cues from the private sector to determine the appropriate level of privacy protection in public-sector employment.[18] Not only is Justice Scalia's proposed test expressly based on a comparison of privacy interests in the private and public workplaces, but even the plurality borrowed concepts from the private sector to develop its operational realities test.[19] But rather than elevating private-sector privacy rights to the public-sector level, *Quon* suggests that public employee workplace privacy rights should be "privatized" and reduced to the level of employees in the private sector.

This Article maintains that the equalization of privacy rights in the public and private sector down to the level of the private sector is mistaken. Normatively, public employees should have stronger workplace privacy rights in their physical and electronic workplace locations than their private-sector counterparts for at least three reasons. First, the Fourth Amendment to the U.S. Constitution textually requires such a distinction.[20] Second, and relatedly, the government employer has substantially more power over its employees than private

16 *Quon*, 130 S. Ct. at 2631. More specifically, the two-step plurality test enunciated in *O'Connor*, requires consideration of whether under the operational realities of the workplace the employee had a reasonable expectation of privacy and if so, whether the employer's intrusion upon that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct [was reasonable] . . . under all the circumstances." *O'Connor*, 480 U.S. at 725–26.

17 *Quon*, 130 S. Ct. at 2632–33. Under this test, Justice Scalia, would generally presume that government employees' offices are covered by the Fourth Amendment and hold that 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 Fourth Amendment." *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring).

18 The "privatization" of workplace privacy law in *Quon* does not appear to be limited to *Quon* alone. In another recent privacy case, the Court indicated in the informational privacy context that it was also looking to the private sector for appropriate legal standards. *See* NASA. v. Nelson, 131 S. Ct. 746, 761 (2011) ("The reasonableness of such open-ended [background] questions is illustrated by their pervasiveness in the public and private sectors.").

19 *See O'Connor*, 480 U.S. at 717 (plurality opinion) ("Public employees' expectations of privacy in their offices, desks, and file cabinets, *like similar expectations of employees in the private sector*, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." (emphasis added)).

20 U.S. CONST. amend. IV.

corporations do.[21] Third, public employees function as the eyes and ears of the citizenry to help keep government free from waste, abuse, fraud, and corruption and, consequently, to insure government accountability and transparency.[22]

To reestablish greater workplace privacy protections for public employees, this Article proposes that the Court adopt a new, two-step approach for workplace searches in the public sector. First, a court should determine for what purpose the workplace search is conducted. If the search is for routine and noninvestigatory purposes, a search warrant should not be required and the court should apply the "special needs" exception to the Fourth Amendment.[23] Under the special needs test, the court should determine whether the employee has a reasonable expectation of privacy and whether the search was legitimate in its inception and scope.[24] On the other hand, if a public employer undertakes the search to investigate employee misconduct, the public employer should be required to obtain a warrant based on probable cause, unless the employer can prove that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"[25] or that a state public record law requires the documents in question to be disclosed.[26]

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21 *See generally* Grodin, *supra* note 1, at 13–15 (comparing the rights enjoyed by private employees with those of public employees).

22 As discussed in more detail below, a similar dynamic of diminishing public employee free speech rights is at play in the First Amendment and Equal Protection contexts as a result of the Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which eliminated public employee free speech protections under the First Amendment when an employee speaks pursuant to his or her official duties. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 610 (2008) (Stevens, J., dissenting) ("In *Garcetti*, the Court created a new substantive rule excepting a category of speech by state employees from the protection of the First Amendment. Today, the Court creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State."). Yet, as elaborated on below, there are reasons, based on the text and the structure of the Bill of Rights, to provide more protection for privacy rights than free speech rights in the public employment context. *See infra* Part IV.D.

23 This "special needs test" derives from existing Fourth Amendment jurisprudence. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2628 (2010) ("A majority of the Court further agreed that 'special needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable for government employers." (citations omitted) (quoting *O'Connor*, 480 U.S. at 725 (plurality opinion))); *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring).

24 *O'Connor*, 480 U.S. at 725–726 (plurality opinion).

25 *Id.* at 720 (quoting Camara v. Mun. Court, 387 U.S. 523, 533 (1967)).

26 *See Quon*, 130 S. Ct. at 2629 (noting public employer investigation into text messages might be justified in compliance with state open records laws).

This Article discusses the impact of technological workplace innovation on the privacy rights of public employees in four parts. Part I discusses the evolving law of workplace privacy in the public sector. Part II considers recent developments in the workplace privacy law in the private sector, with emphasis on the newly-drafted Chapter 7 of the *Restatement of Employment Law*. Part III contends that, post-*Quon*, public-sector employee workplace privacy rights have been reduced to the private-sector level and maintains that public employees should have stronger privacy protections than their private-sector counterparts for textual and prudential reasons. Part IV concludes by proposing a novel, two-step approach to public workplace searches, based on the reason for the search. The hope is that this bifurcated approach to workplace searches by the government will reestablish greater workplace privacy protections for public-sector employees and that they will then be better able to play their crucial government watchdog role.

I. Workplace Privacy in the Public Sector

Essentially, there are two major U.S. Supreme Court workplace privacy cases involving physical or electronic location searches in the public workplace.[27] Neither of these cases, *O'Connor v. Ortega* or the more recent case of *City of Ontario v. Quon*, provides a singular test for either what constitutes a reasonable expectation of employee privacy or what constitutes a reasonable employer search.

A. O'Connor v. Ortega

The Court first examined public employees' rights to privacy at work in the 1987 case of *O'Connor v. Ortega*. Although the Court had previously held that private-sector employees could have reasonable expectations of privacy in their workplaces under the Fourth Amendment when the police searched their offices,[28] questions remained as to: (1) whether a protectable privacy interest existed when a public employer searched an employee's office, desk, and file cabinets; and (2) whether a warrant based on probable cause was necessary to make the search constitutionally reasonable.

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27 *See O'Connor*, 480 U.S. at 720 ("There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets.").

28 *See* Mancusi v. DeForte, 392 U.S. 364 (1968) (finding a warrantless search of an office in violation of the Fourth Amendment).

In *O'Connor*, Dr. Ortega was the Chief of Professional Education for psychiatry residents at a California state hospital.[29] After being placed on administrative leave for alleged improprieties, hospital officials thoroughly searched his office, desk, file cabinets, and papers, and subsequently seized personal items without his consent.[30] Dr. Ortega alleged in the subsequent lawsuit that this invasion of his office and personal effects constituted an unconstitutional search and seizure.[31] Although the Court held that the Fourth Amendment prohibitions against unreasonable searches and seizures apply to the public workplace,[32] the Justices diverged over what the applicable test should be and whether Ortega had a reasonable expectation of privacy in the office itself.[33]

According to the plurality decision written by Justice O'Connor, in deciding whether public employees have privacy protections at the workplace, a court should first decide whether the employee has a reasonable expectation of privacy in their office or personal effects based on the "operational realities of the workplace."[34] Thus, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation,"[35] and, therefore, "whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."[36] The upshot is that government employees have reduced expectations of privacy or no expectation of privacy at all, depending on whether the public employer has promulgated the necessary anti-privacy policies.[37] Indeed, the lower

29 *O'Connor*, 480 U.S. at 712 (plurality opinion).

30 *Id.* at 713.

31 *Id.* at 714.

32 *Id.* at 717 ("[W]e reject the contention . . . that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.").

33 *Id.* at 718–19.

34 *Id.* at 717 ("The operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.").

35 *Id.*

36 *Id.* at 718.

37 Many have criticized this test as being too employer friendly. *See, e.g.*, Marissa A. Lalli, Note, *Spicy Little Conversations: Technology in the Workplace and a Call for a New Cross-Doctrinal Jurisprudence*, 48 AM. CRIM. L. REV. 243, 246 (2011) (arguing that "lower courts' application of [O'Connor's] . . . operational realities of the workplace test vests a dangerous amount of discretion in government employers") (internal quotation marks omitted). Others believe the test is tantamount to a highly-deferential rational basis review analysis. *See, e.g.*, Carol S. Steiker, *Second Thoughts About First*

federal court cases, applying the plurality test from *O'Connor*, "indicate that the government employer alone determines an employee's reasonable expectation of privacy."[38]

If a court finds that the employee has a reasonable expectation of privacy, the plurality next would have courts apply a "special needs" analysis for both legitimate work-related, noninvestigatory intrusions and investigations for work-related misconduct.[39] The plurality concluded that it was not necessary to obtain a warrant based on probable cause, because it would be impracticable for the government employer to obtain a warrant in this context.[40] Such searches are instead judged on "reasonableness under all the circumstances,"[41] which in turn balances "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."[42] Finally, the reasonableness of the employer search is judged from the perspective of whether the search was reasonable in its inception and in its scope.[43]

In his concurring opinion, Justice Scalia commented that he would have generally presumed that governmental employees' offices, and the personal items therein, are covered by the Fourth Amendment.[44] Rather than employ an ad-hoc inquiry based on reasonable-

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Principles, 107 HARV. L. REV. 820, 855 (1994) ("[J]udgments couched in terms of 'reasonableness' slide very easily into the familiar constitutional rubric of 'rational basis' review . . . ."); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) ("The Supreme Court's generalized 'reasonableness' standard resembles not negligence, but rational-basis constitutional review . . . .").

38 *See* Lalli, *supra* note 37, at 258.

39 *See O'Connor*, 480 U.S. at 725 (plurality opinion) (finding the "special needs" of public employers may override the warrant and probable-cause requirements of the Fourth Amendment).

40 *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2628 (2010) (quoting *O'Connor*, 480 U.S. at 725) (plurality opinion)) ("A majority of the Court further agreed that 'special needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable for government employers." (internal quotation marks omitted)); *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring). Justice Blackmun's dissent, joined by three other Justices, would have found Dr. Ortega had a reasonable expectation of privacy in his office, desk, and file cabinets, and would have found that public employment does not constitute a "special needs" circumstance and, therefore, a warrant based on a probable cause should have been required. *See O'Connor*, 480 U.S. at 732–33 (Blackmun, J., dissenting).

41 *O'Connor*, 480 U.S. at 725–26 (plurality opinion).

42 *Id.* at 719–20.

43 *Id.* at 726.

44 *Id.* at 730–31 (Scalia, J., concurring in the judgment). Justice Scalia's preference for such an approach is based on his objection "to the formulation of a standard

ness as the plurality did, he would hold that "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 Fourth Amendment."[45] Justice Scalia's legal framework would therefore treat privacy rights in the public workplace the same as privacy rights in the private workplace.

