

Changing Expectations of Privacy and the Fourth Amendment

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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 four years with no comparable attacks in the United States, 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.

Several commentaries have addressed the impact of September 11 on governmental powers and civil liberties.¹ This article takes a different perspective, focusing on how we as a society expect the government to respond to terrorism and how those expectations affect fourth

¹ See, e.g., *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & the USA Patriot Act*, 72 GEO. WASH. L. REV. 1139 (2004); 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); Donald A. Dripps, *Reflections on the Criminal Justice System after September 11, 2001: Terror and Tolerance: Criminal Justice in the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9 (2003); Steven Osher, *Essay, Privacy, Computers and the Privacy Act: The Fourth Amendment Isn’t Dead, But No one Will Insure It*, 54 FLA. L. REV. 521 (2002). 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 Act of 2001, Pub. L. 107-56, Stat. 272 (hereinafter Patriot Act).

amendment doctrine.² 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 – travel by air, enter a federal building, use the internet, drive on a highway.

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. A series of Harris Poll studies tracked public attitudes from 2001 through 2004. 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.³ The company's own polls from September 2001, March 2002, September 2002, and September 2004 revealed 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

² 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. Those effects may change aspects of fourth amendment law.

³*America Attacked: What the Polls Tell Us*, Harris Poll #46, September 19, 2001, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=257 (“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 tape telephones, monitor cell phones and other wireless communications’ and – by only 50% to 45% – the power to ‘read all private e-mails.’”). See also *American Psyche Reeling from Terror Attacks*, Pew Research Center for the People and the Press, September 19, 2001, available at <http://people-press.org/reports/print.php3?ReportID=3>.

by the government, despite overall confidence in the government's use of new security powers.⁴ Follow-up polls six months and a year later showed continued support for security measures, but at somewhat lower levels, and continued reservations about potential abuses.⁵ 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.⁶ 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.⁷

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 investigatory powers are now part of the national discourse, television documentaries, newspaper editorials,

⁴ *Overwhelming Public Support for Increasing Surveillance Powers and, in Spite Of Many Concerns About Potential Abuses, Confidence That These Powers Would Be Used Properly*, Harris Poll # 49, October 3, 2001, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=260.

⁵ *Homeland Security*, Harris Poll #16, April 3, 2002, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=293; *Special "9/11" Poll*, Harris Poll # 46, September 10, 2002, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=325. See also Amitai Etzioni & Deirdre Mead, *The State of Society - A Rush to Pre-9/11*, The Communitarian Network for Individual Rights and Social Responsibility, available at http://www2.gwu.edu/~ccps/The_State_of_Society.html; Jill Darling Richardson, *Poll Analysis: Concern Growing Over Loss of Civil Liberties*, Los Angeles Times, Dec. 21, 2001, available at http://www.latime.com/news/nationworld/timespoll/la-463pa3an,1,457920.story?coll=1a-news-times_poll-nation&ctrack=2&cset=true.

⁶ *Public Perceptions of Likelihood of Future Terrorist Attack Leads to Continuing Support for Tough Surveillance Measures to Prevent Terrorism*, Harris Poll # 73, October 1, 2004, available at http://harrisinteractive.com/harris_poll/index.asp?PID=501.

⁷ *Id.*

and even radio talk show blather is a good sign.⁸ 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, however, 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. The article goes on to consider the central requirement of the fourth amendment, the prohibition of *unreasonable* searches and seizures. 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.

⁸ 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 51-54 and accompanying text. The controversy over Bill Clinton and Monica Lewinsky provided a similar teachable moment. Back in the late 1990's 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.”

The Supreme Court's *Katz*⁹ decision in 1967 expanded the understanding of "searches" to include electronic surveillance of telephone conversations, even in the absence of a physical trespass, which had been required in prior caselaw.¹⁰ 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.¹¹ Actions or things that are knowingly exposed to the public, on the other hand, are not protected by the fourth amendment.¹² 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 caselaw – the reasonable expectation of privacy.¹³ A government action that intrudes upon a reasonable expectation 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." 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 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

⁹ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁰ *See* *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928); *Goldman v. United States*, 316 U.S. 129, 134-36 (1942); *Silverman v. United States*, 365 U.S. 505, 509-12 (1961).

