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CONSTITUTIONAL LAW—EMPLOYEES' FOURTH AMENDMENT RIGHTS BEYOND THEIR WORK SPACE: THE EMPLOYMENT RELATIONSHIP AS A SOURCE OF PRIVACY EXPECTATIONS

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NOTE

CONSTITUTIONAL LAW – EMPLOYEES' FOURTH AMENDMENT RIGHTS BEYOND THEIR WORK SPACE: THE EMPLOYMENT RELATIONSHIP AS A SOURCE OF PRIVACY EXPECTATIONS

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right . . . .[1]

INTRODUCTION

Consider the following situation. Police enter the office building of XYZ Corporation without a search warrant and without consent. The building is not open to the general public; access is primarily limited to employees. The police seize items from Jane Doe's office on the second floor and from another room on the third floor. These items are later used as evidence to indict Doe on criminal charges.

Doe is likely to argue that the items were illegally obtained in violation of her Fourth Amendment rights[2] and cannot be introduced into evidence at her trial. Before Doe can seek the remedy of the exclusionary rule,[3] she must first meet certain requirements

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1. Boyd v. United States, 116 U.S. 616, 635 (1886).

2. U.S. CONST. amend. IV. The Fourth Amendment 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

3. The exclusionary rule is a remedy available to the court when a Fourth Amendment violation has been established and which results in the inadmissibility of

to establish a constitutional violation. Doe must establish that the rooms searched were places in which one could have a "legitimate expectation of privacy."[4] More specifically, she must demonstrate that the search and seizure violated *her* Fourth Amendment rights, as opposed to those of her employer or another employee.[5] This latter criterion is often referred to as establishing "standing" to assert a constitutional violation.[6]

Doe is likely to be able to establish standing with respect to the search of her own office.[7] However, her ability to establish standing with respect to the search of the room beyond her office may prove more difficult. A variety of factors, such as whether other employees have access to that room or whether Doe's work establishes some connection to that room, may be relevant to the court's decision.[8]

This Note examines the issue of what establishes the basis upon which an employee may assert a Fourth Amendment claim when police conduct a search beyond her own workspace.[9] The Su-

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the illegally obtained evidence at trial. *See* Alderman v. United States, 394 U.S. 165, 171 (1969). The rule was originally established for evidence obtained by federal officials in *Weeks v. United States*, 232 U.S. 383, 397-98 (1914) and later extended to state officials in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The fundamental purpose of the rule is to deter illegal police conduct. United States v. Calandra, 414 U.S. 338, 348 (1974) (stating that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

4. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

5. *See* United States v. Salvucci, 448 U.S. 83, 86 (1980) (stating that the defendant must show that he is a "victim of an invasion of privacy") (quoting Jones v. United States, 362 U.S. 257, 261 (1960)).

6. See *infra* note 60 for an explanation of standing and the distinction between the constitutional requirement and the judicially created requirement imposed by the Supreme Court for Fourth Amendment claims in particular. In *Rakas v. Illinois*, the Court expressly rejected a separate standing analysis and stated that it merged into the substantive Fourth Amendment analysis. 439 U.S. 128, 140 (1978). The courts, however, have continued to use the phrase to encompass the issue germane to this Note. *See Salvucci*, 448 U.S. at 97 (Marshall, J., dissenting); United States v. Brien, 617 F.2d 299, 305 (1st Cir. 1980); Tobias v. Indiana, 479 N.E.2d 508, 510 (Ind. 1985); State v. Richards, 552 N.W.2d 197, 204 (Minn. 1996).

7. *See* Mancusi v. DeForte, 392 U.S. 364 (1968) (holding that a Union official had standing to object to a search of his office); United States v. Chuang, 897 F.2d 646, 650 (2d Cir. 1990) (noting that the defendant may have had standing to object to a search of his office).

8. See *infra* Part II for a discussion of the factors relied upon by the courts in addressing this issue.

9. This Note solely addresses government searches pursuant to criminal investigations. It does not address other problems that emerge when the government as employer conducts searches. See Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations*, 29 AM. BUS. L.J. 625, 645-63 (1992)

preme Court has not precisely addressed this issue, although petitions for certiorari have been filed on several occasions to resolve the question.[10] The Court has, however, through case law addressing workplace-related issues, set forth certain fundamental principles relevant to the inquiry.[11] Guided by these principles, the lower courts have developed their own criteria to answer this question.

Part I begins by examining how the Supreme Court has addressed two questions central to resolving the issue in this Note: (1) to what degree is the workplace a locus in which one can have privacy expectations protected by the Fourth Amendment, and (2) what establishes the basis upon which an employee may assert a claim? In particular, this section analyzes *Mancusi v. DeForte*,[12] the Supreme Court case that most directly addresses an employee's privacy expectations in a workplace environment shared with other employees. Part II then discusses two approaches the lower courts have developed in light of the principles articulated by the Supreme Court. These approaches address the specific issue of an employee's right to assert a Fourth Amendment claim in searches beyond her workspace. Some of these courts have applied a "totality of circumstances" test, using the same multi-factor approach they apply in non-workplace contexts. Several other courts have devised an approach specific to the workplace context, focusing on whether the employee can demonstrate a "nexus" between her workspace and the area searched. Part II then addresses a recent Tenth Circuit decision, *Anderson v. United States*,[13] in which the court discusses the competing merits of the two approaches.

Part III argues that both approaches fail to recognize how the employment relationship provides a basis for privacy expectations. This section contends that the collaborative nature of work and the legal obligations that arise from this relationship establish a basis for shared privacy rights between employer and employee. Part III

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and Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 VA. L. REV. 243, 262-74 (1993), for a discussion of the issues arising in workplace searches conducted by government employers.

10. *See* United States v. Anderson, 154 F.3d 1225 (10th Cir. 1998) (holding that the defendant had standing beyond workspace), *cert. denied*, 526 U.S. 1159 (1999); United States v. Chuang, 897 F.2d 646 (2d Cir. 1990) (holding that the defendant did not have standing in search of subordinate's office), *cert. denied*, 498 U.S. 824 (1990); United States v. Britt, 508 F.2d 1052 (5th Cir. 1975) (holding that the defendant did not have standing in search of storage area), *cert. denied*, 423 U.S. 825 (1975).

11. See *infra* Part I for a discussion of the Court's approach to workplace privacy and an employee's right to assert a claim.

12. 392 U.S. 364 (1968).

13. 154 F.3d 1225 (10th Cir. 1998).

also examines how the courts have, in non-workplace contexts, relied on relationships as a basis for establishing Fourth Amendment rights. This Note contends that courts recognize the employment relationship as a source of Fourth Amendment rights for several reasons: to protect people in a place in which they spend a significant portion of their time, to deter unwarranted government intrusion, and to halt a disturbing trend towards using commercial relationships as a basis for eroding Fourth Amendment rights beyond the workplace. Finally, Part IV suggests an analytical model that recognizes the employment relationship as a basis for Fourth Amendment rights but which also encompasses established Fourth Amendment limiting principles to allow for legitimate police intrusions.

I. WORKPLACE PRIVACY & AN EMPLOYEE'S RIGHT TO ASSERT A FOURTH AMENDMENT CLAIM

The fundamental inquiry in any Fourth Amendment claim is "whether the disputed search . . . has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[14] To answer this question the courts often focus on two factors. The first is whether the place searched was one in which a person could have a legitimate expectation of privacy.[15] The courts have afforded varying degrees of Fourth Amendment protection depending upon the nature of the location in which the search takes place.[16] If one were to envision a spectrum, places such as open fields would fall at one end, where no protection is afforded,[17] while one's own home would be at the opposite end, where the courts traditionally have afforded the highest level of constitutional pro-

14. Rakas v. Illinois, 439 U.S. 128, 140 (1978).

15. In *Katz v. United States*, the Supreme Court expressly rejected the notion that the Fourth Amendment protects places rather than people. 389 U.S. 347, 351 (1967). The location, however, continues to be relevant for purposes of determining whether a "search" within the meaning of the Fourth Amendment took place. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (concluding that a search in an open field does not implicate Fourth Amendment privacy expectations); United States v. Lee, 274 U.S. 559, 563 (1927) (suggesting there is no expectation of privacy for a motorboat on high seas).

16. *See* New York v. Burger, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home."); *Rakas*, 439 U.S. at 148 ("We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes.") (citations omitted).

17. *Oliver*, 466 U.S. at 179.

tection.[18] Consequently, in determining an employee's right to assert a Fourth Amendment claim, it is important to determine where the workplace falls along this spectrum.

The second factor is whether the person asserting the claim has a legitimate basis for asserting a claim.[19] The party asserting the claim must have been "aggrieved" by the search—a victim of the search as opposed to one who is incidentally harmed by a search directed at another.[20] In order to make this determination, the court examines the claimant's relationship to the place searched and the item seized.[21] This inquiry is especially critical for employees, where documents belonging to the employer are often the target of a workplace search.[22]

Part I.A discusses how the courts have historically viewed the degree of Fourth Amendment protection afforded in the workplace. It also examines limitations imposed on that protection due to the public or highly regulated nature of certain businesses. Next, Part I.B examines the evolution of the Court's approach for determining whether a person has been "aggrieved" by a search. This section highlights the *Mancusi v. DeForte*[23] decision in which the Supreme Court addressed an employee's right to assert a claim

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18. *See* Minnesota v. Carter, 525 U.S. 83, 106-07 (1998) (Ginsburg, J., dissenting) (noting "the unique importance of the home — the most essential bastion of privacy recognized by the law"); Payton v. New York, 445 U.S. 573, 601 (1980) (noting "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic").

19. *See Rakas*, 439 U.S. at 143 (noting that the *Katz* decision instructs the courts that Fourth Amendment protection depends upon "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

20. *See* Jones v. United States, 362 U.S. 257, 261 (1960) (distinguishing between one who is a victim of a search and thus, aggrieved, as opposed to one who is not targeted by the search and incidentally prejudiced), *overruled on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980). *Salvucci* overruled the automatic standing part of the *Jones* decision. *See* 448 U.S. at 85-86, 95. The other part, the "legitimately on the premises" test, was overruled by *Rakas*, 439 U.S. at 142. However, the factual setting in *Jones* would still satisfy the current Fourth Amendment standard of "legitimate expectation of privacy." *See Rakas*, 439 U.S. at 142-43; *see also* Minnesota v. Olson, 495 U.S. 91, 97-98 (1990) (noting that "the *Rakas* Court explicitly affirmed the factual holding in *Jones*").

21. *See Rakas*, 439 U.S. at 148 (holding that the defendants' claim must fail since "[t]hey asserted neither a property nor possessory interest in the [place searched], nor an interest in the property seized").

22. *See* United States v. Anderson, 154 F.3d 1225, 1230 (10th Cir. 1998) (noting that most cases that discuss employee standing involve seizure of work-related documents from the workplace).

23. 392 U.S. 364 (1968).

where he had neither property rights in the item seized nor exclusive use of the area searched.

A. *Fourth Amendment Protection in the Workplace*

Although the text of the Fourth Amendment does not expressly refer to workplaces, the Supreme Court has long held that commercial, as well as residential, premises fall within the Amendment's scope.[24] In one of the earliest cases to address the scope of the Fourth Amendment, the Court held that business papers must be afforded the same protection as personal papers.[25] The Court recently noted that "[a]s with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'"[26]

For some time the courts failed to make any meaningful distinction between the constitutional protection afforded in a home and a place of business.[27] Eventually, two important distinctions emerged. The first was that businesses, unlike homes, might be open generally to the public.[28] The second was that businesses tend to be subject to many more government regulations than residential premises.[29] Both of these distinctions impact the degree of Fourth Amendment protection one can expect in a workplace.

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24. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978); See v. City of Seattle, 387 U.S. 541, 543 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

25. *See* Boyd v. United States, 116 U.S. 616, 622 (1886) (calling the invoices that the defendant was compelled to produce "private papers" and, thus, within the scope of the Fourth Amendment).

26. O'Connor v. Ortega, 480 U.S. 709, 716 (1987) (quoting Oliver v. United States, 466 U.S. 170, 178 n.8 (1984)).

27. *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (discussing the authority to search one's home or place of business); Gouled v. United States, 255 U.S. 298, 305-06 (1921) (discussing the "security and privacy of the home or office"), *overruled in part by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

28. This distinction is relevant not only for traditional workplaces, but any place in which privacy is not possible due to the public nature of the place. *See, e.g.*, *Oliver*, 466 U.S. at 179 (open fields); United States v. Brandon, 599 F.2d 112, 113 (6th Cir. 1979) (used car lot); State v. Herbest, 551 A.2d 442, 444 (Me. 1988) (reception area of hospital emergency room); Commonwealth v. Adams, 341 A.2d 206, 210-11 (Pa. Super. Ct. 1975) (bus terminal); *cf.* Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

29. *See See*, 387 U.S. at 545-46 (noting that businesses may reasonably be subject to more inspections than homes).

1. Public/Private Distinctions

While the Fourth Amendment requires that no warrants be issued without probable cause, no such warrant requirement applies to enter premises that are open to the public.[30] The courts have held on these grounds that police could accept a general public invitation to enter a business, albeit for reasons unrelated to the business's purpose, without a warrant.[31] Because the public invitation creates the warrant exception, courts may limit this exception to hours that the business is open to the public[32] or to those portions of the premises open to the public.[33]

Likewise, an officer is "entitled to take note of objects in plain view."[34] Some courts have limited the plain view doctrine so that the warrant exception applies only when police view objects within the premises as a member of the public would.[35] Consequently, the

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30. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4(b) (3d ed. 1996) (noting that various police investigative conduct is permissible without warrants where the premises are open to the public).