The difference in how these two legal tests in *O'Connor* incorporate private-sector privacy notions is a difference of degree rather than a difference in kind, as both opinions end up equating public and private sector workplace privacy rights. Indeed, many courts post-*O'Connor* largely ignored Justice Scalia's test, believing that the two tests amounted to much the same thing.[46] Whereas Justice Scalia relies on notions of privacy in the private sector to determine the reasonableness of the government employer's search, the plurality's reliance on the private sector takes place in determining whether the employee has a reasonable expectation of privacy in the first place.[47] Nevertheless, under both tests, private sector conceptions of workplace privacy influence whether the public-sector employee is found to have a cognizable workplace privacy interest.

In the end, a majority of Justices in *O'Connor* agreed that Dr. Ortega had at least a legitimate expectation of privacy in his office, desk, and file cabinets.[48] Yet, the Court remanded the case to determine, given the employer's interests, whether the scope of the intru-

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so devoid of content that it produces rather than eliminates uncertainty . . . ." *Id.* at 730.

45 *Id.* at 732; *see also Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment) (rejecting the application of the "standardless and unsupported" operational realities test). In other words, Justice Scalia would prefer a bright-line rule in these cases as opposed to balancing interests of employees and the government or applying legal standards that are hard to capture. This approach is very much consistent with his jurisprudence in other areas of the law. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 28 (1997) (identifying Justice Scalia as "perhaps the leading contemporary champion of rules over more loosely defined standards and especially over multi-factor balancing tests.").

46 *See, e.g.*, Shields v. Burge, 874 F.2d 1201, 1203–4 (7th Cir. 1989) (applying *O'Connor* plurality standard and maintaining that Justice Scalia did not seem to supply an alternative legal test).

47 *O'Connor*, 480 U.S. at 717–18 (plurality opinion).

48 Justice O'Connor in her plurality opinion recognizes as much. *See id.* at 718 ("The Court of Appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office, and five Members of this Court agree with that determination.").

sion was reasonable.[49] *O'Connor* thus stands for the proposition that public employees may be able to claim workplace privacy interests under the Fourth Amendment but that protection is narrower in scope than the Fourth Amendment protections citizens generally enjoy against the government.[50] This is because, like private employers, public employers also "have an interest in ensuring employee productivity, data security, patent and trademark protection, and quality customer relations."[51] Additionally, employers must act to work to "preserv[e] evidence for potential litigation, minimiz[e] behavior that may create a hostile work environment, and ensur[e] their communications systems are secure, stable, and free of harmful viruses and programs."[52] These efficiency interests of private and public employers in the privacy context are in fact very much like the same interests described in the *Pickering* line of public employee free speech cases under the First Amendment and in the "class of one" equal protection claims in *Engquist v. Oregon Department of Agriculture*.[53] And as Pauline Kim has commented, all of these cases, and *O'Connor*, "focus attention on the government's role as employer, losing sight of the fact that this employer is *also* the government."[54]

As far as the *O'Connor* decision itself, because it did not contain a majority opinion, the legal standard for workplace searches of public employees' offices and personal property remained an open question. After *O'Connor*, lower federal courts have generally applied the opera-

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49 *Id.* at 729. On remand, the Ninth Circuit found that the scope of the search of Ortega's office was unreasonable. *See* Ortega v. O'Connor, 146 F.3d 1149, 1159 (9th Cir. 1998).

50 *O'Connor*, 480 U.S. at 725–26 (plurality opinion); *id.* at 732 (Scalia, J., concurring) (requiring no warrant or showing of probable cause for warrantless searches because "'special needs' are present in the context of government employment.").

51 Justin Holbrook, *Communications Privacy in the Military*, 25 BERKELEY TECH. L.J. 831, 861 (2010). *See* Lawrence A. Edell, *A Reasonable Expectation of Privacy: Is a Government E-mail Account the Equivalent of a Wall Locker in a Barracks Room?*, 2008 ARMY LAW 1, 2 (2008).

52 Holbrook, *supra* note 51, at 861. *See* Micah Echols, *Striking a Balance Between Employer Business Interests and Employee Privacy: Using* Respondeat Superior *to Justify the Monitoring of Web-Based, Personal Electronic Mail Accounts of Employees in the Workplace*, 7 COMPUTER L. REV. & TECH J. 273, 278 (2003).

53 553 U.S. 591 (2008). The free speech line of cases includes: *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See generally* Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 939–41 (2011) (discussing the adverse impact of recent U.S. Supreme Court's approach on public employee free speech rights).

54 *See* Pauline T. Kim, *Constitutional Rights at Work: Speech and Privacy* 11 (emphasis in original) (unpublished draft) (on file with author).

tional realities test of the plurality to diminish or eliminate the workplace privacy expectations of public workers, while emphasizing the efficiency interests of employers.[55]

B. City of Ontario v. Quon

For twenty-three years, *Ortega v. O'Connor* remained the primary, albeit ambiguous, legal standard for workplace privacy claims in the public sector under the Fourth Amendment. In 2009, the U.S. Supreme Court took certiorari in the case of *City of Ontario v. Quon.* The case concerned the scope of privacy rights a city SWAT officer had in text messages he sent on his employer-provided pager.[56]

In *Quon,* the City of Ontario issued pagers, capable of receiving and sending text messages, to its SWAT officers so that the unit could easily communicate and mobilize during crisis situations.[57] The City, through its wireless provider, Arch Wireless Operating Company, limited the number of texts that could be sent or received in a given month, and excess usage resulted in additional fees being incurred.[58] The City had a "Computer Usage, Internet, and E-mail Policy" that expressly limited the expectation of privacy of employees in city-owned technology,[59] and Sergeant Quon acknowledged in writing

55 *See* Lalli, *supra* note 37, at 255–69 (collecting cases to establish that lower courts post-*O'Connor* have applied the operational realities test to generally diminish public employee workplace privacy protections).

56 *City of Ontario v. Quon*, 130 S. Ct. 2619, 2624 (2010) (plurality opinion). The fact that the pager in question was owned by the employer was not dispositive as the Court had previously held that employees could have expectations of privacy in work spaces they did not own. *See* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (noting 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 which there was a reasonable expectation of freedom . . . ."); *see also* O'Connor v. Ortega, 480 U.S. 709, 740 n.7 (1987) (Blackmun, J., dissenting) ("This Court . . . has made it clear that privacy interests protected by the Fourth Amendment do not turn on ownership of particular premises.") (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978), and Katz v. United States, 389 U.S. 347, 353 (1967))).

57 *Quon*, 130 S. Ct. at 2625.

58 *Id.*

59 *Id.* ("[The Computer Policy] specified that the City 'reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.'" (quoting App. to Pet. for Cert. 152a)).

receiving this policy.[60] Yet, the parties agreed that this policy did not apply expressly to text messaging.[61]

Instead, the City orally told its SWAT team members that the text messages on the pagers would be treated the same way as emails and then put its oral statements in a written memorandum.[62] When Quon later discovered that he was exceeding the usage limits, he was assured by his supervisor that the City did not intend to audit employees' text messages, and permitted Quon to pay the City directly for his excessive usage.[63]

Despite the supervisor's statement that the City did not intend to audit employees' text messages, the City did in fact audit them. The City claimed that it wanted to determine whether the usage limit it had established was too low and whether the overages were because of professional usage or personal usage of the pagers.[64] The City therefore requested from Arch Wireless transcripts of text messages for a couple of months for employees like Quon who had exceeded their usage limit during a specified period.[65]

Upon reviewing the transcripts sent by Arch Wireless, Quon's supervisor discovered that most of the messages sent by Quon were of a personal nature and some were sexually explicit.[66] Based on this information, Quon was investigated by the police department's internal affairs division to determine whether Quon had violated work rules by pursuing personal matters while on duty.[67] The investigation revealed that even if one solely looked at text messages sent by Quon during work hours, only a little more than ten percent of the remaining messages were work-related.[68] Based on this violation of work rules, Quon claims he was disciplined.[69]

The Supreme Court reviewed Quon's claims that the City's handling of his text messages constituted an unreasonable search and seizure under the Fourth Amendment. Importantly, during trial, the

60 *Id.*

61 *Id.* The Court pointed out that e-mails and text messages differ in that text messages do not pass through computers owned by the City, but rather are routed through Arch Wireless's computer network. *Id.*

62 *Id.*

63 *Id.* The same policy was utilized for other members of the SWAT team that exceeded their usage limit on the pager. *Id.*

64 *Id.* at 2626.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* It is unclear from the record whether, in fact, Officer Quon suffered discipline.

jury determined that the purpose of the City's audit was noninvestigatory and only undertaken to determine whether the usage limit for the pagers was sufficient.[70] The audit was not done to investigate Quon for workplace misconduct.[71]

Although the hope was that the Court would determine once and for all the appropriate legal analysis for such workplace privacy claims, the Court instead wrote an opinion in the City's favor which only further confused matters and satisfied neither side. All the Justices agreed *arguendo* that the Fourth Amendment applied to the audit of the text messages.[72] Yet, the Court did not decide formally whether Quon had a reasonable expectation of privacy in the text messages[73] and did not decide the appropriate test for determining the reasonableness of the search in light of those privacy expectations.

As to the question of whether Quon had a reasonable expectation of privacy in his employer-provided pager, the Court declined to choose between the "operational realities" test of the plurality in *O'Connor* and the presumption adopted by Justice Scalia in his concurrence that offices (and impliedly other physical and electronic locations in such offices) are normally covered by Fourth Amendment protections. Rather, the Court assumed for the sake of argument[74]

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70 *Id.* at 2631.

71 *Id.* at 2627. Although this jury determination did not make a difference to the outcome in *Quon*, this distinction is crucial to the proposed workplace privacy test below, which depends in part on the investigatory or noninvestigatory purpose of the public employer's search. *See infra* Part IV. As will be discussed, the distinction between investigatory and non-investigatory searches turns on the purpose of the search at the time the search is initiated. Searches commenced to uncover workplace misconduct by an employee are presumptively investigatory.

72 *Quon*, 130 S. Ct. at 2630.

73 *Id.* ("Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts.").

