CHANGING TIDES: A LESSER EXPECTATION OF PRIVACY IN A POST 9/11 WORLD

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I. INTRODUCTION

Since 1966, the Supreme Court of the United States has interpreted the Fourth Amendment to the United States Constitution to protect the privacy of the individual against unwarranted governmental intrusion by the state.[1] What an individual seeks to proclaim as private and what is protected by the Fourth Amendment are determined by a standard of reasonableness.[2] The exclusion of evidence of the government's warrantless electronic surveillance of an individual in a telephone booth on a street corner, in *Katz v. United States*, may now be viewed

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· J.D., University of California at Los Angeles,1981; Associate Professor of Law, University of District of Columbia David A. Clarke School of Law. I wish to thank a number of people who have assisted in various ways with the drafts of the article, notably Professors Will McClain and Michael Lewyn—McClain who kept me abreast with numerous articles and news clippings with his encouraging comments like "while you are incubating your article," and Lewyn who encouraged me as well and edited several earlier drafts. I also give special thanks to Helen Frazer, Associate Director of our law library, who gave me invaluable assistance in editing; Gail Mathapo, who assisted with research and footnotes; Professor Tanya Washington, for her encouragement, and her teaching assistant, Lisa Bobb, who assisted with footnote edits; and my Student Assistants Char Harouna and Katherine Dinkel. I dedicate this article to the memory of my best friend, the late Professor Manley Elliott Banks, whose love of teaching, scholarship, and humanity has motivated me further.

1. Schmerber v. California, 384 U.S. 757, 767 (1966). The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan's concurring opinion in *Katz* formulated the modern test of reasonable expectation of privacy under Fourth Amendment analysis. Smith v. Maryland, 442 U.S. 735, 740 (1979). His formulation of privacy became the talisman for Fourth Amendment protection. *See id.* Like the majority opinion, Justice Harlan's concurrence recognized that the Fourth Amendment protected people, not places. *Katz*, 389 U.S. at 351 (majority opinion); *id.* at 361 (Harlan, J., concurring).

differently in light of concerns about domestic terrorist threats.[3] The parameters of a search proscribed by the Fourth Amendment change over time with the evolution of society's expectations of privacy.[4] Yet, certain constitutional values remain constant, such as the right of the people to be secure in their homes and persons against unreasonable searches and seizures.[5] This value is deeply rooted in the nation's history.[6]

Although originally interpreted to protect a "zone of property" and individual security, the modern Court has viewed the Fourth Amendment to protect one's reasonable expectation of privacy.[7] Thus, the Supreme Court's interpretation of the Fourth Amendment's protection evolves as society's view on privacy changes. One commentator concluded that "a Fourth Amendment based upon expectation of privacy must contend

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3. *Katz*, 389 U.S. at 359 (majority opinion). The Court in the *Katz* case overruled its prior precedent established in the *Olmstead* case, which required a physical trespass of property to invoke privacy interests protected by the Fourth Amendment. *Id.* at 353; *see* Olmstead v. United States, 277 U.S. 438, 466 (1928), *overruled by* Katz, v. United States, 389 U.S. 347 (1967). The Court in *Katz* declared that the electronic eavesdropping was a search requiring probable cause and a warrant even though there was no physical intrusion of the phone booth. *Katz*, 389 U.S. at 353 ("The Government's activities in electronically listening to and recording the petitioner's words . . . constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."). What an individual seeks to proclaim as private, in this case a phone conversation in a closed phone booth, is a constitutionally protected interest so long as it is reasonable. *Id.* at 361 (Harlan, J., concurring). The notion of "domestic terrorist threat" will be discussed throughout this article. Would *Katz* be viewed differently if the government viewed the speaker in the phone booth to fit a terrorist profile? Some would argue the warrantless searches would then be justified. Herein, "domestic terrorism" is defined to mean any terrorist act aimed at injuring, killing, or destroying persons or property for political motivations which are designed to destroy American political institutions. *See* 18 U.S.C. § 2331(5) (2006). Domestic terrorism includes acts that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
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> (B) appear to be intended—
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> > (i) to intimidate or coerce a civilian population;
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> > (ii) to influence the policy of a government by intimidation or coercion; or
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> > (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
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> (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5) (2006).

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

5. *See* U.S. CONST. amend. IV.

6. Akil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) [hereinafter *Fourth Amendment First Principles*]. Professor Amar argued for a return to the first principles of the Fourth Amendment's reasonableness clause. *Id.* He contended that a careful, simple reading of the words illustrates that the Fourth Amendment does not require warrants or probable cause, but only reasonable searches or seizures. *Id.* at 759, 761. He cited to historical evidence and the role of juries in assigning civil damages for unreasonable searches. *Id.* at 780–81.

7. *See supra* note 3 and accompanying text.

with the changing nature of the modern society."[8] This raises the question of how the law of criminal procedure is and will be affected in a post 9/11 world. Will the interest in "national security" or security from terrorist threats reshape constitutional rights, resurrecting, for example, *Korematsu*'s pernicious siren call of massive race- or national origin-based seizure and internment during a time of war? Many changes in criminal procedure doctrine have accompanied a perceived need for greater or more direct enforcement of criminal laws. The increase in "on the street" police encounters with citizens led to a new standard for less than full-blown searches, called the *Terry* search.[9] Widespread usage, sale, and importation of narcotics resulted in the courts granting greater leeway to conduct warrantless searches and seizures.[10] Commentators have written widely about the drug war's impact on the law of criminal procedure and the Fourth Amendment. One commentator stated, "Like the war on drugs before it, the war on terrorism is likely to leave us with a different law of criminal procedure than before."[11]

The "war on terror" is changing society's view on Fourth Amendment privacy values. The interest in protecting domestic security has resulted in increased acceptance of airport searches of persons and property, mass video surveillance on public thoroughfares, and warrantless searches of citizens in public buildings, stadiums, office buildings, trains, subways, buses, schools, public institutions, and private workplaces.[12] To what extent will the American public and courts believe that privacy and security are or should be subject to greater restrictions for some greater good? Is balancing privacy interests against security the proper framework to safeguard Fourth Amendment interests?[13]

Terrorist bombings in July 2005 on public transportation systems in Madrid, Spain and London, England heightened public awareness and

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8. Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1758 (1994). Sundby asserted that the Fourth Amendment as a privacy- focused doctrine has not fared well in modern times and no longer fully captures the values at stake. *Id.* His article re-examined the privacy-based doctrine of the Fourth Amendment and argues for a reciprocal government-citizen trust. *Id.* at 1771–1808; *see infra* note 81.

9. Terry v. Ohio, 392 U.S. 1, 27 (1968).

10. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2151 (2002).

11. *Id.* at 2160.

12. *See infra* Part IV.

13. *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (2006). Posner argued for a balancing approach to the threat of terrorism, evaluating liberty interests in freedom from government restraint against the interest in with public safety. *Id.* He suggested that some constitutional rights change as the relative weights of interest in liberty and safety change. *Id.*

concerns for safety.[14] The American public reacted to the London bombings with some skepticism, anxiety, and an overall concern for greater security.[15] Although there were no immediate known "terrorist threats" following the 2005 London bombings, municipal officials in New York and Washington, D.C. claimed that security of public places could be assured by employing heavily armed policemen on subway stations and increasing video surveillance.[16] Without any basis of reasonable suspicion or probable cause, New York City immediately initiated mass searches of baggage, luggage, and personal belongings of persons using the subway system.[17] Similarly, in Washington, D.C, former Mayor Anthony Williams claimed that the greater use of video camera surveillance of neighborhoods, recreation facilities, parks, and commercial areas following the 2005 bombings would not be a "big mortal threat to civil liberties."[18]

The tide immediately shifted from a reasonable expectation of privacy in one's bags and personal effects to a heightened sense of insecurity without any perceived threat of terrorist violence. There were no major terrorist strikes on American soil since 9/11 to prompt New York City to undertake suspicionless searches of subways. Authorities later determined that the London bombings were a product of a locally grown terror group in London.[19] Yet, public opinion polls taken immediately following the London bombings showed that Americans overwhelmingly favored the checking of bags and persons upon entering mass transit cars.[20] Expectations of privacy changed overnight. Transit officials in Washington, D.C. announced they were

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14. *See* Glenn Frankel, *Man Shot Dead by British Police Was Innocent Brazilian Citizen; Bystander Mistaken for Suspect in Failed Bomb Attacks*, WASH. POST, July 24, 2005, at A24. The anxiety and reaction were extraordinarily high in London following the bombings, and British police overreacted after another failed subway bombing by chasing and eventually shooting and killing an innocent bystander. *Id.* The killings produced outrage through London and the rest of the world. *Id.*

15. CNN.com, Your E-Mails: London Bombings, http://www.cnn.com/2005/WORLD/europe/07/07/feedback.london/index.html (last visited Jan. 5, 2010).

