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Antonia J. Broughton

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A "WORKPLACE EXCEPTION": EXPLORING THE LEGAL LOOPHOLE THAT ALLOWS FOR WARRANTLESS GPS TRACKING OF GOVERNMENT EMPLOYEES' PERSONAL VEHICLES

COURT OF APPEALS OF NEW YORK

Cunningham v. New York State Department of Labor¹
(decided June 27, 2013)

I. INTRODUCTION

Public employees in New York once enjoyed an undisputed right to privacy with respect to their personal automobiles.² However, such privacy is no longer guaranteed after the New York Court of Appeals decision in *Cunningham v. New York State Department of Labor*.³ The workplace exception, a legal device that excuses employers from obtaining a warrant to conduct a search of an employee within the "workplace," now provides government employers with a broad discretion that seems to contradict the inherent purpose of the Fourth Amendment of the United States Constitution and article I, section 12 of the New York State Constitution.⁴ The Court of Appeals in *Cunningham* created this loophole by expanding the definition of "workplace" to allow a government employer to monitor an employee's personal vehicle during the employee's business day.⁵

¹ 997 N.E.2d 468 (N.Y. 2013).

² *People v. Weaver*, 909 N.E.2d 1195, 1200-01 (N.Y. 2009) (quoting *Delaware v. Prouse*, 440 U.S. 648-49 (1979)).

³ *Cunningham*, 997 N.E.2d at 474.

⁴ *Id.* at 471 ("[T]he State argues, and we agree, that this search is within the 'workplace' exception to the warrant requirement recognized in *O'Connor* . . . and *Caruso* . . .") (internal citations omitted); see *O'Connor v. Ortega*, 480 U.S. 709 (1987); see also *Matter of Caruso v. Ward*, 530 N.E.2d 850 (N.Y. 1988); see U.S. CONST. amend. IV; see N.Y. CONST. art. I, § 12.

⁵ *Cunningham*, 997 N.E.2d at 470, 472 ("We thus conclude that when an employee chooses to use his car during the business day, GPS tracking of the car may be considered a

The court's expanded view is alarming because it shackles a fundamental right of every employee in the public sector—subjecting private citizens employed by the government to a continuous unwarranted Global Positioning System (“GPS”) search and divulging every place those employees visit, even if only during business hours.⁶ In essence, after this decision, the government has unfettered discretion to track its employees during their breaks or lunch hours, even if those employees are on personal business in their own respective privately-owned vehicles.⁷

Despite the court's ultimate decision to suppress GPS evidence for other reasons, the court's definition of the “workplace” has opened the door to overly intrusive searches in the future.⁸ The “workplace exception” gives employers authority to conduct searches of an employee's personal possessions outside of an employee's office building, even in locations that are well beyond the parking lot surrounding the workplace.⁹ The court defended its reasoning by stating that employees have “a greater expectation of privacy in the location of their bodies” or accompanying belongings such as a purse, clothing, or shoes, than in a vehicle's location.¹⁰ Yet, using a GPS device to locate an employee's vehicle is merely an indirect means of locating an employee's body.¹¹ Thus, as warned by the concurrence, employers will be empowered to electronically track an employee's personal vehicle even if the vehicle is used for a transitory work-related purpose, such as traveling “to and from work.”¹²

workplace search.”).

⁶ *Id.* at 473 (“Perhaps it would be impossible, or unreasonably difficult, so to limit a GPS search of an employee's car as to eliminate all surveillance of private activity—especially when the employee chooses to go home in the middle of the day . . .”).

⁷ *Id.*

⁸ *Id.* at 470-71, 473 (stating that the evidence was suppressed because the Department did not make a “reasonable effort to avoid tracking” the employee during his personal activities); *see also* Nat'l Ass'n of Letter Carriers, AFL-CIO v. U.S. Postal Serv., 604 F. Supp. 2d 665, 675-76 (S.D.N.Y. 2009) (“Although the term ‘work-related’ was used by the *O'Connor* Court, neither *O'Connor* nor the cases considered by the Court in reaching its holding involved any area physically outside of the workplace”).

⁹ *Cunningham*, 997 N.E.2d at 472 (declining to follow petitioner's suggestion to confine the workplace exception to “the workplace itself, or . . . workplace-issued property that can be seen as an extension of the workplace.”).

¹⁰ *Id.*

¹¹ *Id.* at 470, 476-77 (Abdus-Salaam, J., concurring).

¹² *Id.* at 476-77 (“No New York court has ever permitted government employers to search employees' personal cars without a warrant, and the majority creates a dangerous precedent

II. CUNNINGHAM V. NEW YORK STATE DEPARTMENT OF LABOR

A. Facts

Cunningham, the Director of Staff and Organizational Development of the New York State Department of Labor ("Department"), was suspected of taking unpermitted absences and forging his employment time records.¹³ Pursuant to an investigation and disciplinary proceeding, the State of New York attached a GPS device to Cunningham's personal car without a warrant or his knowledge.¹⁴ The device was installed at the order of the Inspector General while Cunningham's car was located in a parking lot near the office.¹⁵

The GPS device was used to record Cunningham's movements and location for an entire month and generated machine evidence that led to the charges disputed in this case.¹⁶ The Department tracked Cunningham outside of business hours, including evenings, weekends, and even throughout the duration of the employee's family vacation in another state.¹⁷ The GPS records demonstrated that Cunningham's manually logged arrival and departure times differed from the vehicle's actual movements, and, thus, the Department was able to infer his dishonesty.¹⁸ Cunningham brought an Article 78 proceeding to challenge the Commissioner's finding of employee misconduct based on the GPS evidence.¹⁹ The Department's decision to terminate Cunningham was affirmed by the Appellate Division, but the

by allowing them to do so now.").

¹³ *Id.* at 470.

¹⁴ *Cunningham*, 997 N.E.2d at 470.

¹⁵ *Id.* The court in *Cunningham* did not indicate whether the employee's car was parked in a lot owned by the Department.

¹⁶ The court in *Cunningham* explained that:

Four of [the] 11 charges were dependent on evidence obtained from the GPS device. As to three charges, the GPS information showed that petitioner's times of arrival at and departure from his office were inconsistent with the number of hours he claimed, on time records he submitted, to have worked. A fourth charge was based on petitioner's approval of time records showing his secretary was working during hours when the GPS information showed that he was visiting her home.