74 *Id.* The Court took this same approach in another recent employment privacy case, *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."). That privacy right, not discussed herein, involves the privacy "interest in avoiding disclosure of personal matters" under the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* (citing Whalen v. Roe, 429 U.S. 589, 599–600 (1977); Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 457 (1977)); *see also Nelson*, 131 S. Ct. at 764 (Scalia, J., concurring in the judgment) ("[T]he right to informational privacy emerged from the Due Process Clause of the Fifth Amendment, [and] counsel invoked the infinitely plastic concept of 'substantive' due process."). The Fourth Amendment did not apply to the informational privacy interests in *Nelson* because the background employment inquiries to third parties in that case "were not Fourth Amendment 'searches' under *United States v. Miller*, 425 U.S. 435 (1976) . . . [and] the Fourth Amendment does not prohibit the Government

that Quon did have a reasonable expectation of privacy, since the outcome of the case would still come out in favor of the City, regardless of which reasonableness test was applied.[75]

Nonetheless, Justice Kennedy in his majority opinion examined a number of factors that could potentially play a role in determining whether an employee has a reasonable expectation of privacy.[76] For instance, Kennedy tantalizingly wonders whether the increased use of smart phones and other devices means that employees will have more or less privacy in such devices.[77] Having noted the potential relevant issues, the Court punts, maintaining that it "would have difficultly predicting how employees' privacy expectations will be shaped by [evolving technology] or the degree to which society will be prepared to recognize those expectations as reasonable."[78]

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from asking questions about private information." *Id.* at 765. *But see* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise than an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." (citation omitted)).

75 *Quon*, 130 S. Ct. at 2628–29. The unwillingness of the Court to weigh in on the reasonableness of Quon's expectation of privacy can probably be explained by a factual dispute in the record that had not been determined by the jury. Although it was clear that Quon had been told by superiors that the text messages would be treated like emails and could be audited, there was also evidence that this policy had been overridden by subsequent comments by Quon's supervisor that the City did not intend to audit employee text messages. *Id.* at 2629. Applying the "operational realities" test of the *O'Connor* plurality, additional factual questions remained, including: (1) did the supervisor have the authority to change the policy; and (2) could text messages be reviewed for purposes of performance evaluations, litigation against the police department, or because of open records requests. *Id.* In any event, this unsettled state of the record appears to have made it difficult to determine whether Quon had a reasonable expectation of privacy and, rather than remand the case for further factual findings, the Court appears to have chosen to assume the privacy expectation existed and to decide the case for the City based on the reasonableness of its search.

76 This discussion by Justice Kennedy infuriated Justice Scalia. *See id.* at 2634–35 (Scalia, J., concurring in part and concurring in the judgment) ("The Court . . . inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question. That discussion is unnecessary." (citations omitted)).

77 *Id.* at 2630 (majority opinion).

78 *Id. See Jones*, 132 S. Ct. at 962 (Alito, J., concurring in judgment) (noting "[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes," when it comes to what amounts to a reasonable expectation of privacy.). There is also the recurring problem that "judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person." *Id.* (citing Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

As far as the test for whether the search of Quon's text messages was reasonable, the Court applied both the plurality test based on "reasonableness under all the circumstances"[79] and Justice Scalia's test that approved of public employee searches that would be "reasonable and normal in the private-employer context"[80] In the end, however, the *Quon* majority does not pick a particular test because the City prevails under either test.[81]

The problem with this state of affairs in the workplace privacy context, post-*Quon*, is that inevitably a case will again come along which will require a determination of whether an employee has a reasonable expectation of privacy in electronic equipment provided by their government employer.[82] Moreover, what should be done in future cases where a search is reasonable under the plurality's test in *O'Connor*, but not under Scalia's test in *O'Connor*, or vice versa?[83] Does the plurality test trump because it received four votes and was applied approvingly in *Quon*, or does Scalia's test apply because he was the fifth vote in *O'Connor* and his opinion can be seen as the most narrow one upon which a majority of Justices agreed?[84]

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79 *Quon*, 130 S. Ct. at 2628.

80 *Id.*

81 *Id.* at 2629.

82 *See* Lalli, *supra* note 37, at 245–46 ("The Supreme Court had an opportunity to adapt the outdated [*O'Connor*] test to 'the new generation of communications technology' when it decided *Quon*. Instead, the Court sidestepped the most important question regarding employee privacy rights in electronic communications." (footnote omitted)). In fact, lower court cases since *Quon* have not identified such a case yet. *See, e.g.*, True v. Nebraska, 612 F.3d 676, 680–82 (8th Cir. 2010) (discussing both tests, but applying only plurality test); Carter v. County of L.A., 770 F. Supp. 2d 1042, 1052 (C.D. Cal. 2011) ("[T]he court concludes that because of the constant and non-discriminating nature of the surveillance, and because it occurred in a semi-private area where employees had to perform non-work activities (like eating and taking breaks), under either Justice Scalia's *O'Connor* test or the *O'Connor* plurality test, the video surveillance was unreasonable and in violation of [plaintiffs'] Fourth Amendment rights."). In fact, at least one recent case post-*Quon* did not even mention Scalia's alternative test in its Fourth Amendment workplace privacy analysis. *See* Jones v. Houston Cmty. Coll. Sys., 816 F. Supp. 2d 418 (S.D. Tex. 2011).

83 For instance, one could imagine a public workplace search excessive in scope under the plurality test, but considered to be reasonable and normal in the private sector under Justice Scalia's approach.

84 *Quon*, 130 S. Ct. at 2634 n.* (Scalia, J., concurring in part and concurring in the judgment) ("There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in *O'Connor*—the plurality's and mine—is controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977)."); *see also* United States v. Gonzalez, 300 F.3d 1048, 1053 (9th Cir. 2002) ("[T]he Supreme Court's decision in *O'Connor* is a plurality decision, and it is difficult to identify 'that position taken by those Members who concurred in the judgment on

Regardless, the argument here is that whether a court applies the plurality's or Scalia's workplace privacy test, both tests essentially hold that a public employee search is reasonable as long as it would be reasonable in the private sector.[85] Justice Scalia would expressly look at what would be reasonable and normal in the private workplace for his test.[86] But even the plurality's approach considers what would be considered acceptable in the private workplace. In this regard, Justice O'Connor writes for the plurality that "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, *like similar expectations of employees in the private sector*, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."[87]

Perhaps most significantly, Justice Kennedy's majority decision in *Quon* explicitly twins the plurality and Justice Scalia's tests by stating:

> For these same reasons [that make the search reasonable under the plurality's test]—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employment context" and would satisfy the approach of Justice Scalia's concurrence [in *O'Connor*].[88]

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the narrowest grounds.'" (citing *Marks*, 430 U.S. at 193)); Shields v. Burge, 874 F.2d 1201, 1204 (7th Cir. 1989) (assuming the plurality test of *O'Connor* should be applied because it is the least-common-denominator holding).

85 *See supra* notes 54–55 and accompanying text. A similar convergence of public and private employee privacy rights appears to be occurring in a number of countries in Western Europe as well. *See* Alexander De Becker, *The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the United Kingdom, France, Belgium, and the Netherlands*, 32 COMP. LAB. L. & POL'Y J. 949, 951 (2011) ("In each country [studied], some convergent tendencies between employment regulation in the public and private sectors can be found.").

86 Justice Scalia also makes clear in his concurrence in *Quon* that his views since *O'Connor* have not changed, and that "the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers." *Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment).

87 O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion) (emphasis added). "[A]t least three (and probably many more) factors diminish subjective privacy expectations in workplace electronic communications: the public nature of work environments, the technical oversight of network administrators, and the ubiquity of employee notices in handbooks, user agreements, and logon banners." *See* Holbrook, *supra* note 51, at 832 (footnote omitted).

88 *Quon*, 130 S. Ct. at 2633 (majority opinion) (citing *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring in the judgment)).

In short, rather than public employees being subject to a more searching inquiry when their privacy rights are implicated in the workplace, both the plurality and Scalia's test seek to reduce public employee privacy rights to the level of private employees under the common law of tort. Post-*Quon,* privacy rights of public employees and private employees are being discussed interchangeably.[89] Of course, it is impossible at this point to say whether this is a troubling development from a normative standpoint until we explore the nature of workplace privacy rights in the private sector.

II. Workplace Privacy in the Private Sector

To determine the relative level of workplace privacy rights for private sector employees, this part is divided into two sections. The first section explains which of these workplace privacy rights should be compared to the public sector privacy rights discussed above. The second section analyzes the applicable sections of Chapter 7 of the *Restatement of Employment Law* to determine the relative strength of these common law workplace privacy rights to those existing in the public sector under the Fourth Amendment.

A. The Scope of the Common Law of Workplace Privacy

The appropriate historic analog in the common law context to searches of physical and electronic locations in the workplace is the intrusion upon seclusion tort fashioned by Dean Prosser in the *Restatement (Second) of Torts.*[90] This intrusion tort required a showing that the employer intruded into a physical location where the employee had a

89 As Justice Blackmun points out in dissent in *O'Connor*, this might mean that there are few situations where a public employer's search, whether routine or investigatory, will not be considered reasonable under the plurality's standard. *See O'Connor*, 480 U.S. at 734 (Blackmun, J., dissenting). Justice Blackmun goes even further: "It could be argued that the plurality removes its analysis from the facts of this case in order to arrive at a result unfavorable to public employees, whose position members of the plurality do not look upon with much sympathy." *Id.* at 734 n.3.

90 Restatement (Second) of Torts § 652A (1965). The other privacy torts—false light, public disclosure of private facts, and misappropriation of name or likeness—are beyond the scope of this Article.

reasonable expectation of privacy[91] and such an intrusion also had to be "highly offensive to a reasonable person."[92]

The current version of Chapter 7 of the *Restatement (Third) of Employment Law* takes a different approach.[93] First, it combined employee privacy and autonomy interests. Whereas the "interest in privacy refers to what has been called the 'right to be left alone,' the right to keep certain areas and activities free from intrusion by others," the "interest in personal autonomy covers activities that may not be private but are considered so much a part of the individual's personality that they deserve a level of protection against outside interference."[94] This Article addresses employee privacy interests (discussed in Sections 7.01–7.07),[95] not autonomy interests (discussed in Sections 7.08–7.09).[96]

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91 As the *Restatement (Third) of Employment Law* observes, the concept of a "reasonable expectation of privacy" is common to both workplace privacy analyses in the public and private sectors. *See* RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.01 cmt. f (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf ("[C]ourts have utilized Fourth Amendment principles in deciding whether employees generally, whether they work for the government or for private company, have a reasonable expectation of privacy in their offices."). *But see id.* § 7.03 Reporter's Notes, cmt. e ("[T]he Fourth Amendment jurisprudence on reasonable expectation of privacy cannot be automatically transposed into the area of workplace intrusions.").

92 Smyth v. Pillsbury Co., 914 F. Supp. 97, 100 (E.D. Pa. 1996) (citations omitted); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632, 632 (Tex. App. 1984). Forty-one states and the District of Columbia apply some version of the intrusion upon seclusion tort. RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.01 Reporter's Notes, cmt. b (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf.