16. *See* CNN.com, Cities' Security Measures, http://www.cnn.com/2005/US/07/07/cities.security/index.html (last visited Jan. 5, 2010).

17. Michelle Garcia, *New York Police Sued Over Subway Searches*, WASH. POST, Aug. 5, 2005, at A3.

18. Eric M. Weiss, *D.C. Might Add Cameras for Police; London Bombings Renew Debate*, WASH. POST, July 14, 2005, at B1. Williams proposed to enlarge the use of video cameras beyond the guidelines approved by the D.C Council. *Id.* Council guidelines allowed cameras to be used only to monitor traffic, large demonstrations, and city emergencies and required installation only in areas "where people would have a reasonable expectation of being videotaped." *Id.*

19. Sam Knight, *Profile: The Leeds Bombers*, TIMESONLINE (London), July 13, 2005, http://www.timesonline.co.uk/tol/news/uk/article543476.ece (last visited Jan. 5, 2010).

20. David W. Moore, *London Terrorist Attack Increases Worries Among Americans*, Gallup News Service, July 8, 2005, *available at* http://www.gallup.com/poll/17221/london-terrorist-attack-increases-worries-among-americans.aspx.

considering random searches of trains.[21] Members of the United States House of Representatives immediately passed a bill, after lengthy debate, extending the Patriot Act.[22] These actions were labeled as necessary counterterrorism measures. Undoubtedly, such measures may also lead to abuse, such as racial or ethnic profiling or unguided discretion by the individual conducting the search. Where will the public, and hence the Court, be willing to draw the constitutional boundary between individual privacy and counterterrorism measures? Will warrantless or suspicionless searches of persons or cars on the public streets, or warrantless entries in the home, schools, churches, synagogues, and places of worship be accepted as needed for domestic security increases? As the public's privacy expectations change, so will the Courts' expectations.[23]

In New York, passengers ultimately filed a lawsuit challenging the random container searches on subways as unconstitutional under the Fourth Amendment.[24] In *MacWade v. Kelly*, the Second Circuit, relying on the special needs doctrine, upheld the warrantless and suspicionless searches as constitutional under the Fourth Amendment.[25] Initially premised on a reduced expectation of privacy in certain areas as justification for warrantless searches without probable cause or reasonable suspicion,[26] the special needs doctrine is expanding to cover random counterterrorism searches in the war on terror.[27] How then should the courts look at what is a reasonable expectation of privacy in light of worldwide terrorist threats? The Eleventh Circuit recently asserted that we cannot restrict civil liberties until the war on terror is over because the war on terror may never be over.[28]

The government has expanded the warrantless wiretapping and datavellaince in the name of national security and has, thus, affected the privacy interests of thousands of Americans. The National Securities Administration's Terrorist Surveillance Program ("TSP"), a program

21. Paul Duggan & Lyndsey Layton, *Transit Security Seen and Unseen; Most Commuters Not Riding Scared*, WASH. POST, July 14, 2005, at A1.

22. Sheryl Gay Stolberg, *Postponing Debate, Congress Extends Terror Law 5 Weeks*, N.Y. TIMES, Dec. 23, 2005, at A1.

23. *See supra* note 4 and accompanying text.

24. MacWade v. Kelly, 460 F.3d 260, 263–66 (2d Cir. 2006).

25. *Id.* at 275; *see infra* Part III.F.

26. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

27. *See, e.g.*, *MacWade*, 460 F.3d at 275.

28. Bourgeois v. Peters, 387 F.3d 1303, 1307, 1312, 1325 (11th Cir. 2004) (invalidating the City of Columbus' policy of conducting check point magnetometer searches of persons wishing to protest outside the Fort Benning military base).

authorizing secret, warrantless surveillance of international telephone and email communications between persons in the United States and persons abroad suspected of being members of or affiliated with al Qaeda, created widespread controversy because of its secrecy and deliberate bypassing of constitutional and statutory safeguards.[29] The program was established by secret presidential executive order.[30] Congress later amended the Foreign Intelligence Surveillance Act to exercise oversight over the program and issued subpoenas seeking information concerning the program's secret authorization by the president.[31] Recent revelations that domestic email communications between American citizens were also secretly collected have raised even more concerns.[32] Moreover, the American Civil Liberties Union ("ACLU") challenged the TSP, and a federal district court issued a partial summary judgment against the program's operation.[33] That decision was later reversed by the Sixth Circuit on standing grounds, but nevertheless, the court stated that "the TSP was unlawful."[34]

In sum, the Court has in recent years balanced the degree of government intrusion of the individual or place searched against the government's need for the search. This article addresses some of the questions posed by the evolution of the Fourth Amendment doctrine in light of terrorist concerns since 9/11. Part II will address the history of Fourth Amendment jurisprudence, from the Boyd Era of property protection and the use of general warrants to discover evidence of crime, to *Olmstead* and the development of the right of privacy under the Fourth Amendment. Part III will address the modern test under *Katz* and the current search and seizure doctrine, including *Terry* stops; racial,

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29. The program was first discovered by reporters of the New York Times who withheld publication of the story. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec.16, 2005, at A1. The TSP was later revealed by the Bush Administration. President George W. Bush, President's Radio Address (Dec. 17, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html [hereinafter Radio Address]; Press Release, Alberto Gonzales, Att'y Gen. and Gen. Michael Hayden, Principal Deputy Dir. For Nat'l Intelligence (Dec. 19, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html [hereinafter Press Release].

30. *See* Press Release, *supra* note 29.

31. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended in scattered sections of U.S.C.); RONALD B. STANDLER, GEORGE BUSH'S ILLEGAL TERRORIST SURVEILLANCE PROGRAM—QUOTATIONS AND LINES 44–53 (2007), http://www.rbs0.com/TSP.pdf (last visited Jan. 5, 2010).

32. James Risen & Eric Lichtblau, *Extent of E-Mail Surveillance Renews Concerns in Congress*, N.Y. TIMES, June 17, 2009, at A1.

33. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758, 782 (E.D. Mich. 2006), *rev'd*, 493 F.3d 644 (6th Cir. 2007).

34. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 720 (6th Cir. 2007).

ethnic, and terrorist profiles; airport and border searches; roadblocks; and mass video and data surveillance. Part IV will discuss the recent assaults on privacy interests under the expectation of privacy test and address the need to balance liberty and privacy concerns under the Fourth Amendment with the need for domestic homeland security. Part V will explore whether the current *Katz* standard of reasonable expectations of privacy is sufficient under changing circumstances of the war on terror or whether the special needs doctrine or a domestic security exception to the Fourth Amendment's test of reasonableness should govern under society's changing expectations with respect to privacy and security.