Id. at 470-71.

¹⁷ *Id.* at 471.

¹⁸ *Id.*

¹⁹ *Cunningham*, 997 N.E.2d at 471.

New York State Court of Appeals reversed.²⁰

B. Majority Opinion

The Court of Appeals held that the Department's act of placing a GPS device on Cunningham's vehicle in order to track the employee's location constituted a search—an inspection of an area that a person would reasonably expect to be kept private—subject to the Fourth Amendment of the United States Constitution and article I, section 12 of the New York State Constitution.²¹ The majority also found that the Department had reasonable suspicion or grounds to suspect employee misconduct.²² Thus, the main issue presented to the Court of Appeals was whether tracking Cunningham's movements in a personal vehicle throughout his scheduled business day and during his personal activities, was reasonable under the New York State Constitution.²³

In deciding this issue, the court considered whether the search was an unnecessary interference into Cunningham's right to privacy.²⁴ An employer is justified in conducting a search without a warrant if it is both reasonable in scope and necessary to its initial objectives.²⁵ Further, the search must be in alignment with the employee's "reasonable expectation of privacy."²⁶ Cunningham was required by the Department to report his arrival and departure times, which diminished the privacy he could expect in his location during scheduled working hours.²⁷ Yet, the Department's attempt to verify Cunning-

²⁰ *Id.*

²¹ *Id.* at 470-71 ("We decided in *Weaver*, and the Supreme Court decided in *Jones*, that the attachment by law enforcement officers of a GPS device to the automobile of a criminal suspect, and the use of that device to track the suspect's movements, was a search subject to constitutional limitations."); *see also* *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that a personal vehicle is an "effect" under the Fourth Amendment which protects the possession from being unreasonably searched); *see* U.S. CONST. amend. IV; *see* N.Y. CONST. art I, § 12.

²² *Cunningham*, 997 N.E.2d at 473.

²³ *Id.* at 472.

²⁴ *Id.* at 472-73 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968); and *N.J. v. T.L.O.* 469 U.S. 325, 326 (1985)).

²⁵ *Id.*

²⁶ *Id.* at 474 (Abdus-Salaam, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

²⁷ *Cunningham*, 997 N.E.2d at 472 (explaining that an employee has a diminished expectation of privacy in his personal car because he has to report arrival and departure times to

ham's location through a GPS search was tainted because the government employer unnecessarily documented Cunningham's leisure activities.²⁸

The Department had the ability, but nevertheless, failed to remove the GPS device from the employee's vehicle, which led to the tracking of Cunningham's personal movements for an entire month.²⁹ Even though the majority held that surveillance devices designed to record the whereabouts of an employee's personal car for work-related purposes are permitted within the "workplace exception," tracking Cunningham outside of his scheduled business hours was irrelevant to the Department's purpose for the search of investigating occupational misconduct, and thus, the search was excessive.³⁰

Generally, if a search is excessive, any evidence that does not exceed the "permissible scope" of the investigation may be used in court.³¹ Nevertheless, the Court of Appeals in *Cunningham* did not follow the general rule because of the inherent power of a GPS device to substantially invade the privacy of an individual.³² Because the Department did not make any effort to limit the privacy invasion, the search was unconstitutional and all of the evidence was suppressed.³³

However, the Court of Appeals created an exception excusing employers from having to obtain warrants to attach GPS devices to an employee's automobile if they can claim that it is reasonable and necessary to a work related matter.³⁴ The employer need only make a "reasonable effort" to stop the GPS tracking after business hours; yet, "reasonable effort" was not defined and only negligible restrictions are in place to limit the scope of these types of searches.³⁵

his employer).

²⁸ *Id.* at 470, 473.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 473 (citing *United States v. Martell*, 654 F.2d 1356, 1361 (9th Cir. 1981)).

³² *Cunningham*, 997 N.E.2d at 473 (quoting *Weaver*, 909 N.E.2d 1195 (describing the all-encompassing ability of a GPS device as "[c]onstant, relentless tracking of anything")).

³³ *Id.*

³⁴ *Id.* at 470, 472.

³⁵ *Id.* at 473.

III. FEDERAL APPROACH

A. “Reasonable Expectation of Privacy”

In light of advancing technologies, which allow people to conduct searches without physically touching the property being investigated, the Supreme Court of the United States in *Katz v. United States*³⁶ applied the “reasonable-expectation-of-privacy test.”³⁷ In determining whether a search was reasonable under the Fourth Amendment, the decision did not ignore the historical relevance of property rights.³⁸ Rather, it delineated an even broader range of privacy violations which are protected under the Constitution.³⁹

The Court found that police officers illegally interfered with an individual’s privacy rights by listening and recording phone calls made by that individual in a public phone booth.⁴⁰ Prior to the *Katz* decision, a physical trespass upon tangible property was required to invoke the protections of the Fourth Amendment.⁴¹ However, after *Katz*, placing an eavesdropping device on the outside of a public telephone booth in order to gain private information constitutes a violation of the Fourth Amendment under federal law.⁴²

The Court’s reasoning in *Katz* relied on an individual’s “expectation of privacy” in his or her person or belongings and justifiable reliance on that expectation.⁴³ For example, an individual who

³⁶ 389 U.S. 347 (1967).

³⁷ *Id.* at 361; *see also Jones*, 132 S. Ct. at 951, 952 (“The *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”).

³⁸ U.S. CONST. amend. IV (“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.”); *see Katz*, 389 U.S. at 353.

³⁹ *Katz*, 389 U.S. at 353.

⁴⁰ *Id.* at 348, 358.

⁴¹ *Olmstead v. United States*, 277 U.S. 466 (1928) (holding that the Fourth Amendment protects property not people and that a telephone wiretap is not a privacy intrusion sufficient to invoke protection under the Fourth Amendment).

⁴² *Katz*, 389 U.S. at 351 (holding that the “Fourth Amendment protects people, not places” and overruling the exclusive property-based approach in *Olmstead*).

