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## CHANGING EXPECTATIONS OF PRIVACY AND THE FOURTH AMENDMENT

Robert C. Power\*

Immediately after the Al Qaeda terrorist attacks of September 11, 2001, one thought that occurred to many Americans was “things will never be the same.” That reaction reflected a diminished sense of security—a very natural reaction to the infliction of massive violence on a nation that had largely been spared war on its home ground for 140 years. In 2006, after the passage of over five years with no comparable attacks in the United States (but a few scares), the domestic effects appear to be less dramatic. We know, however, from events in Europe and the Middle East that domestic peace can disappear at any time, and we realize that we were foolhardy to have a strong sense of personal safety before September 2001. This article addresses the effects of both the attacks and the nation’s responses, focusing on the substantive law of the Fourth Amendment.<sup>1</sup>

Several commentaries have addressed the impact of September 11 on governmental powers and civil liberties.<sup>2</sup> This article takes a different perspective, focusing on how we as a

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> See, e.g., Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9 (2003); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 441 (2002); Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133 (2004); Steven A. Osher, Essay, *Privacy, Computers and the Patriot Act: The Fourth Amendment Isn’t Dead, but No One Will Insure It*, 54 FLA. L. REV. 521 (2002); *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & the USA Patriot Act*, 72 GEO. WASH. L. REV. 1139 (2004). Most articles address the “USA Patriot Act,” the acronymic nickname of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

society expect the government to respond to terrorism and how those expectations affect Fourth Amendment doctrine.<sup>3</sup> Our expectations have changed in two key respects. First, they are based on an enhanced awareness of the extent to which our private lives are open to public scrutiny. Second, we increasingly take for granted and accept substantial intrusions by governmental security measures when we do things we have always thought we have the right to do—such as travel by air, enter a federal building, use the Internet, and drive on a highway.<sup>4</sup>

Several polls and other studies of public attitudes concerning privacy have focused on responses to September 11. Two points show up repeatedly. More people are willing to part with some of their individual privacy as part of the war on terror, but, at the same time, they are increasingly aware of inroads on privacy and are concerned about giving up too much.<sup>5</sup> A series of Harris Poll studies have tracked public attitudes from 2001 through 2006. A September 19, 2001, report analyzing poll data from several major newspapers and other institutions showed strong, visceral support for expanded security actions in a wide range of areas.<sup>6</sup> The

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<sup>3</sup> Notwithstanding the importance of the Patriot Act, this article does not address it other than in a glancing fashion. The Act is both a cause and a result of public reactions to the September 11 attacks and, in this respect, may have substantial effects on the public's expectations of privacy. These effects may change aspects of Fourth Amendment law.

<sup>4</sup> See Humphrey Taylor, *The Harris Poll #46: America Attacked: What the Polls Tell Us*, Sept. 19, 2001, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=257](http://www.harrisinteractive.com/harris_poll/index.asp?PID=257).

<sup>5</sup> See Humphrey Taylor, *The Harris Poll #49: Overwhelming Public Support for Increasing Surveillance Powers and, in Spite of Many Concerns About Potential Abuses, Confidence That These Powers Would Be Used Properly*, Oct. 3, 2001, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=260](http://www.harrisinteractive.com/harris_poll/index.asp?PID=260).

<sup>6</sup> Taylor, *supra* note 4.

The attacks have substantially increased public support for security measures that might erode our civil liberties. A two-to-one majority believes this is necessary, and modest majorities support giving law enforcement the power to stop “people who may fit the profile of a suspected terrorist,” broader power “to tap telephones, monitor cell phones and other wireless communications” and—by only 50% to 45%—the power to “read all private e-mails.”

*Id.* See also PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMERICAN PSYCHE REELING FROM TERROR ATTACKS (2001), <http://people-press.org/>

company's own polls from September 2001, March 2002, September 2002, September 2004, June 2005, and August 2006 reveal more nuanced conclusions. American support for enhanced security was strong in September 2001, as one would clearly expect, but the polls also indicated substantial concerns about potential abuses by the government despite overall confidence in the government's use of new security powers.<sup>7</sup> Follow-up polls for six months and then a year later showed continued support for security measures, but at somewhat lower levels, and continued reservations about potential abuses.<sup>8</sup> By September 2004 the results seemed to reflect a longer term split in attitudes: continued strong support for some increased law enforcement powers coupled with substantial concern about improper use of surveillance techniques.<sup>9</sup> Looking to the extremes of a fairly wide spectrum of attitudes, 17% of the public felt that increased security measures had already taken more than a moderate amount of their personal privacy, while 35% felt that the government's actions had taken none of their privacy.<sup>10</sup> By June 2005 polls showed continued majority support for increased law enforcement video

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reports/display.php3?ReportID=3 (discussing how the public supported military action and was willing to sacrifice civil liberties).

<sup>7</sup> See Taylor, *supra* note 5.

<sup>8</sup> See Jill Darling Richardson, *Poll Analysis: Concern Growing over Loss of Civil Liberties*, L.A. TIMES, Dec. 21, 2001, [http://www.latimes.com/news/nationworld/timespoll/la-463pa3an,1,457920.story?coll=la-news-times\\_poll-nation](http://www.latimes.com/news/nationworld/timespoll/la-463pa3an,1,457920.story?coll=la-news-times_poll-nation); Amitai Etzioni & Deirdre Mead, *The State of Society—A Rush to Pre-9/11*, THE COMMUNITARIAN NETWORK, [http://www2.gwu.edu/~ccps/The\\_State\\_of\\_Society.html](http://www2.gwu.edu/~ccps/The_State_of_Society.html) (last visited Nov. 10, 2006); Humphrey Taylor, *The Harris Poll #16: Homeland Security: Public Continues to Endorse a Broad Range of Surveillance Powers but Support Has Declined Somewhat Since Last September*, Apr. 3, 2002, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=293](http://www.harrisinteractive.com/harris_poll/index.asp?PID=293); Humphrey Taylor, *The Harris Poll #46: Special "9/11" Poll: Support for Some Stronger Surveillance and Law Enforcement Measures Continues While Support for Others Declines*, Sept. 10, 2002, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=325](http://www.harrisinteractive.com/harris_poll/index.asp?PID=325).

<sup>9</sup> See Harris Interactive, *The Harris Poll #73: Public Perceptions of Likelihood of Future Terrorist Attack Leads to Continuing Support for Tough Surveillance Measures to Prevent Terrorism*, Oct. 1, 2004, [http://harrisinteractive.com/harris\\_poll/index.asp?PID=501](http://harrisinteractive.com/harris_poll/index.asp?PID=501).

<sup>10</sup> *Id.*

surveillance, undercover activity, and a national ID card system.<sup>11</sup> A poll taken after government data-mining and warrantless electronic surveillance programs were revealed showed no significant changes in public attitudes.<sup>12</sup>

Consideration of such privacy versus security issues should not be limited to law school classes or debates among policy wonks. The fact that privacy and government investigative powers are now part of the national discourse, television documentaries, newspaper editorials, and even radio talk show blather is a good sign.<sup>13</sup> Americans are not inclined simply to accept every loss of privacy without asking appropriate questions. While public awareness portends a healthy debate on the issues, that same awareness may itself erode privacy, at least as a matter of constitutional law. This article addresses that erosion, focusing on the two “reasonableness” requirements of the Fourth Amendment. The starting point is the scope of the Fourth Amendment, which applies only where government intrudes on a *reasonable* expectation of privacy.<sup>14</sup> The article goes on to consider the central requirement of the Fourth Amendment, the prohibition of

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<sup>11</sup> See Harris Interactive, *The Harris Poll #51: Majority Believes U.S. Law Enforcement Is Using Its Expanded Investigative Powers Properly in Terrorist Cases but Over Two-Thirds Worry About Insufficient Civil Liberty Safeguards*, June 29, 2005, [http://harrisinteractive.com/harris\\_poll/index.asp?PID=580](http://harrisinteractive.com/harris_poll/index.asp?PID=580).