II. EARLY HISTORY OF THE FOURTH AMENDMENT

In the context of perceived terrorist threats to national security and the technology for ever greater scrutiny of individuals, changes in the Fourth Amendment privacy doctrine appear to be eroding the traditional protections of individuals. How has our concept of Fourth Amendment protection of privacy from government intrusion changed in the context of modern law enforcement and counterterrorism measures in the twenty-first century? The expansion of the internet, email communication, omnipresent cell phones, thermal image devices, biometric imaging, whole body imaging, mass video surveillance, and mass data surveillance as measures in law enforcement or counterterrorism have presented new challenges to privacy concepts under the Fourth Amendment.[35] For over two centuries, protecting the individual citizen from overbroad, unwarranted governmental intrusion has been a central meaning of the Fourth Amendment.[36] At times, it has been a delicate balance of security and liberty—an expansion of governmental powers during times of national emergencies, followed by judicial deference and retrenchment by the courts.[37] Some would say

35. Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 376 (2002). The author noted, "Today's technology has the potential to eliminate the area in which an individual can legitimately declare privacy from the intrusion of the government. If allowed to do so, the very fabric of our democratic society will change." *Id.* Whole body imaging is a device used by airport security officials to photograph air travelers through a millimeter wave scanner, producing a virtual, naked image of an individual. Jessica Ravitz, *Airport Security Bares All, or Does It?*, CNN.COM, May 18, 2009, http://www.cnn.com/2009/TRAVEL/05/18/airport.security.body.scans/ (last visited Jan. 5, 2010). The images are shown on a screen in a separate, closed room, and the traveler's face is not identified with the image. *Id.*

36. *See* United States v. Calandra, 414 U.S. 338, 354 (1974).

37. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE

there is an inherent check and balance in the constitutional system that restores the balance in favor of liberty after the threat has passed.[38] In the case of the growing threat of international terrorism since 9/11, the war in Iraq, and the expansion of the war in Afghanistan, there appears to be no ending point where constitutional boundaries can be relaxed to restore any imbalance in the personal liberty, privacy, and security paradigm. The nature of constitutional law changes with changes in threats to security and liberty. Yet, the commands of the Fourth Amendment seem equally clear—the protection from the government against unreasonable searches and seizures of a person's house, papers, and effects.[39] A historical overview of Fourth Amendment doctrine demonstrates how courts have interpreted the meaning of the Fourth Amendment principles to protect against unreasonable searches and seizures.

> The Fourth Amendment to the Constitution provides:
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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[40]

The Fourth Amendment has drawn its historical meaning from the common law and the English case of *Entick v. Carrington*, which addressed the widespread abuses of the general warrants and the writs of assistance.[41] In *Entick*, the Secretary of State issued general executive

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COURTS 16 (2007). The authors argued for a trade-off thesis between security and liberty and a deference thesis where judges and legislators should defer to governmental balancing during times of emergencies. *Id.* at 15. For example, if domestic security is at risk, then intrusive searches should be tolerated. *See id.* at 16. This view would lead to a relaxing of the Fourth Amendment during times of emergencies. *See id.* It would then be permissible under the Patriot Act for executive officials to inspect records and books of patrons at libraries and bookstores. *Id.* at 22.

38. *Id.* at 42–43; *see also* POSNER, *supra* note 13, at 44 ("Every time civil liberties have been curtailed in response to a national emergency, whether real or imagined, they have been fully restored when the emergency passed—and before it passed, often long before.").

39. U.S. CONST. amend. IV.

40. *Id.*

41. Entick v. Carrington, (1765) 95 Eng. Rep. 807, 817–18 (K.B.). Writs of Assistance were like general warrants. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 28 (1970). The abuse of the general warrants and writs of assistance by the English government led to the ratification of the Fourth Amendment. United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S 297, 327 (1972) (Douglas, J., concurring); LASSON, *supra* note 41, at 50 & n.125. The writs had been used by customs agents to detect the smuggling of illegal goods by the colonists. *Id.* at 51. In 1761, all writs expired six months after the death of George II, and the colonists petitioned the court, opposing any new writs. *Id.* at 57–

warrants authorizing local officials to roam about and seize libelous material and libellants of the sovereign.[42] Entick, a victim of the searches, brought a successful damage action against the crown.[43] Lord Camden, in affirming the judgment, wrote that if such sweeping tactics were validated "the secret cabinets and bureaus of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of seditious libel."[44] The abuses of the general warrant by the crown and unchecked governmental power were among the principal reasons the framers adopted the Fourth Amendment.[45]

In *Olmstead v. United States*, the Supreme Court of the United States, in addressing the constitutionality of telephone wiretaps under the Fourth Amendment, acknowledged, "The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will."[46] In this case, the government wiretapped the defendant's telephone line to disclose a conspiracy to import alcohol, and the Court stated, "The language of the [Fourth] Amendment can not [sic] be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than the highways along which they are stretched."[47] Precedent established that the Fourth Amendment was only violated by "an official search and seizure of his person, or such a seizures of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage'...."[48] Although wiretaps were placed in the basement of Olmstead's office building and near his home, there was no physical trespass.[49] Thus, the Court held that the wiretapping "did not amount to a search or seizure within the meaning of the Fourth Amendment"

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42. *Entick*, 95 Eng. Rep. at 808.

43. *Id.* at 807, 811.

44. Entick v. Carrington, (1765) 19 How. St. Tr. 1029, 1063 (K.B.).

45. Olmstead v. United States, 277 U.S. 438, 463 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

46. *Id.* at 463.

47. *Id.* at 465.

48. *Id.* at 466.

49. *Id.* at 457.

and affirmed his conviction.[50] The *Olmstead* Court effectively required physical trespass of person or property to trigger Fourth Amendment protection, thus creating the trespass doctrine.[51]

Justice Brandeis, in a famous dissent in *Olmstead*, disagreed with the property-based theory of the Fourth Amendment and declared that the Amendment was much "broader in scope" than protection of material things and places alone.[52]

> The makers of our Constitution... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever means employed, must be deemed a violation of the Fourth Amendment.[53]

Justice Brandeis' conception of a privacy right embodied in the Fourth Amendment severed the literal construction of the Fourth Amendment from its textual base. He noted that the Court had "time and again... refused to place an unduly literal construction" on the meaning of the Fourth Amendment.[54] He thought it was immaterial where the physical connection with the telephone wires leading into the basement was made or that the intrusion was made with the aid of law enforcement.[55] Brandeis saw a greater future evil in the government's use of wiretapping: "[t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails .... As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared to wiretapping."[56] Despite the brilliance of Brandeis' dissent, *Olmstead* remained the law for nearly forty years until the *Katz* Court finally lifted the Fourth Amendment from its property-based moorings.

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50. *Id.* at 466, 470.

51. *See id.* at 465–66.

52. *Id.* at 478 (Brandeis, J., dissenting).

53. *Id.* Brandeis first outlined his conception of a "right of privacy" in a law review article written with Samuel Warren. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Warren and Brandeis argued that privacy went beyond protecting physical property. *Id.* at 205–06.

54. *Id.* at 476 (Brandeis, J. dissenting).

55. *Id.* at 475.

56. *Id.* at 477.

III. MODERN FOURTH AMENDMENT JURISPRUDENCE

A. Shifting to Katz and the Right to Be Left Alone

The modern conception of the Fourth Amendment as protecting privacy interests emerged from the Supreme Court's decision in *Katz v. United States*.[57] Like *Olmstead*, *Katz* involved government wiretapping of defendant Katz's telephone conversations in a public telephone booth.[58] The government argued there was no physical trespass in the wiretapping since it was outside the phone booth, and therefore, the Fourth Amendment and its warrant clause were inapplicable under *Olmstead*'s trespass doctrine.[59] In overruling *Olmstead*'s trespass doctrine, the Court noted that the underpinnings of the trespass doctrine were no longer controlling.[60] The fact that the electronic device employed by the government did not penetrate the wall of the booth had no constitutional significance.[61] The Court held:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[62]

The Court noted that what Katz wanted to exclude by entering the phone booth was not the intruding eye but "the uninvited ear" of the government listening in on the conversations without a judicially authorized warrant.[63] A person is entitled to keep his conversations from being broadcasted to the world.[64] The Court also rejected the government's contention that the narrowness of the search, only listening to certain conversations, excused the requirement for a warrant.[65] "Wherever a man may be, he is entitled to know that he will

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57. Katz v. United States, 389 U.S. 347, 351–52 (1967); *id.* at 361 (Harlan, J., concurring).

58. *Id.* at 348 (majority opinion).