⁴³ *Id.* at 353 (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”).

enters a telephone booth to place a call intends to keep the conversation private and may reveal certain information that he or she would otherwise refrain from disclosing in a public setting.⁴⁴ Essentially, the Fourth Amendment protects individuals rather than property or locations.⁴⁵ The Supreme Court in *United States v. Jacobsen*⁴⁶ adopted the concurrence's view in *Katz*, which further emphasized that a person has the right to be free from excessive governmental intrusions if he or she has an expectation of privacy that is reasonable in the eyes of society.⁴⁷ As long as an individual makes an effort to keep the object or exchange private, whether it is a possession or a conversation made within an enclosed area, it is protected.⁴⁸ If the petitioner in *Katz* placed the call while leaving the phone booth door open, without making any effort to conceal the conversation from third parties, society would not recognize an expectation of privacy.⁴⁹

Furthermore, one does not waive constitutional protection simply because he or she can be visually observed in a transparent booth or public space by third parties.⁵⁰ Constitutional protections that shield against unreasonable searches are not lost even when the

⁴⁴ *Id.* at 352 (holding that an individual using a public telephone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

⁴⁵ *Id.* at 353 ("[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

⁴⁶ 466 U.S. 109 (1984).

⁴⁷ *Jacobsen*, 466 U.S. at 113. The concurrence in *Katz* stated:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Katz, 389 U.S. at 361 (Harlan, J., concurring).

⁴⁸ *Katz*, 389 U.S. at 351.

⁴⁹ *Id.* ("What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

⁵⁰ *Id.*

object is placed in a publicly accessible area, such as a parking lot.⁵¹ Although the act of observing the physical appearance of an individual or the outside of a car is not constitutionally impermissible, an individual does not lose all reasonable expectation of privacy in his or her movements while driving a vehicle or walking along a road.⁵²

The Court in *United States v. Jones*,⁵³ pointed out that a violation under the Fourth Amendment should be determined by an analysis of the inherent privacy expectations attached to the constitutionally protected area that is searched.⁵⁴ *Jones* mandated that citizens receive the same amount of privacy that the Framers intended at the time of the Fourth Amendment's enactment.⁵⁵ Thus, the Court's application requires a minimum amount of protection that a citizen would have benefitted from at that time.⁵⁶ The conservation of these rights is embedded in the meaning behind the concept of a "reasonable expectation of privacy," and these protections are based upon the realistic beliefs of society.⁵⁷ By way of these layers of constitutional protection, any government encroachment in the absence of trespass could be a violation of the Fourth Amendment.⁵⁸

⁵¹ *Id.*

⁵² *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979). The Court stated:

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalk; nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Id.

⁵³ 132 S. Ct. at 945.

⁵⁴ *Id.* at 951.

⁵⁵ *Id.* at 947 (quoting *Kyllo v. United States*, 533 U.S. 34 (2001) ("[A]t bottom, we must 'assur[e] preservation of that degree of privacy against [the] government that existed when the Fourth Amendment was adopted.'")).

⁵⁶ *Id.* at 953 ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.").

⁵⁷ *Id.* at 951 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) ("We have embodied that preservation of past rights in our very definition of 'reasonable expectation of privacy' which we have said to be an expectation 'that has 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.'")).

⁵⁸ *Jones*, 132 S. Ct. at 955 ("[P]hysical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones.").

B. "Reasonableness" of a Search

In *Katz*, the Supreme Court held that a warrantless search is presumptively unreasonable without prior judicial approval.⁵⁹ A judicial order is imperative to the enforcement of sufficient safeguards in favor of citizens because it enables a neutral judge to set specific limitations by way of a warrant and in advance of a search.⁶⁰ Without this order, government officials may encroach upon a citizen's privacy with little restraint.⁶¹ Likewise, it is difficult for a judge to correct the situation in hindsight, especially when an individual's Fourth Amendment rights have already been violated.⁶²

The Court in *New Jersey v. T.L.O.*⁶³ enumerated factors that should be taken into account when determining whether a warrantless search by a public entity is reasonable: (1) the context of the location where the search took place; (2) the necessity of the search balanced with the privacy invasion to the individual; and (3) whether the individual's expectation of privacy was appropriate.⁶⁴ A search lacking probable cause may nevertheless be upheld if the public interest out-

⁵⁹ *Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

⁶⁰ *Id.* at 356 (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272 (1960) ("[T]he procedure of antecedent justification that is central to the Fourth Amendment procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.")).

⁶¹ *Beck v. Ohio*, 379 U.S. 89, 97 (1964) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.").

⁶² *Katz*, 389 U.S. at 358 (quoting *Beck*, 379 U.S. at 96 ("Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' ")).

⁶³ 469 U.S. 325 (1985).

⁶⁴ The Court stated that:

[W]hat is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536 (1967)).

weighs the intrusion to the citizen.⁶⁵ Likewise, the warrant requirement may also be overcome in circumstances where a time constraint renders a warrant unrealistic or impossible, such as a setting where public order must be maintained.⁶⁶

T.L.O. explained that absolute certainty is not required—“reasonable suspicion” or “sufficient probability” can be enough to make a search reasonable under the Constitution.⁶⁷ Still, there must be a good faith basis that the evidence exists in order to conduct a search.⁶⁸ If the search bares evidence unrelated to the scope of the inspection’s purpose, the court must consider the reasonableness of the original search and the question of whether a sufficient nexus existed between the evidence and the original intrusion to determine whether suppression is warranted.⁶⁹

In *O’Connor v. Ortega*,⁷⁰ the Court upheld a warrantless search of an employee because it would be both “unduly burdensome” and disruptive to business if the employer were required to obtain a warrant each time it needed to access an employee’s business files.⁷¹ A search to secure property is valid if the employer has a reasonable belief that government-owned property is contained in an

⁶⁵ The concurrence explained that:

The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although “both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search . . . in certain limited circumstances neither is required.” Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although “reasonable,” do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

Id. at 340-41 (Powell, J., concurring) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

⁶⁶ *Id.* at 339 (quoting *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.”)).

⁶⁷ *Id.* at 346 (citing *Hill v. California*, 401 U.S. 797, 804 (1971)).

⁶⁸ *T.L.O.*, 469 U.S. at 346 (quoting *Hill*, 401 U.S. at 797, 804 (“But the requirement of reasonable suspicion is not a requirement of absolute certainty: ‘sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment’”)).

⁶⁹ *Id.* at 345.

⁷⁰ *O’Connor*, 480 U.S. at 709.