93 This Article relies on Council Draft No. 6 for the current iteration of Chapter 7 of the *Restatement (Third) of Employment Law*. Because the American Law Institute has not yet adopted Chapter 7, it should be expected that aspects of this Chapter will change before being adopted. Yet, the current version is utilized here to provide an analogous structure for comparing the intrusion upon seclusion tort with workplace privacy law under the Fourth Amendment.

94 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY ch. 7, introductory note (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf. This dichotomy is based on the distinction made in *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) ("One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.").

95 Section 7.07, however, is beyond the scope of this Article because it deals with retaliatory actions taken by employers where an employee refuses to consent to a wrongful intrusion upon a protected privacy interest.

96 Consequently, issues of sexual privacy under *Lawrence v. Texas*, 539 U.S. 558 (2003), grounded in the substantive component of the due process clauses of the Fifth and Fourteenth Amendment (primarily discussed in the opinion), are beyond

Section 7.01 of the *Restatement (Third) of Employment Law*, introducing the newly-named tort of wrongful employer intrusion upon a protected employee privacy interest, generally states that "[e]mployees have a right of privacy against wrongful employer intrusions upon protected employee privacy interests. Protected employee privacy interests are set out in Section 7.02, and discussed in Sections 7.03–7.05. The concept of wrongful employer intrusion is discussed in Section 7.06."[97]

Section 7.02 then divides the protected employee private interests into essentially four categories: (1) the employee's physical person and personal functions;[98] (2) physical or electronic locations, including work locations provided by the employer; (3) the employee's information of a personal nature;[99] and (4) the non-disclosure to third parties of employee information of a personal nature disclosed in confidence to the employer.[100]

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the scope of this Article. Nevertheless, it can be pointed out briefly here that development of autonomy interests in the public sector do appear to have had a positive influence on similar interests in the private sector in the drafting of Sections 7.08 and 7.09 of the *Restatement* (subjecting an employer to liability for intruding upon an employee's autonomy interest unless that autonomy interest interferes with the employer's legitimate business interests), and in the expansion of state off-duty conduct statutes. *See, e.g.*, CAL. LAB. CODE § 96(k) (West 2011); COLO. REV. STAT. § 24-34-402.5(1) (2008); CONN. GEN. STAT. ANN. § 31-51q (2012); N.Y. LAB. LAW § 201-d(2) (McKinney 2009); N.D. CENT. CODE §§ 14-02.4-01 to -03 (2009).

97 *See* RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.01 (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf.

98 This category under Section 7.03(a)(1) involves searches involving the drug testing of employees. *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 626 (1989). This issue is not discussed in this Article, though such privacy intrusions are also examined under the Fourth Amendment in the public workplace.

99 This protectable interest, discussed in Section 7.04, concerns information privacy interests like those discussed in the recent case of *NASA v. Nelson*, 131 S. Ct. 746 (2011) (upholding background questions of NASA contract employees). Such informational privacy rights, to the extent that they exist, are thought to be grounded in state and federal laws, not the Fourth Amendment. *Id.* at 764 (Scalia, J., concurring) (noting that "counsel asserted . . . that the right to informational privacy emerged from the Due Process Clause of the Fifth Amendment," but "[t]hat counsel invoked the infinitely plastic concept of 'substantive' due process . . . .").

100 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.02(c) (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf. This last category, addressed in Section 7.05, is most closely associated with the tort of public disclosure of private facts and is also beyond the scope of this Article.

This Article focuses on Section 7.03(a)(2), the second category, concerning "physical or electronic locations in which the employee has a reasonable expectation that the location is private as to that intrusion."[101] This category "covers those traditional intrusions into private physical spaces, like bathrooms or lockers, as well as electronic 'places,' such as email and text messages . . . ."[102] Also, and similar to Fourth Amendment principles in this regard, just because the employer owns the premises, furniture, or electronic equipment, does not necessarily mean that an employee cannot have a reasonable expectation of privacy in those physical or electronic locations.[103] It is because these "most prototypical privacy invasion[s]"[104] are most closely aligned with traditional Fourth Amendment concerns in the public sector that they are the focus of this discussion of workplace privacy in the private sector.[105]

B. Wrongful Intrusions upon Employees' Protected Privacy Interests in Physical or Electronic Locations

Section 7.03(b) discusses in detail employee privacy interests in physical and electronic locations in the workplace. An employee has an expectation of privacy in such a location if:

> (1) the employer has provided express notice that the location is private for employees;[106] or
> (2) the employer has acted in a manner that treats the location as private for employees, the type of location is customarily treated as private space for employees, and the employee has made reasonable efforts to keep the location private.[107]

For example, the existence of an employee manual with a statement concerning the lack of privacy expectations in electronic com-

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101 *Id.* § 7.03(a)(2).

102 *Id.* § 7.02 Reporters' Notes, cmt.

103 *Id.* § 7.03 cmt. d.

104 *Id.* § 7.03 Reporters' Notes, cmt. a.

105 *Id.* ("There is considerable overlap between this type of invasion of privacy and the situations that have [been] found to be searches under the Fourth Amendment.").

106 The ability of employer policies to reduce privacy expectations of employees in the private sector works in the same manner that such policies work under the "operational realities" test of the *O'Connor* plurality. *See supra* notes 39–43 and accompanying text.

107 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.03(b) (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf.

munications could limit the reasonable expectation of privacy.[108] Indeed, responding to the potential of tort liability, many private-sector employers in recent years have added policies to employee handbooks which make clear that employers control all of these electronic communications and can monitor them to ensure that such communications are not being used for improper purposes (e.g., personal communications or internet pornography).[109] Such policies change the "operational realities" of a workplace, to use the terminology of the plurality in *O'Connor*,[110] insuring that employees do not develop reasonable expectations of privacy in these electronic communications while at work. However, in the absence of such an express employer policy concerning electronic communications, employees may still have an expectation of privacy if the factors set out above in Section 7.03(b)(2) are met.[111]

If an employer intrudes upon an employee's physical or electronic location in which the employee has a reasonable expectation of privacy, the question then becomes, under Section 7.06, whether the intrusion is wrongful. The intrusion can be wrongful if: "(1) the employer does not have sufficient business justification for the intrusion; or (2) the scope or manner of the intrusion would be highly offensive to a reasonable person under the circumstances."[112] Putting it slightly differently, "[a]n intrusion upon a privacy interest only creates liability when that intrusion is unreasonable and offensive."[113]

An employer does not have a "sufficient business justification for an intrusion" if the intrusion does not "advance[ ] a substantial, legitimate business interest or an important public interest."[114] The scope or manner of an intrusion is not "highly offensive to a reasonable person" if "in light of the justification, the employer action meets the

108 *Id.* at § 7.03 cmt. i ("An employer's notice regarding the likelihood of employer intrusions in a work location is often an important factor in determining whether employees have a reasonable expectation of privacy in that location. . . . [A] clear employer notice or policy that a particular location is not private for employees generally defeats an employee's expectation of privacy, unless the employer's actual practices contravene the wording of an express notice or policy.").

109 Indeed, this is exactly what the City of Ontario did expressly with regard to computers, the internet, and email. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2625 (2010) (plurality opinion).

110 O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion).

111 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.03(b)(2) cmts. d–e (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment _Law_CD6_online.pdf.

112 *Id.* at § 7.06(a).

113 *Id.* at § 7.06 Reporters' Notes, cmt. a.

114 *Id.* at § 7.06(b).

generally accepted societal norms for making such an intrusion."[115] It is important to note that the ways in which employer intrusions can be wrongful under this section are stated in the disjunctive so that "even if the intrusion is supported by sufficient business justification, it may still be actionable if its manner or scope would be highly offensive to a reasonable person under the circumstances."[116]

It would appear then that in applying the "highly offensive" standard, the common law contains an additional requirement for the finding of liability for an invasion of privacy in physical or electronic locations in the workplace. Whereas the constitutional privacy law for government employees requires under *O'Connor*'s plurality test the finding of a reasonable expectation of privacy and an unreasonable intrusion into that privacy interest,[117] the common law goes a step further. It also requires a further finding that the employer's interference with a reasonable expectation of privacy would be highly offensive to a reasonable person.[118] This additional requirement is significant because as the *Restatement* points out, this additional showing requires that the "employer action meet[ ] the generally accepted societal norms for making such an intrusion."[119] In other words, it puts an additional burden on the employee before he or she can hold the employer liable for an intrusion of a protected privacy interest in the workplace.

In this regard, consider how the *Restatement* legal approach might apply in the well-known workplace privacy case of *K-Mart Corp. Store No. 7441 v. Trotti*.[120] *Trotti* involves a classic on-the-job privacy claim in the private sector involving a female K-Mart employee who had a locker at work.[121] With her employer's permission, she had placed a personal lock on this locker and was not required to give the combination to her employer.[122] Nonetheless, she found one day that her locker had been opened and her purse inside had been significantly disturbed.[123] Although her manager initially denied going through

115 *Id.* at § 7.06(c).

116 *Id.* at § 7.06, cmt. b.

117 *See supra* notes 39–43 and accompanying text.

118 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.06 cmt. b (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf.

119 *Id.* at § 7.06(c).

120 677 S.W.2d 632 (Tex. App. 1984).

121 *Id.* at 634.

122 *Id.* at 634–35.

123 *Id.* at 635.

her belongings, he later admitted to looking for stolen goods in her locker.[124]

First, the court noted the legal standard for an intrusion upon seclusion claim: "'the intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person.'"[125] In analyzing whether the employee had a reasonable expectation of privacy, the court commented that the employee could have a reasonable expectation of privacy in the locker, as the jury found, because even though the locker was K-Mart's property, it had permitted the employee to place her own lock on it.[126]

The court also found that to avoid turning the privacy tort into a strict liability offense, it was essential that the plaintiff show that the intrusion into her locked locker without her permission would be highly offensive to a reasonable person.[127] Because the trial court had not required the jury to consider whether the intrusion would be highly offensive to a reasonable person, the court remanded the case for a new trial, but hinted that the female employee would likely be successful at trial on this point given the facts in the record.[128]

Applying the *Restatement of Employment Law* approach to *Trotti* would appear to yield the same outcome. This claim constitutes an employer intrusion upon a physical location where the employee had a reasonable expectation of privacy. This expectation of privacy was based on the fact that: (1) the employer had acted in a manner that suggested the employee's locker would remain private; (2) a locker with one's own lock on it is the type of location customarily treated as private space; and (3) the employee made more than reasonable efforts to keep the location private by keep the locker locked and not telling her employer the combination.[129]

The employer intrusion of the employee's locker was wrongful because the employer did not have sufficient business justification for the intrusion as there was no reason to suspect that Trotti had stolen the items in question. Second, both the scope and manner of the

124 *Id.*

125 *Id.* at 636 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

126 *Id.* at 638 ("It is sufficient that an employee in this situation, by having placed a lock on the locker at the employee's own expense and with the appellants' consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it.").