59. *Id.* at 352–53. The government also argued that a public telephone booth was not a constitutionally protected area, but even if it was, a physical penetration of the phone both was necessary for a search to occur. *Id.* at 351–52.

60. *Id.* at 353.

61. *Id.*

62. *Id.* at 351–52 (internal citations omitted).

63. *Id.* at 352.

64. *Id.*

65. *Id.* at 354–56.

remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification... that is central to the Fourth Amendment,'"[66] in this case a judicially authorized warrant.

The Court in *Katz* took an important step and recognized privacy as a central meaning of the Fourth Amendment, but not the only principle. Justice Harlan's concurrence laid out the more fundamental test that has emerged as the *sine qua non* of the search doctrine—"the right to be let alone."[67] Justice Harlan's two-part test requires, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[68] The reasonable expectation of privacy formulation has been the "loadstar" for determining how and when the Fourth Amendment should be applied.[69] The concept of privacy, thus, emerged as the central meaning of the Fourth Amendment.[70] The privacy concept also determined what constituted a search subject to the commands of the Fourth Amendment's warrant clause and its prohibition against unreasonable searches.[71] If government action does not invade some justifiable expectation of privacy that society regards as reasonable, then it is not deemed a search under the Fourth Amendment's warrant clause or reasonableness clause.[72]

While the *Katz* Court defined what constituted a search for Fourth Amendment purposes, it did not define privacy interests.[73] Matters exposed to the public view such as garbage left at the curbside of one's home or information generally given to third parties, such as bugged informants, phone records, pen registers, or bank records, are not searches governed by the warrant requirement.[74] Crops left growing in

66. *Id.* at 359 (quoting Osborn v. United States, 385 U.S. 323, 330 (1966)).

67. *Id.* at 350; *see id.* at 361 (Harlan, J., concurring).

68. *Id.*

69. Sundby, *supra* note 8, 1756.

70. *Id.*

71. *Id.* at 1756–57.

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

73. RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 356 (2d ed. 2005); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149,1159–60 (1998); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382–83 (1974) (suggesting that the legitimate expectation of privacy test had replaced one "talismanic solution" for Fourth Amendment problems with another).

74. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40–41 (1988) (finding that a person does not have a reasonable subjective expectation in privacy and that society is not willing to recognize an expectation of privacy in garage left for pick up on the road); Smith v. Maryland, 442 U.S. 735, 745 (1979) (holding there is no search if the police discover numbers dialed from the telephone company

open fields and observations made through partially open roof tops, windows, or doors are not deemed searches subject to the Fourth Amendment.[75] Privacy was thus viewed as an aspect of secrecy; if it is observable from a lawful vantage point, then it is not private.[76] The Fourth Amendment as a concept of privacy embodying secrecy has undergone scholarly criticism,[77] as did the old *Olmstead* trespass doctrine.[78] As one commentator suggested, "Although we have moved from the *Boyd* and *Olmstead* world of physical papers and places to a new regime based upon expectations of privacy, there is a new *Olmstead*, one that is shortsighted and rigid in approach."[79]

Criticism directed at the concept of secrecy is embedded in the modern Fourth Amendment jurisprudence of privacy. "Many current problems in Fourth Amendment jurisprudence stem from the Court's failure to conceptualize privacy adequately, both in method and substance."[80] Some commentators have argued, for example, that privacy should be viewed as an abstract value or principle protected by the Fourth Amendment rather than as a fact-specific inquiry to determine if the Fourth Amendment should apply to a governmental intrusion.[81] Some of the cases, for example, have focused on the

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because the customer voluntarily conveyed numerical information to the phone company); United States v. Miller, 425 U.S. 435, 441, 445 (1976) (holding that a person has no reasonable expectation of privacy concerning information kept in bank records because that information was voluntarily given to third parties). The *Miller* decision has been criticized as highly questionable in its privacy analysis. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 144 (3d ed. 2000). The fact that customers turn over checks and deposits to banks as third parties does not indicate a lack of privacy interest by the customer. *Id.*

75. Florida v. Riley, 488 U.S. 445, 451–52 (1989) (plurality opinion); Oliver v. United States, 466 U.S. 170, 180–81 (1984).

76. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1105 (2002) [hereinafter *Conceptualizing Privacy*].

77. *See, e.g.*, *id.* at 1109. Solove examined the various conceptions of privacy under various categories such as right to be left alone, secrecy, intimacy, control over personal information, and personhood. *Id.* at 1092. He argued it was a mistake to invoke a common denominator to define all privacy interests. *Id.* For example, he asserted that a number of theorists have claimed that understanding privacy as secrecy conceptualizes privacy too narrowly. *Id.* at 1108. Privacy, according to Solove, does not have universal value but must be looked at from particular practices and the social value of those practices. *Id.* at 1093.

78. *See supra* notes 52–56 and accompanying text.

79. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1133 (2002) [hereinafter *Dissipation of Fourth Amendment Privacy*]. Solove argued that we have moved to a new *Olmstead* due to the Court's emphasis on secrecy. *Id.* "This conception of privacy is not responsive to life in the modern Information Age, where most personal formation exists in record systems of hundreds of entities." *Id.* at 1087.

80. *Id.* at 1122.

81. Sundby, *supra* note 8, at 1760. Sundby concluded, "When used as a factual measure, reliance upon privacy as the centerpiece of Fourth Amendment rights actually creates the potential for less overall protection." *Id.* Thus, the Court should ask whether bank or phone records should be kept

frequency of helicopter aerial surveillance four hundred feet above one's home,[82] collecting urine samples,[83] dog sniffing of cars and trucks on public highways,[84] manipulation of luggage and handbags,[85] or the physical distance between a barn and house.[86] Therefore, the traditional cases have measured reasonable expectations of privacy from a factual matter rather than as constitutional values.

In light of technological advances and the government's professed need for domestic security, what constitutional values should the Fourth Amendment protect beyond the physical right to be left alone? Some have argued that the privacy doctrine has led to a decline of Fourth Amendment protection.[87] They contend that it is a non-workable framework for protecting Fourth Amendment rights.[88] As people's expectations change, the law itself must adapt to changing circumstances. The extent to which the war on terror has changed individual expectations of privacy will be discussed more fully below.

B. Unreasonable Searches and Seizures and the Fourth Amendment's Warrant Clause

In addition to protecting one's reasonable expectation of privacy against unwarranted government intrusion, the Fourth Amendment, by its literal terms, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects...."[89] The Fourth Amendment's second clause requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized."[90] Historically, the framers of the Fourth Amendment were concerned

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private, invoking privacy as a value, rather than ask whether, as a factual matter, we expect others to see those records. *Id.* at 1760–61. Sundby advocated for the constitutional value of trust between the government and the citizenry. *Id.* at 1777.

82. Florida v. Riley, 488 U.S. 445, 451–52 (1989) (plurality opinion).

83. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 626–27 (1989).

84. Illinois v. Caballes, 543 U.S. 405, 408–09 (2005).

85. Bond v. United States, 529 U.S. 334, 338–39 (2000).

86. United States v. Dunn, 480 U.S. 294, 302–03 (1987) (holding that a barn located sixty yards from the house and fifty yards from the fence surrounding the house was outside the curtilage and not subject to protection).

87. *Conceptualizing Privacy*, *supra* note 76, at 1108; Sundby, *supra* note 8, at 1760.

88. *Dissipation of Fourth Amendment Privacy*, *supra* note 79; Christian M. Halliburton, *How Privacy Killed* Katz*: A Tale of Cognitive Freedom and the Property of Personhood as Forth Amendment Norm*, 42 AKRON L. REV. 803, 827 (2009).