⁷¹ *Id.* at 722 (quoting *Camara*, 387 U.S. at 533). If the process of obtaining a court order would frustrate the governmental reason for the search, the warrant requirement is waived.

employee's office.⁷² However, an individual does not lose the right to privacy in the workplace merely because he or she works for a public employer.⁷³ An employee has an "expectation of privacy . . . in his desk and file cabinets" if the items are not shared and if the employer does not have any established regulations or policies precluding the employee from keeping personal items in his or her office.⁷⁴ Thus, the search itself must be analyzed by applying "the appropriate standard of reasonableness" within the particular employment relationship.⁷⁵

The Supreme Court in *O'Connor* devised a similar test to that in *T.L.O.* to determine whether a search is reasonable under the Fourth Amendment.⁷⁶ First, the search must be warranted at its inception.⁷⁷ This is satisfied when the employer's suspicion of an employee's wrongdoing is reasonably grounded in the belief that evidence will be gained by the search.⁷⁸ The second requirement is based on the reasoning in *T.L.O.*, which required the search to be appropriately connected to the employer's initial goal.⁷⁹ Hence, the methods used to conduct the search must be reasonably associated with its original purpose and the means cannot exceed those which are necessary.⁸⁰

C. The "Workplace Exception" and Other Exemptions to the Warrant Requirement

In *O'Connor*, the Supreme Court followed the "workplace exception," which exempts employers from obtaining a warrant to

⁷² *Id.* at 728 ("A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification.")

⁷³ *Id.* at 717.

⁷⁴ *Id.* at 710.

⁷⁵ *O'Connor*, 480 U.S. at 719.

⁷⁶ *Id.* at 726 (referring to *Terry v. Ohio*, 392 U.S. 1, 20 (1968), and *T.L.O.*, 469 U.S. at 341). See also *T.L.O.*, 469 U.S. at 337 (quoting *Camara*, 387 U.S. at 536).

⁷⁷ *O'Connor*, 480 U.S. at 726 (quoting *Terry*, 392 U.S. at 20).

⁷⁸ *Id.* ("Ordinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file.")

⁷⁹ *Id.* (citing *T.L.O.*, 469 U.S. at 341).

⁸⁰ *Id.*

conduct a routine or investigatory search of an employee.⁸¹ Unlike the court in *Cunningham*, the Court in *O'Connor* defined the “workplace” to include objects that are controlled or owned by an employer or those personal items openly exposed within the workplace environment.⁸² The Court explained that the workplace is not all-inclusive and personal items within the building do not inevitably qualify under the “workplace exception.”⁸³ Instead, the determination should be based upon an individual’s reasonable “expectation of privacy in the *contents* of” a possession in light of objective “societal expectations” of privacy in one’s employment.⁸⁴ Most importantly, the *O'Connor* rule explicitly prohibited a sealed personal item from being searched under this exception.⁸⁵

The presence of “ ‘special needs’ beyond normal law enforcement [or an emergency] . . . may [also] justify departures from the” warrant requirements.⁸⁶ In *Wiley v. Department of Justice*,⁸⁷ a

⁸¹ *Id.* at 722.

⁸² *Cunningham*, 997 N.E.2d at 472. However, the Supreme Court specified that:

The workplace includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.

O'Connor, 480 U.S. at 715-16.

⁸³ *O'Connor*, 480 U.S. at 716.

⁸⁴ The Court in *O'Connor* stated:

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. 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. The 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 As 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.”

Id. (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)).

⁸⁵ *Id.* at 716 (“The 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.”).

⁸⁶ *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

prison employee was suspected of having contraband in his car on work premises and in clear violation of a recognized policy.⁸⁸ In light of the concerns of danger in this context, the Court of Appeals in *Wiley* held that a search of an employee's vehicle need only be "supported by reasonable suspicion."⁸⁹ The special facts of this case were viewed in conjunction with the government's immediate need to control "the entry of guns and other dangerous weapons" that came into the facility in order to preserve safety.⁹⁰ Nevertheless, the court held that this search was unconstitutional because an allegation by an "anonymous informant" absent corroboration was unreliable under the *O'Connor* "reasonable suspicion standard."⁹¹ Furthermore, the employer took nearly a year to forward this anonymous letter to the necessary parties for further investigation, which proved to the court that the search was not an emergency.⁹²

For each particular set of facts, an employee's expectation of privacy can be reduced by office practices, procedures or regulations, and the employment relationship itself, which may permit an intrusion by an employer.⁹³ Ultimately, the governmental interest in conducting a search for supervisory and operational purposes must be balanced against the privacy invasion suffered by the individual.⁹⁴

⁸⁷ 328 F.3d 1346, 1353 (Fed. Cir. 2003)

⁸⁸ *Id.* at 1348-49.

⁸⁹ *Id.* at 1349, 1352 ("The Board concluded that the agency established that the Warden had reasonable suspicion to search Wiley's car based on the information available to the Warden at the time he ordered the search.").

⁹⁰ *Id.* at 1353.

⁹¹ *Id.* at 1349-56; *see also O'Connor*, 480 U.S. at 724.

⁹² *Wiley*, 328 F.3d at 1356-57.

⁹³ *O'Connor*, 480 U.S. at 717 ("The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.").

⁹⁴ *Id.* at 719-20 ("In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.").

IV. NEW YORK STATE APPROACH

A. Article I, Section 12

The first paragraph of article I, section 12 of the New York State Constitution mirrors the Fourth Amendment of the United States Constitution.⁹⁵ However, the New York State Constitution expanded the safeguards provided to citizens by including interferences from technological communications in its protections.⁹⁶ The New York Court of Appeals sought to enforce these constitutional protections by requiring judicial scrutiny and held that GPS searches without warrants are antithetical to the protections guaranteed by the state constitution.⁹⁷ Furthermore, the court in *Cunningham* adopted the balancing test of the United States Supreme Court to determine “reasonableness,” which weighs the individual’s expectation of privacy against the government’s need to conduct a search.⁹⁸

B. Reasonable Expectation of Privacy

Notice of the likelihood of a search can be provided to an employee in the form of employment contracts or agreements that set

⁹⁵ N.Y. CONST. art. I, § 12 (“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.”); see U.S. CONST. amend. IV.

⁹⁶ N.Y. CONST. art. I, § 12 (“The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated . . .”).

⁹⁷ The warrantless use of a tracking device is inconsistent with the protections guaranteed by their state constitutions. The Court of Appeals stated:

Technological advances have produced many valuable tools for law enforcement and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse. Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual’s whereabouts requires a warrant supported by probable cause.

Weaver, 909 N.E.2d at 1203.