127 *Id.* at 637 ("We hold that the element of a highly offensive intrusion is a fundamental part of the definition of an invasion of privacy . . . .").

128 *Id.*

129 *See* RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.03(b) (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf.

intrusion would likely be highly offensive to a reasonable person under the circumstances because of the manner in which the employee's supervisor forced open her locker and because of the personal nature of the items which were rifled through in her locker by her supervisor.[130] The intrusion would likely be considered "highly offensive" under the circumstances because in light of the justification for the search advanced by her employer, the employer's action did not meet generally accepted societal norms for making such an intrusion.[131] Indeed, the evidence which the employer in *Trotti* sought could have been obtained in less intrusive ways, including by merely questioning all employees about the whereabouts of the missing items. Finally, the use of deception in effectuating the intrusion in *Trotti* by first denying responsibility for the search "is particularly questionable" and does not seem "justified by legitimate business reasons [or] in line with the practices of other employers in like circumstances."[132]

Based on all of these reasons, then, it appears that the Fourth Amendment's "unreasonable" standard requires a higher level of scrutiny than the "highly offensive" approach in both the *Restatement of Torts* and *Restatement of Employment Law*.[133] Theoretically, at least, there would seem to be intrusions by employers into employees' protected privacy interests that are sanctionable under the Fourth Amendment that would not be sanctionable in the private sector workplace under the "highly offensive to reasonable person" standard.[134] Private-sector workplace privacy standards would then supply

130 *Id.* § 7.06 cmt. d ("'Manner' refers to the means that the employer uses in effecting the intrusion. 'Scope' refers to the extensiveness or breadth of the intrusion.").

131 In this regard, the *Trotti* court commented that "[t]he mere suspicion either that another employee had stolen watches, or that unidentified employees may have stolen price-marking guns was insufficient to justify the appellants' search of appellee's locker and personal possessions without her consent. The record also demonstrates that the appellants lied to appellee and concealed the truth of their wrongful search for approximately one month." *Trotti*, 677 S.W.2d at 640.

132 RESTATEMENT (THIRD) OF EMP'T LAW: EMP'T PRIVACY & AUTONOMY § 7.06 illus. 8 (Council Draft No. 6, 2011), *available at* http://extranet.ali.org/docs/Employment_Law_CD6_online.pdf; *see also Trotti*, 677 S.W.2d at 641 ("The appellants clearly made this wrongful intrusion with neither the appellee's permission nor justifiable suspicion that the appellee had stolen any store inventory.").

133 That being said, I argue below that even a higher level of scrutiny should be adopted under the Fourth Amendment when public employers seek evidence from searches to take adverse employment action against their employees. *See infra* Part IV.D.

134 This point is a hard point to prove in practice, because workplace privacy cases are either decided under the common law or constitutional law, but generally not

less protection to employees than constitutional standards. Thus, to the extent that the Justices in *Quon* based their decisions about public employees' expectations of privacy and the reasonableness of public employers' search on private-sector conceptions of workplace privacy rights, constitutional standards have been deployed to counter-intuitively decrease the level of privacy protections for public-sector workers.

The next Part maintains, as a normative matter, that public-sector workers should be entitled to greater levels of privacy protections in the workplace based on textual and prudential considerations. This Article then concludes in the final Part by arguing for a new, two-step workplace privacy analysis which seeks to contextualize workplace searches and then applies presumptively the Fourth Amendment's warrant and probable cause requirements to those searches undertaken for investigatory purposes in the public workplace.

III. Distinguishing Workplace Privacy Protections in Public and Private Employment

As illustrated above, post-*Quon,* public and private employees have been deemed to have the same level of workplace privacy rights. Further, because the *Restatement* approach in the private sector is less privacy protective than the constitutional balancing approach in the public sector, the upshot is that public-sector workplace privacy rights have been diminished to the level of private-sector workplace privacy rights.

This Part contends that public-sector employees should have a greater expectation of privacy in the workplace than their private-sector counterparts for three reasons: (1) the text of the constitution; (2) the power of the government as employer; and (3) the critical oversight role public employees undertake in American representative democracy.[135]

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both. *But see* Carter v. Cnty. of Los Angeles, 770 F. Supp. 2d 1042 (C.D. Cal. 2011) (applying both private-sector and public-sector tests and coming to same finding of unreasonable employer intrusion in secret video surveillance case).

135 All of this is not to denigrate "the critical role that public-sector litigation has played in the development of the common law." Issacharoff, *supra* note 1, at 616; *see also* De Becker, *supra* note 85, at 949–50 ("[I]t is commonly recognized that the role of the State as employer demands for certain *ad hoc* regulation derived essentially from private employment law.").

A. The Text of the Constitution and the State Action Doctrine

Private employees are treated differently from public employees because, under the state action doctrine, the federal constitution only applies to intrusions by public employers.[136] People might disagree on whether there is a sustainable distinction between private conduct and public conduct,[137] but the theory behind the state action doctrine is that actions by the state are the primary concern of constitutional prohibition because of the power of the state in relation to the power of a private actor.[138]

But even further, and as Richard Kay aptly observes, most people have an intuition that there is something special about constitutional law: "That intuition is the idea that the rules of the Constitution make up a separate and exceptional body of law with its own subject matter and its own limits."[139] This exceptional body of law is not merely concerned with whether a particular intrusion by a given employer offends some notion of appropriate conduct in the workplace. Rather, constitutional law is about bigger issues, like the appropriate balance between liberty and order in a representative democracy.[140] Or to place this discussion more directly into the workplace context, the question of under what circumstances should government

136 *See supra* note 2 and accompanying text.

137 Scholars hold differing views on how this public-private distinction should be made. *See generally* Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004) (arguing against the formalism of the public-private distinction because it interferes with personal integrity, including the First Amendment rights of individuals); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1041 (1987) (explaining that *Carolene Products* compromise does not explain what is actually happening in Supreme Court rulings); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 967–68 (1989) ("[U]nder the discriminatory intent test, the question in 'state action' cases is no longer whether the state is acting but whether the state's action—whatever it is—is tainted by discriminatory intent.").

138 *See* Kay, *supra* note 2, at 329–30. The relative power of the government as employer compared to the power of private employers over its employees is discussed *infra* Part III.B.

139 Kay, *supra* note 2, at 337.

140 *Id.* at 339 ("Modern interpretations of the rules of the Constitution do not specify narrowly defined duties and prohibitions. They declare general standards of conduct."); *see also* Primus, *supra* note 8, at 259 ("The specter of additional terrorist attacks means that we should expect the courts to confront even more government intrusions in the name of safety and security in the future.").

employers have the ability to conduct workplace searches to provide a more efficient and effective government for the good of society.[141]

So whereas under tort law we require a court to ask whether an employer's unjustified invasion of its employee's privacy interests would be "highly offensive" to a reasonable person, we only require a balancing of government and individual interests in the Fourth Amendment context.[142] This constitutional balancing of interests is consistent with "[t]he central paradigm for modern constitutional law[,] . . . the process of balancing the individual injury complained of against the social benefits from the state's action."[143]

B. The Power of the State as Employer

Not only should public employees have greater privacy rights because the text of the Fourth Amendment provides more protection against government actors than private actors, but also because government employers in fact do have significantly more power over their employees than ordinary companies do over theirs. As already seen from the textual analysis above, the state action doctrine is based on the unique power of the state and "[t]he central purpose of constitutions [is] the creation of a set of preexisting limits to the interferences with individual action historically associated with the state."[144]

For instance, in *United States v. Kahan*,[145] the Southern District of New York commented upon this significant difference between the power of private employers and the power of public employers in carrying out workplace searches and the consequence of such searches:

> If a private employer suspects misconduct on the part of an employee, he will not ordinarily conduct an investigation to substantiate criminal charges against him. Rather, he will simply fire that employee. . . . In contrast, when a government supervisor begins an investigation of suspected criminal activities of an employee in the

141 *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598 (2008) ("[T]he extra power the government has in [the government as employer context] comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." (quoting Waters v. Churchill, 511 U.S. 661, 674–75 (1994) (plurality opinion))).

142 Although it could be suggested that this is because we assume the workplace search is highly offensive to a reasonable person when the employer is the government, it is appears that the Constitution gives greater protection to public employees by merely using the word "reasonable" without any further gloss.

143 Kay, *supra* note 2, at 339.

144 *Id.* at 341.

145 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd in part*, *rev'd in part*, 479 F.2d 290 (2d Cir. 1973), *rev'd*, 415 U.S. 239 (1974).

> course of his work, the supervisor's role is no longer that of a manager of an office, but that of a criminal investigator for the government. The purpose of the supervisor's surveillance is no longer simply to preserve efficiency in the office. It is specifically designed to prepare a criminal prosecution against the employee. In that case, searches and seizures by the supervisor or by other government agents are governed by the Fourth Amendment admonition that a warrant be obtained in the absence of exigent circumstances.[146]

So whereas both the public and private employer may terminate or otherwise discipline the employee if there is evidence of employee malfeasance, the public employer may have greater power in its ability to retaliate against the employee and to turn over evidence of that misconduct to other arms of the state for prosecution. In short, whereas all that is at stake in an investigatory search in the private sector is at most the loss of one's job, the loss also of one's liberty may be at stake in the public sector.

Additionally, and importantly, public employers are not limited by the same market-based forces that limit private-sector employers. Government employers play a different role in the market economy in the sense that they are sometime the only game in town.[147] Consider in this regard police officers and prosecutors. Additionally, government employers are not subject to the same market forces as private employers as far as having the same incentives to get rid of bad employees who undermine their ability to maximize profits.[148] Finally, the goal of government employers is to produce public goods not produced privately and to promulgate policies the public desires.[149] For all these reasons, and as Pauline Kim aptly observes, "[i]mposing checks on [public employer] personnel decisions—including restraints protecting basic constitutional rights—should be part of," holding public employers accountable.[150]

There is one last distinction between public and private employees that deserves mention. In a very real sense, "We the people" are

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146 *Id.* at 791.

147 *See* Kim, *supra* note 54, at 13 ("Although the pool of labor from which they hire may overlap with that from which private employees are drawn, for some types of jobs the government is the only relevant employer.").

148 *Id.* ("The public employer . . . is largely insulated from these market pressures, creating the possibility that irrational personnel practices could persist unchecked.").