<sup>12</sup> See Harris Interactive, *The Harris Poll # 63: Large Majorities of Public Support Surveillance of Suspected Terrorists*, Aug. 17, 2006, [http://harrisinteractive.com/harris\\_poll/index.asp?PID=690](http://harrisinteractive.com/harris_poll/index.asp?PID=690).

<sup>13</sup> Increased public attention to privacy issues can be very positive. Not long after the September 11 attacks, a store clerk asked me about the constitutionality of racial profiling at airports. She was a white person in a politically conservative region and had only rarely traveled by air, but she had heard enough to be concerned. See *infra* notes 67-72 and accompanying text.

The controversy over Bill Clinton and Monica Lewinsky provided a similar experience. Back in the late 1990s, I had lunch at a truck stop during a long trip. At the next table were four of the most stereotypical long-haul truckers you could imagine. They were having a fervent conversation, but in tones so hushed that no one else in the restaurant could hear what they were discussing. All of a sudden, one raised his voice enough for everyone to hear. He said: “You all don’t understand. If Congress can force the President to produce White House documents, it destroys the separation of powers under the Constitution.”

<sup>14</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

*unreasonable* searches and seizures.<sup>15</sup> The discussion of that prohibition addresses the growing public and legal acceptance of suspicionless searches, which may pave the way for approval of racial and ethnic profiling.

#### I. THE “REASONABLE” EXPECTATION OF PRIVACY REQUIREMENT

Public expectations play two major roles in Fourth Amendment legal doctrine. The first and most direct is the gatekeeper role. The Fourth Amendment applies to “searches and seizures”; unless a governmental action is a search or a seizure, the Fourth Amendment is not applicable.<sup>16</sup> The Supreme Court’s *Katz v. United States*<sup>17</sup> decision in 1967 expanded the understanding of “searches” to include electronic surveillance of telephone conversations, even in the absence of a physical trespass,<sup>18</sup> which had been required in prior case law.<sup>19</sup> The logical premise of *Katz* was that where people seek to preserve something as private and then “justifiably rely” on that privacy expectation, the Fourth Amendment protects them from unreasonable intrusions by government.<sup>20</sup> Actions or things that are knowingly exposed to the public, on the other hand, are not protected by the Fourth Amendment.<sup>21</sup> As was often the case, Justice Harlan wrote a concurring opinion that cut through some of the verbal complexity of the majority opinion to articulate the concept that has since dominated the case law—the reasonable expectation of privacy.<sup>22</sup> A government action that intrudes upon a reasonable expectation

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<sup>15</sup> 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 . . .”).

<sup>16</sup> *Id.*

<sup>17</sup> 389 U.S. 347 (1967).

<sup>18</sup> *Id.* at 558-59.

<sup>19</sup> See *Silverman v. United States*, 365 U.S. 505, 509-12 (1961); *Goldman v. United States*, 316 U.S. 129, 134-36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928).

<sup>20</sup> *Katz*, 389 U.S. at 352-53.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 361 (Harlan, J., concurring). Accord *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“[T]he *Katz* test . . . has come to mean the test enunciated by Justice Harlan’s separate concurrence in *Katz* . . .”).

of privacy is a search and is therefore subject to the requirements of the Fourth Amendment; one that does not so intrude is not a search and, at least so far as the Fourth Amendment is concerned, is exempt from any requirement that it be “reasonable.”<sup>23</sup>

The crux of the issue in the post-September 11 environment is the extent to which the expansion of governmental investigative powers and the public’s awareness of or acquiescence in security intrusions have changed our expectations of privacy. Public expectations about privacy may now be so reduced that what was previously thought to be a reasonable expectation of privacy is now *unreasonable*, with the result that the Fourth Amendment no longer applies to some very intrusive governmental actions.

Simple visual observation provides a possible example. We are now subject to regular video surveillance—indoors and outdoors, in parks, on streets, in government buildings, private stores, shopping malls, parking lots, and hotel meeting rooms.<sup>24</sup>

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<sup>23</sup> *Katz*, 389 U.S. at 359.

<sup>24</sup> “There are [twenty-nine] million cameras videotaping people in airports, government buildings, offices, schools, stores and elsewhere, according to one widely cited estimate in the security industry.” Joseph Pereira, *Spying on the Sales Floor*, WALL ST. J., Dec. 21, 2004, at B1. See also Megan Santosus, *The Windy City Gets New Eyes*, CIO MAG., Nov. 1, 2004, available at [http://www.cio.com/archive/110104/tl\\_security.html](http://www.cio.com/archive/110104/tl_security.html) (discussing the mayor’s plan to network 2250 cameras throughout Chicago); Electronic Privacy Information Center, Video Surveillance, <http://www.epic.org/privacy/surveillance> (collecting links to news reports on video surveillance, legislative action, etc.); National Public Radio, The Video Surveillance Debate, [http://www.npr.org/programs/morning/features/2002/feb/surveillance/020225\\_surveillance.html](http://www.npr.org/programs/morning/features/2002/feb/surveillance/020225_surveillance.html) (last visited Nov. 10, 2006) (explaining various uses of video cameras in the U.S. and abroad to increase security). Look for security cameras at the places you visit in a day. What was once limited to banks and luxury homes has become a standard protective technique of small businesses and the middle class, and access to surveillance tapes is commonplace in television drama, perhaps the most potent destroyer of a reasonable expectation of privacy. Of course, ingenuity begets ingenuity. See Institute for Applied Autonomy, *iSee v. 911*: “Now More than Ever,” <http://www.appliedautonomy.com/isee/info2.html> (last visited Nov. 10, 2006) (“iSee is a web-based application charting the locations of closed-circuit television (CCTV) surveillance cameras in urban environments. With iSee, users can find routes that avoid these cameras—paths of least surveillance—allowing them to walk around their cities without fear of being ‘caught on tape’ by unregulated security monitors.”). I counted four video

George Orwell anticipated the 24/7 video camera world in his book *1984*.<sup>25</sup> We can be thankful that interactive television inside the home is not yet mandatory for us, as it was for the citizens of Orwell's Oceania.<sup>26</sup> But we should, and probably do, know that cameras are trained on us at many places outside our homes. *Inside* many homes, a computer is transmitting and receiving streams of information through the Internet, and both government and private businesses are studying that information.<sup>27</sup> This was the trend

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cameras and a security observation post in the hotel meeting room at which this article was presented at a meeting of the Association of American Law Schools.

<sup>25</sup> GEORGE ORWELL, 1984 (The New Am. Library of World Literature, Inc. 1961) (1949).

<sup>26</sup> *1984* begins with Winston Smith returning to his apartment, where he is greeted by:

a voice [that] came from an oblong metal plaque like a dulled mirror . . . . The instrument (the telescreen, it was called) could be dimmed, but there was no way of shutting it off completely. . . .

. . .

. . . The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

*Id.* at 6-7.

<sup>27</sup> DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 491-92 (2003):

In our day-to-day transactions with private sector businesses and services, we release a significant amount of personal information—about our purchases, our finances, and even our health. . . . An entire industry has arisen devoted to the creation of gigantic databases of personal information that can be analyzed based on purchasing habits, income levels, race, lifestyle, age, and hobbies and interests.