31. *E.g.*, United States v. Berrett, 513 F.2d 154, 156 (1st Cir. 1975) (per curiam); *see, e.g.*, Donovan v. Lone Steer, Inc., 464 U.S. 408, 413 (1984) (public lobby of motel and restaurant); Northside Realty Assocs., Inc. v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979) (real estate office); Cantizano v. United States, 614 A.2d 870, 873 (D.C. 1992) (per curiam) (mail courier office); Wilson v. Commonwealth, 475 S.W.2d 895, 897 (Ky. 1971) (furniture store); State v. Lund, 409 So.2d 569, 570 (La. 1982) (bar); Sullivan v. Dist. Court, 429 N.E.2d 335, 338-39 (Mass. 1981) (cafeteria in hospital); State *ex rel.* Rear Door Bookstore v. Tenth Dist. Court of Appeals, 588 N.E.2d 116, 124-25 (Ohio 1992) (bookstore).

32. *E.g.*, United States v. Swart, 679 F.2d 698, 701 (7th Cir. 1982) ("Commercial establishments do not extend an implicit invitation to enter during nonbusiness hours or when there are no employees on the premises."); *see also Wilson*, 475 S.W.2d at 898 (locker accessible at any time). *But see* United States v. Alewelt, 532 F.2d 1165, 1168 (7th Cir. 1976) (holding that the defendant had no Fourth Amendment claim where police gained entrance through a "technical trespass" after hours since he knowingly left the item in a place open to the public).

33. *See, e.g.*, State v. Baker, 271 A.2d 435, 439 (N.J. Super. Ct. App. Div. 1970) (holding that "the rear room was not visible from [other parts of the store], and the incursion to the rear room in the course of a thorough search of the whole first floor . . . was plainly not justified on the theory of store premises open to the public").

34. *Berrett*, 513 F.2d at 156; *see* Maryland v. Macon, 472 U.S. 463, 469 (1985) (finding no search where an officer purchased magazines from an adult bookstore and then examined them to see if they were obscene); People v. Superior Court, 82 Cal. Rptr. 507, 509 (Cal. Ct. App. 1969) (finding no search where officer picked up a typewriter in a pawnshop to view the serial number); State v. Cockrum, 592 S.W.2d 300, 303 (Mo. Ct. App. 1979) (finding no search where officer examined serial numbers on appliances for sale in store).

35. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) (holding that the government official had conducted a search in an adult bookstore where he viewed films without paying for them as a customer would be required to do); *see also* Winters v. Board of County Comm'rs, 4 F.3d 848, 854 (10th Cir. 1993) (holding that the police

degree of access by the public may limit a business owner's, as well as any employee's, right to assert a Fourth Amendment claim.

2. Closely Regulated Industries

Almost all businesses are subject to some form of government regulation.[36] These regulations may include health and safety codes, licensing requirements, or record keeping requirements. It was not until 1967 that, in a pair of decisions, the Supreme Court addressed the question of whether government regulations would reduce privacy expectations to such a degree that search warrants might not be constitutionally required.[37]

In those cases, the defendants were prosecuted for refusing to allow city officials to conduct inspections pursuant to safety ordinances; one setting was residential[38] and the other was commercial.[39] The Court held that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."[40] The Court noted, however, that there might be more situations in which it is reasonable to inspect a business than a private home and that the reasonableness of these inspections must be addressed on a case-by-case basis.[41]

Subsequently, the Court began to carve out exceptions to warrant requirements for industries that had a history of government oversight.[42] The Court eventually expanded the exception to encompass "closely regulated" industries,[43] regardless of whether there was a history of oversight.[44] In *New York v. Burger*,[45] the

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conducted a search when they demanded that the clerk produce a ring described in the pawnshop record even though the ring was located in a display case).

36. *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. §§ 651-71 (1998).

37. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

38. *See Camara*, 387 U.S. at 527 (housing code inspection of residence).

39. *See See*, 387 U.S. at 541 (search pursuant to fire code enforcement).

40. *Id.* at 545.

41. *See id.* at 546.

42. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972) (gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor licensee).

43. Interestingly, the expansion to "closely regulated" businesses came out of a case in which the Court held that an Occupational Safety and Health Act (OSHA) provision violated the Fourth Amendment. Marshall v. Barlow's, Inc., 436 U.S. 307, 324-25 (1978).

44. Donovan v. Dewey, 452 U.S. 594, 605-06 (1981)(rejecting the length of time of the oversight and instead focusing on "the pervasiveness and regularity of the federal regulation" with regard to a search at a stone quarry); *see also* New York v. Burger, 482

Court set some boundaries on these exceptions by establishing a three-part test for determining whether warrantless inspections of these businesses are reasonable.[46] Most importantly, the test required specific statutory authorization for inspections to "provid[e] a constitutionally adequate substitute for a warrant."[47]

The *Burger* Court had noted that "[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home."[48] The Tenth Circuit later explained that a reduced expectation of privacy in the workplace is important for Fourth Amendment purposes in two ways.[49] First, it "may justify a *statutory* authorization of warrantless . . . searches."[50] Second, it may "affect the type of evidence that constitutes probable cause to obtain a search warrant."[51]

Consequently, the fact that a search is conducted on commercial premises does not automatically result in reduced Fourth Amendment protection.[52] The public nature of a business may affect privacy expectations and thus, limit protection. Likewise, a business may be closely regulated and put on sufficient notice of government oversight so that Fourth Amendment protection is limited.

B. *An Employee's Right to Assert a Fourth Amendment Claim*

Like Fourth Amendment claims in other settings, courts ana-

U.S. 691, 702 (1987) (finding that a warrantless inspection of a pervasively regulated business may be reasonable under the Fourth Amendment).

45. 482 U.S. 691 (1987).

46. *Id.* at 702-03. The test required: 1) the regulation must be informed by a substantial government interest; 2) warrantless inspections must be necessary to carry out the regulatory purpose; and 3) a constitutionally adequate substitute for a warrant must be specified in the statute's inspection provision in terms of certainty and regularity of its application. *Id.*

47. *Id.* at 703 (alteration in original) (quoting *Donovan*, 452 U.S. at 603) (noting that the statute must be sufficiently defined to put a business on notice that it is subject to inspections and that the inspector's discretion must be limited in time, place, and scope).

48. *Id.* at 700.

49. United States v. Leary, 846 F.2d 592, 597-98 n.6 (10th Cir. 1988) (discussing privacy expectations in a commercial setting); *accord* Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1216 n.5 (D.C. Cir. 1981) (comparing entry onto commercial versus private premises).

50. *Leary*, 846 F.2d at 597 n.6 (emphasis added).

51. *Id.* at 597-98 n.6 (citing *Blackie's House of Beef, Inc.*, 659 F.2d at 1216-17 n.5).

52. *Blackie's House of Beef, Inc.*, 659 F.2d at 1216 n.5 (stating that except in rare instances, a warrant is as necessary to support a search of commercial premises as private premises).

lyzed early workplace cases by focusing on property rights.[53] The right to suppress evidence was linked to the right to seek the return of one's own property.[54] Therefore, if a person did not have ownership, she could not be "aggrieved" by a search and seizure.[55] Corporations were considered "persons" within the meaning of the Fourth Amendment and, thus, could assert claims as property owners.[56] Corporate shareholders, however, could not assert a claim without an interest independent of the corporation's right.[57]

Eventually the courts expanded the scope of Fourth Amendment protection to include persons with possessory as well as proprietary interests.[58] However, the court maintained that a claimant had to have a personal basis for asserting a claim.[59] The courts analyzed this expanded basis for asserting a claim under the rubric of "standing."[60] A non-corporate employee could establish a suffi-

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53. Newfield v. Ryan, 91 F.2d 700, 702 (5th Cir. 1937) (discussing the defendants' property rights with respect to telegrams seized); Whitcombe v. United States, 90 F.2d 290, 293 (3d Cir. 1937) (rejecting the defendants' claims because they had no property rights); *see* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309-27 (1998) (discussing the Supreme Court's transition from its property-based inquiry to the reasonable expectation of privacy test in Fourth Amendment claims).

54. *See* Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932) ("The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it.").

55. Until 1972, the term "aggrieved persons" was the phrase used in the Federal Rules for parties who were entitled to make motions for the return of property seized and motions to suppress. *See* FED. R. CRIM. P. 41(e). The rule was subsequently divided and section (f), which now addresses motions to suppress, no longer uses the term. *See id.* at 41(f).

56. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding that a corporation has a right against unlawful search and seizure of its property).

57. Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946) (per curiam) (holding that an officer and sole shareholder of a corporation had no right to assert a Fourth Amendment claim where corporate records were seized). "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment . . . . Its wrongs are not his wrongs; its immunity not his immunity." *Id.*

58. Proprietary interest is the interest of an owner of property including various rights that the owner has by virtue of his ownership. *See* BLACK'S LAW DICTIONARY 816 (7th ed. 1999). Possessory interest is the right to exercise control over property to the exclusion of others but it need not be through title to the property. *See id.* at 1185.

59. *See* Brown v. United States, 411 U.S. 223, 230 (1973) (stating that "[f]ourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted") (citations omitted).

60. The term "standing" may be used to refer to two different requirements. *See* United States v. Taketa, 923 F.2d 665, 669 (9th Cir. 1991). One is a constitutionally based requirement found in the phrase "case or controversy" in Article III of the Constitution. *Id.* A party asserting a constitutional challenge "must allege such a personal stake or interest in the outcome . . . as to assure the concrete adverseness which

cient interest to have standing if her office was searched and her work papers were seized.[61] Employees who did not have such interest and were merely unlucky enough to be present when police seized incriminating evidence did not have a sufficient basis upon which to assert a claim.[62]

Beginning in 1960, the Supreme Court began a major shift in Fourth Amendment analysis. In *Jones v. United States*,[63] the Court rejected the idea that property law should control a person's ability to establish standing to assert a Fourth Amendment violation.[64]

Art[icle] III requires." Rakas v. Illinois, 439 U.S. 128, 132 n.2 (1978). The constitutional standing requirement is primarily used to determine whether a party has the right to bring a private suit. *E.g.*, Steel Co. v. Citizens for a Better Env., 523 U.S. 83, 103 (1998). The party bringing suit must show injury in fact - a concrete and actual or imminent harm, causation - a sufficient connection between the plaintiff's injury and the defendant's conduct, and redressability - a likelihood that the relief available through the court will redress the injury. *Id.* Since Fourth Amendment claims are raised in criminal cases, where the personal stake element is readily apparent, the constitutional requirement is met. LAFAVE, *supra* note 30, § 11.3, at 117.

The second requirement, judicially created, is used specifically in Fourth Amendment claims to address a party's basis for asserting a claim. *Taketa*, 923 F.2d at 669. The fact that Fourth Amendment "standing" is a judicially created requirement is evinced by the *Rakas* Court's rejection of this component as a separate inquiry in Fourth Amendment claims. *Rakas*, 439 U.S. at 132 n.2 (making a distinction between the two standing components).

61. *See* United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932) (distinguishing searches of one's office for evidence, like papers, from searches to find stolen goods); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357-58 (1931); Gouled v. United States, 255 U.S. 298, 308-13 (1921) (seizing papers).

62. *See, e.g.*, Whitcombe v. United States, 90 F.2d 290, 293 (3d Cir. 1937) (holding that "unless the defendants claim the ownership of the property seized . . . they have no constitutional rights to object to its production in evidence and have no standing in order to avail themselves of the rights protected by the Fourth Amendment"); United States v. Conoscente, 63 F.2d 811, 811 (2d Cir. 1933) (per curiam) (finding that a workman in occupancy but not dwelling on the premises did not have interest in the property seized or the premises searched and had no right to assert a claim); Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932) (holding that a night watchman did not have possessory rights because those rights remained with his employer and therefore, he could not assert a claim).

63. 362 U.S. 257 (1960), *overruled on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980). See *supra* note 20 for the current importance of the *Jones* case after *Salvucci* was decided.

64. *Id.* at 261 (extending the exclusionary rule to avoid requiring defendants to claim ownership of narcotics in order to obtain protection against the illegal search). The Court found:

> [I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . . Distinctions such as those between "lessee," "licensee," "invitee" and "guest," . . .

The important distinction instead was between one who is "a victim of a search or seizure . . . as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[65] A person legitimately present in the place searched and who was targeted by the search had standing to assert a Fourth Amendment claim.[66]

In 1967, the Court issued its landmark Fourth Amendment decision, *Katz v. United States*.[67] This decision articulated a new standard for determining if a search within the meaning of the Fourth Amendment had been conducted: whether the person had a subjective expectation of privacy that was objectively reasonable in the place searched.[68] One year later, the Court indicated how this new standard would impact an employee's standing to challenge a workplace search.

1. Reasonable Expectations of Freedom from Government Intrusion: *Mancusi v. DeForte*

In *Mancusi v. DeForte*,[69] the government had conducted a warrantless search of a Teamster's Union office as a result of a conspiracy and extortion investigation.[70] The scope of the search included a large room used as an office by defendant DeForte, a Union vice-president, as well as by several other Union officers.[71] Over the defendant's objections, papers belonging to the Union were seized from the office.[72] The papers were later used at trial to convict DeForte.[73] On appeal, the Supreme Court held that DeForte had

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> ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Id. at 266.

65. *Id.* at 261.

66. *Id.* at 265-67 (noting that the defendant had established a sufficient interest in the premises searched by his legitimate presence therein). The defendant had spent at least a night in the apartment, he had been given keys to the apartment, and had kept some clothes there. *Id.* at 259.