¹¹ 389 U.S. at 352-53.

¹² *Id.*

¹³ *Id.* at 361. *See* *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) ("the *Katz* test . . . has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*").

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.¹⁴ George Orwell anticipated the 24/7 video camera world in his book *1984*.¹⁵ 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.¹⁶ But

¹⁴ “There are 29 million cameras videotaping people at 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 STREET JOURNAL, December 21, 2004, B1. See also Megan Santosus, *The Windy City Gets New Eyes*, CIO MAGAZINE, Nov. 1, 2004, available at http://www.cio.com/archive/110104/tl_security.html (city plan to network 2,250 cameras throughout Chicago); Electronic Privacy Information Center, available at <http://www.epic.org/privacy/surveillance> (collection of links to news reports on video surveillance, legislative action etc.); National Public Radio, available at <http://www.npr.org/programs/morning/features/2002/surveillance/020225.surveillance.html> (story concerning various uses of video cameras in 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 *iSee v. 911* “*Now More than Ever*,” available at <http://www.appliedautonomy.com/isee/info2/html> (“iSee is a web-based application charting the location 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 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.

¹⁵ GEORGE ORWELL, NINETEEN EIGHTY- FOUR (Signet ed. 1961).

¹⁶*Nineteen Eighty Four* 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;

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 a constant stream of information through the internet, and both government and private businesses are studying that information.¹⁷ This was the trend 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.¹⁸ Third parties gain access to personal information following virtually all non-cash business transactions, including credit card and check purchases, bank

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.

¹⁷ “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 data bases of personal information that can be analyzed based on purchasing habits, income levels, race, lifestyle, age, and hobbies and interests.” Darrel J. Solove & Marc Rotenberg, *INFORMATION PRIVACY LAW* 491-92 (Aspen 2003). 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 Hackers get access to 35,000 people’s data*, UPI, Feb. 16, 2005; Robert O’Harrow, *ID Data Conned From Firm, ChoicePoint Case Points to Huge Fraud*, WASHINGTON POST, Feb. 17, 2005, at E1; Robert O’Harrow, *ChoicePoint Data Cache Became a Powder Keg; Identity Thief’s Ability to Get Information Puts Heat on Firm*, WASHINGTON POST, March 5, 2005, at A1.

¹⁸ *See, e.g.* *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005); *United States v. Knotts*, 460 U.S. 276, 281-83 (1983); *Kyllo v. United States*, 533 U.S. 27, 32-35 (2001).

deposits and withdrawals, and internet shopping, as well as both personal and business telephone calls. Caselaw 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.¹⁹ 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.

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 what the Supreme Court meant in *Katz*.²⁰ This normative approach holds that *Katz*’s expectation of privacy was reasonable because our society values the

¹⁹ See, e.g., *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735, 741-46 (1979) (outgoing call data); *United States v. Phibbs*, 999 F.2d 1053, 1077-78 (6th Cir. 1993) (credit card records); *Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir. 2001) (computer subscriber information); *People v. Elder*, 63 Cal. App.3d 731, 134 Cal. Rptr.212, 214-15 (Cal. Ct. App. 1976) (public utility records).

²⁰ See, e.g., WAYNE R. LAFAVE, *SEARCH AND SEIZURE* §2.1(d) (4th ed. 2004) (hereinafter LaFave Treatise); Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 *UCLA L. Rev* 199, 250 (1993); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 403 (1974); Eric Luna, *Sovereignty and Suspicion*, 48 *DUKE L.J.* 787, 827 (1999). This notion was addressed in recurring comments in Justice Harlan’s dissent in *United States v. White*, 401 U.S. 745, 769-95 (1971), in which he showed how the majority had misunderstood the meaning of the “reasonable expectation of privacy” in Harlan’s *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* is.

privacy of telephone communications and not because no third person could 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,²¹ although it does receive favorable mention in cases involving virtual intrusions into the home. The most recent “home intrusion” decision is *United States v. Kyllo*,²² which involved use of a thermal imager to scan the outside of a house to detect that certain portions of the roof and walls were relatively hot, from which the investigators inferred that the inside of the house was being used to grow marijuana. 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. It then connected this greater expectation of privacy to law enforcement 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.²³

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

²¹ 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 29-43. 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. 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.