*Id.* Computerized government records are equally detailed. The authors note congressional proposals to utilize state automobile licensing data to create a national database. *Id.* at 460. Such data is sometimes obtained by criminals and used for fraudulent purposes, as indicated by the ChoicePoint data theft of 2005. See Mike Obel, *Hackers Get Access to 35,000 People's Data*, UNITED PRESS INT'L, Feb. 16, 2005, available at [www.upi.com/archive/view.php?archive=1&StoryID=20050216-100849-6302r](http://www.upi.com/archive/view.php?archive=1&StoryID=20050216-100849-6302r); Robert O'Harrow Jr., *ChoicePoint Data Cache Became a Powder Keg; Identity Thief's Ability to Get Information Puts Heat on Firm*, WASH. POST, Mar. 5, 2005, at A1; Robert O'Harrow Jr., *ID Data*

before September 2001, of course, but the attacks seem to have accelerated both the surveillance and our awareness of it.

The responses of the courts will probably not be very supportive of privacy. *Katz* expanded Fourth Amendment coverage, but a negative implication of the decision is that once an expectation of privacy is no longer reasonable, the matter is open to the public and the Fourth Amendment has no application.<sup>28</sup> Third parties gain access to personal information following virtually all non-cash business transactions, including credit card and check purchases, bank deposits and withdrawals, and Internet shopping, as well as both personal and business telephone calls. Case law that developed over the last thirty years treats such information as “knowingly exposed” under *Katz* on the theory that what a person reveals to a bank, or a telephone company, or a lender, or an Internet service provider cannot reasonably be expected to remain private.<sup>29</sup> The only “reasonable” expectation of privacy seems to be an accurate and informed expectation of complete privacy. In the absence of that degree of privacy, the government can access all of the information that it wants and has the technological ability to obtain. More significantly, there is no longer any Fourth Amendment requirement that the government act reasonably in accessing or using that information. In other words, losing a reasonable expectation of privacy means losing Fourth Amendment protection, and that means losing any constitutional protection against unreasonable governmental intrusions.

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*Conned from Firm: ChoicePoint Case Points to Huge Fraud*, WASH. POST, Feb. 17, 2005, at E1.

<sup>28</sup> See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408-10 (2005); *Kyllo v. United States*, 533 U.S. 27, 32-35 (2001); *United States v. Knotts*, 460 U.S. 276, 281-83 (1983).

<sup>29</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735, 741-46 (1979) (outgoing call data); *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (bank records); *Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir. 2001) (computer subscriber telephone information); *United States v. Phibbs*, 999 F.2d 1053, 1077-78 (6th Cir. 1993) (credit card records); *People v. Elder*, 134 Cal. Rptr. 212, 214-15 (Cal. Ct. App. 1976) (public utility records). This seems to be the strongest basis for defending the alleged widespread data-mining by United States security agencies after September 11, 2001.

A different and more generous line of Fourth Amendment analysis occasionally prevails. Some cases take a normative view of what constitutes a reasonable expectation of privacy. Many commentators think this was what the Supreme Court meant to do in *Katz*.<sup>30</sup> This normative approach holds that Katz's expectation of privacy was reasonable because our society values the privacy of telephone communications and not because a third person could not be expected to overhear him, the "accurate and informed" privacy view of the later cases. Changes in time, issues, and Justices make this theory less viable today,<sup>31</sup> although it does receive favorable mention in cases involving virtual intrusions into the home. The most recent "home intrusion" decision was *United States v. Kyllo*,<sup>32</sup> which involved use of a thermal imager to scan the outside of a house to detect whether certain portions of the roof

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<sup>30</sup> See, e.g., WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(d) (4th ed. 2004) [hereinafter LAFAYE TREATISE]; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250 (1993); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 827-28 (1999). This notion was addressed in recurring comments in Justice Harlan's dissent in *United States v. White*, 401 U.S. 745, 768 *passim* (1971) (Harlan, J., dissenting), in which he showed how the majority had misunderstood the meaning of the "reasonable expectation of privacy" in his *Katz* concurrence to come up with the "accurate and informed" notion that now dominates Fourth Amendment law. It was nonetheless a dissent, and *White* is as binding as *Katz*.

<sup>31</sup> It was presented and rejected in a series of cases perhaps best exemplified by *California v. Greenwood*, 486 U.S. 35 (1988). The majority upheld police officers going through a suspect's garbage because garbage bagged up and left for pickup is no longer likely to remain private. *Id.* at 39-43. The dissent argued that the police violated a reasonable expectation of privacy because our society does not want people picking through other people's trash. *Id.* at 45, 50-56 (Brennan, J., dissenting). In other words, even though it is possible, perhaps even likely in some settings, that trash will be viewed by strangers, society believes that people are entitled to privacy with respect to their disposal of garbage and that their garbage should be protected by the Fourth Amendment.

In any event, even routine use of military airplanes or facial-recognition technology would probably be held to be outside of Fourth Amendment protections because they reveal only a better, more informed image of things "knowingly exposed" to the public.

<sup>32</sup> 533 U.S. 27 (2001).

and walls were relatively hot, from which the investigators inferred that the inside of the house was being used to grow marijuana.<sup>33</sup> The Court drew upon language from earlier cases acknowledging heightened privacy expectations in one's home because of the intimate personal activities that take place there.<sup>34</sup> It then connected this greater expectation of privacy to law enforcement's use of a device not normally available to the public and therefore not readily foreseeable by the occupant, to hold that *Kyllo* was entitled to Fourth Amendment protection for the heat emanating from his house.<sup>35</sup>

The *Kyllo* line of analysis is unlikely to halt, or even to slow, expanded government data collection practices in the wake of the September 11 attacks. Other than the occasional use of advanced military technology within the United States,<sup>36</sup> there is little indication that law enforcement relies heavily on new technological devices to reach into places or things traditionally regarded as private under societal norms. Computer tracing systems, such as Carnivore,<sup>37</sup> might involve greater law

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<sup>33</sup> *Kyllo*, 533 U.S. at 29-30.

<sup>34</sup> *Id.* at 37-39 (citations omitted).

<sup>35</sup> *Id.* at 40.

<sup>36</sup> There does not appear to be widespread use of advanced military technology in law enforcement. Reconnaissance aircraft equipped with electro-optical and infrared sensors were provided during the search for the Washington, D.C. area snipers in 2002. See Steve Vogel, *Military Aircraft with Detection Gear to Augment Police*, WASH. POST, Oct. 16, 2002, at A1. An article in Slate explained how rarely the military assists in law enforcement due to the Posse Comitatus Act. Phillip Carter, *Why Can the Army Help Cops Catch the D.C. Sniper*, SLATE, Oct. 17, 2002, <http://www.slate.com/id/2072727> (citing Posse Comitatus Act, 18 U.S.C. § 1385 (2000)). The other use of sophisticated technology heavily reported in recent years is the use of facial-recognition software to scan persons seen by video camera at the 2001 Super Bowl, which predated the September 11 attacks. See, e.g., Louis Sahagun & Josh Meyer, *Secret Cameras Scanned Crowd at Super Bowl for Criminals*, L.A. TIMES, Feb. 1, 2001, at A1; Editorial, *Super Bowl Snooping*, N.Y. TIMES, Feb. 4, 2001, § 4, at 16. Cf. Robert O'Harrow Jr., *Facial Recognition System Considered for U.S. Airport*, WASH. POST, Sept. 24, 2001, at A14 (discussing the possible use of facial-recognition systems at Reagan International Airport). The Harris Poll of September 2001 reported support for use of facial-recognition technology in the war on terrorism by 86% to 11%. Taylor, *supra* note 5.