67. 389 U.S. 347 (1967). One scholar referred to *Katz* as "mark[ing] a watershed in [F]ourth [A]mendment jurisprudence." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974).

68. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's concurrence established the two-prong inquiry viewed universally as the "Katz test". *See* LAFAVE, *supra* note 30, § 2.1(b), at 384-85 (noting that both the lower courts and the Supreme Court relied upon Justice Harlan's explanation of the *Katz* holding).

69. 392 U.S. 364 (1968).

70. *Id.* at 365.

71. *Id.* at 368.

72. *Id.* at 365.

73. *Id.*

standing to assert a Fourth Amendment claim despite his failure to establish a property interest in the office or the papers seized.[74]

Since DeForte had no property rights to establish standing, the *Mancusi* Court inquired instead whether, in light of all circumstances, the office was a place in which there was a "reasonable expectation of freedom from governmental intrusion."[75] DeForte spent considerable time in the office and, at the time of the search, had custody of the papers seized.[76] The office, however, was not DeForte's private office and the records were not taken from an area that was reserved for his personal use.[77]

The Court focused on the question of whether the defendant had the right to exclude others from the place searched and the items seized.[78] It concluded that it was immaterial that the workspace was shared as long as the defendant could still reasonably expect that access would be limited to the others with whom he shared the office and guests invited by those persons.[79] The Court further noted that the defendant could reasonably expect that no one would have access to the records seized without the permission of the persons with whom he shared the office or without permission from his superiors.[80] Therefore, DeForte had a reasonable expectation of freedom from governmental intrusion and had standing to assert a Fourth Amendment violation.

The dissent had argued that an employee suffers no personal injury when the property of a corporation is seized, and hence, there was no basis upon which to claim a constitutional violation.[81] Certainly a person could not be a "victim" of a search and seizure if he or she was not the target of the search.[82] It was immaterial, ac-

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74. *Id.* at 369.

75. *Id.* at 368.

76. *Id.* at 368-69.

77. *Id.*

78. *See id.* at 369 (comparing the right to exclude others from a private office to one's right in an office shared by others).

79. *Id.*

80. *Id.*

81. *Id.* at 373-74 (Black, J., dissenting). This view is based on the principle that a corporation is the holder of property rights and thus the party who may rightfully assert a Fourth Amendment claim. *See* United States v. Mohney, 949 F.2d 1397, 1403-04 (6th Cir. 1991) (stating that a corporate officer may be the "person aggrieved" by corporate search); United States v. Britt, 508 F.2d 1052, 1055 (5th Cir. 1975) (noting that a corporate officer may be able to assert the right to privacy). *But see* Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946) (per curiam) (discussing how a sole shareholder does not get the privilege of a corporation under the Fourth Amendment).

82. *Id.* at 376-77 (Black, J., dissenting). See LAFAVE, *supra* note 30, § 11.3(h), at 212-19 for a discussion of the idea of "target standing" where a person targeted by the

cording to the dissent, whether or not the employee actually prepared documents or was entrusted by the employer to keep custody of the papers.[83]

Two important points emerged from the Court's holding. First, a defendant without property rights to either the place searched or the item seized may have a sufficient expectation of privacy to establish standing in a workplace search. Second, the use of an area need not be exclusive in order for a defendant to have standing. This point is of particular importance in workplace searches where employees may be likely to share work areas or to use multiple areas within the workplace.

2. "Legitimate" Expectations of Privacy

After the Court eliminated legal possession or ownership as a requirement for establishing standing, the role of property rights in determining privacy expectations began to re-emerge. As a result, with its decision in *Rakas v. Illinois*,[84] the Court began to narrow[85] or refine, depending on one's perspective, the broad language of the *Katz* standard.[86] The first step taken by the Court was to eliminate the question of standing as a distinct inquiry from the substantive question of whether the search and seizure infringed an interest of the defendant that the Fourth Amendment was designed to protect.[87]

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search is considered for standing purposes to be a person aggrieved by, or a victim of, a search.

83. *Mancusi*, 392 U.S. at 373-74 (Black, J., dissenting).

84. 439 U.S. 128 (1978).

85. *See* Minnesota v. Carter, 525 U.S. 83, 111 (1998) (Ginsburg, J., dissenting) (stating that the Court has "veer[ed] sharply from the path" set out in *Katz*); Rawlings v. Kentucky, 448 U.S. 98, 115 n.* (1980) (Marshall, J., dissenting) (arguing that the Court's restrictive standard of "legitimate expectation of privacy" narrowed the privacy interests from *Katz*).

86. *See* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 914 (1997) (calling the *Katz* standard "broad" as compared to the strict property-based Fourth Amendment analysis that preceded *Katz*); Eulis Simien, Jr., *The Interrelationship of the Scope of Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 525 (1988) (stating that "Fourth amendment [sic] protection reached its height in *Katz*"). Some members of the Court have been highly critical of the *Katz* test as setting forth an unworkable standard. *See Carter*, 525 U.S. at 97 (Scalia, J., concurring) (calling it "notoriously unhelpful" and "self-indulgent" because of its subjectivity).

87. *See Rakas*, 439 U.S. at 138-40. Despite the Court's rejection of a separate standing inquiry, many courts continue to use the term in their analysis. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 97 (1980) (Marshall, J., dissenting); United States v. Brien, 617 F.2d 299, 305 (1st Cir. 1980); Tobias v. State, 479 N.E.2d 508, 510 (Ind. 1985); State v. Richards, 552 N.W.2d 197, 204 (Minn. 1996).

In addition, the Court rejected the standard it had set forth earlier in *Jones*, in which a person, by virtue of being legitimately on the premises, had the right to assert a Fourth Amendment claim.[88] The Court determined that the standard was too broad since it would permit even a casual visitor to assert a claim.[89] Instead, a person must demonstrate a legitimate expectation of privacy in the place searched.[90]

In explaining the importance of property rights in establishing privacy expectations, the Court noted that:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.[91]

In his concurrence, Justice Powell addressed the dissenters' argument that the plurality had reverted back to tying Fourth Amendment rights to property law.[92] He noted that the ultimate question, whether a person's privacy expectations were reasonable, required an inquiry into the totality of the circumstances.[93] Property rights were merely one of several factors to be considered, with no single factor dispositive.[94] Other important considerations included whether the person had taken measures to guard their privacy, how the person had used the location searched, and whether it was the kind of intrusion historically found to be objectionable.[95]

In a highly criticized decision one year later, *Rawlings v. Kentucky*,[96] the Court held that property rights in an item seized does

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88. *Rakas*, 439 U.S. at 142.

89. *Id.*

90. *Id.* at 143.

91. *Id.* at 143 n.12 (citations omitted).

92. *Id.* at 150 (Powell, J., concurring); *see also id.* at 156-57 (White, J., dissenting) (arguing that the Court's decision to tie Fourth Amendment rights back to property laws was motivated by its concerns about the exclusionary rule's impact).

93. *Id.* at 152 (Powell, J., concurring).

94. *Id.* (Powell, J., concurring).

95. *Id.* at 152-53 (Powell, J., concurring). The totality approach and the factors cited by Justice Powell were adopted by the majority in subsequent cases. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 715 (1987); Oliver v. United States, 466 U.S. 170, 177-78 (1984).

96. 448 U.S. 98, 117-18 (1980) (Marshall, J., dissenting) (arguing that the Court's decision resulted from too narrow a reading of the Fourth Amendment); State v. Tan-

not automatically establish one's legitimate expectation of privacy.[97] This aspect of the *Rawlings* holding may have been clarified to some extent by the Court's subsequent decision in *O'Connor v. Ortega*.[98] In that decision, which addressed a workplace search by a government employer, the Court noted that certain kinds of personal items found in the workplace, such as luggage, handbags, or briefcases signal to others by their private nature that the owner has legitimate privacy expectations in the contents therein.[99]

A more troubling aspect of *Rawlings*, especially as it affects searches beyond an employee's work area, is its potential limitations on the *Mancusi*[100] holding. Rawlings had hidden drugs in an acquaintance's purse.[101] The Court found that Rawlings did not have a legitimate expectation of privacy since another friend's access demonstrated that he did not have the right to exclude others from the purse.[102] In *Mancusi*, the defendant was allowed to assert a claim despite sharing access with others to the area searched.[103] More importantly, *Rawlings* suggests that the defendant's burden of proof is to show an expectation of freedom from all intrusions, rather than the *Mancusi* standard of an expectation of freedom from *governmental* intrusion.[104] If the lower courts were to apply

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ner, 745 P.2d 757, 762, 762-63 n.7 (Or. 1987) (in banc) (disapproving of the *Rawlings* approach and stating that if A allows B to store property on A's property, then B should be able to assert a claim for a search uncovering B's property); LAFAVE, *supra* note 30, §11.3(d), at 164 n.191 (calling it a "poorly-reasoned case"); Simien Jr., *supra* note 86, at 490-92 (calling the Court's move to eliminate property rights as a separate basis upon which to assert a Fourth Amendment claim a "bloodless coup").

97. 448 U.S. at 105-06.

98. 480 U.S. at 712 (addressing the appropriate standard for searches where the government is acting as employer, rather than as criminal investigator). Ortega was a doctor whose office was searched while he was on administrative leave due to allegations of sexual harassment and other inappropriate conduct. *Id.* The Court established a different and lower standard, reasonableness, for searches when the government is acting as an employer. *See id.* at 722-23; United States v. Taketa, 923 F.2d 665, 674 (9th Cir. 1991) (calling the *O'Connor* standard the "lesser burden of reasonableness").

99. *O'Connor*, 480 U.S. at 715-16 (discussing the importance of the context of a search). *But see* Wyoming v. Houghton, 526 U.S. 295, 301-07 (1999) (finding that the defendant could not assert a claim where her purse was taken from the back seat of a car in which she was a passenger). It is important to note that in *Rawlings*, the defendant's property, his drugs, were found in someone else's purse. *Rawlings*, 448 U.S. at 101.

100. Mancusi v. DeForte, 392 U.S. 364 (1968).

101. *Rawlings*, 448 U.S. at 101.

102. *Id.* at 105-06.

103. *See Mancusi*, 392 U.S. at 369 (noting that it viewed no fundamental difference between a private office, in which the defendant could exclude all others, and an office space shared with others).

104. *Compare Rawlings*, 448 U.S. at 104-05 (discussing the defendant's lack of

the *Rawlings* standard, it would be difficult for employees to assert Fourth Amendment claims in areas to which other employees have access.

II. SEARCHES BEYOND ONE'S WORKSPACE

It is clearly established that the Fourth Amendment extends to commercial premises.[105] Although property rights are not controlling in Fourth Amendment claims, those with property rights to the workplace are likely to be able to assert a claim to searches throughout the premises.[106] Thus, a corporation[107] as well as a sole proprietor of a business[108] will usually be able to assert a Fourth Amendment claim. However, as noted in the previous section, these property owners' privacy expectations may be sufficiently reduced where the business is open to the public or is closely regulated so that entry by police will not be subject to warrant requirements.[109]

Employees, on the other hand, usually do not have property rights to the workplace itself. The Supreme Court has affirmed that an employee usually has a legitimate expectation of privacy in her own workspace.[110] The Court has not, however, addressed the

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privacy expectations since other friends of the woman who owned the purse had access), *with Mancusi*, 392 U.S. at 368 (noting that a Fourth Amendment right "depends upon whether the area [searched] was one in which there was a reasonable expectation of freedom from governmental intrusion") (citing Katz v. United States, 389 U.S. 347, 352 (1967)). The Court noted that "DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of [company] higher-ups." *Mancusi*, 392 U.S. at 369.

105. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978); See v. City of Seattle, 387 U.S. 541, 543 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920).

106. *See* LAFAVE, *supra* note 30, § 11.3(d), at 163 (noting "it is fair to say that a defendant who does show . . . [a property right in the invaded place] is most certain to be found to have standing").

107. *See Silverthorne Lumber Co.*, 251 U.S. at 390 (corporation); United States v. Leary, 846 F.2d 592, 595-96 (10th Cir. 1988) (corporation and corporate officer); *cf.* Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946) (per curiam) (distinguishing a corporate officer's rights from a corporation).

108. *See* United States v. Trickey, 711 F.2d 56, 57 (6th Cir. 1983) (sole proprietor of outer building on property); State v. Penn, 576 N.E.2d 790, 791 (Ohio 1991) (pharmacy owner).

109. See *supra* Part I.A for a discussion of these limitations on Fourth Amendment workplace claims.

110. *See* O'Connor v. Ortega, 480 U.S. 709, 716-17 (1987); Mancusi v. DeForte, 392 U.S. 364, 369-70 (1968).

scope of Fourth Amendment protection when the search extends beyond the employee's workspace.

Relying on guiding principles set forth by the Supreme Court, the lower courts have essentially developed two approaches to determine whether an employee has established a legitimate expectation of privacy in a search beyond her own workspace.[111] One of these approaches weighs the "totality of circumstances," while the other focuses on the employee's ability to show a "nexus" to their own workspace. Parts II.A and B examine the application of these two approaches. Part II.C then examines a recent Tenth Circuit decision, *United States v. Anderson*,[112] in which the court discussed the competing merits of the two approaches in resolving this question.[113]

A. *Totality of Circumstances*

When addressing the question of whether an employee's Fourth Amendment rights have been violated in a search beyond her workspace, many courts apply the same analytical framework that is utilized in non-workplace contexts.[114] These courts, in keeping with Justice Powell's concurrence in *Rakas v. Illinois*,[115] examine the totality of the circumstances to determine whether the employee has demonstrated a legitimate expectation of privacy in the area searched.[116] The totality of circumstances may include

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111. In at least one case, a court has applied both. *See* State v. Richards, 552 N.W.2d 197, 204-05 (Minn. 1996) (holding that the defendant could neither establish a nexus between areas nor the requisite relationship to the item seized). In addition, the Ninth Circuit has applied a third approach to limited circumstances, which it refers to as the co-conspirator exception. See *infra* notes 223-27 and accompanying text for a discussion of that approach.