89. U.S. CONST. amend. IV.

90. *Id.*

about the abuses of the English general writs of assistance, which allowed government officials to indiscriminately seize a person's private papers in their homes.[91] In Britain, many of the writs of assistance were issued against critics of the Crown, and the government sought to gather information to suppress political speech.[92] The early English cases of *Wilkes v.Wood* and *Entick v. Carrington* involved the issuances of writs of assistance by the Crown to search and seize incriminating papers of government critics without proper judicial limitations protecting an individual's right to privacy.[93] Thus, the requirement of a judicially authorized warrant under the Fourth Amendment would protect privacy interests as well as operate as a shield against government intrusion.[94] In interpreting the Fourth Amendment, the Supreme Court had linked the reasonableness clause and the warrants clause together and defined the reasonableness of a search or seizure by whether it had complied with the warrant requirement.[95] As the Court stated in *Katz*, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[96]

The warrant clause was the touchstone of the Fourth Amendment requirement of probable cause. It equally applied to arrest warrants as to search warrants.[97] For much of the Fourth Amendment's history, the judicial preference for a warrant guided the Court's jurisprudence, including a preference for arrest and search warrants based upon an independent finding of probable cause by a detached and neutral magistrate.[98] The warrant clause and its requirement of probable cause was the cornerstone of the Fourth Amendment.[99] Some scholars have interpreted the historical evidence to suggest that the Fourth

91. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 657–58 (1999); *supra* note 45 and accompanying text.

92. *See* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 8 & n.34 (1994).

93. Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 489–90 (K.B.); Entick v. Carrington, (1765) 95 Eng. Rep. 807, 807–08 (K.B.).

94. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1180 (1991) [hereinafter *The Bill of Rights as a Constitution*]. Scholars have also argued that the main point of the warrant requirement is to insulate officials from civil liability for exceeding the warrant. *Id.* at 1179. Searches and seizures conducted without warrants subjected officials to civil liability and false arrest. *Fourth Amendment First Principles*, *supra* note 6.

95. *The Bill of Rights as a Constitution*, *supra* note 94, at 1178–80.

96. Katz v. United States, 389 U.S. 347, 357 (1967).

97. LAFAVE ET AL., *supra* note 74, at 147.

98. *Id.*

99. *Id.* at 146. As Professor LaFave stated, "The Supreme Court has long expressed a strong preference for the use of arrest warrants and search warrants." *Id.* at 147; *see also* Silas Wasserstorm, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281 (1984).

Amendment did not prohibit all warrantless searches.[100] The Court later interpreted the Fourth Amendment to permit warrantless arrests of persons for felonies in public places.[101] Yet, the warrantless felony arrest did not extend to a person's home, where the Court viewed the warrant requirement as sacrosanct.[102]

To what extent did the founders anticipate that the warrant clause would not extend to searches or arrests conducted for national or domestic security during the present climate of widespread surveillance? The Fourth Amendment on its face contains no such exception, despite the new republic's newfound freedom from the occupation by troops of the British Crown during times of war. In fact, the evidence suggests that the Fourth Amendment itself was adopted in response to the occupation of homes by British troops and the fears of the general warrant.[103] Certainly, the threat of British spies, saboteurs, and foreign agents and general searches were on the minds of the Founding Fathers when drafting the Constitution and balancing concerns of liberty and security of the nation. They struck the balance in favor of liberty.[104] Some scholars have recently suggested that the framers intended the Fourth Amendment reasonableness clause, and not the warrants clause, to govern in cases of searches in the interest of national or domestic security.[105] Over the years, judicially crafted exceptions to the warrant clause, such as exigent circumstances, plain view, and hot pursuit, began to weaken the warrant clause.[106] The modern view of the Fourth Amendment bifurcates the warrant clause and the reasonableness clause.[107] This fits squarely within the doctrine that the reasonableness

100. *See, e.g.*, *Fourth Amendment Principles*, *supra* note 6, at 759, 761.

101. United States v. Watson, 423 U.S. 411, 423–24 (1976).

102. Payton v. New York, 445 U.S. 573, 589–90 (1980).

103. *See supra* note 91 and accompanying text; *see also* Glenn Sulmasy & John Yoo, Katz *and the War on Terrorism*, 41 U.C. DAVIS L. REV. 1219, 1234 (2008). Nonetheless, Sulmasy and Yoo suggested that the Founding Fathers would allow reasonable searches against foreign threats to national security under the Fourth Amendment's reasonableness clause. *Id.*

104. Benjamin Franklin stated, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS 199 (1997).

105. Sulmasy & Yoo, *supra* note 103, at 1219. The authors argued that by the inclusion of the reasonableness clause, the framers understood the need for searches and seizures in the absence of a warrant. *Id.* at 1235. They also concluded that there was no evidence that the Fourth Amendment was meant to apply to national security. *Id.* at 1234.

106. *See id.* at 1224.

107. Professor Amar suggested that the modern Court has reversed the original linkage between the Fourth Amendment's two clauses. *The Bill of Rights as a Constitution*, *supra* note 94, at 1178–80. "It is not that a search or seizure *without* a warrant was presumptively *un*reasonable, as the Court has assumed; rather, a search or seizure *with* a warrant was presumed reasonable as a matter of law—and thus immune from jury oversight." *Id.* (emphasis in original).

clause governs most searches, with the exceptions being the governing rule. Thus, the government's need to conduct warrantless searches has expanded over time, and the Court has taken the path of balancing the government's justifications for the search against the individual's privacy interest. The *Katz* regime of reasonable expectations of privacy began to give way to the government's interest in conducting searches under a variety of contexts for crime control, administrative searches, airports, and border patrols.[108] The emerging question is whether the *Katz* expectation of privacy test and the warrants clause will withstand the present regime of reasonable searches for national and domestic security.

C. Less than Probable Cause: The Dominant Reasonableness Clause and Terry-Type Suspicion

The government's interest in conducting warrantless searches during the present age of terror for a variety of reasons, including national or domestic security, may likely find support among the Supreme Court cases relaxing the probable clause standard for administrative searches and special needs. Aside from exigent circumstances, the Supreme Court first upheld searches without probable cause in cases where the government asserted the need for administrative searches. Beginning with *Camara v. Municipal Court of San Francisco*, the Court began to invite a balancing analysis in assessing Fourth Amendment interests of reasonable expectations of privacy.[109]

The *Camara* Court held that housing inspections conducted in San Francisco without a warrant triggered Fourth Amendment protection; however, the searches could be upheld under the Fourth Amendment because "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an areas inspection are satisfied...."[110] The Court stated that reasonableness, not probable cause, was the ultimate standard under the Fourth Amendment.[111] To determine the reasonableness of the housing inspection search, the Court balanced "the need to search against the invasion which the search entails."[112] When balancing the need to search, the Court looked to the long history of judicial and public

108. *See infra* Part III.C–F.
109. Camara v. Mun. Ct. of S.F., 387 U.S. 523, 536–37 (1967).
110. *Id.* at 534, 538.
111. *Id.* at 539.
112. *Id.* at 537.

acceptance of housing inspections, whether the practice was essential to achieving results, and whether the practice involved a relatively limited invasion of privacy.[113] Regarding the nature of the privacy interest, the Court found that the privacy interests were minimal "because the inspections [were] neither personal in nature nor aimed at the discovery of evidence of crime...."[114] The searches were aimed at housing code violations of fire, plumbing, heating, or electrical equipment rather than personal papers.[115] Notably, they did not involve the searches of persons on the property, yet the privacy interests remained.[116]

The Court's decision in *Camara* marked a turning point for emphasizing the reasonableness of the search over the probable cause standard and for balancing governmental interests against the nature of the privacy interests at stake.[117] It was also a turning point away from the factual analysis and individual-based probable cause requirement of the warrant clause onto a slippery slope of reasonableness in weighing policy factors.[118] Commentators have noted that *Camara* marked the emergence of the reasonableness clause of the Fourth Amendment as the basis for justification for searches, rather than probable cause-based warrants.[119] It later formed the basis for the *Terry* "stop and frisk" doctrine and the diminished probable cause requirement for searches conducted without warrants.[120]

D. The *Terry*-Type Balancing and the Modern Reasonableness Test

Camara's balancing test opened the door to the acceptance of infringement on privacy interests when the government need to conduct searches on less than probable cause outweighed those privacy interests. The government's justifications for administrative searches broadened to include the need to further law enforcement in general and a wide variety of articulated specific needs, such as *Terry*-type searches, inventory searches, border searches, special needs roadblocks, and