<sup>37</sup> Carnivore is a computer system intercept mechanism that can monitor a person's private electronic communications, including e-mail and Internet

enforcement access to individual computer usage data than in the past, but such data is already so widely available to private industry that any expectation of privacy a person holds in this area is due to ignorance rather than technological reality. Amazon, Tower Records, and Brown University already know that I am largely a Netscape, Westlaw, Yahoo person rather than a Microsoft, LexisNexis, Google person. Under Fourth Amendment law, that means the government may know it as well. In law, if not in cultural belief, the Patriot Act and other statutes *grant* us privacy rights beyond those of the Fourth Amendment because they impose some limits on governmental access to or use of personal information.<sup>38</sup>

The more we become accustomed to video camera surveillance whenever we are outside our homes and to public and

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browsing. See Graham B. Smith, Comment, *A Constitutional Critique of Carnivore, Federal Law Enforcement's Newest Electronic Surveillance Strategy*, 21 LOY. L.A. ENT. L. REV. 481, 492 (2001). A central privacy debate concerns keeping statutory privacy protections up to date with such technological advances. See, e.g., Robert S. Steere, Note, *Keeping "Private E-Mail" Private: A Proposal to Modify the Electronic Communications Privacy Act*, 33 VAL. U.L. REV. 231, 253-54 (1998). Carnivore itself became a victim of technological advancement. In January 2005, the FBI reported that it had stopped using Carnivore. The bad news is that it did so because the Bureau found commercially available software to be more effective at monitoring other people's keystrokes. See Richard B. Schmitt, *New FBI Software May Be Unusable*, L.A. TIMES, Jan. 13, 2005, at A1; Caron Carlson, *FBI's Carnivore Is Toothless*, EWEEK, Jan. 24, 2005, at 18, available at [www.eweek.com/article2/0,1759,1753381,00.asp](http://www.eweek.com/article2/0,1759,1753381,00.asp).

<sup>38</sup> Pen register or caller-id information and data in the custody of other persons or businesses are not protected by the Fourth Amendment. See *supra* notes 28-29 and accompanying text. Federal statutes, however, impose privacy restrictions, such as requiring court orders or subpoenas on certification of some level of proof or showing of relevance to a criminal or national security investigation. See, e.g., 18 U.S.C. §§ 2701-2709 (Supp. II 2004) (telephone records, e-mail held in third party storage); §§ 3121-3127 (pen registers and trap and trace devices). The Patriot Act loosened some procedures for obtaining such data. E.g., Pub. L. No. 107-56, § 216, 115 Stat. 272, 288-89 (2002) (expanding scope of data obtainable about e-mail; allowing nationwide execution of court orders authorizing use of pen registers, etc.); § 210 (allowing law enforcement subpoenas of credit card and bank account information from a communication service provider). In these and similar respects, the Patriot Act trimmed statutory privacy protections but still maintained a zone of privacy beyond that required by the Constitution.

commercial access to information about our private lives, the less we retain any actual expectation of privacy. As a legal matter, that shrinks our *reasonable* expectations of privacy, which accelerates the trend by making us even more accustomed to government and private intrusions on privacy. The change in our expectations also costs us judicial oversight of police surveillance activities because if there is no search, there is no constitutional law to restrict those activities.

## II. "REASONABLE" SEARCHES AND SEIZURES

Public perceptions play into Fourth Amendment doctrine in a second way, one that is less direct but equally significant. The central requirement of the Fourth Amendment is that searches and seizures must be reasonable in order to be constitutional.<sup>39</sup> In theory, the warrant and probable cause requirements provide a basic minimum standard of "reasonableness." In practice, however, most searches and seizures fall within exceptions to one or both of those requirements and may take place without a warrant or probable cause. As a result, approval or disapproval of a search or seizure often turns on a general judicial assessment of what is reasonable.<sup>40</sup> These general "reasonableness" inquiries often mirror public attitudes about government actions that intrude for law enforcement or other purposes. Examples that relate to the war on terrorism include "special needs" searches and "stop and frisk" law, each of which can present racial profiling issues.

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<sup>39</sup> U.S. CONST. amend. IV.

<sup>40</sup> See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 86 (7th ed. 2004). See also *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (describing the warrant requirement as "so riddled with exceptions that it [is] basically unrecognizable"). Justice Scalia cited Professor Craig Bradley's 1985 law review article, *Two Models of the Fourth Amendment*, which noted over twenty warrant or probable cause exceptions. *Id.* (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985)). Bradley's list did not include more recently acknowledged exceptions for special needs, drug tests, inventory, containers, protective sweeps, public safety, student searches, national security electronic surveillance, and a variety of intrusions from dog sniffs to garbage seizures deemed outside Fourth Amendment protections because no reasonable expectation of privacy exists.

A. “Special Needs” Searches and Seizures

Many of the intrusive actions by government agencies in terrorism investigations are “special needs” searches premised on national security or public safety rather than criminal law enforcement. The notion behind “special needs” is that searches for reasons other than criminal law enforcement should be exempt from traditional warrant and probable cause requirements, which make sense only in the context of criminal investigations.<sup>41</sup> Warrants are rarely required, and while some justification for the intrusion is required, that justification is far less than individualized probable cause. Courts often allow across-the-board privacy invasions for “special needs” based on little more than the featherweight requirement of a rational basis.<sup>42</sup> This is the source of law for routine safety screening at airports and courthouses, as well as various forms of regulatory searches, such as DUI checkpoints and drug testing.<sup>43</sup>

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<sup>41</sup> See LAFAVE TREATISE, *supra* note 30, §§ 10.1-10.11.

<sup>42</sup> “Special needs” searches are judged through a balancing test that was described by the Supreme Court in *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997). The application of this approach to national security electronic surveillance and, by implication, other actions with a security objective was addressed in *In re Sealed Case No. 02-001*, 310 F.3d 717, 744-46 (Foreign Int. Surv. Ct. Rev. 2002) (per curiam).

<sup>43</sup> *E.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002) (drug testing of students in extracurricular activities); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450-55 (1990) (DUI roadblock); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 618-20 (1989) (drug testing); *United States v. Green*, 293 F.3d 855, 859 (5th Cir. 2002) (protecting military installations from terrorism); *Grider v. Abramson*, 180 F.3d 739, 748-50 (6th Cir. 1999) (use of a magnetometer at a KKK rally at a courthouse); *Romo v. Champion*, 46 F.3d 1013, 1020 (10th Cir. 1995) (safety search of persons entering prison parking lot); *McMorris v. Alioto*, 567 F.2d 897, 899-901 (9th Cir. 1978) (weapons search at public buildings); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (searches of bags and packages of all persons entering federal courthouses); *Legal Aid Soc’y v. Crosson*, 784 F. Supp. 1127, 1128 (S.D.N.Y. 1992) (upholding use of magnetometers in juvenile courts, noting routine use in the state since mid-1980s); *infra* notes 44-45 (airports). *Cf.* *New York v. Burger*, 482 U.S. 691, 717-18 (1987) (no warrant or probable cause needed for junkyard inspections under statutory regulatory scheme); *Green v. Berge*, 354 F.3d 675, 676-79 (7th Cir. 2004) (compelled DNA testing). The Supreme Court has described similar security measures at public buildings as “routine.” *Chandler*, 520 U.S. at 323.