⁹⁸ *Cunningham*, 997 N.E.2d at 472 (referring to *Ontario v. Quon*, 560 U.S. 746 (2010) (stating that an employer’s need to conduct a search outweighs the employee’s right to privacy if the property being searched is “employer-issued”)); see also *O’Connor*, 480 U.S. at 721-22.

the terms of hire and, thereby, form a bottom-line for an employee's reasonable expectation of privacy.⁹⁹ In *Caruso v. Ward*,¹⁰⁰ the volunteer officers of the specialized Organized Crime Control Bureau ("OCCB") challenged a component of an Interim Order that would subject the officers to random drug testing as a requirement to remain in the unit.¹⁰¹ In light of the nature of their duties in "hazardous narcotics-related operations," and their prior agreement, which set forth a minimal expectation of privacy upon acceptance of their positions in the specialized force, the court held that the drug tests were constitutional.¹⁰² In reaching that conclusion, the court in *Caruso* decided that the state's interest in making sure that the officers were drug free was of substantial importance in order to prevent any fatal risk to the public or other officers.¹⁰³ The court also decided that the notice provided to these employees, regarding the thorough scrutiny to which they are subject as a condition of employment, was fundamentally fair and reasonably informed.¹⁰⁴ Despite the officers' low expectation of privacy and the forms they signed when hired, the court determined that searching a personal vehicle would still be an unrea-

⁹⁹ *Caruso*, 530 N.E.2d at 854 ("Of crucial significance in this case is that OCCB members have a very diminished expectation of privacy due to their pursuit of service in the elite unit based on conditions known in advance . . .").

¹⁰⁰ 530 N.E.2d 850 (N.Y. 1988).

¹⁰¹ *Id.* at 850.

¹⁰² *Id.* at 851, 853-54 ("[T]heir status, considered with the substantial privacy intrusions to which these particular OCCB members and applicants already have subjected themselves, reduces their privacy interest to a minimal or insubstantial level such that the admittedly crucial State interest justifies the random testing.").

¹⁰³ *Id.* at 855 ("It is not melodramatic to note even the potentially fatal risks to fellow officers and others if a drug-abusing OCCB officer is called upon to use a weapon while under the influence of drugs in inherently high-risk assignments. The terror-filled world they are working in requires the sternest precautionary safeguards to weed out drug abusers from their own ranks.").

¹⁰⁴ The Court of Appeals stated that:

All members enter this service informed, fairly and reasonably, that they will be held to the strictest standards of probity and purity, over and above those already imposed on the police force at large. They enter with professionally sophisticated eyes wide open to the reality that they will operate in fishbowl-like circumstances The officers agree to undergo microscopic examinations of their personal lives, their financial affairs and their professional judgment calls. Realistically, the proposed random drug testing in these narrow circumstances is just another layer of an already heightened, persistent and employee-expected scrutiny.

Id. at 854.

sonable privacy intrusion without probable cause.¹⁰⁵

The capability of certain technologies to collect data is also a factor taken into account when measuring an individual's expectation of privacy.¹⁰⁶ The New York Court of Appeals, in *People v. Weaver*,¹⁰⁷ drew a line between human observation and technological surveillance.¹⁰⁸ It recognized the dramatic disparity in power between the two methods—it would take hundreds of police officers lined up at every corner to match the relentless tracking ability of a GPS device.¹⁰⁹ Furthermore, the court emphasized that GPS tracking is an all-encompassing intrusion because a person's location may divulge his or her political and religious views, sexual orientation, and health status, among other private information.¹¹⁰ Investigations of a vehicle are generally unanticipated by the average citizen because there is a "sense of security and privacy" in traveling in one's personal car.¹¹¹

Weaver adopted the reasoning of Justice Harlan's concurrence in *Katz*, that an individual's "subjective expectation of privacy" must be considered appropriate by society in order to invoke the protections under the constitution.¹¹² Under the New York State Constitution, individuals "have a reasonable expectation that their every move will not be continuously and indefinitely monitored by a technical device without their knowledge."¹¹³

A location of the search is a key factor in determining wheth-

¹⁰⁵ *Id.* at 855 ("[E]ach officer retains important personal rights of privacy in the implementation of this facially valid program and our decision in no way impinges on their 4th Amendment rights to be secure against unreasonable searches and seizures of their persons, homes, cars, lockers or other personal effects under traditional probable cause standards.").

¹⁰⁶ *Weaver*, 909 N.E.2d at 1201.

¹⁰⁷ 909 N.E.2d 1195 (N.Y. 2009).

¹⁰⁸ *Id.* at 1199.

¹⁰⁹ *Id.* ("GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over . . . a practically unlimited period.").

¹¹⁰ *Id.* at 1199 (explaining that a GPS device can create inferences from "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, the synagogue or church, the gay bar and on and on").

¹¹¹ *Id.* at 1201 (quoting *Prouse*, 440 U.S. at 143, 146) ("Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.").

¹¹² *Weaver*, 909 N.E.2d at 1198; see *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

¹¹³ *Weaver*, 909 N.E.2d at 1197-98.

er an individual's expectation of privacy is legitimate.¹¹⁴ Yet, with the advancement of technology, the line between what is a public or private location has blurred.¹¹⁵ The court reasoned, however, that an individual's expectation remains the same notwithstanding the progression of modern technology.¹¹⁶ If the government conducts a search in a secret manner and fails to provide any notice to the individual, an expectation of privacy is still reasonable and the search would be constitutionally impermissible.¹¹⁷

The Court of Appeals in *Weaver* also acknowledged that even a small expectation of privacy is sufficient to sustain a claim against an unreasonable search.¹¹⁸ To rule otherwise would make individuals susceptible to "enormous unsupervised intrusion[s] . . . upon personal privacy."¹¹⁹ Most importantly, the court held that GPS searches require certain safeguards such as judicial oversight and a warrant to prevent the abuse of this technology.¹²⁰ If individuals are subject to governmental interference every time they wish to drive in a personally owned vehicle, "the security guaranteed by the constitution would be seriously" handicapped.¹²¹ As in *Katz*, the Court of Appeals in *Weaver* held that a search must have prior judicial approval unless the particular set of facts qualifies within "specifically established and well-delineated exceptions."¹²² For example, the search would not violate the constitution if an emergency or exigent circum-

¹¹⁴ *Id.* 1198.