149 *Id.* at 14 ("[I]t is a mistake to assume that the public interest always coincides with the interests of the public manager. Without the competitive pressures of the market, the overreaching or corrupt public manager is less likely to be eliminated.").

150 *Id.*

the employers of public employees.[151] The citizens of the polity can, and should, demand more as far as how we want workers treated by the government. Indeed, to the extent that public employees are treated more fairly and with dignity in the workplace, it is less likely that they will engage in fraud or misconduct that undermines the public service.[152]

Thus, it is not only necessary, but "We the people" should insist that public employees have a greater level of employment protection under the federal Constitution to prevent the government from using its power against these public employees in arbitrary and irrational ways.[153] Even if current Fourth Amendment doctrine is not adequately providing such protection as argued below, the aspiration is that someday the federal Constitution will provide a meaningful check on executive discretion,[154] so that government employees will not be targeted with harassment and discrimination through arbitrary searches and seizures of their physical and electronic locations.[155]

C. The Oversight Role of Public Employees

Of course, government employers' exercise of executive power can devolve into harassment, especially if employees are seeking to

151 "We the people" is the beginning of the preamble to the United States Constitution. U.S. CONST. pmbl.

152 Additionally, as one recent commentator observed: "All of us need to recognize that happy employees are better than unhappy employees and that losing good employees is expensive." Linda A. Klein, *Having a Winning Reputation with Engaged Employees*, LAW PRAC. May/June 2011, available at http://www.americanbar.org/publications/law_practice_magazine/2011/may_june/having_a_winning_reputation_with_engaged_employees.html.

153 *See* Primus, *supra* note 8, at 277 ("It is a matter of general consensus that one purpose of the Fourth Amendment is to eliminate or at least substantially reduce governmental intrusions that are arbitrary.").

154 Indeed, "the key to preventing arbitrariness in the sphere of the Fourth Amendment is limiting the discretion of officials who wield executive power." *Id.* at 277 (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974)). Primus refers to this observation by Amsterdam as "canonical." *Id.*

155 See *id.* This view of needing a check on the political power of the state employer is generally shared by Western European countries. *See also* De Becker, *supra* note 85, at 987 ("For all continental countries researched, it is desirable that all individuals exercising tasks of public authority and working under a direct political hierarchy be better protected against dismissal or political intervention than in the private sector.").

shed light on government misconduct.[156] And even though it is no doubt true that we need government employers to exercise oversight of employees to ensure the efficiency and effectiveness of the government service,[157] the constitutional rights of public employees should not be lost in the mix. More specifically, these employee privacy rights in the public sector are crucial so that these employees can fulfill their role of ensuring government transparency and accountability. As Justice Marshall observed in his dissent in the 1974 case of *Arnett v. Kennedy*[158]: "The importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times."[159]

The times to which Justice Marshall referred were the Watergate era of the 1970s. The constitutional right to which he referred was the right of public employee free speech under the First Amendment. Indeed, in another First Amendment case in which Marshall wrote the majority opinion, *Pickering v. Board of Education*,[160] he made clear that public employees play a unique role in a representative democracy.[161] There, in the context of a public school teacher's critical op-ed in a local newspaper about his school, he wrote:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[162]

Indeed, and as I have written elsewhere:

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156 Kim, *supra* note 54, at 14 ("Rather than responding to market discipline, public agencies are generally held to account by requiring some measure of transparency in their operations.").

157 O'Connor v. Ortega, 480 U.S. 709, 724 (1987) (plurality opinion) ("Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, and other work-related misfeasance of its employees.").

158 416 U.S. 134 (1974).

159 *Id.* at 228 (Marshall, J., dissenting).

160 391 U.S. 563 (1968).

161 *See id.* at 572; *see also* City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) ("The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.").

162 *Pickering*, 391 U.S. at 572.

> Given the sheer size of American government, it is impossible for ordinary citizens to keep tabs on everything their government is doing at any given time. Government employees therefore must be the vanguard of the citizenry. This is so not only because of their physical proximity to the problem but also because of their special expertise in dealing with the governmental issues that come to their attention.[163]

The same observations about the importance of public employees' playing an oversight role can be made today in discussing the loss of individual privacy protections under the Fourth Amendment in this time of workplace technological innovation. Such technologies make monitoring and surveillance of workplace activity all the more frequent.[164]

These developments are problematic when one considers that the rights contained in the Fourth Amendment, like those in the First Amendment, "create the environment necessary for other freedoms to flourish."[165] Indeed, like Nadine Strossen, I believe that, "[a] sound argument can . . . be made that [F]ourth [A]mendment rights

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163 Secunda, *supra* note 53, at 946–47.

164 *See* Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 120 (2008) ("[E]mployee expectations of privacy are yielding to surveillance technologies that become generally available."); *see also* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year."); *id.* at 963 (Alito, J., concurring) ("[C]ell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States." (citing CTIA, *50 Wireless Quick Facts* http://www.ctia.org/consumer_info/index.cfm/AID/10323 (lasted visited Sept. 2, 2012))).

165 Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1241 (1998). In this vein, Monrad Paulsen has observed that, "All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty." Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 264 (1961); *see also Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) ("[In GPS monitoring context, I question] the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'" (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))); Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (claiming that Fourth Amendment freedoms are "indispensable to individual dignity and self-respect.").

should be entitled to the same degree of judicial protection as [F]irst [A]mendment rights."[166] In the public employment context, this means that public employees need protection of their Fourth Amendment workplace privacy rights to feel secure acting as the eyes and ears of other citizens as far as ensuring the appropriateness of government conduct.[167] Otherwise, public employees might feel impeded in their ability to express themselves in a way that could potentially protect other members of society from governmental waste, fraud, and abuse. Only through greater workplace privacy rights, then, can public employees feel free enough to fulfill this essential societal function.

IV. Restoring the Warrant Requirement for Public Employee Investigatory Workplace Searches: A Bifurcated Approach

Because *Quon* has pushed public employee privacy rights down to the level of private employees and because persuasive textual and prudential arguments exist why public employees should have greater privacy rights than their private-sector counterparts, this Part considers how to elevate those workplace privacy rights back to the appropriate level in the public sector. Borrowing from the dissent of Justice Blackmun in *O'Connor* and the concurrence of Justice Stevens in *Quon*, this Part makes a two-step argument for a bifurcated approach to workplace searches of physical or electronic locations in the public sector.

The first part of this proposed approach focuses on the reason for, or context of, the government employer intrusion. If the government employer's reason is to investigate workplace misconduct, rather than merely to obtain routine entry into an employee's office, then the second part of this new approach maintains that such searches do not qualify under the "special needs" exception to the Fourth Amendment.[168] As such, a warrant based on probable cause should be required before such a search is permitted. This Part concludes by anticipating two potential criticisms to this proposed approach.

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166 Strossen, *supra* note 168, at 1241.

167 *See Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.").

168 *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (holding that the warrant requirement of the Fourth Amendment should be abandoned "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, makes the warrant and probable-cause requirement impracticable").

A. Contextualization: Determining the Reason for the Public Employer Search

First, so that workplace privacy law in the public sector is consistent with the purposes of the Fourth Amendment, the applicable constitutional law should at least seek to separate the various reasons for why a public employer might seek to intrude upon the physical or electronic locations of its employees in the workplace.[169] This is so because:

> [O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute[should] the Court turn to a "balancing" test to formulate a standard of reasonableness [in] this context.[170]

Indeed, the Court in *O'Connor v. Ortega* has already drawn clear lines between employer intrusion for work-related and law enforcement purposes.[171]

Consider also in this regard the previously discussed case of *United States v. Kahan*, which the Supreme Court cited in *O'Connor* for the distinction between work-related and law enforcement searches. In *Kahan*, an employee of the federal immigration service attempted to suppress evidence of criminal misconduct taken by immigration agents from a desk-side wastebasket used exclusively by the employee.[172] The wastebasket had been routinely checked as part of a criminal investigation into the employee's official duties.[173] The court concluded that the checking of the wastebasket constituted a "search" for purposes of the Fourth Amendment because:

> (1) the sole purpose of the intrusion was to obtain criminal evidence; (2) the case was distinguishable from those in which a supervisor or co-worker chances upon criminal evidence while looking

169 *See* Holbrook, supra note 51, at 835 ("The Article concludes by suggesting that military courts adopt an analytical framework that explicitly distinguishes between work-related and law enforcement searches in determining the degree of communications privacy properly afforded service members.").

170 O'Connor v. Ortega, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting).

171 *Id.* at 721 (plurality opinion) ("While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct.").

172 United States v. Kahan, 350 F. Supp.784, 789–90 (S.D.N.Y. 1972).

173 *Id.* at 790.

> through an employee's desk or wastebasket; and (3) the case did not involve a supervisor engaged in a work-related inspection.[174]

Similar considerations can be readily utilized in making the distinction between work-related searches and those undertaken to ferret out employee wrongdoing.

Although searches done for noninvestigatory, routine workplace purposes may still run afoul of Fourth Amendment norms, it is much more likely that investigatory workplace searches by employers to support claims of employee malfeasance will unlawfully tread upon Fourth Amendment interests.[175] Or to put it slightly differently, investigatory workplace searches are much more like law enforcement searches of private individual's homes, papers, and personal effects, where individuals are at the mercy of executive discretion.[176]

Justice Stevens makes an important distinction in this regard in his concurrence in *Quon*. He notes that whereas the search of the doctor's office in *O'Connor* was done to potentially implicate the doctor in wrongdoing, the jury found in *Quon* that the audit of the officer's text message was done to determine whether the current usage limits for SWAT team pagers were in line with the professional requirements of the officers.[177] So, *O'Connor* was about an investigatory search to ferret out employee wrongful employee conduct, while *Quon* concerned a legitimate, noninvestigatory search for work-related materials.[178]

In the *Quon* situation, one can readily see why employers with legitimate business justifications should be able to search for workplace materials without running to a magistrate every time they need to look for a routine document in an employee's office.[179] In such

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174 Holbrook, *supra* note 51, at 846 (citing *Kahan*, 350 F. Supp. at 791).

175 *See* Primus, *supra* note 8, at 267 ("The normal method of protecting citizens against arbitrary, discriminatory, and harassing searches is to limit the discretion of executive officials, . . . by requiring that a neutral decisionmaker issue a warrant before a government intrusion occurs . . . .").

176 *Id.* at 277.

177 City of Ontario v. Quon, 130 S. Ct. 2619, 2634 (2010) (Stevens, J., concurring) (distinguishing *O'Connor* from *Quon* in an asterisked note).