²² 533 U.S. 27 (2001).

²³ *Id.* at 40.

advanced military technology within the United States,²⁴ 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 Carnivore²⁵ might involve greater law 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, lexis, google person. Under fourth

²⁴ 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 D.C. area snipers in 2002. See Steve Vogel, *Military Aircraft with Detection Gear to Augment Police*, Washington Post, Oct. 16, 2002, p. A1. An article in *Slate* explained how rarely the military assists in law enforcement due to the Posse Comitatus Act. Philip Carter, *Why Can The Army Help Cops Catch the D.C. Sniper*, *Slate*, posted Oct. 17, 2002, available at slate.msn.com/?id=2072727. The other use of sophisticated technology heavily reported in recent years was 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*, LOS ANGELES TIMES, Feb. 1, 2001, at 1; Editorial, *Super Bowl Snooping*, NEW YORK TIMES, Feb. 4, 2001, at section 4, p. 16. Robert O'Harrow, *Facial Recognition System Considered for U.S. Airports; Reagan National May Get Scanning Device*, WASHINGTON POST, Sept. 24, 2001, at A14. The Harris Poll of September 2001 reported support for use of facial recognition technology in the war on terrorism by 86 % to 11 %. See *Overwhelming Public Support*, *supra* note 4.

²⁵ Carnivore is a computer system intercept mechanism that can monitor a person's private electronic communications, including email and internet browsing. See Graham Smith, *Comment, A Constitutional Critique of Carnivore, Federal Law Enforcement's Newest Electronic Surveillance Strategy*, 21 Loy. L.A. Ent. L. Rev. 481, 482 (2001). A central privacy debate concerns keeping statutory privacy protections up to date with such technological advances. See, e.g., Robert Steere, *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 Schmitt, *New FBI Software May be Unusable*, Los Angeles Times, Jan. 13, 2005, at A1; *FBI's Carnivore is Toothless*, eWeek, Jan.24, 2005, at 18.

amendment law, that means that 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.²⁶

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

²⁶ 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 18-19 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 (2003) (telephone records, email held in third party storage); 18 U.S.C. 3121-3127 (2003) (trap and trace devices, pen registers). The Patriot Act loosened some procedures for obtaining such data. *E.g.*, Section 216 (expanding scope of data obtainable about email; allowing nationwide execution of court orders authorizing use of pen registers, etc.); Section 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.

and seizures must be reasonable in order to be constitutional. 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.²⁷ 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.

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,

²⁷See, e.g., 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 cites Professor Craig Bradley’s 1985 law review article, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985), which noted over twenty warrant or probable cause exceptions. Bradley’s list does 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.

which make sense only in the context of criminal investigations.²⁸ 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 based on little more than the featherweight requirement of a rational basis.²⁹ This is the source of law for routine safety screening at airports and courthouses, as well as various forms of regulatory searches, such as D.U.I. checkpoints and drug testing.³⁰ 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.

²⁸ See LaFave Treatise, *supra* note 20, at chapter 10.

²⁹ Special needs searches are judged through a balancing test that was described by the Supreme Court in *Chandler v. Miller*, 520 U.S. 305 (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 (F.I.S. Ct. Rev. 2002).