¹¹⁵ *Id.* at 1200 ("[C]ontemporary technology [has] project[ed] our private activities into public space[s] . . .").

¹¹⁶ *Id.* at 1200 (quoting *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) ("Fourth Amendment jurisprudence 'keep[s] pace with the march of science.'"). "[T]his change in venue has not . . . [caused] any diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private." *Id.*

¹¹⁷ *Weaver*, 909 N.E.2d at 1200 ("Here, particularly, where there was no voluntary utilization of the tracking technology, and the technology was surreptitiously installed, there exists no basis to find an expectation of privacy so diminished as to render constitutional concerns de minimis.").

¹¹⁸ *Id.* at 1201 (holding that the defendant's minimal expectation in his vehicle was sufficient to support his constitutional claim) (referring to *Arizona v. Gant*, 556 U.S. 332, 345 (2009) ("[A]lthough we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nevertheless important and deserving of constitutional protection.")).

¹¹⁹ *Id.* at 1202.

¹²⁰ *Id.* at 1199, 1203 (holding that the unlimited power of the GPS technology partnered with its cheap assembly is a recipe for employer abuse).

¹²¹ *Id.* at 1201 (quoting *Delaware*, 440 U.S. at 663).

¹²² *Weaver*, 909 N.E.2d at 1201 (quoting *Katz*, 389 U.S. at 357).

stance existed sufficient to trump the warrant requirement.¹²³

V. ANALYSIS AND PROPOSED PROCEDURES

A. Workplace Exception

As the concurrence in *Cunningham* warned, the court's decision not only unnecessarily expanded the boundaries of the "workplace" to include locations and possessions outside the physical office, but it also relieved employers of the mandatory requirements that government authorities must follow in order to conduct a constitutional search.¹²⁴ This leaves government employees susceptible to an array of privacy invasions, so long as their employers can manipulate the surveillance to fit within the "workplace exception."¹²⁵

1. Employer Control

In reformulating the definition of the "workplace," the majority in *Cunningham* purported to rely on reasoning used in *O'Connor*; yet, the cases in *O'Connor* involved possessions located exclusively within office buildings.¹²⁶ Moreover, the Supreme Court held that an employee's personal belongings, which are intended to be kept closed and private, are not considered part of the workplace, even if those items are on company-owned territory.¹²⁷

The employee's car in *Wiley* was regularly used to transport employees and visitors which demonstrated that it was under the em-

¹²³ *Id.* ("While there may and, likely will, be exigent situations in which the requirement of a warrant issued upon probable cause authorizing the use of GPS devices for the purpose of official criminal investigation will be excused, this is not one of them. Plainly, no emergency prompted the attachment of the Q-ball to defendant's van.").

¹²⁴ *Cunningham*, 997 N.E.2d at 474 (Abdus-Salaam, J., concurring).

¹²⁵ *Nat'l. Ass'n of Letter Carriers*, 605 F. Supp. 2d at 676 (referring to *O'Connor*, 480 U.S. at 720-22 ("Although the term 'work-related' was used by the *O'Connor* Court, neither *O'Connor* nor the cases considered by the Court in reaching its holding involved any area physically outside of the workplace" until *Cunningham* was decided.)).

¹²⁶ *Cunningham*, 997 N.E.2d at 471-72, 476 (quoting *O'Connor*, 480 U.S. at 715-16 ("A personal car is also not akin to a letter posted on a bulletin board, a photograph displayed on a desk, or other personal items an employee may bring within the 'areas' traditionally understood as 'part of the workplace context.' ")).

¹²⁷ *O'Connor*, 480 U.S. at 716 (distinguishing that "closed personal luggage, a handbag or a briefcase" is not part of the workplace).

ployer’s control and may have reduced the employee’s expectation of privacy.¹²⁸ But, in *Cunningham*, the Department did not exert any authority over the car—it did not issue the vehicle to the employee, provide maintenance to ensure its workability, or pay for gas or mileage.¹²⁹ Nor was Cunningham’s car used to store company-owned property or transport other employees.¹³⁰ Even though the car was regularly driven home for family use, the court in *Cunningham* classified this personal vehicle under the “workplace exception” as if it were business property.¹³¹ Thus, the Court of Appeals disregarded both the law and the facts when it held that the employee’s personal car was part of the “workplace.”

2. *Sufficient Notice*

In *Cunningham*, the employee did not have notice that the Department could place a GPS device on his personal car to track his movements for an extended period of time.¹³² Unlike the police officers in *Caruso*, Cunningham was not forewarned that both his business and private affairs would be monitored before accepting his position with the Department.¹³³ Nor did Cunningham hold a high-risk position such as a paramilitary officer in the OCCB in *Caruso* or as a teacher in a correctional facility in *Wiley*.¹³⁴ The Department made no attempt, not even by posted notice as in *Wiley*, to make Cunningham aware that vehicles in lots surrounding the office could be

¹²⁸ *Wiley*, 328 F.3d at 1351.

¹²⁹ *Cunningham*, 997 N.E.2d at 476-77 (Abdus-Salaam, J., concurring) (demonstrating that the employer holds more control when the property is issued by the employer which lowers an employee’s expectation of privacy).

¹³⁰ *Id.* at 476 (quoting *O’Connor*, 480 U.S. at 715, and rejecting the argument that employees who use their cars to take care of “work-related obligations place those cars within the ambit of their ‘employer[s]’ control’ such that they could be subjected to a warrantless search”).

¹³¹ *Id.* at 472, 477.

¹³² *Id.* at 470.

¹³³ *Id.* *Contra Caruso*, 530 N.E.2d at 854 (“All members enter this service informed, fairly and reasonably, that they will be held to the strictest standards of probity and purity.”).