178 *Id.* at 2634 n.* ("This case does not implicate that debate [over the proper standard for evaluation a search] because it does not involve an investigatory search. The jury concluded that the purpose of the audit was to determine whether the character limits were sufficient for work-related messages.").

179 O'Connor v. Ortega, 480 U.S. 709, 723 (1987) (plurality opinion) ("Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for purposes of finding a file or piece of office correspondence."). *See* Primus, *supra* note 8, at 299 ("[T]he [*O'Connor*] Court was correct to say in its

instances, not only does there appear to be a "special need" to free the government employer from the normal application of the warrant requirement under the Fourth Amendment, but such a warrant requirement would greatly undermine the effectiveness and efficiency of the government workplace.[180]

B. Reestablishing the Warrant and Probable Cause Requirements for Public Employer Investigatory Workplace Searches

Noninvestigatory, routine workplace searches, like the one in *Quon*, seem to fit nicely into the "special needs analysis."[181] On the other hand, a requirement of a warrant issued by a neutral magistrate upon probable cause seems more in line with the nature of workplace investigatory searches which can threaten the livelihood of public employees.[182] As Justice Blackmun commented in his dissent in *O'Connor*, just because a search warrant is impracticable for some workplace searches does not mean it is impractical for all workplace searches.[183] Part of the problem, as Eve Brensike Primus points out, is that the Justices appear to be applying the "special needs" analysis in cases where it should not apply.[184] Also, it is less likely that an

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opinion that it would be impractical to require a warrant every time a government employer wanted to open an employee's desk drawer to look for a work-related document.").

180 *See O'Connor*, 480 U.S. at 745 (Blackmun, J., dissenting) ("It is certainly correct that a public employer cannot be expected to obtain a warrant for every routine entry into an employee's workplace.").

181 *Id.* at 723 (plurality opinion) ("[T]he concept of probable cause has little meaning for a routine inventory conducted by public employers for the purposes of securing state property.").

182 One need only consider the plight of Dr. Ortega after his employer was able to conduct a fishing expedition to come up with reasons to terminate his employment. *See* Ortega v. O'Connor, 146 F.3d 1149, 1152 (9th Cir. 1998) ("Dr. Ortega claimed that the defendants' repeated intrusions constituted an unreasonable and indiscriminate search—essentially a fishing expedition—aimed at discovering whether there was any material of any kind in his possession that might be used against him at an administrative proceeding.").

183 *O'Connor* 480 U.S. at 745 (Blackmun, J., dissenting) (arguing against "dispensing with a warrant in all searches by the employer" and noting "[t]he warrant requirement is perfectly suited for many work-related searches" (emphasis omitted)).

184 *See* Primus, *supra* note 8, at 299–300 ("Simply declaring that there are 'special needs' in the government employment context, as administrative search doctrine now makes it natural to do, points judges away from noticing that there may be instances in which it would be perfectly appropriate to require a government official to get a warrant before searching an employee's belongings.").

employer would be prejudiced by having to obtain a warrant in such investigatory situations.[185]

1. Requiring a Warrant Based on Probable Cause for Investigatory Searches

The proper departure point for this section is the proposition that courts should abandon the probable cause requirement "[o]nly in those *exceptional circumstances* in which special needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable."[186] Indeed, "a search conducted without probable cause and a search warrant is unconstitutional except in a few unusual situations."[187] In those instances when an employer is seeking evidence of wrongdoing against an employee as part of an investigatory search, it is not evident why requiring a warrant from a neutral magistrate is "impracticable" as five Justices determined in *O'Connor*[188] or qualifies as an "exceptional circumstance" where a special needs analysis should apply. Consider *O'Connor* itself in this regard.

Dr. Ortega was out on administrative leave on advice of counsel.[189] There was therefore plenty of time to swear out a warrant before a neutral magistrate based on probable cause. Indeed, because the search was done without subjecting it to review by a magistrate, what resulted was a "general rummaging through the doctor's office, desk, and file cabinets."[190] A magistrate would have limited the infringement on Dr. Ortega's privacy rights by requiring the Hospital "to articulate their exact reasons for the search and to specify the items in Dr. Ortega's office they sought."[191]

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185 Indeed, as Justice Blackmun notes in his *O'Connor* dissent, "the plurality has failed to explain why, on the facts of this case, obtaining a warrant would have been burdensome for [the hospital], even if one assumes that they were unfamiliar with this requirement." *O'Connor*, 480 U.S. at 745 n.10 (Blackmun, J., dissenting).

186 New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) (emphasis added).

187 *See* Primus, *supra* note 8, at 255 (citing City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010)).

188 In addition to the four-Justice plurality in *O'Connor*, Justice Scalia in his concurrence in *O'Connor* agreed that special needs existed in the public workplace context and, therefore, a warrant was not required. *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring); *see also Quon*, 130 S.Ct. at 2628 ("'[S]pecial needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable for government employers." (quoting *O'Connor*, 480 U.S. at 725)).

189 *O'Connor*, 480 U.S. at 747 n.13 (Blackmun, J., dissenting).

190 *Id.* at 743.

191 *Id.*

Therefore, like Justice Blackmun in his dissent in *O'Connor*, this Article contends that a search warrant should be presumptively required where the employer is clearly seeking evidence to take adverse employment action against the employee,[192] unless the employer can show that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[193] In other words, the presumption is that a government search without a warrant is *per se* unreasonable unless a "special need" can be established, and the burden is on the government employer to make such a showing.[194] Because neither the plurality nor Justice Scalia in *O'Connor*, nor the Court in *Quon*, explain sufficiently why applying the probable cause standard would "impose intolerable burdens on public employers,"[195] and the probable cause standard is properly characterized as a "practical, nontechnical conception,"[196] it is unlikely that many public employers will be able to meet this burden and escape from the warrant requirement when undertaking investigatory searches of their employees' offices and electronic communications.

Government employers should also have to presumptively obtain a warrant based on probable cause because investigatory searches of public employees' offices are more like criminal searches where evidence is being sought in order to penalize an individual.[197] Indeed,

192 *Id.* ("[B]ecause no 'special need' . . . demanded that the traditional warrant and probable-cause requirements be dispensed with, the [hospital's] failure to conduct the search in accordance with the traditional standard of reasonableness should end the analysis . . . ."). *See* Primus, *supra* note 8, at 300 ("By adopting the special needs test to cover government employment cases wholesale, rather than differentiating between different kinds of searches that might occur within the government workplace, the Court unnecessarily expanded the government's ability to search government employees' offices without any form of judicial or legislative preclearance.").

193 *O'Connor*, 480 U.S. at 720 (plurality opinion) (quoting Camara v. Mun. Court, 378 U.S. 523, 533 (1967)).

194 Technological advances could actually now make it much easier for a government employer to receive a warrant based on probable cause. *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1493 (1985) (suggesting that officials take advantage of technology and update warrant requirements based on this new technology). Such telephonic warrants are already available in analogous criminal law scenarios. *See, e.g.*, FED. R. CRIM. P. 41(D)(3); WIS. STAT. § 968.12(3) (2011); *see also* Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 729 (1988) (discussing telephonic warrants in the criminal procedure context).

195 *O'Connor*, 480 U.S. at 724 (plurality opinion).

196 *Id.* at 747 (Blackmun, J., dissenting) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

197 *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE 382–85 (9th ed. 2007) (noting difficulty of distinguishing "between a

the requirement of having individualized suspicion for these types of searches is crucial as a "bulwark against the arbitrary power that could flow from excessive discretion."[198] Look what happened in *O'Connor* in this regard when no individualized suspicion was required: a fishing expedition through Dr. Ortega's personal effects.[199] Additionally, the harm inflicted on the individual in such circumstances is greater because such targeted searches "are more likely to carry the stigmatic burdens associated with the suspicion of wrongdoing."[200]

For all of these reasons, then, workplace investigatory searches should presumptively[201] require a public employer to obtain a warrant based on probable cause. Only where the employer can make a showing that obtaining such a warrant would be impracticable under all the circumstances, should the employer be able to rely on the "special needs" exception.[202]

2. Potential Criticism of the Proposed Bifurcated Approach to Workplace Searches in the Public Sector

The adoption of the warrant and probable cause requirement presumptively in investigatory workplace searches will doubtlessly lead to a number of criticisms and concerns. Chief among them may be: (1) the subsequent perceived tension between privacy rights and free speech rights in public sector employment law; and (2) the impact of this Fourth Amendment approach on federal and state public record laws. Each of these will be considered in turn.

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search done for 'administrative' purposes and a search that is done to obtain evidence of a criminal violation"); *see also* Primus, *supra* note 8, at 272 ("[Government employee] searches are targeted. They focus on specific individuals, much as routine investigative practices do.").

198 Primus, *supra* note 8, at 286; *see also* Amsterdam, *supra* note 154, at 411 ("[I]ndiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously . . . .").

199 *See supra* note 182 and accompanying text.

200 Primus, *supra* note 8, at 272.

201 A warrant based on a probable cause is only presumptively required because there will be some scenarios where the context of the search and the nature of government employment, say a strip search of prison guards in a state correctional facility, make the use of the probable cause standard unsuitable. In such circumstances, the balancing test offered by the plurality in *O'Connor* should be utilized. *See* O'Connor v. Ortega, 480 U.S. 709, 710 (1987) (plurality opinion).

202 *See* Primus, *supra* note 8, at 310 ("[C]ourts should ask whether complying with the warrant and probable cause requirements is actually impractical in a given kind of case.").

a. The Relationship Between Fourth and First Amendment Rights in the Public Employment Context

Critics might be concerned with this bifurcated approach to investigatory workplace searches under the Fourth Amendment because it appears to place workplace privacy rights in tension with public employee free speech rights under the First Amendment. Currently, under the *Pickering* line of cases, courts balance the speech rights of government employees to comment as citizens on matters of public concern with the right of the government to run an efficient public service.[203] By applying the warrant and probable cause requirements to workplace investigatory searches, the argument goes, Fourth Amendment privacy rights are being inappropriately placed in a preferred position as compared to First Amendment speech rights.

There are two responses to this criticism. The first response is based purely on the text of the two amendments. Only the Fourth Amendment requires a warrant based on probable cause being sworn out with particularity.[204] Of course, no such requirement exists under the First Amendment free speech clause.[205]

So although free speech rights have long been subject to a balancing test in the public workplace, a balancing test has only been required under the Fourth Amendment if a special needs analysis applies. The special needs analysis, however, only applies in exceptional circumstances where it would be impracticable to obtain a warrant.[206] The analysis above, however, suggests that it would be normally practical for government employers to obtain a warrant before undertaking targeted, investigatory searches of its employees' physical and electronic locations. That such a warrant requirement would require a higher level of scrutiny of privacy rights than the balancing test does for free speech rights is merely a consequence of the constitutional text.