112. 154 F.3d 1225 (10th Cir. 1998).

113. It appears that this is the only case in which a court contemplated whether one test was preferable over another. *See id.* at 1230-32.

114. *See* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (affirming the Kentucky Supreme Court's holding that under the "totality of the circumstances" the defendant had not established a legitimate expectation of privacy in his associate's purse); United States v. Baron-Mantilla, 743 F.2d 868, 870 (11th Cir. 1984) (per curiam) (finding that the key holder to third person's apartment did not have a legitimate expectation of privacy based on the totality of circumstances).

115. In *Rakas*, Justice Powell explained that the reasonableness of Fourth Amendment claims must be considered "in light of all of the surrounding circumstances." 439 U.S. 128, 152 (1978) (Powell, J., concurring) (addressing an automobile search). See *supra* notes 84-95 and accompanying text for a discussion of the *Rakas* decision.

116. *See, e.g.*, United States v. Anderson, 154 F.3d 1225, 1232 (10th Cir. 1998) (considering "all of the relevant circumstances"); United States v. Cardoza-Hinojosa, 140 F.3d 610, 615 (5th Cir. 1998) (considering the "nuclei of factors"); United States v.

considerations of the employee's presence at the search—whether the employee has an ownership interest in the item seized, whether the employee took steps to guard her privacy, and whether the employee's position relative to the business gave her particular rights to the area searched.[117]

Each of the factors considered may in some way bear on the employee's ability to exclude others from the place searched.[118] The scope of protection that the totality approach affords in a workplace search, therefore, may largely depend on whether the defendant must demonstrate the right to exclude all others or merely those who are not entitled through their work relationship to have access to the area searched. The Supreme Court's holding in *Mancusi v. DeForte*[119] would indicate that the latter, more liberal approach might be applied in a workplace context.[120] The Court's subsequent reasoning in *Rawlings v. Kentucky*,[121] however, would

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Taketa, 923 F.2d 665, 677 (9th Cir. 1991) (looking at the "totality of circumstances"); United States v. Brien, 617 F.2d 299, 305-06 (1st Cir. 1980) (considering a "variety of factors" suggested by the Supreme Court).

117. *Brien*, 617 F.2d at 306 (comparing favorably the factors considered by the lower court: (1) the defendants' position in the business; (2) their ownership interest; (3) their job responsibilities; (4) their power to exclude others from the place searched; (5) whether they worked in the area and; (6) whether they were present at the time of the search, with those articulated by the Supreme Court in *Rakas v. Illinois*). In *Rakas*, Justice Powell's concurrence noted that relevant factors included: whether the person took customary precautions to maintain privacy, how the person has used the area searched, whether the search took place in an area historically thought to be private, and whether the person has property rights in the location searched. 439 U.S. at 152 (Powell, J., concurring).

118. *See Rakas*, 439 U.S. at 142 n.12 (noting that property rights give rise to the right to exclude others from access); *Anderson*, 154 F.3d at 1232 (considering the defendant's status as corporate officer as a basis for authority to exclude others); United States v. Torch, 609 F.2d 1088, 1091 (4th Cir. 1979) (noting that a salesman's occasional presence did not establish the right to exclude others from a desk which he shared with others); *see also* Martinez v. Nygaard, 831 F.2d 822, 826 (9th Cir. 1987) (finding it dispositive that employees did not have the right to exclude others from the factory premises). One commentator has suggested that Fourth Amendment rights should be determined on the basis of this criterion alone. *See* Clancy, *supra* note 53, at 344-65 (arguing that property and privacy as a basis for defining the scope of Fourth Amendment rights are too limited and that the right to exclude better protects an individual's rights).

119. 392 U.S. 364 (1968). See *supra* Part I.B.1 for a discussion of the *Mancusi* decision.

120. *See Mancusi*, 392 U.S. at 369 (noting that the defendant could assert a Fourth Amendment claim despite the fact that the others with whom he shared the office, higher up officials, as well as business and personal guests of those persons could all have access to the records seized).

121. 448 U.S. 98 (1980). See *supra* notes 96-104 and accompanying text for a discussion of *Rawlings*.

support the former, more restrictive approach.[122]

Illustrative of the courts' approach to this dilemma is the Kansas Supreme Court's reasoning in *State v. Worrell*.[123] In *Worrell*, police retrieved shell casings from a search of the top floor of a warehouse that linked the warehouse manager to a murder.[124] The defendant, who was also charged with security for the building, had been up there to shoot pigeons that had entered and set off the security alarm. The top floor was not open to the public and was mostly unused.[125] The area, however, was accessible to other employees when directed by the manager to perform tasks there, to the business partners, and to several stockholders. The court, relying largely on the fact that others had access to the upper floor, held that the warehouse manager had no expectation of privacy therein.[126] It appeared immaterial to the court that all persons having access were all entitled to do so through their relationship to the business.

The Kansas court did not indicate whether its holding might have differed if a smaller number of persons related to the business had been entitled to access. Some courts applying the totality approach have found that a defendant established a legitimate expectation of privacy where access was limited to a small number of employees.[127] For instance, corporate officers established a legitimate expectation of privacy where police seized corporate docu-

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122. *See Rawlings*, 448 U.S. at 105 (noting the defendant's inability to control access to the purse of an acquaintance in which his drugs were stored precluded his right to assert a Fourth Amendment claim, even though only one other person had been given "free access" to the purse).

123. 666 P.2d 703 (Kan. 1983).

124. *Id.* at 704.

125. *Id.* at 706.

126. *Id.* The court also noted that neither the defendant's personal property nor business records were stored there. *Id.*

127. *See, e.g.*, United States v. Moscatiello, 771 F.2d 589, 601 (1st Cir. 1985) (holding that defendant who owned stock with only three others and who had keys to the warehouse searched had a legitimate expectation of privacy), *vacated on other grounds sub nom.* Carter v. United States, 476 U.S. 1138 (1986); State v. Harms, 449 N.W.2d 1, 6 (Neb. 1989) (holding that a partner in a construction business had a Fourth Amendment claim when a locked shed in which property was stored was searched and only the two partners had keys). Most courts, however, have held that having keys to the place searched in and of itself does not establish a legitimate expectation of privacy. *See* United States v. Anderson, 154 F.3d 1225, 1228-29 (10th Cir. 1998) (noting that it disagreed with the lower court's reasoning that the defendant established privacy expectations because he had a key to the locked building); United States v. Baron-Mantilla, 743 F.2d 868, 870 (11th Cir. 1984) (per curiam) (holding that a key to the premises is insufficient to establish privacy expectation); State v. Richards, 552 N.W.2d 197, 204-05 (Minn. 1996) (holding that a defendant who had one of two keys to the building

ments stored in locked file cabinets and in rooms to which only a few persons, including the defendants, had access.[128]

Most claims arising from workplace searches involve the seizure of work-related materials.[129] Where, instead, personal items have been seized, the employee's own property rights may allow her to take certain measures to sufficiently limit access by others to establish privacy expectations under the totality approach.[130] Furthermore, as the Supreme Court noted in *O'Connor v. Ortega*, some items may be so universally understood as personal that the nature of the item itself signals to others one's privacy expectations.[131] Thus, an employee may have a legitimate expectation of privacy in items such as a briefcase or purse, regardless of access by other employees to the area in which the item is located.[132]

Illustrative of the totality approach where personal property has been seized is the First Circuit's decision in *United States v. Mancini*.[133] In *Mancini*, the court held that the town's mayor had a legitimate expectation of privacy where his appointment calendar

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could not assert a Fourth Amendment claim where nothing indicated that the items stored therein were personal).

128. United States v. Brien, 617 F.2d 299, 305-06 (1st Cir. 1980) (affirming the district court's finding that the defendants had standing to object to the search). The court also noted that the office in which the search took place, a commodity options firm, was heavily secured from access by the public. *Id.* at 306 n.9.

129. *See Anderson*, 154 F.3d at 1230 (noting that "[m]ost cases that discuss employee standing involve seizure of work-related documents from the workplace."). In some instances, it is difficult to classify the materials either as personal or work-related. *See, e.g.*, Tobias v. State, 479 N.E.2d 508, 509-10 (Ind. 1985) (involving a seizure of a vial of pills which were stored above the ceiling in the public bathroom of a pharmacy).

130. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (noting that property rights give rise to the right to exclude others from access).

131. The plurality in *O'Connor v. Ortega* noted that:

> Not everything that passes through the confines of the business address can be considered part of the workplace context. . . . An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way.

480 U.S. 709, 716 (1987) (emphasis in original).

132. *See id.* (noting that "[t]he appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address"). Not all personal items carry that same societal expectation of privacy. *See* United States v. Mancini, 8 F.3d 104, 109 (1st Cir. 1993) (stating that "[t]he most intimate of documents, if left strewn about in the most public of places, would surely not [give rise to an expectation of privacy]") (alteration in original) (citation omitted).

133. 8 F.3d 104 (1st Cir. 1993).

was seized from a box in the attic of the building in which he worked.[134] The mayor had clearly marked the box to indicate that it contained his property.[135] Although he had given his chief of staff authority to go into the box, other employees knew not to examine the contents without authorization.[136] Both the maintenance and personnel departments, however, had keys to the attic.[137] The court found that, in light of his efforts to control access by others, the mayor had a legitimate expectation of privacy in his personal property.[138]

In sum, the totality approach aggregates various facts to determine if, as a whole, they demonstrate an employee's legitimate expectation of privacy. Many of these factors relate to an employee's right to exclude others from the place searched. Personal property rights or a position of authority among a small number of employees may establish a basis upon which to assert this authority.[139] This approach, however, provides no clear answer to the question of to what extent this right must be asserted: whether an employee must be able to exclude all others from the area searched, whether she must be one of a limited number of persons to have access, or whether she may exclude only those who do not have the right to access through their work relationship.[140]

B. *The Nexus Test*

The totality approach analyzes a workplace claim in the same manner as searches conducted in other contexts. Thus, factors specifically relevant to the workplace are not raised.[141] Some other

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134. *Id.* at 110.

135. The box was marked "Mayor's Appointment Books." *Id.* at 107 n.6.

136. *Id.* at 110 n.11 (quoting from a city employee's testimony).

137. *Id.* at 106.

138. *Id.* at 110 (stating that "Mancini could have expected that only members of the maintenance or personnel staff, who had instructions not to disturb the Mayor's boxes, could enter the attic, and that his personal records would not be touched except with his permission or that of his Chief of Staff."). The court also noted that the Mayor had worked in the building for nineteen years and that the attic was upstairs in the building in which he worked during this time. *Id.* This may relate to one factor the court weighed in its consideration — the historical use of the property. *See id.* at 109 (setting forth the relevant factors).

139. *See id.* at 110 (personal property); United States v. Brien, 617 F.2d 299, 306 n.9 (1st Cir. 1980) (defendant corporate officers were among the few entitled to access).

140. For instance, the First Circuit's decision in *Mancini* may be reconciled with the narrower scope of the Supreme Court's holding in *Rawlings v. Kentucky* as well as the broader scope of the Court's *Mancusi v. DeForte* decision. See *supra* Part II.A and *infra* Part II.B for a discussion of both Supreme Court cases.

141. *But see Brien*, 617 F.2d at 306 (considering the defendants' positions in the

courts have relied upon the Supreme Court's reasoning in *Mancusi v. DeForte* to create an approach specific to workplace claims.[142] Recall that in *Mancusi*, work-related documents were seized from somewhere in a large room in which the defendant had a desk along with several others.[143] Using this setting as a starting point, these courts have determined that an employee's privacy expectation may extend beyond their exclusive workspace if the employee can demonstrate some "nexus" between the area searched and their workspace.[144] An employee may show a nexus was established by showing some relationship between the area searched and one's employment activities.[145]

The nexus test was first expressly articulated in a Fifth Circuit case, *Britt v. United States*.[146] In that case, a corporate president attempted to suppress documents that were seized from a building used by the corporation as a storage space.[147] Because the documents were corporate property and Britt was not the corporation's sole shareholder, he had to establish a basis independent from the corporation's upon which to assert a Fourth Amendment claim.[148]

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firm). The First Circuit determined that the lower court's factors were consistent with the usual factors considered by the courts under the totality approach. *Id.*

142. *See* United States v. Britt, 508 F.2d 1052, 1056 (5th Cir. 1975) (comparing the *Mancusi* facts with the ones at issue in *Britt*, noting that in *Mancusi*, "there was a demonstrated nexus between the area searched and the work space of the defendant."); LAFAVE, *supra* note 30, § 11.3(d), at 164 (calling this approach consistent with *Mancusi* and noting that it "is more likely to be relevant with respect to a far greater variety of officers and employees of various business enterprises" than the usual approach). See *supra* Part I.B.1 for a discussion of the *Mancusi* case.

143. Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968).