113. *Id.*
114. *Id.*
115. *See id.* at 535.
116. *Id.* at 535, 537.
117. *Id.* at 536–39.
118. *See id.* at 537.
119. LAFAVE ET AL., *supra* note 74, at 229–30; Sundby, *supra* note 8, at 1767–68 ("[O]nce the express weighing of government and privacy interests had found a foothold in the Warrant Clause for so-called administrative searches as in *Camara*, it was only a matter of time before the 'reasonableness' balancing test would be applied to a variety of searches under the Reasonableness Clause as well.").
120. LAFAVE ET AL., *supra* note 74, at 229.

warrantless searches in the name of national security (i.e., wiretapping under the terrorist surveillance program).[121] In the wake of 9/11, the growing acceptance of warrantless searches on less than probable cause or even reasonable suspicion is a direct off shoot of the Court's interpretation of the reasonableness clause under *Camara* and *Terry v. Ohio*.[122] In response to the government's interest in combating crime in the streets, the Court engaged in a balancing approach, balancing liberty and privacy on one hand with the government's articulated need for the search or seizure on the other.[123] Thus, privacy standing alone as the principle of the Fourth Amendment is subject to a balancing of interests and costs effectiveness. Society's expectations, then, are subject to a scale of changing expectations.

In *Terry v. Ohio*, the Court upheld the police practice of a brief search and seizure of individuals stopped based on observations about suspected criminal activity.[124] The Court viewed restraining a person on the street based on suspected criminal activity as a limited seizure under the Fourth Amendment and the search of outer clothing based on fears that the suspect was armed or dangerous as a limited pat-down search for weapons.[125] In assessing the reasonableness of the police officers actions in *Terry*, the Court said it was important to focus on the governmental interests that justified the official intrusion upon constitutionally protected interests of the private citizens; it was important to balance the need for the search against the privacy interest of the defendant.[126] The Court held that in some circumstances it was appropriate for a police officer to approach a person in order to investigate criminal activity without probable cause for arrest and in some circumstances it was appropriate for the police officer to conduct a limited search of that person's outer clothing.[127] Under *Terry* not all seizures under the Fourth Amendment are arrests, nor are all searches full searches requiring probable cause and a warrant.[128] The pat-down searches were viewed as acceptable, limited intrusions of privacy interests for Fourth Amendment purposes in light of the government's

121. *See, e.g.*, Kathryn R. Urboyna, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1392 (2003).
122. *See supra* Part III.C; Terry v. Ohio, 392 U.S. 1, 30–31 (1968).
123. *Id.* at 22–27.
124. *Id.* at 30.
125. *Id.* at 19.
126. *Id.* at 22–27.
127. *Id.* at 25, 27.
128. *See id.*

demonstrated need for crime prevention, detection, and safety.[129]

The Court relied on *Camara*'s balancing test and emphasis on reasonableness to approve the pat-down search on less than probable cause.[130] The Court cited *Camara* when stating the appropriate balancing test under the Fourth Amendment.[131] Thus, the *Terry* "stop and frisk" was viewed as a tool to assist law enforcement officers on the street in combating crime.[132] In upholding the pat-down, the Court said, "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons... where [the officer] has reason to believe that he is dealing with an armed and dangerous individual regardless of whether he has probable cause to arrest the individual for a crime."[133]

The *Terry* decision was based on the need to assist law enforcement with on the street encounters in investigating crime and is an example of changing circumstances.[134] At the time, increased crime, the growth of drug trafficking, and aircraft hijacking all impacted the Fourth Amendment doctrine and led to the Court's expansion of searches under the *Terry* doctrine.[135] Several cases involving *Terry*-type stops for suspected drug activity in airports or on buses have established that consensual police-citizen encounters do not invoke Fourth Amendment protections.[136] Later cases developed the drug courier profile to help determine the parameters of *Terry*-type searches in airports.[137] The *Terry* stop and frisk doctrine also led to the emergence of racial or ethnic profiles in investigating crime. Race was used in some cases as a proxy for individualized reasonable suspicion.[138] The police practice of stopping African American motorists on the basis of race, known as "Driving While Black," exposed the widespread practice of racial profiling.[139] The Fourth Amendment, through safeguarding one's

129. *See id.* at 30.

130. *Id.* at 20–21, 30–31.

131. *Id.* at 20–21.

132. *Id.* at 30–31.

133. *Id.* at 27.

134. *See id.* at 25, 27.

135. *See, e.g.*, Stuntz, *supra* note 10, at 2151–52.

136. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 431–32, 434 (1991); Florida v. Royer, 460 U.S. 491, 497–98 (1983); United States v. Mendenhall, 446 U.S. 544, 547–49, 555 (1980).

137. *See Royer*, 460 U.S. at 494 n.2; Reid v. Georgia, 448 U.S. 438, 440–41 (1980).

138. Ryan J. Sydejko, *International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment*, 7 J.L. SOC'Y 220, 251–54 (2006). The author noted that Justice Brennan in a memorandum on an earlier draft of the *Terry* opinion expressed concerned about the impact of *Terry* on minority communities. *Id.* at 241–42. Justice Brennan especially feared *Terry*'s impact in cities such as Miami, Chicago, and Detroit. *Id.*

139. *See* Robert C. Power, *Changing Expectations of Privacy and the Fourth Amendment*, 16

reasonable expectation of privacy, fluctuates with the changing rules that govern police behavior and aid law enforcement.

Terry, thus, ushered in an era of warrantless searches for less than probable cause based on an ostensibly minimal intrusion on privacy. The law of criminal procedure changes in both quality and quantity with respect to dealing with and responding to crime.[140] As one commentator stated, "the specter of the suicide bomber will play a much larger role in Fourth Amendment cases than before."[141] Random stops and searches of people only of Arab or Muslim descent at airports following 9/11 without any individual suspicion was simply ethnic profiling and discriminatory.[142] Such practices have an impact on a group's expectations of privacy as victims of these practices.[143] Thus, racial or ethnic minorities may have lesser expectations of privacy in being illegally stopped or questioned because past experiences have resulted in diminished expectations of privacy.[144] Airport encounters between citizens and police have reduced expectations of privacy interests to a minimum so that people seldom find reason to decline an officer's inquiry and walk away. *Terry*-type balancing of interests has, therefore, expanded warrantless searches under the reasonableness umbrella of the Fourth Amendment. The Bush Administration saw the need to justify warrantless searches for national security on the basis of perceived terrorist threats.[145] A recently released classified document

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WIDENER L. J. 43, 63 (2006). The author noted the substantial body of literature on racial profiling aimed at African Americans. *Id.* at 61 n.60. He pointed out that racial profiling became a matter of public discourse between 1998 and 2001, producing a national consensus against profiling. *Id.* at 63. Such a shift may now change in response to the war on terror. *Id.* at 64.

140. *See, e.g.*, Stuntz, *supra* note 10,at 2150. Stuntz argued that higher crime rates have led to cutbacks in legal protections. *Id.* at 2138. He argued that the Fourth and Fifth amendment rights varied with crime and will do so again in the future because the law must reflect a sensible balance between the social need for order and an individual's desire for privacy and liberty. *Id.* at 2146. "This raises a fair question about the one-day crime wave we saw on September 11. Will courts, including but not limited to the Supreme Court, react as they have to other spikes in serious crime?" *Id.* at 2156.

141. *Id.* at 2158. Changes since 9/11 have already produced changes in people's behavior. It stands to reason that courts, like other public institutions and the public itself, will likewise see some changes in behavior sooner rather than later.

142. *See* Sydejko, *supra* note 138, at 252.

143. *See id.* at 252–54.