³⁰ *E.g.*, cases discussed in text and notes 31-33, *infra* (airports); *United States v. Green*, 293 F.3d 855 (5th Cir. 2002) (protecting military installations from terrorism); *McMorris v. Alioto*, 567 F.2d 897, 899-901 (9th Cir. 1978) (upholding weapons search at public building); *Grider v. Abramson*, 180 F.3d 739, 748 (6th Cir. 1999) (upholding magnetometer at KKK rally at courthouse); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); (D.U.I. roadblock); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) (drug testing); *Board of Education v. Earls*, 536 U.S. 822 (2002) (upholding drug testing of all students in extracurricular activities); *Legal Aid Society v. Crosson*, 784 F.Supp. 1127 (S.D.N.Y 1992) (upholding use of magnetometers in juvenile courts, noting routine use in state since mid-1980s); *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972) (permitting searches of bags and packages of all persons entering federal courthouses); *Romo v. Champion*, 46 F.3d 1013 (10th Cir. 1995) (safety search of persons entering prison parking lot). *Cf.* *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (compelled DNA testing); *New York v. Burger*, 482 U.S. 691 (1987) (no warrant or probable cause needed for junkyard inspections under statutory regulatory scheme). The Supreme Court has described similar security measures at public buildings as "routine." *Chandler v. Miller*, 520 U.S. 305 (1997).

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 1960's, and at first the intrusions generated controversy under the fourth amendment.³¹ 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 reason is 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 Judge Henry J. Friendly warned in connection with a magnetometer case, "[a]t 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."³²

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

³¹ The LaFare Treatise has a lengthy section on the past and present of airport searches. *Supra* note 20, § 10.6. A task force formed to respond to a number of skyjackings in the 1960's proposed several mechanisms, including broad use of magnetometers and frisks or searches of suspicious passengers. A 1972 Federal Aviation Administration regulation required airlines to use one or more of the mechanisms. FAA Press Release No. 72-26 (Feb. 6, 1972); *see* 14 CFR section 121.538 (1973). Caselaw 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. Davis*, 482 F.2d 893, 908-15 (9th Cir. 1973) (passengers can avoid screening by electing not to board); *United States v. Edwards*, 498 F.2d 496, 499-501 (2d Cir. 1974) (balancing need against intrusion). *See also* *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972).

³² *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.

searches as constitutional under the special needs rubric.³³ Before the September 11 attacks, the Supreme Court casually noted the validity of “searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”³⁴ Since the attacks, we have seen new requirements that passengers produce photo identification and that subject checked as well as hand-carried baggage to manual, item-by-item searches.³⁵ There is now virtually no privacy for anything traveling by air, and the result may be that our acceptance of these intrusions as reasonable will permanently render domestic travel subject to

³³ See *supra* note 30.

³⁴ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (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 guns.

Klarfield v. United States, 1992 U.S.App LEXIS 11267 (9th Cir. 1992) (en banc) (Kozinski, J., dissenting).

³⁵ 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 of 2001, Pub. L. 107-71, 115 Stat. 597 (2001), both codified in various sections of 49 U.S.C. See LaFave Treatise note at §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. The Transportation Safety Administration has not been successful in implementing the program to date. See, e.g., Robert O’Harrow, *Airport Screening System Touted as Improvement*, Washington Post, Aug. 27, 2004, p. E3; 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).

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*,³⁶ 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.³⁷ Stop and frisk law has been the biggest growth area in fourth amendment law for nearly forty years.³⁸ This is probably because *Terry* both

³⁶ 392 U.S. 1 (1968).

³⁷ *Id.* at 30-31.

³⁸ The “Stop and Frisk” materials take up over 400 pages in the LaFave Treatise, as many as any other body of search and seizure law. The same trend applies to casebooks, which have expanded steadily over the editions, with the largest expansions generally in the stop and frisk

added to the 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.”

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.³⁹ 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.⁴⁰ 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.⁴¹ If a stop has taken place, the police

materials. A thirtieth year anniversary symposium on *Terry* took up 800 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).

³⁹Supreme Court cases in the canon include *United States v. Sokolow*, 490 U.S. 1(1989); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980). Less cited today, but still pertinent to analysis in this area, are *Reid v. Georgia*, 448 U.S. 438 (1980) and *Florida v. Rodriguez*, 469 U.S. 1(1984). Many cases in the courts of appeals and state courts concern use of the drug courier profile at airports. *See infra* notes 44-48 and accompanying text.