144. Some courts expressly refer to a "nexus" in their decisions, while others rely on the nexus reasoning without using the term. *Compare* United States v. Anderson, 154 F.3d 1225, 1229 (10th Cir. 1998) (Kelly, J., dissenting) ("nexus"), *and* United States v. Chuang, 897 F.2d 646, 649 (2d Cir. 1990) ("nexus"), *and Britt*, 508 F.2d at 1056 ("nexus"), *and* Tobias v. State, 479 N.E.2d 508, 510 (Ind. 1985) ("nexus"), *and* State v. Richards, 552 N.W.2d 197, 204 (Minn. 1996) ("nexus"), *with* United States v. Mohney, 949 F.2d 1397, 1403-04 (6th Cir. 1991) (considering the same factors as the Fifth Circuit did in discussing the nexus relationship in *Britt*), *and* United States v. Lefkowitz, 464 F. Supp. 227, 230-31 (C.D. Cal. 1979) (relying on the fact that the corporate officer worked in the corporate suite), *and* State v. Williams, 417 A.2d 1046, 1048 (N.J. 1980) (relying on the defendant's work connection to the storage closet searched as a basis for establishing his right to assert a Fourth Amendment claim).

145. *See Britt*, 508 F.2d at 1056; LAFAVE, *supra* note 30, § 11.3(d), at 164-65 ("In the absence of some other basis for showing standing, . . . it still seems necessary to establish that the place searched was rather directly connected with the defendant's employment responsibilities and activities.").

146. 508 F.2d at 1056.

147. *Id.* at 1055. The office where the corporation conducted its daily business had also been searched. *Id.* at 1053-54.

148. *See id.* at 1055 (discussing the usual rule that applies where corporate prop-

The Fifth Circuit held that Britt failed to establish that basis since there was no "demonstrated nexus between the area searched and the workspace of the defendant."[149]

The *Britt* court enumerated several factors that mitigated against a finding of the requisite nexus.[150] Britt had never worked in the area searched. In addition, the documents seized were neither prepared by him nor taken from his personal work area, which was located in another building. Finally, he was not present when the search took place. The court concluded that, unlike the Union vice-president in *Mancusi*, Britt failed to establish a nexus between the area searched and his workspace.[151]

Britt indicates that an employee may demonstrate a nexus where she performs some work-related duties in an area, even if that area is not her primary workspace. This reasoning is consistent with a pre-*Britt* decision in which corporate officers who worked in a corporate suite were entitled to assert Fourth Amendment claims where areas beyond their office were searched.[152] Likewise, in a later case, a custodian was found to have a legitimate privacy expectation in a storage room in which he kept his tools.[153] Where the contact is infrequent or there is less physical proximity between the area searched and the employee's workspace, the nexus may be too tenuous to provide a basis upon which to assert a Fourth Amendment claim.[154]

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erty is at issue). See also *supra* notes 53-57 and accompanying text for the case law from which this rule originates.

149. *Id.* at 1056. The *Mancusi* decision never expressly discussed a nexus requirement. *See* Mancusi v. DeForte, 392 U.S. 364 (1968). See also *supra* Part I.B.1 for a discussion of *Mancusi*.

150. *Britt*, 508 F.2d at 1055.

151. *Id.* at 1056.

152. United States v. Lefkowitz, 464 F. Supp. 227, 231 (C.D. Cal. 1973) (expressly rejecting the governments contention that the defendants' Fourth Amendment rights should be limited to their own office and extending the scope of Fourth Amendment protection to include the entire suite).

153. State v. Williams, 417 A.2d 1046, 1048 (N.J. 1980). The storage closet, located in the basement of a tavern, was not accessible to the public and was kept locked. *Id.*

154. *See* United States v. Mohney, 949 F.2d 1397, 1404 (6th Cir. 1991) (holding that a corporate officer, who operated his business as a sole proprietorship, could not assert a claim where corporate papers were seized from an office that he rarely visited); Chuang v. United States, 897 F.2d 646, 649-50 (2d Cir. 1990) (holding that a bank president had not established a nexus where bank documents were seized from another bank official's office on a different floor). The *Chuang* court emphasized that the defendant's office was on the fourth floor and the documents were seized from an office on the third floor. *Id.* at 648, 650. The court was also influenced by the fact that the search took place in a bank, an industry that is subject to intense oversight by the government.

In addition to infrequency of use, use of the area for a non-work related purpose may weigh against demonstrating the requisite nexus. These considerations were highlighted in an Indiana Supreme Court decision, *Tobias v. United States*.[155] In *Tobias*, the defendant was a pharmacist in his father's pharmacy business.[156] The pharmacy contained two bathrooms, one for employees and one for the public.[157] Employees had informed police that they suspected Tobias was dealing drugs when, on several occasions, they noticed he and another person met briefly in the pharmacy and then went to the public restroom in succession.[158] Police later retrieved drugs from the area above the ceiling tiles in the bathroom.[159] The court found that there was no nexus "since the only time this area was visited by [the defendant] was for the purpose of making the instant drug transaction."[160] Thus, the implication is that the defendant might have established a nexus had he either used the area with greater frequency or for its intended purpose.

Another factor that *Britt* indicated might establish a nexus between the area searched and one's workspace is some role in the preparation of the work materials seized.[161] The courts applying the nexus test have not clarified whether one must actually draft the documents or whether one could expressly direct a subordinate to draft it on her behalf. However, in at least one case, a corporate president's role in preparing the seized documents was insufficient as the sole basis for asserting a Fourth Amendment claim.[162]

Although the *Britt* court mentioned presence at the search as a

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See id. at 650. See *supra* Part I.A.2 for a discussion of lesser privacy expectation in highly regulated industries pursuant to the Fourth Amendment.

155. 479 N.E.2d 508 (Ind. 1985).

156. *Id.* at 509.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 510. The court's reliance on the nexus test seems odd in light of the fact that the court could have decided the case based on the public access to the bathroom. See *supra* Part I.A.1 for a discussion of the importance of the public/private distinction in workplace searches.

161. United States v. Britt, 508 F.2d 1052, 1055 (5th Cir. 1975) (noting that the corporate records were not prepared by the defendant); *see Mohney*, 949 F.2d at 1403 (citing Britt and noting that lack of personal preparation of corporate materials seized indicated one factor against finding a reasonable expectation of privacy).

162. United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989). The defendant was also the sole shareholder of the corporation and its chief operating officer. *Id.* at 1411. The corporate documents were seized from a bookkeeping office in a different building from the one in which the defendant worked. *Id.*

factor to be considered,[163] the Supreme Court's holding in *Rakas* makes it clear that legitimate presence alone is no longer a sufficient basis for asserting a Fourth Amendment claim.[164] Thus, no courts have held that presence at the search alone establishes the requisite nexus.

In comparing the nexus test to the totality approach, similarities as well as distinctions emerge. Both approaches consider multiple factors to determine if an employee has demonstrated a legitimate expectation of privacy.[165] In addition, the nexus test's consideration of the frequency of use of the area searched may likewise bear on the employee's ability to control access by others under the totality approach.[166] In contrast, the totality approach may consider the defendant's position of authority as a basis to exclude others, while that fact is irrelevant in the nexus approach.[167] In Part II.C, this Note next examines a recent Tenth Circuit decision in which the court considered the competing merits of the two approaches.

C. *The Nexus or Totality Approach?:* United States v. Anderson

In *United States v. Anderson*,[168] the Tenth Circuit considered whether the nexus test should be applied where personal property of an employee was seized in an area in which the defendant had

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163. *Britt*, 508 F.2d at 1055.

164. *See* Rakas v. Illinois, 439 U.S. 128, 142 (1978) (rejecting "legitimately on the premises" as a basis for asserting a claim).

165. Factors considered under the totality approach may include: the employee's presence at the search, whether the employee has ownership interest in the item seized, whether the employee took steps to guard their privacy, and whether the employee's position relative to the business gave them particular rights to the area searched. See *supra* note 117 for the factors applied by a district court in the First Circuit and their comparison to those articulated by the Supreme Court. Under the nexus test, the court may consider whether the employee worked in the area searched, whether they had a role in the preparation of the documents, and whether the employee is present at the search. *See Britt*, 508 F.2d at 1055.

166. *See* United States v. Torch, 609 F.2d 1088, 1091 (4th Cir. 1979) (stating that "[o]ccasional presence, [ ] without any right to exclude others, is not enough").

167. *Compare* United States v. Mancini, 8 F.3d 104, 110 (1st Cir. 1993) (considering in its totality approach that the mayor had the authority to instruct others not to enter his box in the attic archive), *and* United States v. Brien, 617 F.2d 299, 306 (1st Cir. 1980) (considering in its totality approach the defendant's position in the firm), *with* United States v. Chuang, 897 F.2d 646, 650 (2d Cir. 1990) (giving no weight under the nexus test to the fact that the defendant was the bank president), *and* United States v. Britt, 508 F.2d at 1055 (giving no weight under the nexus test to the defendant's position as corporate president).

168. 154 F.3d 1225 (10th Cir. 1998).

never worked.[169] The panel concluded, over a vigorous dissent by Judge Kelly, that the court should not apply the nexus test because it fails to account for certain relevant factors.[170] As a result, the court decided to apply a three-part test consistent with the totality approach.[171]

The defendant, Anderson, had been suspected by the FBI of interstate trafficking in child pornography.[172] Anderson was set up in a sting operation when an FBI informant sent him some tapes.[173] To the dismay of the agents, who had secured a warrant for his home, Anderson took the tapes from the mail drop to his office building.[174] It was a holiday weekend and Anderson entered the locked building with the master key that he held as corporate vice-president.[175] Anderson went to a vacant room some distance from his office, closed the door, and pulled the curtains across the window.[176] Agents broke into the building and found Anderson preparing to watch the tapes.[177] The agents then secured incriminating statements and evidence from Anderson.[178]

On appeal from the district court's decision suppressing the evidence, the government argued that Anderson did not have standing to challenge the search.[179] It argued that he had neither a possessory nor proprietary interest in the room searched, nor a

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169. *See id.* at 1230-32 (discussing the merits and deficiencies of the nexus approach).

170. *Id.* at 1232.

171. *See id.* at 1230 (stating that "the better approach is to examine all of the circumstances of the working environment and the relevant search.") (citing Mancusi v. DeForte, 392 U.S. 364, 368 (1968)). See also *infra* note 187 and accompanying text for the three-part test.

172. *Anderson*, 154 F.3d at 1227.

173. *Id.*

174. *Id.*

175. *Id.* at 1227-28. The key gave him universal access with the exception of the president's office. *Id.* at 1228-29.

176. *Id.* at 1227. The office was in the interior section of the building. *Id.* The dissent noted that the room was far from Anderson's office. *Id.* at 1236 (Kelly, J., dissenting).

177. The FBI agent broke in when they became concerned that Anderson would destroy evidence once he discovered the tapes were blank. *Id.* at 1227-28. The agents knocked, but were unaware that Anderson could not hear them since he was not wearing his hearing aids. *Id.* at 1228.

178. *Id.* at 1228. Some pornography was seized from a location in Anderson's office that he identified for them. *See id.*

179. *Id.* at 1229. The government also argued that exigent circumstances created an exception to the warrant requirement, *id.*, but the circuit court affirmed the lower court's holding that the government failed to meet the requisite standards to prove exigency. *Id.* at 1233-34.

nexus between his job and the room searched.[180] The district court had relied upon the defendant's position as corporate vice-president and his possession of a master key as a basis for standing.[181]

The Tenth Circuit affirmed, but on different grounds.[182] The court first discussed the merits of applying the nexus test, noting that the test is often applied in workplace contexts since it is usually work-related materials that have been seized in such searches.[183] It agreed that a nexus is an important consideration under those circumstances.[184] The court rejected the premise, however, that whether an employee works in the area searched should be dispositive in her Fourth Amendment claim.[185] It concluded that the nexus test is inadequate since it fails to account for factors the court thought relevant to an employee's right to contest a search.[186]

Relevant factors for the Tenth Circuit included an employee's relationship to the item seized, such as bailment or ownership; whether the employee had control over the item at the time it was seized; and whether the employee took steps to maintain privacy relative to the item.[187] The court also noted that the authority to exclude others from the area searched is an important consideration.[188] The court cited several Supreme Court cases in support of the application of these factors.[189] After applying these factors to

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180. *See id.* at 1229. The government's argument was similar to the criteria applied by the Second Circuit in *United States v. Chuang*, in which the court held that the defendant had to show both a proprietary or possessory interest in the area searched as well as a nexus to his workspace. 897 F.2d 646, 649 (2d Cir. 1990).

181. *Anderson*, 154 F.3d at 1228-29.

182. *Id.* at 1229.

183. *Id.* at 1230.

184. *Id.*

185. *Id.* ("We endorse the 'business nexus' test to the extent we share a belief that an employee enjoys a reasonable expectation of privacy in his work space . . . However, we do not believe the fact that a defendant does or does not work in a particular area should categorically control his ability to challenge a warrantless search.")

186. *Id.*

187. *Id.* at 1231-32.

188. *Id.* at 1232 n.3 (rejecting the government's analogy between the instant case and apartment cases in which the courts have held that tenants do not have reasonable expectations of privacy in common areas).