Fourth Amendment doctrine has allowed reasonable safety or security-based intrusions into persons and their belongings for many years. After September 11, however, growing public acceptance of more intrusive searches means that we are now much more likely than ever to characterize routine use of highly intrusive practices as reasonable and, therefore, constitutional. This is, of course, President Bush's defense of a wide range of actions taken for national security reasons.

Air travel provides a good example. Not many years ago people could get on an airplane almost as easily as they could get on a bus. Air passenger screening came after a rash of skyjackings in the 1960s, and at first these minor intrusions generated controversy under the Fourth Amendment.<sup>44</sup> Airports are now an obstacle course of magnetometers, hand-held metal detecting wands, X-ray machines, explosives-sniffing dogs, and more. The change in security practices at airports has meant that it has been a very long time since people thought of magnetometers as too intrusive or a requirement that passengers submit carry-on items to X-ray machines as unreasonable. The reasons are our society's gradual decision that such measures are effective in promoting safety on airplanes, and that the resulting loss of privacy is relatively painless. In 1972 Second Circuit Chief Judge Henry J. Friendly warned in connection with a magnetometer case, "[a]t

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<sup>44</sup> The LaFave Treatise on the Fourth Amendment has a lengthy section on the past and present of airport searches. *See* LA FAVE TREATISE, *supra* note 30, § 10.6. A task force formed to respond to a number of skyjackings in the 1960s proposed several mechanisms, including broad use of magnetometers and frisks or searches of suspicious passengers. *Id.* § 10.6(a). A 1972 Federal Aviation Administration regulation required airlines to use one or more of these techniques. Note, *The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128, 130 n.12 (quoting FAA Press Release No. 72-26 (Feb. 6, 1972)). *See* 14 C.F.R. § 121.538 (2006). Case law of the period upheld magnetometers used in connection with behavioral profiles under theories from consent to early versions of "special needs." *E.g.*, *United States v. Edwards*, 498 F.2d 496, 499-501 (2d Cir. 1974) (balancing need against intrusion); *United States v. Davis*, 482 F.2d 893, 908-15 (9th Cir. 1973) (passengers can avoid screening by electing not to board); *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972) (use of a magnetometer is "justified by a reasonable governmental interest in protecting national air commerce"); *United States v. Epperson*, 454 F.2d 769, 770-72 (4th Cir. 1972) (balancing government interest in detecting metal upon passengers against privacy).

least so long as the present wave of airplane hijacking continues, permissible subjection of airline passengers and their baggage to a search for objects that might be used for air piracy or to cause or constitute a threat of an explosion goes far beyond this.”<sup>45</sup>

Magnetometers and other security searches and seizures later came to courthouses and schools, resulting in substantial litigation, most of which upheld at least limited use of such searches as constitutional under the “special needs” rubric.<sup>46</sup> Before the September 11 attacks, the Supreme Court casually noted the validity of “searches at places such as airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”<sup>47</sup> Since the attacks, we have seen new requirements that passengers produce photo identification, that ban many common household products, and that subject checked as well as hand-carried baggage to manual, item-by-item searches.<sup>48</sup> There is now virtually no privacy for anything traveling

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<sup>45</sup> *United States v. Bell*, 464 F.2d 667, 674-75 (2d Cir. 1972) (Friendly, C.J., concurring). His reference was to use of a magnetometer and pat-down of a person who set off its alarm. *Id.* at 669.

<sup>46</sup> *See supra* note 43.

<sup>47</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). Circuit Judge Alex Kozinski wrote the following in a case about courthouse security measures:

No one goes through security checkpoints for the pleasure of it. It's intrusive. It may force you to come into physical contact with perfect strangers. It delays your progress toward your destination. It's a bother. It's a nuisance. It's a pain in the neck. But most people put up with it without complaint because they understand that security screenings serve an important purpose: safeguarding us all from armed attack. At airports alone, over a billion screenings—four for every man, woman and child in the United States—are conducted each year. Although such screenings can be inconvenient, we all feel a good deal more secure knowing that our fellow airline passengers aren't carrying guns, knives and bombs.

*Klarfeld v. United States*, 962 F.2d 866, 867 (9th Cir. 1992) (Kozinski, J., dissenting from denial of rehearing en banc) (citation omitted).

<sup>48</sup> Congress passed two laws shortly after September 11, the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001), and the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), both codified in various sections of 49 U.S.C. *See* LAFAYETTE TREATISE, *supra* note 30, § 10.6. These laws required screening all airline passengers. One method for doing so is by a computer-based screening system that assigns security risk levels and search protocols to known individuals based on their risk level. § 136, 115 Stat. at 636-37. The

by air, and the result may be that our acceptance of these intrusions as reasonable will permanently render domestic travel subject to the sort of governmental powers previously reserved for international border crossings. Identification requirements could conceivably become internal passport requirements. It is even conceivable that the courts could deny the application of the Fourth Amendment at all on the premise that there is no longer any reasonable expectation of privacy while traveling by air.

Has this change been bad? It is hard to say yes because most of us would rather be certain that bombs are being kept off airplanes than have our baggage inviolate and our pockets unscanned. It was terrorists, after all, and not the government whose actions have made such searches seem “reasonable” to most of us. But it represents a major change in public attitudes, and it is a change that the courts will probably recognize as permitting more security “special needs” searches without probable cause or a warrant than in the past. And as long as expectations drive the scope of Fourth Amendment protection, once an intrusion moves from the “unreasonable” to the “reasonable” category, it may never be able to move back.

### *B. Stop and Frisk*

“Stop and frisk” law arises from *Terry v. Ohio*,<sup>49</sup> a 1968 decision upholding the police practice of requiring suspicious individuals to stop and submit to limited searches in the absence of a warrant and on less than probable cause.<sup>50</sup> Stop and frisk law has been the biggest growth area in Fourth Amendment law for nearly forty years.<sup>51</sup> This is probably because *Terry* both added to the

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Transportation Safety Administration has not been successful in implementing the program to date. See, e.g., Leigh A. Kite, Note, *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II System Meet the Constitutional Challenge?*, 61 WASH. & LEE L. REV. 1385, 1390-92 (2004); Robert O’Harrow Jr., *Airport Screening System Touted as Improvement*, WASH. POST, Aug. 27, 2004, at E3.

<sup>49</sup> 392 U.S. 1 (1968).

<sup>50</sup> *Id.* at 30-31.

<sup>51</sup> The “Stop and Frisk” materials take up over four hundred pages in the LaFave Treatise, as many as any other body of search and seizure law. See LAFAVE TREATISE, *supra* note 30, § 9. The same trend applies to casebooks,

roster of police actions subject to Fourth Amendment restrictions and created an entirely new standard of justification for such mini-searches and mini-seizures, “reasonable suspicion.”<sup>52</sup>

The application of stop and frisk law to the intrusions common in terrorism investigations, such as security screening at airports, is obvious. Even before September 2001 numerous stop and frisk cases involved confrontations at airports.<sup>53</sup> Many of those cases, most involving drug prosecutions, turned on whether the person was “stopped” without reasonable suspicion. Most confrontations began with a law enforcement officer walking up to a traveler and asking questions. The issue was whether the officer’s actions amounted to a “stop,” which brings the Fourth Amendment into play or was a mere “encounter,” not subject to Fourth Amendment analysis. In encounters, people have the right to “keep on moving” and to decline police inquiries.<sup>54</sup> The key fact in determining whether a stop has taken place is whether the person reasonably believes he or she is not free to leave.<sup>55</sup> If a stop has taken place, the police must have reasonable suspicion to justify their actions.<sup>56</sup>

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which have expanded steadily over the editions, with the largest expansions generally in the stop and frisk materials. A thirtieth year anniversary symposium on *Terry* took over eight hundred law review pages. Symposium, “*Stop and Frisk*” In 1968: *The Issue, the Cases and the Supreme Court’s Decisions in Terry v. Ohio, Sibron v. New York, and New York v. Peters*, 72 ST. JOHN’S L. REV. 721-1525 (1998).