Second, and relatedly, the presence of Fourth Amendment freedoms can be viewed as a necessary precondition for the exercise of

203 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

204 "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." U.S. CONST. amend. IV.

205 "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

206 Indeed, with noninvestigatory, routine searches of employees' offices, the special needs exception will apply under the proposed approach.

First Amendment freedoms.[207] In other words, all the liberties contained in the Bill of Rights, including free speech rights, could not be effectively exercised without freedom from arbitrary government search and seizures. The U.S. Supreme Court has commented in this regard: "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[208] Thus, where privacy rights are subject to potential governmental overreaching in a disciplinary context, mere governmental efficiency interests must give way to fundamental constitutional rights under the Fourth Amendment.[209]

b. Public Record Laws: Personal Records vs. Government Function Records

Still other critics might be concerned that this proposed approach is inconsistent with state or federal public record laws,[210] which may require public employees to disclose written or electronic records to the public or their employer without need for a search warrant.[211] As an initial matter, and notwithstanding the general presumption of disclosure,[212] the public's right to access public records is

207 *See* Strossen, *supra* note 166, at 1241.

208 *See* Marcus v. Search Warrant, 367 U.S. 717, 729 (1961).

209 *See* United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms.").

210 *See, e.g.*, Public Records Law, WIS. STAT. §§ 19.31-.39 (2011). The general presumption is that public records are *open to the public* unless there is a clear statutory or common law exception. *Id.* § 19.32(2) (emphasis added) ("'Record' means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority."). On the federal level, Congress promulgated the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), to ensure government transparency.

211 In his majority opinion in *Quon*, Justice Kennedy discusses the potential "operational realities" in that case and notes that, "[i]t would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including . . . perhaps compliance with state open records laws. These matters would all bear on the legitimacy of an employee's privacy expectation." City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010) (citing CAL. PUBLIC RECORDS ACT, CAL. GOVT. CODE ANN. § 6250 *et seq.* (West 2008)).

212 WIS. STAT. § 19.31 (2011) ("[The Wisconsin Public Records Law] shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business."). I rely on the Wisconsin Public Records Law throughout this section as it represents one of the more stringent public record laws

not absolute,[213] and in Wisconsin and under federal statutes, for instance, there are some 175 specific exemptions to the public record law.[214] State statutory exemptions protect records ranging from mental health records to attorney-client privileged documents.[215] Additional common law exceptions include preventing disclosure if privacy or reputational interests are at stake,[216] or where such records are purely personal.[217]

As far as purely personal e-mails, the Wisconsin Supreme Court recently concluded in *Schill v. Wisconsin Rapids School District*[218] *that teachers' personal* e-mails[219] sent on school district e-mail accounts and district-owned computers were not records under the Public Records Law and need not be disclosed.[220] The important point here is that, "the content of a document must have a connection to a government function to constitute a record within the meaning of Wis. Stat. § 19.32(2)."[221]

Yet, "if the e-mails were used as evidence in a disciplinary investigation or to investigate the misuse of government resources, the personal e-mails would be records under Wis. Stat. § 19.32(2),"[222] and

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in the country. *See* Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177, 182 (Wis. 2010) ("If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government.").

213 *See* WIS. DEP'T OF JUSTICE, WISCONSIN PUBLIC RECORDS LAW, WIS. STAT. §§ 19.31–19.39: COMPLIANCE OUTLINE 20 (2007), *available at* http://www.doj.state.wi.us/AWP/2007OMCG-PRO/2007_PR_Outline.pdf. The Wisconsin statutes and the federal statutes, such as the Family Educational Rights and Privacy Act (FERPA), contain more than 175 additional exemptions that are applicable to state-government offices.).

214 *See generally* State ex. rel. Blum v. Bd. of Educ., 565 N.W.2d 140 (Wis. Ct. App. 1997) (discussing some of the exemptions to disclosure, such as pupil records).

215 *See* WIS. STAT. §§ 51.30, 905.03 (2011).

216 *See* Woznicki v. Erickson, 549 N.W.2d 699, 700–701 (Wis. 1996).

217 *See Schill*, 786 N.W.2d at 183 n.4 .

218 *Id.* at 177.

219 The teachers in *Schill* did not object to the release of their work-related e-mails, that is, e-mails with a connection to school district affairs or their official actions as public employees. *Id.* at 186.

220 *Id.* at 185–86 ("The contents of the personal e-mails that the Teachers created and maintained on government-owned computers pursuant to the government employer's permission for occasional personal use of the government e-mail account and computer are not 'records' under [WIS. STAT.] § 19.32(2)."). As Chief Justice Abrahamson observed: "We know of no state that has reached the conclusion that the contents of such personal e-mails should be released to members of the public." *Id.* at 183.

221 *Id.* at 196.

222 *Id.* at 185, 208.

may be subject to disclosure under the Wisconsin Public Record Laws.[223] This is because where there are allegations of misconduct, "[t]he public has an interest in monitoring how the resources it finances are used by government employees" and in being able to "review[ ] the conduct of disciplinary investigations."[224] In such circumstances, the applicable test would require a custodian of records to consider all relevant factors to determine "whether permitting inspection would result in harm to the public interest which [would] outweigh[ ] the legislative policy recognizing the public interest in allowing inspection."[225] If the content of the email "is personal in part and has a connection with the government function in part, then the custodian [of the records] may need to redact the personal content and release the portion connected to the government function."[226]

This analysis, however, points to the fact that even if public employee records are required to be disclosed in some circumstances to their employer or to the public, there is still substantial room to protect many types of personal documents and materials which may exist in that employee's personal office space. To the extent that such materials are not subject to disclosure under the public records law, they should be protected from targeted, investigatory searches by government employers by the warrant and probable cause requirements of the Fourth Amendment for the reasons discussed in detail above.

A majority of the Supreme Court in *O'Connor* appears to sanction this approach. Justice Scalia in his concurrence, joined by the four members of the plurality, observed that, "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable

223 *See id.* at 183 ("Personal e-mails are . . . not always records within the meaning of WIS. STAT. § 19.32(2) simply because they are sent and received on government e-mail and computer systems."); *see also* WIS. STAT. §19.36(10)(b) (2011) (prohibiting an employee from disclosing employee records relating to a *current* investigation of possible employment-related misconduct or potential criminal or civil law violations).

224 *See Schill*, 786 N.W.2d at 185–86 n.9. Indeed, when employee records were implicated in investigations into alleged misconduct, these records have been considered "public records" under WIS. STAT. § 19.32(2) in a number of cases. *See, e.g.*, Linzmeyer v. Forcey, 646 N.W.2d 811, 814 (Wis. 2002) ("In the absence of a statutory or common law exception, the presumption favoring release can only be overcome when there is a public policy interest in keeping the records confidential."); Armada Broadcasting, Inc. v. Stirn, 516 N.W.2d 357, 361 (Wis. 1994) ("We have also recognized that there is a public-policy interest in protecting the reputation of its citizens.").

225 Woznicki v. Erickson, 549 N.W.2d 699, 701 (Wis. 1996).

226 *Schill*, 786 N.W.2d at 207.

intrusions in its capacity as employer."[227] While one may not have a privacy interest in one's workplace communications as to the public because of the operation of the public records law, one can still have a privacy interest against the government employer if previous employer actions suggested to the employee that they had a reasonable expectation of privacy in a physical or electronic location in the workplace.[228] For instance, and as Justice Kennedy pointed out in the majority opinion in *Quon*, "many employers expect or at least tolerate personal use of [employer-owned communication devices] by employees because it often increases worker efficiency."[229] Under this scenario, employees may still have a reasonable expectation of privacy in their employer-owned communication devices vis-à-vis their government employers.[230]

The important point here is that through contextualization of the public workplace search—with a focus on both the reason for the search and the identity of the party seeking to undertake the search—a more privacy-protective legal standard may be fashioned for investigatory workplace searches in the public sector undertaken to discover employee wrongdoing. Indeed, reestablishment of the warrant and probable cause requirements for investigatory searches will strengthen public employee workplace privacy rights and restore such rights to an appropriate higher level of constitutional protection under the Fourth Amendment than similar common law privacy protections in the private-sector workplace.

227 *See* O'Connor v. Ortega, 480 U.S. 709, 731 (1987) (Scalia, J., concurring in the judgment); *id.* at 717 (plurality opinion) (agreeing with Justice Scalia's statement).

228 City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010) ("[I]t would be necessary to ask whether [the supervisor's] statements could be taken as announcing a change in [police department] policy, and if so, whether [the supervisor] had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging.").

229 *Id.* at 2629 (citing Brief for Electronic Frontier Foundation et al. 16–20); *see Schill*, 786 N.W.2d at 182 ("As a part of normal workplace operation, many government offices, like many private employers, have chosen to allow their employees to send and receive occasional personal messages on the employer's e-mail system."); *see also id.* at 183 ("Reasonable government workplace policies in line with private sector practice help government attract and retain skilled employees.").

230 *See Schill*, 786 N.W.2d at 196 ("[T]here is a distinction between allowing public oversight of employees' use of public resources and invoking the Public Records Law to invade the private affairs of public employees by categorically revealing the contents of employees' personal e-mails.").

Conclusion

All employees, whether public or private, should retain some reasonable expectation of privacy in their physical and electronic locations at work. Such privacy rights promote productivity, positively impact employee morale, and support the recruiting and retention of highly competent employees. The proper level of privacy protection, this Article maintains, should be based on whether the search involves a public sector or private sector workplace. Public sector workers are entitled to greater levels of privacy protections than their private sector counterparts based on the text of the Constitution, the immense power of the government as employer, and the critical oversight role public employees play in a representative democracy.

To ensure this higher level of workplace privacy protection for public employees, and to reverse the equalization of public and private workplace privacy rights post-*Quon*, this Article argues that public employer searches of employee physical and electronic locations in the workplace should be bifurcated based on the nature of the search. If the search is undertaken for routine, noninvestigatory purposes, the special needs exception to the warrant requirement should apply and such searches should be considered reasonable without a warrant if related to legitimate work reasons and reasonable in scope. On the other hand, investigatory workplace searches to uncover employee misconduct or wrongdoing should be treated like other targeted government searches where a sanction or penalty is possible. Such searches should require the employer to obtain a warrant based on probable cause in front of a neutral magistrate unless the employer can prove that special needs exist to conduct the investigatory search without a warrant.