⁴⁰ *See Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J. concurring) (suspect is not obligated to answer requests for information); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (adopting White view). 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.* 185-89.

⁴¹ *Florida v. Royer*, 460 U.S. 491, 501-02 (1983); *see also* *United States v. Mendenhall*, 446 U.S. 544 (1980). While *Royer* is a four-justice plurality, the test is endorsed by a majority,

must have reasonable suspicion to justify their actions.

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 seems to be the view of second year law students in 2005, who share the perception that airports are in effect martial law zones.⁴² 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 contacts 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.

see 460 U.S. at 514 (Blackmun, J., dissenting), and has been treated as established law since then by the Supreme Court. *E.g.*, *INS v. Delgado*, 466 U.S. 210 (1984); *California v. Hodari D*, 499 U.S. 621 (1991); *United States v. Drayton*, 536 U.S. 194 (2002).

⁴² My spring 2005 Criminal Procedure students seemed surprised that anyone would think that a person could 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.

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 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,” and that a barber with only one chair but six telephones in his or her shop is probably a bookmaker.⁴³ Other profiles are less obvious, such as that drug couriers tend to purchase airplane tickets with cash in small denominations.⁴⁴ 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-

⁴³ *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 US. 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*, 1997 Ohio App. LEXIS 6054, 11 (Ohio Ct. App. 1997) (profile of a mussel poacher).

⁴⁴ 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. Hernandez-Cuartas*, 717 F.2d 552 (11th Cir. 1983); *United States v. Manchester*, 711 F.2d 458 (1st Cir. 1983); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *Cresswell v. State*, 564 So.2d 480 (Fl. 1990); *Grant v. State*, 461 A.2d 524 (Md. Ct. Spec. App. 1983); *State v. Washington*, 364 So.2d 958 (La. 1978).

Americans as drug couriers or dealers.⁴⁵ Much foolish or offensive profiling 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

⁴⁵ There is a substantial body of literature concerning racial profiling directed at African-Americans. *See, e.g.*, AMNESTY INTERNATIONAL, THREAT AND HUMILIATION, RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES (2004); KENNETH MEEKS, DRIVING WHILE BLACK (2000). Law review treatments include Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003); David A. Harris, “Driving While Black” and 11 Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997). 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, televised in the U.S. by BBC America as *Night Detective*, Jan. 31, 2005.

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.* and n.2. A strong dissent challenged the reliance on race. *Id.* at 396-97. *See also* *United States v. Malone*, 886 F.2d 1162, 1163 (9th Cir. 1989) (suspect fit profile of Los Angeles Gang member – 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 575-76, with a concurring opinion troubled by the racial aspects of the case, *id.* at 579-80, and compelling dissents analyzing the record, caselaw, and history to find illegal racial discrimination in law enforcement, *id.* at 580-92. *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 (concurring Justice Douglas describing the practice as “a patent violation of the Fourth Amendment”); Susan Sachs, *Latino Profiling Seen in Immigration Agency Files*, NEW YORK TIMES, May 1, 2001, at A21. Even white people who go into the “wrong” neighborhoods or socialize with African-Americans can be targeted as well. *E.g.*, *State v. Kuhn*, 517 A.2d 162, 165 (N.J. Super. Ct. 1986); *State v. Letts*, 603 A.2d 562, 564-65 (N.J. Super. Ct. 1992).

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 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 potentially useful but fearful of the dangerous ramifications of profiling, most courts pretend that they do not exist. Thus, in *United States v. Sokolow*,⁴⁶ the Supreme Court tersely noted the long history and use of the drug courier profile, but rejected the notion that its use either supported or detracted from a determination that there was reasonable suspicion justifying a stop.⁴⁷ That approach appears to be consistent with a widely cited Fifth Circuit decision that treats profiles as irrelevant to fourth amendment determinations.⁴⁸

In the 1990's, 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

⁴⁶ 490 U.S. 1 (1989).