189. *See id.* at 1231-32. The court relied upon *O'Connor v. Ortega*, 480 U.S. 709, 715-16 (1986), *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980), and *United States v. Salvucci*, 448 U.S. 83, 91 (1980) as support for the importance of property rights as a relevant consideration. *Id.* at 1231. The court cited *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968), as support for its reliance on the factor considering an employee's control over the item. *Id.* at 1232. Finally, the court cited *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978), for the proposition that an employee's right to exclude others is an important factor. *Id.* at 1232 n.3.

the circumstances, the court concluded that Anderson had demonstrated a legitimate expectation of privacy in light of his efforts to exclude others from the room and his control over the items at the time of the search.[190]

Judge Kelly argued in dissent that absent a nexus between the area searched and Anderson's workspace, his claim should fail.[191] The majority's approach failed to consider that Fourth Amendment protection is more limited in commercial premises.[192] It also put too much emphasis on Anderson's relationship to the item seized.[193] Judge Kelly argued that under the majority's analysis, Anderson would have been able to challenge a claim anywhere in the building, as long as he kept the tapes in his possession and took steps to maintain his privacy.[194]

In this case, Judge Kelly argued, there was no nexus. The room in which Anderson was found was not his office. It was located some distance from his office, it was a vacant room, and it was accessible to other employees.[195] There was no evidence that Anderson had ever worked in the room.[196] Furthermore, Judge Kelly concluded that there was no evidence to support the majority's finding that Anderson had the right to exclude others from the

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190. *Id.* at 1233.

191. *Id.* at 1235 (Kelly, J., dissenting). Judge Kelly did not argue that the factors mentioned by the majority were irrelevant, just insufficient without a proven nexus. *See id.* (Kelly, J., dissenting).

192. *See id.* (Kelly, J., dissenting) (citing Dewey v. Donovan, 452 U.S. 594, 598-99 (1981)). It is noteworthy that the case Judge Kelly cites is one in which the Supreme Court stated this difference in the context of heavily regulated industries. See *supra* Part I.A.2 for a discussion of the reduced scope of Fourth Amendment protection in a heavily regulated industry.

193. *See Anderson*, 154 F.3d at 1235-36 (Kelly, J., dissenting). The courts are not uniform in their approach to the question of whether a defendant must demonstrate a privacy expectation with regards to the item or the place searched. *Compare* United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989) ("privacy or property interest in premises searched *or* item seized") (emphasis added), *and* State v. Williams, 417 A.2d 1046, 1048 (N.J. 1980) ("test is whether a defendant had a legitimate expectation of privacy in the property *or* premises involved") (emphasis added), *with* United States v. Mancini, 8 F.3d 104, 107 (1st Cir. 1993) ("defendant must demonstrate a privacy expectation in *both* the item seized and the place searched) (emphasis added) *and* United States v. Chuang, 897 F.2d 646, 649 (2d Cir. 1990) ("question . . . focuses principally on whether [the defendant] has made a sufficient possessory or proprietary interest in the *area* searched) (emphasis added), *and* State v. Worrell, 666 P.2d 703, 705 (Kan. 1983) ("[T]est . . . is not whether that person 'had a possessory interest in the item seized, but whether he had an expectation of privacy in the *area* searched.'") (citation omitted) (emphasis added).

194. *Anderson*, 154 F.3d at 1235 (Kelly, J., dissenting).

195. *Id.* at 1236 (Kelly, J., dissenting).

196. *Id.* (Kelly, J., dissenting).

room.[197]

The *Anderson* opinions exemplify the conflicting views held by the courts as to what creates the basis upon which an employee may establish a legitimate privacy expectation. The nexus approach relies upon the legitimate privacy expectations created in the employee's own workspace and then expands the protection afforded in that space if a sufficient connection can be made to the area searched.[198] The totality approach considers various factors but often relies upon a showing that sufficient efforts were made to protect one's privacy by excluding others to establish the requisite privacy expectations.[199]

In the next section, this Note argues that the basis of an employee's privacy expectations is, instead, created through the employment relationship. It further argues that the nexus and totality approaches, as applied, are deficient in protecting employees' Fourth Amendment rights beyond their own workspace by failing to recognize this basis. Part III suggests an alternative approach that makes the employment relationship the central focus of determining the scope of Fourth Amendment protection in workplace searches.

III. EMPLOYMENT RELATIONSHIPS AS A SOURCE OF PRIVACY EXPECTATIONS

In order to assess the merits of the approaches currently taken by the courts or an alternative to those approaches, it is important to consider the context in which this issue arises. Part III.A begins with a discussion of how employees function in the workplace: what kinds of relationships are created and what kind of rights and obli-

197. *Id.* (Kelly, J., dissenting) (noting that "one does not gain such right merely by closing the door and covering a window"). Judge Kelly did not discuss the fact that Anderson's master key may have given him access to the building that others might not have had.

198. *See id.* at 1235 (Kelly, J., dissenting) (noting that an employee's Fourth Amendment claim cannot prevail "absent a 'demonstrated nexus between the area searched and the workspace of the defendant'") (quoting United States v. Britt, 508 F.2d 1052, 1056 (5th Cir. 1975)).

199. *See id.* at 1232 (calling the authority to exclude an important consideration, focusing on the defendant's dominion and control over the item as well as the efforts taken to keep others out of the room); United States v. Mancini, 8 F.3d 104, 110 (10th Cir. 1993) (focusing on the steps that the mayor had taken to ensure that others would not have access to his belongings even though the attic was an area to which limited people had access); United States v. Brien, 617 F.2d 299, 306 (1st Cir. 1980) (focusing on the security measures taken by the firm to restrict access and the positions of the defendants which entitled them to access).

gations arise from those relationships. Part III.B critiques the nexus and totality approaches as applied by the courts in light of the importance of this relationship. Part III.C explains why the current, narrower scope of Fourth Amendment protection that the courts have defined for the workplace has the potential to create unintended adverse consequences in both the workplace and beyond. Finally, Part III.D suggests an alternative approach that accounts for the importance of the employment relationship in creating privacy expectations. This approach recognizes important Fourth Amendment limiting principles while creating a sufficiently broad scope of protection to protect legitimate privacy expectations.

A. *The Workplace & The Employment Relationship*

The workplace is, by necessity, an environment that requires a degree of cooperation amongst employees in order to accomplish a shared goal or goals set by the employer.[200] The shared goal may be as broad as achieving targeted sales or profits, creating a final product, improving the quality of goods or services, or increasing the number of customers served.[201] In order to accomplish this goal, it is common for an employer to delegate duties and responsibilities to various employees.

Once an employer[202] hires an employee to help it achieve its goals, an agency relationship is created between the parties which gives rise to certain obligations and expectations.[203] A fiduciary duty is created, obligating the employee to make certain efforts to

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200. *See generally* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (discussing the importance of the workplace to democratic society because of its ability to foster ongoing cooperative relations of trust and common interest among individuals). Trends indicate that workplace models that further facilitate a cooperative environment are increasing amongst employers. *See* Estlund, *supra*, at 67 (noting "many firms are moving towards more cooperative modes of organization, more diffuse authority relations, and flatter organizational pyramids"); Jerry Ackerman, *Dawn of the Space Age: The New Trend in Office Design Aims for Fewer Walls and a Collaborative Atmosphere - Office Design Moves Toward Open Space Offices – Offices Move Out in Open K*, BOSTON GLOBE, Nov. 19, 2000, at K1; *The Case For Teams*, PURCHASING MAGAZINE, June 3, 1999, at 108.

201. The function of goals as easily applies to large scale, legitimate businesses as small scale, illegal ones. For instance, a group selling drugs on street corners has profit goals and may look to expand its customer base.

202. An employer could be a sole proprietor or a corporation that acts through its corporate officers.

203. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1) (2000 App.) ("Agency is a fiduciary relation which results from the manifestation of control by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.").

protect the employer from harm.[204] This duty also imposes limitations on the employee's freedom of action.[205] In some instances, an employer may reciprocate by offering legal protection to the employee by indemnifying them for actions taken within the scope of employment.[206]

The importance of the employment relationship in affecting workplace privacy expectations is demonstrated by the fact that courts have found employees' consent to police searches in the workplace valid absent express authorization.[207] Although the courts have no uniform approach to determining the validity of employee consent, many courts rely upon the principal-agent relationship as a basis for such authority.[208] Additionally, courts have relied upon joint access or control, assumption of risk by the employer, and apparent authority as a rationale for upholding employee consent to a search.[209]

This agency/employment relationship creates privacy expectations in the employer since she would justifiably expect her employees not to do her harm. Because of the necessity of collaboration and work delegation required to accomplish shared goals, an em-

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204. *See id.* § 13 ("An agent is a fiduciary with respect to matters within the scope of his agency.").

205. *See id.* § 379 (imposing duty of care and skill on employee); § 393 (restricting an employee's right to compete with the principal's business); § 395 (forbidding an employee from acting in concert with those whose interests conflict with the employer); § 395-96 (restricting an employee's ability to disclose confidential information both during employment and after it terminates).

206. *See, e.g.*, 1 FOLKS ON THE DELAWARE GENERAL CORPORATION LAW, § 145 (4th ed. 2000 Supp.) ("Indemnification of officers, directors, employees and agents; insurance"); *see also* Citadel Holding Corp. v. Roven, 603 A.2d 818 (Del. 1992) (affirming an agreement indemnifying the corporate director).

207. *See* United States v. Reeves, 730 F.2d 1189, 1193-94 (8th Cir. 1984) (finding consent valid where the deputy sheriff consented to a search of the sheriff's office); United States v. Buettner-Janusch, 646 F.2d 759, 764-66 (2d Cir. 1981) (finding consent valid where a research assistant allowed the search of a professor's university lab which he had permission to use).

208. *See generally* LAFAVE, *supra* note 30, § 8.6(c) (discussing employee consent and noting that the courts are influenced by factors such as the employee's duties relative to the area searched and the employee's status).

209. *See* United States v. Matlock, 415 U.S. 164, 172 (1974) (finding consent valid where there is "joint access or control for most purposes"); United States v. Sells, 496 F.2d 912, 914 (7th Cir. 1974) (relying on apparent authority); United States v. Grigsby, 367 F. Supp. 900, 902 (E.D. Ky. 1973) (relying upon assumption of risk); Commonwealth v. Wahlstrom, 375 N.E.2d 706, 707 (Mass. 1978) (relying on apparent authority); *see also* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1642 (1987) (noting that third-party consent has been justified on an assumption of risk rationale as well as reduced expectations of privacy).

ployer must also expect employees collectively to protect her privacy expectations. As one scholar has noted, "[t]he necessarily cooperative and social nature of work itself also tends to depend upon and to engender trust among coworkers."[210] As a result, privacy expectations are created in the employee regarding work materials from those outside of the business or those employees whose job responsibilities do not entitle them to access.[211] The employer's privacy expectation in work materials is, thus, extended from the employer to the employee.[212]

Employees' privacy expectations with respect to their personal property raises different issues since the employer does not have a similar privacy interest in those items. Several members of the Supreme Court have recognized that "an employee's private life must intersect with the workplace" and therefore, "tidy distinctions [ ] between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality."[213] Employers may also take affirmative steps to create privacy expectations with respect to personal items by actions that further blur the previously distinct spheres of personal and professional lives: allowing or encouraging employees to decorate work areas with personal items; offering on-site personal services such as day care, health clubs, and shower facilities; or arranging social functions in the workplace.

B. *The Recognition of Relationships as a Basis for Privacy Expectations*

Both the courts and commentators have recognized relationships as a source of shared privacy rights. The Supreme Court, in

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210. Estlund, *supra* note 200, at 10.

211. This view is supported by the Supreme Court's reasoning in *Mancusi v. DeForte*, 392 U.S. 364 (1968). The Court found that the defendant had a legitimate expectation of privacy in documents that were merely in his custody despite the fact that numerous others were entitled to access to the office and the seized documents. *Id.* at 367-69. DeForte, the other union officials who shared the office, and union higher-ups all had access to the documents. *Id.* at 369. See *supra* Part I.B.1 for a discussion of *Mancusi*.

212. See *infra* notes 214-18 and accompanying text explaining how the Supreme Court has recognized in other contexts how a person possessing legitimate privacy expectations may extend their Fourth Amendment protection to another on the basis of a certain kind of relationship. *See generally* Coombs, *supra* note 209 (discussing how privacy rights are shared as a result of relationships in other contexts and arguing for a broader recognition of this basis of privacy expectations).

213. O'Connor v. Ortega, 480 U.S. 709, 739 (1986) (Blackmun, J., dissenting) (joined by three other justices).

contexts other than the workplace, has recognized the importance of relationships in creating privacy expectations, albeit most often by finding the relationship too insubstantial to engender such expectations.[214] The Court has differentiated between an overnight guest's and a casual visitor's relationship to a homeowner as an important distinction in Fourth Amendment claims.[215] It has reasoned that an overnight guest has legitimate privacy expectations in the host's home because the homeowner has chosen to extend his protection to her.[216] The Court has also found that a homeowner's ultimate control over the house is not incompatible with a guest's legitimate expectation of privacy therein.[217] As a result, the scope of protection established by the relationship extends to areas beyond those set aside for the overnight guest's personal use.[218]

One relationship-based theory that has been applied in the lower courts outside of the Fourth Amendment context has been

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214. *See* Minnesota v. Carter, 525 U.S. 83, 90 (1998) (holding that the lack of connection between the defendant and the homeowner was a factor mitigating against his right to object to a search); Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (rejecting the defendant's claim, in part, because the defendant had only known the person who was holding his drugs for a few days and had never asked her to hold goods for him before). In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court's opinion was replete with references to the importance of relationships and why the Court should not recognize less substantial ones as protected by the Fourth Amendment. *See id.* at 142 (rejecting "legitimately on the premises" since it would allow a casual visitor to object to searches in areas to which they had not had access); *id.* at 142 n.12 (discussing a trespasser's lack of rights); *id.* at 433 (rejecting the defendant's claims since they were "merely" passengers).