<sup>52</sup> *Terry*, 392 U.S. at 37.

<sup>53</sup> Supreme Court cases in the canon include *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Royer*, 460 U.S. 491 (1983); and *United States v. Mendenhall*, 446 U.S. 544 (1980). Less cited today, but still pertinent to analysis in this area, are *Florida v. Rodriguez*, 469 U.S. 1 (1984), and *Reid v. Georgia*, 448 U.S. 438 (1980). Many cases in the courts of appeals and state courts concern use of the drug-courier profile at airports. See *infra* notes 59-63 and accompanying text.

<sup>54</sup> See *Terry*, 392 U.S. at 34 (White, J., concurring) (suspect is not obligated to answer requests for information); *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (adopting Justice White’s view from *Terry*). In *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), the Court recognized a state power to require suspects to identify themselves but took care to limit that power to stops based on reasonable suspicion. *Id.* at 185-89.

<sup>55</sup> *Royer*, 460 U.S. at 501-02 (plurality opinion) (quoting *Mendenhall*, 446 U.S. at 554). While *Royer* is a four-Justice plurality, the test is endorsed by a majority, see *id.* at 514 (Blackmun, J., dissenting), and has been treated as established law since then by the Supreme Court. *E.g.*, *United States v. Drayton*,

One public perception emanating from the September 11 attacks and the resulting additional security measures at airports seems to be that any inquiry by a government official at an airport, especially one by an armed law enforcement or security officer, is mandatory. That at least seemed to be the view of second year law students in 2005, who shared the perception that airports are in effect martial law zones.<sup>57</sup> The traditional notion that people are generally free to come and go and to decline to answer police questioning seems quaint, at least in connection with airports or other security zones. That perception should in theory expand Fourth Amendment protection because it makes it more likely that courts will find that a Fourth Amendment stop has occurred. Thus, more police/traveler contacts of the sort mentioned above would be subject to the reasonable suspicion standard. The counterbalance, however, may be that the widespread recognition of the need for heightened security at airports means that most (perhaps all) such stops will be deemed reasonable, even if not justified by actual individualized reasonable suspicion, as originally contemplated under *Terry*. The same could be said for almost any public building or gathering place that could be identified as a possible terrorist target. Thus, the *Terry* standard may become weakened as a side effect of the public's increasing tolerance of intrusive questioning and search practices.

### *C. Profiling*

Profiling provides another example of the potential impact on Fourth Amendment law of greater security at airports and elsewhere in connection with security investigations. Profiles generalize and disseminate the knowledge of veteran law enforcement officers about observable facts and circumstances that can be linked to crime so that less experienced officers can identify

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536 U.S. 194, 201 (2002); *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991); *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984).

<sup>56</sup> *Sokolow*, 490 U.S. at 7 (citing *Terry*, 392 U.S. at 30).

<sup>57</sup> My spring 2005 Criminal Procedure students seemed surprised that anyone would think that a person could legally walk away from a security inquiry at an airport, the premise of *Mendenhall* and *Royer*, among other cases. Members of the class included a professional pilot, a state legislator, a police officer, and several public and private executives.

likely criminals. Some profiles are fairly obvious, even to those with no law enforcement experience. Law students recognize that the suspects in *Terry* fit an informal profile of “thieves casing a store”<sup>58</sup> and that a barber with only one chair but six telephones in his or her shop is probably a bookmaker. Other profiles are less obvious, such as that drug couriers tend to purchase airplane tickets with cash in small denominations.<sup>59</sup> Some profiles are arguably offensive, such as that motorcyclists are gang members, and some are worse than merely offensive. The latter include racial or ethnic stereotypes, such as those that portray African Americans as drug couriers or dealers.<sup>60</sup> Much foolish or offensive profiling

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<sup>58</sup> *Terry*, 392 U.S. at 5-7. It is useful in class to compare such hypotheticals to the facts of *Spinelli v. United States*, 393 U.S. 410 (1969), in which the Court noted that two telephones were too few to be incriminating. *Id.* at 414. The point at which common behavior becomes sufficiently noteworthy to be suspicious is when a profile becomes credible. Occasionally profiles turn up in unusual situations. *See, e.g.*, *State v. Althiser*, No. 97CA14, 1997 Ohio App. LEXIS 6054, at \*11 (Ohio Ct. App. 1997) (profile of a mussel poacher).

<sup>59</sup> Purchasing airplane tickets with small bills is one of the “seven ‘primary characteristics’ ” in the drug-courier profile as described by the Fifth Circuit in *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979). Other characteristics are more suspicious (*e.g.*, use of an alias) or less suspicious (*e.g.*, travel to or from almost any major U.S. city) standing alone. Many cases address the drug-courier profile. *E.g.*, *United States v. Hooper*, 935 F.2d 484 (2d Cir. 1991); *United States v. Millan*, 912 F.2d 1014 (8th Cir. 1990); *United States v. Manchester*, 711 F.2d 458 (1st Cir. 1983); *United States v. Hernandez-Cuartas*, 717 F.2d 552 (11th Cir. 1983); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *Cresswell v. State*, 564 So. 2d 480 (Fla. 1990); *Grant v. State*, 461 A.2d 524 (Md. Ct. Spec. App. 1983); *State v. Washington*, 364 So. 2d 958 (La. 1978).

<sup>60</sup> There is a substantial body of literature concerning racial profiling directed at African Americans. *E.g.*, AMNESTY INT’L, THREAT AND HUMILIATION, RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES (2004); KENNETH MEEKS, DRIVING WHILE BLACK (2000); David A. Harris, Essay, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998). The phrase “driving while black” has so entered world consciousness that the major plot device to introduce the characters of the BBC television series *55 Degrees North* was a race-based traffic stop of the protagonist, an African-English police detective. *Episode 1* (BBC America television broadcast Jan. 31, 2005) (this program was aired under the name *Night Detective* in the United States).

begins with an observation that seems to have some statistical correlation to crime and then inverts it to make a fallacious assumption. The fact that many drug dealers drive SUVs somehow turns into people who drive SUVs are drug smugglers. At best, this sort of thinking leads to a waste of resources, but it is even worse when poor logic turns into racist stereotyping. The fact that a high percentage of robberies in inner cities are committed by teenage African-American males becomes a profile that depicts teenage African-American males as robbers. In reality, the high percentage of African Americans among inner city residents explains the

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An example of the occasionally off-handed manner in which some courts address race-based policing is *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992), in which the court upheld a stop of a passenger because of facts in addition to his race and appearance. *Id.* at 394. The court indicated that the stop would have been illegal if race had been the only basis for suspicion but that the officer was allowed to act, at least in part, on his knowledge that all-black Los Angeles gangs were distributing cocaine in Kansas City. *Id.* at 394, 394 n.2. A strong dissent challenged the reliance on race. *Id.* at 396-97 (Arnold, C.J., dissenting). *See also* *United States v. Malone*, 886 F.2d 1162, 1163 (9th Cir. 1989) (positing that the suspect fit the Los Angeles gang member profile— young, black male wearing blue jacket (gang color)). The Sixth Circuit has addressed the matter in a number of cases, most based on airport encounters or stops of African Americans. Typical in result and subtext but atypical in providing several different ways to look at the issues is *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992), in which the full appeals court upheld a stop of a suspiciously nervous person who happened to be the only African American on the flight, *id.* at 578-79, with a concurring opinion troubled by the racial aspects of the case, *id.* at 579-80 (Guy, J., concurring), and compelling dissents analyzing the record, case law, and history to find illegal racial discrimination in law enforcement. *Id.* at 580-83 (Keith, J., dissenting); *id.* at 590-91 (Martin, J., dissenting); *id.* at 591-92 (Jones, J., dissenting). *See also* *United States v. Avery*, 137 F.3d 343, 352-57 (6th Cir. 1997) (finding Fourth Amendment and equal protection violations in racial targeting for encounters and stops).