⁴⁷ The issue came up in the context of Sokolow's challenge to the adequacy of reasonable suspicion, claiming that the agents relied on the profile. *Id.* at 10. In an earlier case, *Reid v. Georgia*, 448 U.S. 438 (1980), the Court had noted that the suspect met the drug-courier profile, but concluded that the facts described by the agent did not constitute reasonable suspicion. 448 U.S. at 440-41.

⁴⁸ *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.”).

the East Coast.⁴⁹ 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.⁵⁰ A national consensus against racial 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.

⁴⁹ 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. Soto*, 734 A.2d 350 (N.J. Super. Ct. 1996) and *State v. Smith*, 703 A.2d 954 (N.J. Super. Ct. 1997), which analyzed discrimination claims and statistical evidence showing a strong likelihood that many officers targeted minority drivers for traffic stops.

⁵⁰ Both 2000 presidential candidates strongly condemned racial profiling. Vice President Gore supported a federal statute banning the practice; then-Governor Bush stated: “We ought to do everything we can to end racial profiling.” Text of Oct. 11, 2000 debate, *NEW YORK TIMES*, OCT. 12, 2000, AT 22. See generally *Rivals Focus on Foreign Policy*, *ST. LOUIS DISPATCH*, Oct. 12, 2000, at A1; Richard L. Berke, *The 2000 Campaign: the Overview*, *NEW YORK TIMES*, 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*, *NEW YORK TIMES*, Nov. 28, 2000, at 1. Conservative columnist Lars-Erik Nelson praised the action of U.S. Customs Commissioner Raymond Kelly in ending that agency’s unofficial but common practice of racial profiling people for “extra attention” at borders. Lars-Erik Nelson, *Changing the Profile*, *NEW YORK DAILY NEWS*, Oct. 15, 2000, at 52. See also Elizabeth Rogers, *Fear of Driving, Congress considers study of racial profiling in police traffic stops*, *ABA JOURNAL*, July 2000, at 94; 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, Legislatures Across the USA Debate the Police Practice of Stopping Motorists Based on Their Race*, *USA TODAY*, June 2, 2000, at 3A. Numerous cases in the 1990’s criticized racial profiling, even if they did not always find a legal remedy. *E.g.*, *State v. Donahue*, 742 A2d 775, 788 and n.11 (Conn. 1999) (racial profiling not found, but describing the practice as “insidious”); *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, (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”).

September 11 may have changed this. People know that 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 determine that at least at airports, there is good reason to rigidly screen persons who seem to be of Arab descent, 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 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.⁵¹

The rules that now apply at airports provide for screening of all persons and property,

⁵¹ E.g., Michael Kinsley, *Discrimination We're Afraid to be Against*, 12 THE RESPONSIVE COMMUNITY 64 (2001); John Derbyshire, *A (Potentially) Useful Tool*, 12 THE RESPONSIVE COMMUNITY 67-70 (2001-02); Henry Weinstein, *et al.*, *After the Attack; Law Enforcement*, LOS ANGELES TIMES, Sept. 24, 2001, at 1 (noting statements concerning profiling of Arab persons); Michael Beebe & Douglas Turner, *The Lockdown Life*, BUFFALO NEWS, Sept. 23, 2001, at A1 (noting comments by New York officials for and against profiling). See also Associated Press Poll, reported by Orin Kerr on Dec. 18, 2004 in the Volokh Conspiracy blog, concluding that a substantial minority still favors profiling Muslims or imposing other civil rights limitations. See Volokh Conspiracy, available at http://volokh.com/archives/archive_2004_12_12_2004_12_18.shtml Some of the responses to the airport searches of former Vice President Gore, see *infra* note , favored targeting Muslims for airport searches. E.g., *Transportation – Prime Suspects*, FLORIDA TIMES-UNION, June 20, 2002, at B-6 (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”).