215. *Compare* Minnesota v. Olson, 495 U.S. 91, 98-100 (1990) (overnight guest may assert a Fourth Amendment claim), and Jones v. United States, 362 U.S. 257, 265-67 (1960) (overnight guest may assert a claim) *overruled on other grounds by* United States v. Salvucci, 448 U.S. 83 (1983), *with Carter*, 525 U.S. at 90-91 (casual visitor engaged in commercial transaction may not assert a claim). See also United States v. Rodriguez-Lopez, No. 98-10075, 1999 WL 109632, at *1 (Feb. 26, 1999 9th Cir.) for an interpretation of the Supreme Court's holding in *Carter* to mean that "ordinary social or business visitors enjoy no personal expectation of privacy in the homes of others," and *supra* note 20 for information on the continuing vitality of *Jones* and Fourth Amendment rights for overnight guests.

216. *Olson*, 495 U.S. at 99 (stating that "[t]he houseguest is there with the permission of his host, *who is willing to share his house and his privacy with his guest.*") (emphasis added); *see also* United States v. Osorio, 949 F.2d 38, 41 (2d Cir. 1991) (stating that "the Court reasoning in *Olson* that an overnight guest could depend on his host to protect his privacy interests").

217. *Olson*, 495 U.S. at 99.

218. *See* Mancusi v. DeForte, 392 U.S. 364, 370 (1960) (citing *Jones v. United States* for the proposition that simply because an area was not set aside for Jones' personal use, it did not diminish his standing rights in that area as an overnight guest). *But see Osorio*, 949 F.2d at 41 (stating in dicta that a guest cannot have privacy expectations in areas of the host's house that are off limit or of which the guest has no knowledge).

that of constructive possession.[219] Constructive possession means that a person has the power and intention to exercise control over property either directly or through other persons.[220] It may be held jointly or solely.[221] Constructive possession as a basis for Fourth Amendment rights has been raised but not addressed yet by the Supreme Court.[222]

The Ninth Circuit, however, has embraced a related theory, which it refers to as the "co-conspirator" exception.[223] Under this theory, courts may extend the scope of Fourth Amendment protection beyond an area over which a person has exclusive control where the person asserting the claim can demonstrate a "formal arrangement for joint control" between themselves and the person whose property was seized.[224] The court considers "the degree of cooperation and the respective possessory interest asserted."[225] The court has most often found the requisite relationship where the defendant had some ownership interest in the seized property,[226] but it has indicated that significant evidence of a formalized arrangement or presence at the search and a lesser quantum of evidence of a formal arrangement may suffice.[227]

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219. The courts have recognized constructive possession as a legal theory in drug possession cases. *See* United States v. Stockheimer, 807 F.2d 610, 615-16 (7th Cir. 1986); Commonwealth v. Bonilla, 590 N.E.2d 690, 692-93 (Mass. App. Ct. 1992).

220. United States v. DiNovo, 523 F.2d 197, 201 (7th Cir. 1975).

221. *Stockheimer*, 807 F.2d at 615.

222. In *Brown v. United States*, the defendants raised a joint possession/co-conspirator defense. 411 U.S. 223 at 230 n.4 (1973). The Court did not address the issue since it held that the conspiracy had terminated before the seizure took place. *See id.*

223. See generally Michelle Alexandria Curtis, Note, *Ninth Circuit Joint Venture Standing: A Joint Possessory Interest is Sufficient to Establish Fourth Amendment Standing*, 34 ARIZ. L. REV. 311 (1992) for an extended discussion of this approach in various settings.

224. United States v. Taketa, 923 F.2d 665, 671(9th Cir. 1991) (citing Schowengardt v. General Dynamics Corp., 823 F.2d 1328, 1335 (9th Cir. 1987)) (calling the co-conspirator approach an exception "to the general Rakas rule against contesting the violation of another person's fourth amendment rights.").

225. *Id.* (noting that while the phrase could encompass a range of conduct, from a formal contract to any loose arrangement for a cooperative illegal venture, the correct meaning lies somewhere in between).

226. *See id.* (noting that in "virtually every case applying the exception," the person asserted a property interest); *see also* United States v. Johns, 851 F.2d 1131, 1136 (9th Cir. 1988) (per curiam); United States v. Quinn, 751 F.2d 980, 981 (9th Cir. 1984); United States v. Perez, 689 F.2d 1336, 1337-38 (9th Cir. 1982) (per curiam).

227. *Taketa*, 923 F.2d at 671-72. The court has rejected the application of the exception where simply a criminal conspiracy takes place in a specific location. *Id.* Thus, a defendant could not assert a claim where his employer's property was used for unauthorized purposes in another employee/co-conspirator's office. *See id.* at 668-69, 671-72 (holding that a DEA agent could not assert the co-conspirator exception where he was

Professor Mary Coombs has argued that the courts should adopt a relational model for analyzing Fourth Amendment claims.[228] She notes that the concept of shared privacy better reflects the way in which people actually behave in the world.[229] Under her approach, those who may assert a claim "include derivative claimants - people with a relationship with the primary rightholder such that we would expect the primary rightholder to share the umbrella of her claim."[230] The courts could incorporate these relational notions of privacy as part of the totality of the circumstances approach.[231]

In sum, there is support for the concept of relationships as a basis for Fourth Amendment rights. Like the guest who expects the host not to allow others to enter the home whose interest is adverse to the guest,[232] the employee has similar expectations of her employer. In addition, the collaborative environment of the workplace creates the necessary "degree of cooperation" required under the Ninth Circuit's approach.[233] The obligations that arise as a result of the employment relationship likewise establish a sufficiently "formal relationship for control" to establish an adequate basis for finding shared privacy rights.[234] Consequently, any analysis that considers an employee's Fourth Amendment rights should consider the nature of the employment relationship.

C. *Evaluating the Totality & Nexus Approaches*

Both the nexus and totality approaches to some degree consider the employment relationship when determining an employee's right to assert a Fourth Amendment claim beyond their workspace. The nexus test takes into account whether the employee asserting the claim played any role in preparing seized documents.[235] Also by considering whether the employee worked in the area searched,

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using a DEA pen register in a co-worker's office to record phone numbers in contravention of DEA policy requiring judicial authorization before taking such action).

228. *See generally* Coombs, *supra* note 209.

229. *Id.* at 1596-97.

230. *Id.* at 1597.

231. *See id.* at 1598, 1650-61 (articulating the various considerations relevant to such an analysis).

232. *See* Minnesota v. Carter, 495 U.S. 91, 99 (1990) (noting that it is unlikely that a homeowner would invite someone into the house contrary to the guest's wishes).

233. See *supra* notes 223-27 and accompanying text for a discussion of these criteria under the Ninth Circuit's co-conspirator exception.

234. *See id.*

235. See *supra* notes 161-62 and accompanying text for the application of this criterion.

the nexus test indirectly considers the employment relationship.[236] The totality test also indirectly considers this relationship where the courts consider an employee's position as it relates to her authority to exclude others from the area searched.[237]

Both tests, however, fail to adequately recognize important aspects of the employment relationship in establishing an employee's privacy expectations. The nexus test ignores the realities of workplace delegation of duties. Under the nexus test, despite ultimate responsibility for information contained in corporate documents, a corporate officer may fail to demonstrate a nexus where he has not personally prepared the documents.[238] The nexus test does not consider that the process of work delegation may create several parties with an interest in a document: the person who initiates the project, the person who actually prepares the document, and the person who has custody of the document. Consistent with the Supreme Court's holding in *Mancusi v. DeForte*, all parties are likely to have an expectation of privacy that the document will only be shared with those within the workplace who are entitled to access.[239]

The totality test ignores an important aspect of the employment relationship by focusing to a large degree on the employee's *effort* to exclude others from access rather than the employee's *right* to exclude.[240] An employee's right to exclude is a direct result

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236. See *supra* notes 152-60 and accompanying text for the application of this criterion.

237. *See* United States v. Mancini, 8 F.3d 104, 110 (1st Cir. 1993) (considering the defendant's position as mayor for nineteen years); United States v. Brien, 617 F.2d 299, 306 (1st Cir. 1980) (including the defendants' positions in the firm as specific considerations). *But see* United States v. Anderson, 154 F.3d 1225, 1228-29 (10th Cir. 1998) (rejecting the lower court's reliance on the defendant's position as a corporate officer and the fact that he had a master key as a basis for privacy expectations).

238. *See* United States v. Mohney, 949 F.2d 1397, 1403 (6th Cir. 1992) (finding no nexus where the sole proprietor of businesses rarely visited the office and was completely uninvolved in the preparation of the materials); United States v. Britt, 508 F.2d 1052, 1055 (5th Cir. 1975) (finding that there was no nexus where the president of the corporation did not prepare the documents and did not work in the building where the documents were stored).

239. *See* Mancusi v. DeForte, 392 U.S. 364, 369 (1968) (noting that DeForte could "reasonably have expected that only those persons and their personal or business guests would enter the office and that the records would not be touched except with their permission or that of union higher-ups.")

240. This is best exemplified in the *Anderson* decision, in which the Tenth Circuit rejected the lower court's basis for privacy expectations, the defendant's position as a corporate officer, and focused on all the steps the defendant took to exclude others from the room searched. *See Anderson*, 154 F.3d at 1233; *see also* United States v. Cardoza-Hinojosa, 140 F.3d 610, 616-17 (5th Cir. 1998) (rejecting the defendant's as-

of the employment relationship, whereas efforts to exclude may not be.[241] An even more troubling aspect of this focus is that it may yield results more consistent with the lesser privacy standard employed by the courts where the government conducts a search in their capacity as employer.[242]

Under both the nexus and totality approaches, the courts have erroneously focused on the Supreme Court's *Mancusi* decision as standing for the principal that an office is a *place* in which privacy expectations exist, even where it is shared by others.[243] By focusing on that aspect of *Mancusi*, the courts have failed to apply its more significant recognition that the employment relationship creates a privacy expectation in relation to outsiders, not fellow employees who were entitled to access or persons given access by those employees.[244]

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serted privacy expectations in his shed in which he ran a business since he failed to lock the door or take other measures to exclude others).

241. For instance, an employee could enter the company president's office in his absence, close the curtains, lock the door, and view confidential documents in the president's file cabinet. The employee has excluded others through his efforts but has no right to do so.

242. *Compare* State v. Worrell, 666 P.2d 703, 706 (Kan. 1983) (holding under the totality approach that the warehouse manager had no privacy expectation where others had access to the area searched), *with* Sheppard v. Beerman, 18 F.3d 147, 152 (2d Cir. 1994) (finding that under the reasonableness standard, a law clerk had no privacy expectation in chambers' appurtenances, desks, file cabinets, or other workspaces due to the open access of documents between judges and clerks). This may, in part, result from the subjectivity inherent in the totality's balancing approach. *See generally* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Analysis*, 63 N.Y. L. REV. 1173, 1184-1207 (1988) (criticizing Fourth Amendment balancing tests generally and in particular for their subjectivity).

243. *See* United States v. Chuang, 897 F.2d 646, 649-50 (2d Cir. 1990) (citing *Mancusi* for the principle that one has a legitimate expectation of privacy in one's own office); United States v. Britt, 508 F.2d 1052, 1056 (5th Cir. 1975) (citing *Mancusi* for the principle that there was a demonstrated nexus between the area searched and DeForte's workspace); State v. Worrell, 666 P.2d 703, 706 (Kan. 1983) (citing *Mancusi* for the principle of privacy expectations in one's own office). *But see* United States v. Cardoza-Hinojsa, 140 F.3d 610, 616 (5th Cir. 1998) (rejecting the defendant's reliance on the *Mancusi* principle that access by others does not defeat privacy expectations where the defendant could not show a right to exclude others from his unlocked shed).

244. The *Mancusi* Court made it clear that DeForte's privacy expectation was created in relationship to intrusion by government officials, not with regard to co-workers who were entitled to access through their employment relationship. *See Mancusi*, 392 U.S. at 369 (stating that "DeForte could reasonably have expected only those [with whom he shared an office] and their personal guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials . . . ."); *see also* O'Connor v. Ortega, 480 U.S. 709, 717 (1987) ("The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom

In addition, the short shrift given in both approaches to the importance of the employment relationship is inconsistent with the courts' willingness to rely on it as a basis for allowing employees to consent to searches in the workplace.[245] If the employer has conferred upon the employee sufficient rights to allow them to consent to a search, she logically has conferred commensurate privacy expectations.[246]

It is evident that the nexus and totality tests fail to recognize the importance of the employment relationship in establishing privacy expectations. This result is inconsistent with the *Mancusi* rationale and the Supreme Court's recognition of the importance of relationships in determining privacy expectations. Consequently, a different approach is needed which accounts for this relationship.

D. *Crafting a Relationship-Based Approach: A Broader Scope of Workplace Privacy*

1. The Importance of Expanding the Scope of Workplace Privacy

An employment relationship could be defined either in broad or narrow terms, depending on how one views the degree of protection afforded to an employee under the Fourth Amendment. This Note suggests that the relationship should be broadly defined for three reasons: the time spent in the workplace, the need for deterrence against unwarranted government intrusion upon privacy rights, and the implications created by a narrower definition to areas beyond the traditional workplace.

Americans view privacy as a fundamental right.[247] Consequently, it is important to assure that this right extends to a place in which people spend significant amounts of time. While the Fourth

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a private enclave free from entry by supervisors, other employees, and business and personal invitees.").

245. *See* LAFAVE, *supra* note 30, § 8.6(c) (noting that "the agency test [for determining consent of workplace searches] appears to have retained some of its force in the employee consent cases because its relevance is more apparent in such a context").