144. *See, e.g.*, Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 60–61 (2003). The author noted that expectations vary among groups and that a distinction should be made about "what degree of privacy people want, what they expect, and what they believe they have a right to expect." *Id.* at 60. He noted for example that "[r]elatively few middle class whites expect to be stopped and questioned on the street. For young black males of all social classes, however, the opposite expectation may hold." *Id.*

145. R. Jeffrey Smith & Dan Eggen, *Post-9/11 Memos Show More Bush-Era Legal Errors*, WASH. POST, MAR. 3, 2009, at A5.

from the United States Department of Justice confirmed the Bush doctrine of warrantless searches to combat the war on terror.[146] After September 11, 2001, the Bush Administration also launched the Terrorist Surveillance Program, a secret program aimed at warrantless surveillance of communications where one party to the communication is outside the United States and a suspected member of al Qaeda or affiliated with al Qaeda.[147]

E. The Emergence of Reasonableness and the Special Needs Doctrines

Although *Terry* required reasonable suspicion as the basis for a limited search to justify minimal intrusions of privacy, the Court has expanded suspicionless, warrantless searches to include administrative searches, inventory searches, border patrols, sobriety roadblocks, and searches conducted under the special needs doctrine to combat threats to national security. Following *Camara*, the Court upheld a warrantless administrative search or inspection of a liquor store licensee,[148] a firearms store,[149] and an automobile junkyard.[150] These cases involved heavily regulated businesses where searches were conducted for inspection purposes.[151] The *Burger* Court noted, "The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render the search illegal or the administrative scheme suspect."[152]

The administrative searches balanced the government's need for the search against the privacy interests of regulated business owners and paved the way for recognizing the validity of searches based on reasonableness, dispensing with the warrant requirement and probable cause. In *Michigan Department of State Police v. Sitz*, the Court applied the balancing analysis and reasonable test and extended the warrantless

146. *See id.*

147. *See* Press Release, *supra* note 29; *infra* Part IV.

148. Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

149. United States v. Biswell, 406 U.S. 311, 316–17 (1972).

150. New York v. Burger, 482 U.S. 691, 716 (1987) (upholding the administrative scheme providing for warrantless inspections even though in the course of the inspection evidence of a crime might be discovered).

151. *See supra* notes 148–50 and accompanying text.

152. *Burger*, 482 U.S. at 716. Some scholars noted that *Burger* was not a search under the special needs doctrine. *See, e.g.*, Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 177 (2006). However, its significance is important in later cases, such as City of Indianapolis v. Edmond where the Court invalidated a roadblock whose purpose was to detect ordinary criminal activity. *Id.* at 177–78; City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000).

and suspicionless searches to highway sobriety roadblocks checking for drunk drivers.[153] However, the checkpoints must serve a purpose independent of general crime control.[154] The Court held the highway sobriety checkpoints reasonable under the Fourth Amendment because of the State's great interest in alleviating drunk driving, the minimal intrusion on motorists due to the brief search and seizure, and the uniform administrative scheme under which the checkpoints were performed.[155] Earlier, in *Delaware v. Prouse*, the Court had invalidated discretionary, suspicionless spot-checks of a motorist's driver's license and vehicle registration because no evidence indicated that such stops would promote highway safety.[156] The *Prouse* Court acknowledged the validity of the governmental interests in highway safety: "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."[157] This acknowledgement paved the way for the emergence of roadblock checkpoints under the special needs doctrine. *Sitz* was therefore important as the first case in which the Court upheld

warrantless and suspicionless searches at roadblocks, outside of international borders, on public streets within the country.

First recognized in *New Jersey v. T. L. O.*, the special needs doctrine has developed in cases where the government has demonstrated an interest independent of the need to conduct an ordinary criminal investigation and where it would be impracticable to attain a warrant.[158] The *T. L. O.* Court said that warrants were not required when school officials conduct searches for students who are violating school rules and upheld a warrantless search of a high school student's purse for cigarettes.[159] Although the Court upheld the warrantless search as reasonable using the balancing test, Justice Blackmun disagreed with the application of the balancing test under these circumstances and his concurrence established the special needs exception.[160] Justice Blackmun cautioned that the special needs doctrine should be used

153. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990).

154. *Id.* at 449–50.

155. *Id.* at 451, 453.

156. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

157. *Id.*; *see also Edmond*, 531 U.S. at 39 ("'[q]uestioning of all oncoming traffic at roadblock-type stops' would be a lawful means of serving this interest in highway safety" (citing *Prouse*, 440 U.S. at 663)).

158. New Jersey v. T. L. O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

159. *Id.* at 328, 341–42 (majority opinion).

160. *Id.* at 351 (Blackmun, J., concurring).

"[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable...."[161] The Court later adopted the special needs exception, but still retained the balancing test for administrative searches.[162] What were deemed special needs was not defined, but the result was to remove a whole category of searches from the Fourth Amendment warrant requirement.[163] The result is a diminution in value of certain privacy interests. The Court has subsequently found that the special needs doctrine justified an employer's work-related search of an employee's office,[164] a warrantless search of a probationer's home for weapons,[165] drug testing of federal railroad workers for alcohol,[166] and drug testing of federal customs agents.[167] In several cases, the government's chief concerns were for the safety interests of employees and the public.[168] The Court has looked to the government's articulated interest to determine if the need is separate from a law enforcement purpose.[169] Although these comprise a narrow category of cases so far, a high degree of individuals' privacy interests are involved.

Where the main government purpose was law enforcement or crime prevention, the Court has declined to extend the special needs protection. Thus, the Court has refused to apply the doctrine to general police roadblocks used for the purpose of gathering evidence of drugs.[170] For example in *City of Indianapolis v. Edmond*, the Court held roadblocks, whose primary purpose was the discovery of illegal narcotics, did not amount to a special need despite the secondary interest of keeping roads safe.[171] The roadblocks at issue required a predetermined number of automobiles to be stopped for a brief period, conducted searches only when consented to or when there was an appropriate level of individualized suspicion, and involved a narcotics detection dog walking around each stopped vehicle.[172] The Court first

161. *Id.*
162. O'Connor v. Ortega, 480 U.S. 709, 725 (1987).
163. *See id.*
164. *Id.* at 725–26.
165. Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987).
166. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 606, 620 (1989).
167. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).
168. *See, e.g.*, *id.*; *Skinner*, 489 U.S. at 620; *O'Connor*, 480 U.S. at 725.
169. *See, e.g.*, *Von Raab*, 489 U.S. at 666; *Skinner*, 489 U.S. at 620; *O'Connor*, 480 U.S. at 725.
170. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).
171. *Id.*
172. *Id.* at 35.

stated that the Fourth Amendment required all searches to be reasonable, departing from the traditional requirement of a warrant and probable cause.[173] The Court further noted that there were special circumstances where it had refused to require individual type suspicion, including searches under special needs, administrative searches, and highway checkpoints to intercept illegal aliens, drunk driving, and violations of vehicle registration.[174] All of these searches fall under the rubric of reasonable searches that require a balancing test instead of probable cause.[175] The central focus under the special needs doctrine is whether the search serves a purpose independent of law enforcement needs.[176] This is the single most important factor.[177] If this threshold question is answered in the affirmative, the Court then engages in a balancing of factors to weigh the need for the search against the offensiveness of the intrusion.[178]

In *Edmond*, the Court found that the primary focus of the Indianapolis check-point was to advance the general interest in crime control.[179] The *Edmond* Court stated, "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorizes primarily pursue their general crime control ends."[180] According to the majority, these roadblocks were very different than the sobriety and immigration roadblocks the Court upheld in earlier cases.[181] Although these were law enforcement activities, the *Edmond* Court stated that if general crime control roadblocks were allowed, there would be little check on the ability of the government to construct roadblocks for any conceivable purpose and "the Fourth

173. *Id.* at 37.

174. *Id.* at 37–38.

175. *See id.* at 37.

176. *See id.*

177. Maclin, *supra* note 152, at 178. Professor Maclin identified several factors in the special needs analysis. *Id.* Although no one factor is determinative in the Court's analysis, the purpose factor appears to be the "first among equals." *Id.* at 179. Maclin examined the propriety of the special needs analysis to determine the constitutionality of special needs for DNA sampling of arrested persons. *Id.* at 178–79. The criteria for special needs appears to be an examination of "the purpose of the search; whether law enforcement officials will have access to the results of the search; the extent of police involvement in conducting the search; and finally, whether the search can be characterized as serving civil and criminal law interests." *Id.* Maclin concluded that DNA collecting statutes serve general law enforcement purposes and are unlikely to meet the first factor in the special needs analysis. *Id.* at 179.