¹³⁴ *O’Connor*, 480 U.S. at 710 (stating that employment positions implemented for the purpose of “supervision, control, and . . . efficient operation of the workplace” may alert employees to special circumstances that may allow for unwarranted searches); see *Cunningham*, 997 N.E.2d at 470; see also *Caruso*, 530 N.E.2d at 850, 853; see also *Wiley*, 328 F.3d at 1347-48.

searched without a warrant.¹³⁵

While it is true that the requirement of employee time sheets in *Cunningham* lessened Cunningham's expectation of privacy in his whereabouts during work hours, a time sheet does not serve the same purpose as a prior agreement or contract.¹³⁶ In *O'Connor*, the Court only permitted a search in the absence of notice or a warrant because it involved government-owned property.¹³⁷ Yet, the court in *Cunningham* took the *O'Connor* holding out of context by applying the workplace exception to personal property rather than state property.¹³⁸ This leaves the employee without any guidelines for determining his or her "reasonable expectation of privacy."¹³⁹ Cunningham had no reason to foresee any type of search of his vehicle because of the lack of notice, and therefore, the Court of Appeals should not have applied the workplace exception to his personal vehicle.¹⁴⁰

B. Privacy Protections

Whether a search is used to investigate work-related or criminal misconduct or simply to follow-up on a routine business matter, each search subjects the employee to a possible infringement of constitutional rights.¹⁴¹ Because government employers can escape the judicial scrutiny that necessarily accompanies the warrant requirement by means of the "workplace exception," they are given greater privileges than those of our police.¹⁴² Even though public employers may not be "in the business of investigating the violation of criminal laws," they have been given the discretion to act as law enforcement officials while conducting investigations of their employees.¹⁴³ This

¹³⁵ *Wiley*, 328 F.3d at 1351. The employer posted a notice in the parking lot to alert employees of a possible search of their vehicles. *Contra Cunningham*, 997 N.E.2d at 470.

¹³⁶ *Cunningham*, 997 N.E.2d at 472. *Contra Caruso*, 530 N.E.2d at 851 (stating employees "would have to sign a form acknowledging their understanding that periodic drug testing is a condition of membership in the Bureau").

¹³⁷ *O'Connor*, 480 U.S. at 712-13, 728.

¹³⁸ *Id.* at 715-16; *Cunningham*, 997 N.E.2d at 472.

¹³⁹ *Katz*, 389 U.S. at 360; *see also O'Connor*, 480 U.S. at 715-16.

¹⁴⁰ *Cunningham*, 997 N.E.2d at 470; *contra Wiley*, 328 F.3d at 1351 (finding that employer provided notice to employee of a foreseeable search and, thus, the workplace exception set forth in *O'Connor* applied).

¹⁴¹ *Caruso*, 530 N.E.2d at 858-59.

¹⁴² *Weaver*, 909 N.E.2d at 1203.

¹⁴³ *O'Connor*, 480 U.S. at 722.

loophole has been justified by the fact that lower courts have historically upheld "any 'work-related' search."¹⁴⁴ But, such dictum is fallacious because it assumes that a search satisfies the Fourth Amendment "reasonableness" standard simply because the investigation is performed by an employer.¹⁴⁵

1. *Burden on the Employer*

The Supreme Court in *O'Connor* may have incorrectly suggested that it is a "common-sense realization that government offices could not function if every employment decision became a constitutional matter."¹⁴⁶ Conversely, as a result of technological advances, obtaining a warrant is no longer a time-consuming and onerous task.¹⁴⁷ In fact, business practices could be further disrupted if employers are routinely forced to litigate the "reasonableness" of their searches.¹⁴⁸ If an employer, without too much difficulty, may eliminate unreasonable surveillance of its employees' private activities, such as by providing an employee with a GPS device capable of being turned off during personal activities, it is only reasonable for the warrant requirement to be upheld.¹⁴⁹

2. *Privacy Intrusion to the Employee*

It is undisputed that investigating the existence of an employee's misconduct is a legitimate interest of a state employer.¹⁵⁰ Nevertheless, the one-sided information extracted by a GPS search invites misunderstandings and judgments against employees and, in turn, can

¹⁴⁴ *Id.* at 720-21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 722 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

¹⁴⁷ *United States v. Cuaron*, 700 F.2d 582, 588 (10th Cir. 1983). The availability of telephonic warrants may diminish the burden placed on the employer to obtain a judicial order.

¹⁴⁸ *Weaver*, 909 N.E.2d at 1201. Even a minimal expectation of privacy is sufficient to sustain a claim against an unreasonable search.

¹⁴⁹ *Cunningham*, 997 N.E.2d at 473 ("It would be impossible, or unreasonably difficult, so to limit a GPS search of an employee's car as to eliminate all surveillance of private activity especially when the employee chooses to go home in the middle of the day.").

¹⁵⁰ *O'Connor*, 480 U.S. at 724 (Blackmun, J., concurring) ("Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees.").

impair or negatively affect an individual's career and livelihood.¹⁵¹ Intimate information which an employee may seek to keep private can now be analyzed under an employer's microscope through GPS searches.¹⁵²

The critical problem with the information retrieved by GPS searches is the fact that employees do not have the chance to rebut assumptions made about the employee based on his location because searches are conducted without the employee's knowledge or consent.¹⁵³ Moreover, when employees become aware that their employer has the capability of watching their every move, these surveillances will chill their First Amendment freedoms.¹⁵⁴ Employees will be reluctant to visit certain places during the workday for fear that their travels or even interactions with others may be used against them.¹⁵⁵ Employees now have a new task after the expansion of the "workplace exception" in *Cunningham*: to look over their shoulders and check their vehicles and belongings for hidden GPS devices.¹⁵⁶ Further still, without appropriate safeguards, what will prevent this precedent from creating a slippery slope for even more invasive tracking methods?¹⁵⁷

¹⁵¹ *Cunningham*, 997 N.E.2d at 474 (quoting *Weaver*, 909 N.E.2d at 1199-1200) ("What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits."); *Weaver*, 909 N.E.2d at 1199 ("Disclosed in [GPS] data . . . will be trips [of] indisputably private nature of which takes little imagination to conjure . . .").

¹⁵² *Weaver*, 909 N.E.2d at 1199 ("GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over . . . a practically unlimited period.").

¹⁵³ *Id.* (explaining that an employer may create assumptions about an employee based on his or her "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, the synagogue or church, the gay bar and on and on"); see *Cunningham*, 997 N.E.2d at 470.

¹⁵⁴ *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) ("[A]wareness that the Government may be watching chills associational and expressive freedoms.").

¹⁵⁵ *Id.* at 955-56 ("The Government can store such records and efficiently mine them for information years into the future.").

¹⁵⁶ *Cunningham*, 997 N.E.2d at 476 (Abdus-Salaam, J., concurring) ("There is now little to prevent a government employer from placing a GPS device on that person's bag, briefcase, shoe, cell phone, watch, or purse—anything that is used during the workday (like petitioner's car)—to determine whether, based on the tracking data transmitted by that device, the employee is located where he or she purports to be.").