Racial profiling can harm persons other than African Americans. Hispanics are subject to it for narcotics and immigration offenses. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (noting impropriety of basing stops on apparent Mexican ethnicity); *id.* at 888 (Douglas, J., concurring) (describing the practice as “a patent violation of the Fourth Amendment”); Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1. Even white people who go into the “wrong” neighborhoods or socialize with African Americans can be targeted as well. *See, e.g.*, *State v. Letts*, 603 A.2d 562, 564-65 (N.J. Super. Ct. Law Div. 1992); *State v. Kuhn*, 517 A.2d 162, 165 (N.J. Super. Ct. App. Div. 1986).

racial aspect of the pattern (age and gender may be more significant), but the fact that only a small percentage of the identified group commits such crimes becomes lost. The result of creating such a profile, then, is that potentially millions of people can be unfairly tagged with suspicion.

Perhaps sensing the potential value, but fearful of the dangerous ramifications of profiling, most courts pretend they do not exist. Thus, in *United States v. Sokolow*,<sup>61</sup> the Supreme Court tersely noted the long history and use of the drug-courier profile<sup>62</sup> but rejected the notion that its use either supported or detracted from a determination that there was reasonable suspicion justifying a stop.<sup>63</sup> That approach appears to be consistent with a widely cited Fifth Circuit decision that treats profiles as irrelevant to Fourth Amendment determinations.<sup>64</sup>

In the 1990s, racial profiling became a matter of public and media attention, much of it concerning racially based automobile stops and consent searches in the Interstate 95 corridor on the East Coast.<sup>65</sup> Politicians took more aggressive stands than the courts on this issue. From about 1998 to early 2001, politicians of both major political parties and throughout the political spectrum condemned racial and ethnic profiling.<sup>66</sup> A national consensus against racial

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<sup>61</sup> 490 U.S. 1 (1989).

<sup>62</sup> *See id.* at 6-10.

<sup>63</sup> *Id.* at 10. This issue came up in the context of Sokolow's challenge to the adequacy of reasonable suspicion, claiming that the agents involved relied on the profile. *Id.* In an earlier case, the Court noted that the suspect met the drug-courier profile but concluded that the facts described by the agent did not constitute reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 440-41 (1980).

<sup>64</sup> *United States v. Berry*, 670 F.2d 583, 600 (5th Cir. 1982) (en banc) ("We conclude that the profile is nothing more than an administrative tool of the police. The presence or absence of a particular characteristic on any particular profile is of *no* legal significance in the determination of reasonable suspicion.").

<sup>65</sup> There is substantial material on the racial profiling controversies in this area focusing on New Jersey. Two cases that helped press the matter are *State v. Smith*, 703 A.2d 954 (N.J. Super. Ct. App. Div. 1997), and *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996), which analyzed discrimination claims and statistical evidence showing a strong likelihood that many officers targeted minority drivers for traffic stops. *Id.* at 352-57.

<sup>66</sup> Both 2000 presidential candidates strongly condemned racial profiling. Vice President Gore supported a federal statute banning the practice; then

profiling seemed to be developing—there was to be no justification for government action when the decision was based on the race or ethnic origin of the “suspect.” In short, politicians recognized that public opinion rejected racial profiling, notwithstanding the enigmatic stance of the courts on the legitimacy of the practice.

September 11 may have changed this. People know the September 11 terrorists (and probably most members of Al Qaeda) were Middle-Eastern Muslims, and as far as many people are concerned, the only threat justifying the new security measures is Middle-Eastern terrorism. Accordingly, it is logical *in the profiling sense* to rigidly screen air travelers who seem to be of Arab ethnicity, but no equal justification for treating other passengers in the same way. The result of such a determination would be extremely intrusive screening of many thousands of United States

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Governor Bush stated: “[W]e ought to do everything we can to end racial profiling.” *Second Presidential Debate Between Governor Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000, at A22. Cf. Richard L. Berke, *The 2000 Campaign: The Overview*, N.Y. TIMES, Oct. 12, 2000, at A1 (debating whether racial profiling should be a federal crime); News Services, *Rivals Focus on Foreign Policy*, ST. LOUIS POST-DISPATCH, Oct. 12, 2000, at A1.

That year also saw New Jersey acknowledging a systematic practice of racial profiling of minority drivers and a commitment by Republican Governor Christie Whitman that this would begin “the end of racial profiling in America.” David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1. Conservative columnist Lars-Erik Nelson praised the action of United States’ Customs Commissioner Raymond Kelly in ending the agency’s unofficial but common practice of racial profiling people for “extra attention” at borders. Lars-Erik Nelson, *Changing the Profile*, N.Y. DAILY NEWS, Oct. 15, 2000, at 43. See also Nino Amato, Editorial, *Want to Do Something for Justice? End Racial Profiling*, CAPITAL TIMES (Madison, Wis.), May 17, 2000, at 9A; Scott Bowles, *Bans on Racial Profiling Gain Steam*, USA TODAY, June 2, 2000, at 3A; Elizabeth Rogers, *Fear of Driving: Congress Considers Study of Racial Profiling in Police Traffic Stops*, 86 A.B.A. J., July 2000, at 94. Numerous cases in the 1990s criticized racial profiling, even if they did not always find a legal remedy. *E.g.*, *United States v. Avery*, 137 F.3d 343, 352-58 (6th Cir. 1999) (recognizing an equal protection basis for challenges to racial profiling); *United States v. Ornelas-Ledesma*, 16 F.3d 714, 717 (7th Cir. 1994) (reliance on the drug-courier profile alone would subject a large portion of the Hispanic population to stops, describing the practice as “redolent of police-state tactics”); *State v. Donahue*, 742 A.2d 775, 782 (Conn. 1999) (racial profiling not found, but describing the practice as “insidious”).

citizens of Middle-Eastern ancestry who are loyal to this country and no more likely to become terrorists than anyone else. Many people recognize the inequity but do not really care. Those who favor racial profiling in air security matters are not silent on this aspect of the issue, and supporters come from a variety of political viewpoints.<sup>67</sup>

The rules that now apply at airports provide for screening of all persons and property, thereby addressing concerns about racial profiling, at least on their face.<sup>68</sup> A still experimental screening

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<sup>67</sup> *E.g.*, John Derbyshire, *A (Potentially) Useful Tool*, 12 THE RESPONSIVE COMMUNITY 67-70 (2001); Michael Kinsley, *Discrimination We're Afraid to Be Against*, 12 THE RESPONSIVE COMMUNITY 64 (2001); Henry Weinstein et al., *After the Attack: Law Enforcement: Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A1 (noting statements concerning profiling of Arab persons); Michael Beebe & Douglas Turner, *The Lockdown Life*, BUFF. NEWS, Sept. 23, 2001, at A1 (noting comments by New York officials for and against profiling). *See also* Posting of Orin Kerr to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2004\\_12\\_14.shtml](http://volokh.com/archives/archive_2004_12_14.shtml) (Dec. 18, 2004, 11:47 a.m.) (concluding that a substantial minority still favors profiling Muslims or imposing other civil rights limitations). Some of the responses to the airport searches of former Vice President Gore, *see infra* note 71, favored targeting Muslims for airport searches. *E.g.*, Editorial, *Transportation: Prime Suspects*, FLA. TIMES-UNION, June 20, 2002, at B6 (listing a dozen terrorism-related actions directed at the United States by Muslim extremists and concluding, "If a tall, young Caucasian man had robbed a bank in downtown Jacksonville and the cops were stopping short, elderly Chinese women for questioning all over town, one might think something was amiss."); Editorial, *P.C. Security Checks*, PROVIDENCE JOURNAL-BULLETIN, June 28, 2002, at B6 (calling for profiling persons of Middle-Eastern background and characterizing the present practices as "politically correct" and "public relations").