thereby addressing concerns about racial profiling, at least on their face.⁵² A still experimental screening system based on individual passenger history and background, however, is necessarily more discriminating. If that system works as it is supposed to, persons with a spotless background and good documentation should experience little difficulty in traveling. Others, regardless of nationality, will continue to be inconvenienced. 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.⁵³ Persons who appear to be of Arab descent seem to be subject to

⁵² Section 110 of the Aviation and Transportation Safety Act requires “the screening of all passengers and property, including U.S. mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier.” 49 U.S.C. 44901(b) (2003). Various techniques for screening checked baggage for explosives are permitted, including manual search. 49 U.S.C. 44901(e) (2003). 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.*, 49 CFR 1540.107, Submission to Screening and Inspection. Under this model, the randomness and/or universality of searches may mean that no one’s rights are invaded, as in the D.U.I. roadblock setting. *See Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

⁵³ *See, e.g.*, *Kaukab v. Harris*, 2003 U.S. Dist. LEXIS 13710 (N.D. Ill 2003) (civil action alleging plaintiff singled out for strip search due to Muslim religion and Pakistani ethnicity); Linda Greenhouse, *War Zone: What Price Liberty?* *NEW YORK TIMES*, Sept. 16, 2001, at 1 (noting profiling and violence directed at Muslims); Susan Sachs, *In the Search for Suspects, Sensitivities Over Profiling*, *NEW YORK TIMES*, Sept. 21, 2001, at A19; Eric Slater & Rebecca Trounson, *LOS ANGELES TIMES*, Sept. 14, 2001, at 22 (noting violence and threats toward Arab Americans and Muslims); Somini Sengupta, *A Nation Challenges: Relations*, *NEW YORK TIMES*, Oct. 10, 2001 (at B1 (noting hate crimes and ethnic tensions); Phuong Ly & Petula Dvorak, *Travels & Travails, Japanese Americans Recall 40's Bias, Understand Arab Counterparts' Fear*, *WASHINGTON POST*, Sep. 20, 2001, at B1 (noting ethnic bias incidents). 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. *USDOT Issues Caution on Airline Discrimination*, Sept. 21, 2001, available at <http://www.caasf.org/0901/a1-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. *To All Delta Employees Worldwide*, Sept. 21, 2001, available at

more stringent stops and searches, probably 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."⁵⁴

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 again" 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

<http://www.caasf.org/0901/deltamemo.pdf>.

It may be (or then again, it may not be) a sign of progress 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." Loraine Ali, *Laughter's New Profile*, NEWSWEEK, April 22, 2002, at 61.

⁵⁴ In 2003, the Department of Justice issued policy guidance to prevent federal law enforcement use of racial profiling. Press Release, Justice Department Issues Policy Guidance to Ban Racial Profiling, June 17, 2003, available at 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. The decision does not apply to terrorism, however, although the Department warns against reliance on generalized stereotypes of terrorists. 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." Fact Sheet, p. 5, available as a pdf file accompanying the Press Release at the Department of Justice's internet site.

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,⁵⁵ 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 of racial and ethnic profiling being unacceptable, and President Bush has been very careful to speak out against ethnic suspicion.⁵⁶

But the public may lose its patience with slow and cumbersome passenger screening. If there continue to be no terrorist attacks at airports, and if the government responds to increased costs and criticism by loosening security, will it do so for all passengers, or only for whites or other people who are “obviously” not Arab terrorists? Will we still be amused by searches of patently harmless travelers when the sharpest edge of fear is gone, and when we want to get on

⁵⁵ E.g., *Oh, for Air Force II: Airline Twice Gives Gore 2nd Look*, CHICAGO SUN-TIMES, JUNE 15, 2002, AT 12; *Transportation – Prime Suspects*, FLORIDA TIMES-UNION, June 20, 2002, at B6; *Commentary, Silly Security*, CHICAGO TRIBUNE, June 27, 2002, at 22 (letter to the editor).