¹⁵⁷ The concurrence in *Cunningham* cautioned:

No New York court has ever permitted government employers to search

3. *Safeguards*

The Court of Appeals in *Cunningham* neglected to implement sufficient safeguards against future searches. An individual's privacy rights under the constitution must be protected by a judicial order absent an exception to the warrant requirement or an agreement that sufficiently alerts the employee of the possibility of a search.¹⁵⁸ Only a detached and neutral magistrate has the ability to determine whether a search is "reasonable" at its inception while enforcing safeguards to prevent a constitutional violation in advance.¹⁵⁹ The absence of probable cause and a warrant requirement only allows the judge to analyze a search's "reasonableness" by pure speculation after an employee's rights have already been violated.¹⁶⁰ Additionally, in congruence with the *O'Connor* rationale, the "workplace exception" should be limited to the confines of the company offices if the employer chooses not to obtain a warrant.¹⁶¹

Employers should also be required to provide sufficient notice to their employees of any possibility of a search by the employer without a warrant.¹⁶² This can be done by mutual agreement between the employer and employee.¹⁶³ Likewise, a bargained-for contractual provision would benefit the employer, because it goes toward satisfying Due Process notice requirements and can demonstrate foreseeability.¹⁶⁴

employees' personal cars without a warrant, and the majority creates a dangerous precedent by allowing them to do so now. The ramifications of the majority's decision will extend far beyond this case. All government employees, at all levels, in all three branches of government, may now be subject to electronic surveillance based upon a mere "reasonableness" standard, without any judicial oversight at the inception of the search. Given the majority's imprimatur of warrantless GPS tracking, less intrusive methods for investigating government employees will almost certainly be replaced with electronic surveillance. The potential for abuse that we recognized in *Weaver* is now closer to becoming a reality.

Id. at 477.

¹⁵⁸ *Katz*, 389 U.S. at 357; *see also Caruso*, 530 N.E.2d at 851, 854.

¹⁵⁹ *Katz*, 389 U.S. at 357.

¹⁶⁰ *Weaver*, 909 N.E.2d at 1203.

¹⁶¹ *O'Connor*, 480 U.S. at 715-16.

¹⁶² *Katz*, 389 U.S. at 359 ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

¹⁶³ *Caruso*, 530 N.E.2d at 851, 854.

¹⁶⁴ *Id.*

Finally, the privacy rights of individuals should continuously be reevaluated in light of rapid advances in technology.¹⁶⁵ With the progression of technology, substantial privacy intrusions are now a regular occurrence without any physical trespass.¹⁶⁶ Rather than remaining stagnant, the protections granted under the Fourth Amendment of the United States Constitution and article I, section 12 of the New York Constitution should be reexamined by the legislature in consideration of the many boundaries that are repeatedly being surpassed by modern methods.¹⁶⁷ The law must progress along with the advancement of technology to ensure that the protections that existed during its enactment still remain intact today.¹⁶⁸

VI. CONCLUSION

The New York Court of Appeals was correct in holding that the search conducted by the Department was overly intrusive and unreasonable under both the New York State and United States Constitutions.¹⁶⁹ Holding otherwise would allow government officials to conduct searches of individuals that exceed what is necessary in order to accomplish routine or investigatory tasks.¹⁷⁰ Moreover, suppressing the evidence as a whole will serve to deter employers from conducting searches that are unreasonable in scope.¹⁷¹

However, placing Cunningham's personal vehicle within the "workplace exception" could provide employers with overbroad discretion in conducting employee searches.¹⁷² It allows an employer to track its employees' movements outside of work premises and also compile intimate information that is unrelated to the search's purpose.¹⁷³ Likewise, a search conducted for criminal or work-related

¹⁶⁵ *Jones*, 132 S. Ct. at 962 (Alito, J., concurring).

¹⁶⁶ *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

¹⁶⁷ *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) ("In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."); see U.S. CONST. amend. IV; see also N.Y. CONST. art I, § 12.

¹⁶⁸ *Jones*, 132 S. Ct. at 964.

¹⁶⁹ *Cunningham*, 997 N.E.2d at 470.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 473.

¹⁷² *Id.* at 472-76 (quoting *Weaver*, 909 N.E.2d at 441-42).

¹⁷³ *Id.*

misconduct should not be distinguished because each instance leaves the employee vulnerable to the same privacy intrusions.¹⁷⁴ After all, in the very case at bar, the government failed to halt surveillance when the employee was clearly on personal time.¹⁷⁵ Such abuses are easily capable of repetition, particularly with no oversight in place.¹⁷⁶ Hence, government employers should be held to the same accountability as police officers in ensuring that an individual's privacy rights are not violated by excessive intrusions.

The Court of Appeals neglected to provide sufficient safeguards to prevent privacy intrusions in the first place. Constitutional violations may be curtailed by simply requiring government employers to notify employees of their rights at the commencement of employment, which, in turn, could reduce the burdens on both the court system and employers. If nothing else, at least such notice would give candidates for public sector employment the ability to make informed decisions.

*Antonia J. Broughton**

¹⁷⁴ *Cunningham*, 997 N.E.2d at 477 (Abdus-Salaam, J., concurring) ("All government employees, at all levels, in all three branches of government, may now be subject to electronic surveillance based upon a mere 'reasonableness' standard, without any judicial oversight . . .").

¹⁷⁵ *Id.*

¹⁷⁶ *Weaver*, 909 N.E.2d at 1203.

* J.D. Candidate 2015, Touro College Jacob D. Fuchsberg Law Center; B.A. 2009 in Liberal Arts with concentrations in Fine Arts, Music and Psychology, Hofstra University. Online Editor, for the *Touro Law Review*. I would like to extend my gratitude to Professor Gary Shaw, for challenging my understanding of the law through our many valuable discussions, and to the *Touro Law Review* for their constant devotion to our members and community. Special thanks to the *Review's* Constitutional Law Editor and my law school friend, Jeffrey Gautsche, for his helpful guidance throughout the editing process and for, together with Professor Rena Sepowitz, recommending my article for publication. Lastly, I wish to thank my parents, Rita and Edward Broughton, and my brothers, David and Nicholas, for their love and support throughout my life, and especially, my dear friend, Joseph Martin, for his unconditional kindness, encouragement and inspiration while completing this Case Note.