<sup>68</sup> Section 110 of the Aviation and Transportation Safety Act requires "the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier." Pub. L. No. 107-71, § 110(b)(2), 115 Stat. 597, 614 (2001) (codified as 49 U.S.C. § 44901(a)). Various techniques for screening checked baggage for explosives are permitted, including manual search. *Id.* (codified as § 44901(e)). Detailed regulations confirm that persons or property entering the security zones of airports are submitting to potentially complete searches of their persons and property. *See, e.g.*, Submission to Screening and Inspection, 49 CFR § 1540.107 (2005). Under this model, the randomness and/or universality of searches may mean that no one's rights are invaded, as in the DUI roadblock setting. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

system based on individual passenger history and background, however, is necessarily more discriminating. If that system works as it is supposed to, persons with spotless backgrounds and good documentation should experience little difficulty in traveling. Others, regardless of nationality, will continue to be inconvenienced. As of five years after the September 11 attacks, however, that plan has not been implemented. Under the standard screening techniques that are generally observable today at airports, everyone entering an airport gate area goes through a magnetometer, with full body and baggage searches conducted randomly or based on individualized suspicion. But there are indications, and certainly allegations, that the rules are not always applied equally.<sup>69</sup> Persons who appear to be of Arab descent seem to be subject to more stringent stops and searches, probably

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<sup>69</sup> See, e.g., *Kaukab v. Harris*, No. 02 C 0371, 2003 U.S. Dist. LEXIS 13710 (N.D. Ill. Aug. 6, 2003) (civil action alleging plaintiff was singled out for a strip search due to Muslim religion and Pakistani ethnicity); Linda Greenhouse, *The Clamor of a Free People*, N.Y. TIMES, Sept. 16, 2001, § 4, at 1 (noting profiling and violence directed at Muslims); Phuong Ly & Petula Dvorak, *Travels & Travails, Japanese Americans Recall '40s Bias, Understand Arab Counterparts' Fear*, WASH. POST, Sept. 20, 2001, at B1 (noting ethnic bias incidents); Susan Sachs, *In the Search for Suspects, Sensitivities About Profiling*, N.Y. TIMES, Sept. 21, 2001, at D7; Somini Sengupta, *Sept. 11 Attack Narrows the Racial Divide*, N.Y. TIMES, Oct. 10, 2001, at B1 (noting hate crimes and ethnic tensions); Eric Slater & Rebecca Trounson, *America Attacked: In the Shadow of Liberty*, L.A. TIMES, Sept. 14, 2001, at A22 (noting violence and threats toward Arab Americans and Muslims). In response to reports of discrimination against passengers who appeared to be Arab immediately after September 11, the Department of Transportation ordered all airlines to stop such practices. Norman Strickman, U.S. Dep't of Transp., *USDOT Issues Caution on Airline Discrimination*, Sept. 21, 2001, available at <http://www.caasf.org/0901/al-usdot.htm>. In response, the president of Delta Airlines wrote all employees a strongly worded letter pledging high security standards but deploring race or national origin discrimination. Memorandum from Fred Reid, President and Chief Operating Officer, Delta Airlines, to All Delta Employees Worldwide (Sept. 21, 2001), available at <http://www.caasf.org/0901/deltamemo.pdf>.

It may be a sign of progress (and then again, it may not be) when Arab profiling at airports becomes a joke told by an Arab American: “ ‘I went to the airport check-in counter,’ says Egyptian-American comic Ahmed Ahmed to a packed room at L.A.’s Comedy Store. ‘The lady behind the counter asked if I packed my bags myself. I said yes—and they arrested me.’ ” Lorraine Ali, *Laughter’s New Profile*, NEWSWEEK, Apr. 22, 2002, at 61.

because the reality of the security process is that many actions depend heavily on discretionary judgments by security officers. The Department of Justice's guidelines on racial profiling acknowledge this reality. While they prohibit racial and ethnic profiling in criminal investigations, they permit such profiling in the vague area of "national security."<sup>70</sup>

### III. CONCLUSION: ADDING THE PIECES TOGETHER

The most severe intrusions on personal privacy remain isolated, and the worst fears of terror and our responses to terror have not materialized. But they are always "just around the corner," which means that the immediate post-September 11 belief that "things will never be the same" has proven at least partially correct. The sense of safety is gone. Aware of that loss, most people have proven to be resilient and willing to endure inconvenience. For a long time, air security searches seemed to be dogmatically democratic, non-ethnic, and non-ageist. People were amused by stories of former Vice President Gore being subjected to a full body search at an airport,<sup>71</sup> and I once observed a three-year-old boy getting a full security treatment, including an item-by-item search of his Winnie the Pooh backpack. There is still talk

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<sup>70</sup> In 2003 the Department of Justice issued policy guidance to prevent federal law enforcement use of racial profiling. Press Release, U.S. Dep't of Justice, Justice Department Issues Policy Guidance to Ban Racial Profiling (June 17, 2003), [http://www.usdoj.gov/opa/pr/2003/June/03\\_crt\\_355.htm](http://www.usdoj.gov/opa/pr/2003/June/03_crt_355.htm). The Justice Department's Fact Sheet on Racial Profiling issued at the same time explains the action and condemns most uses of racial profiling as immoral and unhelpful. Fact Sheet, U.S. Dep't of Justice, Racial Profiling (June 17, 2003), [http://www.usdoj.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf). The decision does not apply to terrorism, however, although the Department warns against reliance on generalized stereotypes of terrorists. *Id.* at 5. The Fact Sheet states this terrorism exception in several different ways, with the clearest being "[g]iven the incalculably high stakes involved in [terrorism] investigations, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, alienage, and other relevant factors." *Id.*

<sup>71</sup> See *Oh, for Air Force II: Airline Twice Gives Gore 2<sup>nd</sup> Look*, CHI. SUN-TIMES, June 15, 2002, at 12; Editorial, *Transportation: Prime Suspects*, *supra* note 67. Harold L. Katz, Commentary, *Silly Security*, CHI. TRIB., June 27, 2002, at 22.

full body searches of suspected drug dealers and house-to-house searches for criminals, the courts have always prevented such public opinions from guiding constitutional interpretation. Reasonableness has only recently become a vehicle for reducing the necessary level of suspicion and eliminating the need for prior judicial authorization. Strong public support for aggressive security actions designed to protect us from terrorists should not be taken as strong public support for losing our rights, especially *outside* of terrorism investigations.