⁵⁶ President Bush made two pertinent, and probably well planned, statements on this issue in the week after September 11. The first was at Washington, D.C.’s Islamic Center, where he emphasized that most Muslims were appalled by the attacks, that Islam is a peaceful religion, and that Muslims in this country should not be subject to intimidation or discrimination. Office of the Press Secretary, “*Islam is Peace*” Says President, September 17, 2001, available at <http://www.whitehouse.gov/news/release/2001/09/print/20010917-11.html>. The second was at an informal press conference two days later, at which the President rejected the idea that the war was a religious one and stated: “[T]here are millions of good Americans who practice the Muslim faith who love their country as much as I love the country, who salute the flag as strongly as I salute the flag.” Office of the Press Secretary, *Remarks by the President at Photo Opportunity with House and Senate Leadership*, Sept. 19, 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010919-8.html>.

New Jersey Attorney General John Farmer received substantial criticism when he suggested that there would be racial profiling in response to the September 11 attacks, but then clarified that he “would not sanction or condone racial profiling” in the investigation. Susan Sachs, *In the Search for Suspects, Sensitivities Over Profiling*, NEW YORK TIMES, Sept. 26, 2001, at A19.

our airplanes and start moving? Ethnic profiling may seem reasonable to many people and play a larger role when fewer passengers are singled out for full searches.

This prospect is especially alarming given the variety of scenarios that arise in the new security state. Consensual police encounters are not searches or seizures and are therefore not regulated by the fourth amendment. These include questioning at airports, similar practices on buses,⁵⁷ and police requests for identification in public areas.⁵⁸ When they are conducted randomly or on the basis of legitimate individualized suspicion, we accept those encounters as good police work. When they are done primarily to one ethnic group, on the other hand, such encounters breed resentment and can destroy confidence in our legal system. If we want to focus on persons who appear to be Arab, we may still do a good job of searching for members of Al Qaeda, but we risk going backwards in terms of the public understanding of our privacy rights under the fourth amendment. Even worse, the courts may come to agree with that new understanding, and to allow racial or ethnic profiling in other forms of criminal investigation as well, unraveling the reforms of the pre-September 11 period.

At airports, mandatory questioning by armed security personnel and intrusive searches of

⁵⁷ Law enforcement officers will sometimes follow a practice of walking through buses, questioning passengers and often asking permission to search baggage, as part of drug, weapons, or illegal alien interdiction efforts. *E.g.*, *United States v. Drayton*, 536 U.S. 194, 197-98 (2002); *Florida v. Bostick*, 501 U.S. 429, 431 (1991); *Bond v. United States*, 529 U.S. 334, 335 (2000). The practice is sometimes called “working the buses.” *E.g.*, *Commonwealth v. Vasquez*, 703 A.2d 25, 27 (Pa. Super. Ct. 1997). For an article criticizing the tendency of courts to describe these actions as encounters rather than stops, see Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercing*, 2002 Sup. Ct. Rev. 153.

⁵⁸ *See, e.g.*, *United States v. Ringold*, 335 F.3d 1168 (10th Cir. 2003) (pumping gas); *United States v. Waldon*, 206 F.3d 597 (6th Cir. 2000) (standing at bus stop); *United States v. Young*, 105 F.3d 1 (1st Cir. 1997) (walking down street); *United States v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990) (not a stop unless officers “throw their official weight around unduly”). *See also* *Florida v. Royer*, 460 U.S. 491 (1983) and *United States v. Mendenhall*, 446 U.S. 544 (1980), discussed earlier, which address such encounters in airports.

the person and personal effects are commonplace and either exempt from the fourth amendment or per se reasonable under it. Law enforcement collection of personal data has long been exempt from judicial oversight due to fourth amendment caselaw defining searches and seizures. In a world where technology has given the government extraordinary ability to intrude and where terrorist attacks have provided a justification to use that ability, the cost to privacy can be very high.

The public expects the police to follow the Constitution and the courts to enforce it. Although public anger and fear over crime have led to substantial public support for actions such as automatic 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.