246. *See* Craig M. Bradley, 35 AUG TRIAL 75, 75 (1999) (arguing that the courts should treat the right to assert a Fourth Amendment claim and the right to consent to a search consistently); Coombs, *supra* note 209, at 1638-48 (noting the logical connection between third party consent and derivative Fourth Amendment claims and explaining the basis for third party consent).

247. *See* Mayer, *supra* note 9, at 625 n.1 (1992) (citing a 1990 poll conducted in which "79% of Americans agreed that if the Declaration of Independence were rewritten, privacy should be added to life, liberty, and the pursuit of happiness as a 'fundamental right'").

Amendment routinely protects a person's privacy in their own home, working people are likely to spend more of their waking hours at work than at home.[248] Recent studies indicate that the average workweek has increased in the last twenty years.[249] At the same time, the average time spent at home has decreased.[250] Some members of the Supreme Court have noted that with so much time spent at work, "the workplace has become another home for most working Americans."[251]

Also, broader workplace protections deter the government from unlawful and intrusive conduct.[252] The Fourth Amendment was created to ensure that the government adheres to certain measures before intruding on citizens' rights.[253] With the gaping holes left in workplace privacy by the courts, a great incentive is left for police to cast a broad net in workplace searches, knowing that the courts will limit privacy rights.[254] Broad workplace protection creates a disincentive for police to disregard warrant requirements.

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248. *See* Estlund, *supra* note 200, at 8-9 nn.19-22.

249. *See* Sabrina Jones, *Stretched to Their Limits*, News and Observer (Raleigh, NC), June 6, 1999, at E1 (citing a survey by the Families and Work Institute in which they found that average work hours increased from 43.6 hours in 1977 to 47.1 in 1997). The survey also found that 13% of wage and salaried workers, most of who work full-time, have a second job. *See* Families and Work Institute, *1997 National Study of the Changing Workforce*, http://www.familiesandwork.org.

250. *See* Jones, *supra* note 249 (noting that "[a]s the hours spent on the job have risen, time at home has shrunk). The author cites a report by the Council of Economic Advisors in which they found that working parents spend only 22 hours per week with their children, a 14% decrease in the last three decades. *See id.*

251. O'Connor v. Ortega, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting) (joined by Justices Brennan, Marshall, and Stevens).

252. This rationale obviously applies in contexts other than the workplace. *See* Wallace W. Sherwood, *Fourth Amendment Standing: Flat On Its Face*, 36 CLEV. ST. L. REV. 441, 442 (1988) (stating generally about the Fourth Amendment that a "[n]arrow construction of the scope of an individual's rights promotes the government's ability to violate the Constitution and impedes the citizenry's ability to curtail such violations through court").

253. In one of the first cases to discuss the meaning of the Fourth Amendment, the Supreme Court expressed concerns over minor encroachments by the government that could eventually erode constitutional protections. *See* Boyd v. United States, 116 U.S. 616, 635 (1886). The *Boyd* Court favored strong adherence to warrant requirements unless the government established superior property rights. *See id.* at 623-24. See Morgan Cloud, *The Fourth Amendment During The Lochner Era: Privacy, Property, And Liberty In Constitutional Theory*, 48 STAN. L. REV. 555, 573-81 (1996) for an excellent discussion of the *Boyd* case and its significance.

254. Many scholars have argued that by restricting Fourth Amendment rights and thus reducing the need for the exclusionary rule, the Court has failed to provide an adequate deterrent mechanism. Sherwood, *supra* note 252, at 441; Simien, *supra* note 86, at 539; Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 348 (1970).

Most importantly, there is reason to be concerned that lower privacy expectations in the workplace may be used to erode privacy expectations in traditionally protected areas, such as the home. The Supreme Court recently held that, despite being an invited guest into a person's residence, a lower expectation of privacy existed because the relationship between the homeowner and the defendant was of a commercial, rather than personal, nature.[255] It is not too far a reach to extend this rationale to deny Fourth Amendment rights to business guests in one's home for a dinner party or to guests at a Tupperware party.

This rationale is particularly troublesome if one considers the increasing numbers of people who work in their homes, whether on a full-time or part-time basis.[256] It is unclear based on the Court's current rationale where or how a line would be drawn to distinguish between commercial and personal Fourth Amendment protections. Perhaps one standard of privacy rights would be applied in a home office and another to the rest of the house. Whichever means may be used, they pose troubling privacy concerns.

This recent decision presents precisely the kind of reasoning that the first Supreme Court cautioned against. In *Boyd v. United States*,[257] the Court warned that minor encroachments would erode the Amendment's protection.[258] To guard against such encroachments, the Court advocated a broad scope of protection.[259]

Consequently, many factors weigh in favor of establishing a broad definition of the employment relationship. A broader definition would result in more expansive privacy protections in the

255. Minnesota v. Carter, 525 U.S. 83, 90 (1998) (finding a lesser expectation of privacy on property used for commercial purposes and for a commercial transaction); *see also* United States v. Gordon, 168 F.3d 1222, 1226 (10th Cir. 1999) (noting that in *Carter*, "the Supreme Court effectively heightened the burden for a defendant . . . when the defendant's presence in the dwelling is for a commercial or business purpose"). In *Carter*, the defendant was given permission by a lessee to use her apartment to package cocaine. 525 U.S. at 85-86. The defendant had never been to the apartment prior to the incident and had been given use of the apartment in exchange for some drugs. *Id.* at 86.

256. *See Big Gains in Work at Home*, Boomer Report, July 1998, at 4 (citing Bureau of Labor Statistics finding that in 1997, 4.1 million self-employed people worked out of their home and 3.6 million workers received some compensation from employers for work at home).

257. 116 U.S. 616 (1886).

258. *See id.* at 635.

259. See *supra* note 1 and accompanying text for the *Boyd* Court's statement on the importance of a liberal interpretation of the Amendment in order to prevent abuses. *See also* Cloud, *supra* note 253, at 576-77 (stating that *Boyd's* expansive theory established the principle that even law enforcement goals could not trump fundamental natural rights embodied in the Constitution).

workplace. In light of the time most Americans spend at work, the importance of deterring unlawful government intrusions, and the implications of a narrower definition on areas outside of workplaces, a more expansive scope of protection is warranted.

2. The Analytical Framework

The approaches taken by the courts to address the question at issue in this Note, whether an employee's privacy rights extend beyond their own workspace, provide a fairly narrow scope of Fourth Amendment protection.[260] This section of the Note suggests an alternative approach which recognizes the importance of the employment relationship and which is more likely to provide a broader scope of Fourth Amendment protection.

Since this Note's concept of the employment relationship is predicated on the employer sharing her privacy rights with her employees, the employer logically could not confer privacy expectations that she herself does not have. Consequently, just as an employer could not assert a Fourth Amendment claim where the area searched is open to the public,[261] neither could the employee. Likewise, since employers in heavily regulated industries have reduced expectations of privacy,[262] employees in those industries would have similarly reduced expectations.

In analyzing an employee's Fourth Amendment claim, the first step should be to define the confines of the workplace.[263] This means not only setting the boundaries, but also to make distinctions

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260. This is exemplified most clearly in the courts applying the nexus test, in which there are no examples of cases where the court found an employee had legitimate expectations of privacy outside either their office or office suite. *But see* United States v. Anderson, 154 F.3d 1225, 1235 (10th Cir. 1998) (Kelly, J., dissenting) (arguing that in *United States v. Mancini*, 8 F.3d 104 (1st Cir. 1993), the mayor demonstrated a nexus between the attic searched and his office because of the physical relationship between the locations and the control the mayor exercised over the area). The *Mancini* court had applied the totality test in analyzing the mayor's claim and, thus, did not directly address the nexus criteria. *See Mancini*, 8 F.3d at 109 (discussing relevant factors).

261. See *supra* Part I.A.1 for a discussion of the effect that the public/private distinction has on workplace searches.

262. See *supra* Part I.A.2 for a discussion of lesser privacy expectations in closely regulated industries.

263. *See* O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (noting that "[b]ecause the reasonableness of an expectation of privacy [ ] is understood to differ according to the context, it is essential first to delineate the boundaries of the workplace context. The workplace includes those areas and items related to work and are generally within the employer's control").

between public and private areas within the workplace.[264] In keeping with the *Mancusi* holding, an area should not be deemed public simply because limited numbers of non-employees have access while accompanied by employees.[265] These non-public areas would be parts of the workplace in which the employee has a legitimate expectation of privacy.

In the typical workplace claim, work-related materials have been seized.[266] In these cases, the court's inquiry should focus on whether the item seized relates in some manner to employee's job responsibilities.[267] The court's inquiry thus would recognize the interconnected, collaborative nature of work. An employee who delegates work to another would no longer lose Fourth Amendment protection simply by failing to perform the task herself.[268] Likewise, the person to whom the work is delegated is protected regardless of whether she has the authority to retain the materials in her possession.[269]

Where a workplace seizure involves the employee's personal items, the employer does not have the same privacy interests in the item to share with the employee. Similarly, an employee could not assume that co-workers would keep others from access. In those cases, the employee would need to establish privacy expectations

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264. See *supra* Part I.A.1 for a discussion of the importance of the public/private distinction in workplace searches.

265. *See* Mancusi v. DeForte, 392 U.S. 364, 369 (1968) (noting that DeForte's privacy expectations did not change simply because the workers with whom he shared an office might allow their personal and business guests into the office). Some doubt has been cast on this point by the Court's later decision in *Rawlings v. Kentucky*. 448 U.S. 98 (1980) (holding that access by others sufficiently reduced the defendant's privacy expectation).

266. United States v. Anderson, 154 F.3d 1225, 1230 (10th Cir. 1998) ("Most cases that discuss employee standing involve seizure of work-related documents from the workplace.").

267. In some cases this would be obvious, but in others the court may look to a contract between the parties or could require the employee to produce evidence to establish such responsibilities.

268. This result distinguishes this approach from the nexus test. For example, under the nexus test, a president of a company could not assert a Fourth Amendment claim when he neither worked in the area searched nor prepared the documents. See *supra* notes 146-51 and accompanying text for an example of this result. Under the relationship-based approach, a president of a company would have the right to assert a claim where any work-materials were seized.

269. Professor Mary Coombs, who ascribes to the importance of relationships as a basis for Fourth Amendment rights, suggests that once a relationship has been established, the government may rebut the presumption that a sufficient relationship exists. Coombs, *supra* note 209, at 1652 (noting that either party would be entitled to present such proof).

independent from the employer.[270] Consistent with the approach applied by the First and Tenth Circuit, the employee could do this by showing steps taken to exclude others from access to the item.[271] This could be demonstrated through the employee's presence, through objective manifestations to keep others from access, or by keeping the item in an area reserved for the employee's exclusive use.[272] Consistent with the employment relationship rationale, however, the employer could rightfully place limits on where the employee may keep personal possessions beyond areas reserved for the employee's personal use.[273]

Using the employment relationship as a basis for analyzing privacy expectations does not solve all of the questions that the myriad of workplace situations may create. Yet, it applies to the vast majority of contexts and offers a means by which the courts can recognize a broader scope of protection than that which the current approaches provide. By recognizing the importance of relationships in creating privacy expectations, the courts may stem the tide of eroding Fourth Amendment rights.

CONCLUSION

Workplace privacy has deep historical roots. In *Mancusi v. DeForte*, the Supreme Court established that employees may have legitimate privacy expectations in even those areas of the workplace that are shared with other employees. Subsequent decisions by the Court in non-workplace contexts have raised the question as to what extent an employee must be able to exclude others in order to be able to assert Fourth Amendment claims beyond their own workspace.

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270. This is similar to the rationale the courts have used in requiring corporate officers to establish independent privacy expectations from the corporation when the corporation's property has been seized. See *supra* notes 55-57 and accompanying text for a discussion of that issue.

271. See *supra* notes 133-38 and accompanying text for a discussion of the First Circuit's approach in *United States v. Mancini*, and *supra* Part II.C for a discussion of the Tenth Circuit's approach in *United States v. Anderson*.

272. The courts have consistently supported an employee's right to assert a claim on this basis. *See* LAFAVE, *supra* note 30, at § 11.3(d) (stating that "[i]f it is shown that the place searched was a desk or similar area set aside for the exclusive use of the defendant, then quite clearly the defendant will have standing").

273. Absent consent, the employee could not rightly assume that the employer would limit access to those that share the employee's interests in her property. *See* Minnesota v. Olson, 495 U.S. 91, 99 (1990) (noting that a "host may admit or exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest.").

Workplaces are unique environments in which individuals often work in collaborative relationships to meet shared goals. The employment relationship between the employer and employee gives rise to legal rights and obligations. For this relationship to function properly, an employer expects her employees to protect her privacy interests. The employer shares her privacy with the employee in order to accomplish these goals.

The two approaches taken by the lower courts, the totality of circumstances approach and the nexus test, fail to adequately account for the importance of this relationship in addressing the question of an employee's right to assert a Fourth Amendment claim beyond her own workspace. The nexus test fails to take into account the collaborative nature of workplace relationships. The totality approach relies on an employee's efforts to exclude others, rather than the right to exclude given through the employment relationship. Both approaches fail to recognize the *Mancusi* decision's fundamental principle that an employee need not demonstrate the right to exclude other employees in order to assert a Fourth Amendment claim.

Another approach is needed that recognizes the employment relationship in order to create a broader scope of Fourth Amendment protection for employees. This broader scope is necessary since employees spend most of their waking hours at work, as increased deterrence against unlawful government action, and to stem the tide of eroding Fourth Amendment protection. An approach that focuses on the employment relationship as a source of privacy expectations, while recognizing traditional Fourth Amendment limiting principles, strikes the right balance.

Michele Morris