178. *See* MacWade v. Kelly, 460 F.3d 260, 263, 275 (2d Cir. 2006) (upholding the Container Search Program on New York City subways based on special needs and a balancing analysis of the Program's reasonableness).

179. *Edmond*, 531 U.S. at 44.

180. *Id.* at 43.

181. *Id.* at 41–42.

Amendment would do little to prevent such intrusions from becoming a routine part of American life."[182] Thus, general crime control roadblocks are prohibited under *Edmond*.[183] However, to what extent would the *Edmond* decision hold today for anti-terrorism type roadblocks at airports instead of international borders? Such roadblocks would undoubtedly have a law enforcement purpose—searching for evidence of explosives or weapons to prevent terror type attacks. Thus, the threshold requirement of the special needs doctrine would preclude such roadblocks. However, there is language in *Edmond* to suggest a different result. The *Edmond* Court stated, "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack...."[184] Certain exigent circumstances might justify such roadblocks.[185]

F. Subway Searches as Special Needs

Although the Supreme Court has not yet addressed the subject, warrantless and suspicionless searches under the special needs doctrine have widened to include searches conducted on subways and mass transits. In one of the first important post 9/11 cases, *MacWade v. Kelly*, the United States District Court for the Southern District of New York and the Second Circuit addressed the constitutionality of a random search of a passenger's belongings pursuant to a Container Search Program ("Program") on the New York City subways.[186] In response to bombings of the public transit system in Madrid in 2004 and in London in 2005, the New York City Police Department inaugurated the Program to search passenger bags for explosives on the New York City subway system.[187] Without any specific threat against the subways, the City began the Program to prevent attacks or deter terrorists from carrying concealed explosives onto the subway system.[188] Under the Program, the searches were to be conducted at certain fixed checkpoints among the City's subways, and only backpacks and containers were

182. *Id.* at 42.

183. *Id.* at 44.

184. *Id.*

185. *Id.* ("[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."); *see infra* Part III.F.

186. MacWade v. Kelly, No. 05CIV6921RMBFM, 2005 WL 3338573, at *1 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260, 263 (2d Cir. 2006).

187. *MacWade*, 460 F.3d at 264.

188. *Id.* at 267. The City of New York began the Program in response to bombings on subways and buses in London and Madrid. *Id.* at 264. The purpose was to prevent such attacks in New York. *Id.*

searched.[189] Uniformed officers gave notice of the search and those wishing to avoid the search could leave.[190] Declining a search was not a basis for arrest or individual suspicion, but the police could later search persons who tried to reenter the subway after declining a search.[191] Officers had no discretion to choose individuals for search; they were chosen using a numerical selection rate.[192] The Program operated at randomly selected stations without prior notice.[193] Importantly, only bags or containers capable of concealing explosives were subject to the search; individuals were not subject to any stop or frisk unless individual suspicion was later established or contraband was discovered.[194]

Plaintiffs later challenged the City's Program under the equal protection statute, asserting the searches violated the Fourth Amendment.[195] They further claimed that the special needs exception did not apply, that the Program was ineffective in discovering terrorists or explosives, and that persons who refused to be searched should be able to re-enter the subway at a different stations or checkpoints without fear of being searched.[196] As a threshold matter, the plaintiffs claimed that the special needs doctrine applies only where the subject of the search has a reduced privacy interest and the search is minimally intrusive.[197] The City claimed that the Program served the important governmental interest of preventing a terrorist attack and the threat of an explosive device being taken into the subway system in a carryon container, as had occurred in Moscow, Madrid, and London.[198] Following a bench trial, the District Court found that the Program was constitutional as a special need because it aimed to prevent a terrorist attack on the subways through deterrence and detection.[199] The court held that "[t]he 'risk to public safety' of a terrorist bombing of New York City's subway system 'is substantial and real'" and further found that the Program was not directed "'to detect evidence of ordinary criminal wrongdoing.'"[200] The

189. *Id.* at 264.
190. *Id.* at 265.
191. *Id.*
192. *Id.*
193. *Id.* at 264.
194. *Id.* at 265.
195. *Id.* at 263; *see* 42 U.S.C. § 1983 (2006).
196. *MacWade*, 460 F.3d at 269, 270, 275.
197. *Id.* at 269.
198. *Id.* at 270.
199. MacWade v. Kelly, No. 05CIV6921RMBFM, 2005 WL 3338573, at *20 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260 (2d Cir. 2006).
200. *Id.* at *17 (quoting Chandler v. Miller, 520 U.S. 305, 323 (1997); City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000)).

District Court then engaged in a balancing of interests to determine if the Program was reasonable under the Fourth Amendment.[201] Finding testimony of the City's experts reliable and credible, the District Court found that the government's need to prevent a terrorist bombing on the City's subway system "[was] a governmental interest of the very highest order."[202] In weighing the level of intrusion on the privacy interest, the court found that the Program was narrowly tailored and only minimally intrusive upon the privacy interests for the following reasons: (1) the passengers were given notice of the searches by announcements and signs; (2) the searches were conducted openly and randomly at fixed checkpoints to subway entrances; (3) individuals could decline the searches; and (4) the searches were limited in scope as cursory searches for explosives and were limited in duration, lasting only seconds rather than minutes.[203]

The Second Circuit, reviewing the case *de novo*, affirmed the District Court's findings and upheld the Container Search Program.[204] It was the first post-9/11 case involving mass warrantless searches conducted on public transportation systems. In *United States v. Edwards*, the Second Circuit had previously upheld metal detectors and airline passenger bag searches to prevent terrorist hijacking.[205] In dispensing with the traditional warrant requirement in *Edwards*, the court upheld those searches on the basis of reasonableness, balancing the need for the searches against the offensiveness of the intrusion.[206] In contrast, in *MacWade*, the Second Circuit addressed the applicability of the special needs doctrine to subway searches.[207] Judge Straub, writing for the court, addressed the central issue of the privacy interest at stake.[208] The plaintiffs had argued that the special needs doctrine only applied in cases

201. *Id.* at *16–18. The District Court looked to the gravity of the government's interest, the degree to which the Program advances public interest, and the severity of the interference with individual liberty. *Id.* at *16 (citing Illinois v. Lidster, 540 U.S. 419, 427 (2004)).

202. *Id.* at *17. Despite noting that the Supreme Court had counseled against a searching examination of effectiveness in assessing special needs programs, the District Court was comfortable relying upon the City's experts who testified that the Program would improve the safety of the subway system. *Id.* at *17–18 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990)). The court cited their testimony that the deterrent effect of the Program was embedded in the uncertainty of when inspections would occur and that the introduction of bag searches improved the security of the subway system. *Id.* at *18.

203. *Id.* at *19.

204. MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006).

205. United States v. Edwards, 498 F.2d 496, 500–01 (2d Cir. 1974). *Edwards* predated the special needs doctrine. *See supra* note 158 and accompanying text; *MacWade*, 460 F.3d at 268.

206. *Edwards*, 498 F.2d at 500–01.

207. *MacWade*, 460 F.3d at 263.

208. *Id.*

where the subject of the search possesses a reduced expectation of privacy.[209] Prior cases involved only minimal privacy interests.[210] While acknowledging that in most special needs cases the relevant privacy interests were somewhat limited, the Second Circuit said, "the Supreme Court never has implied—much less actually held—that a reduced privacy expectation is a *sine qua non* of special needs analysis."[211] The Second Circuit noted that while privacy interests were an important factor in special needs cases, it had not imposed a threshold requirement that the privacy interests must be diminished.[212] Further, the court noted that it had expressly rejected the contention that special needs depends on the privacy interests at stake.[213] The privacy interests were just one of the factors to be weighed in the balancing of interests.[214] Those balancing factors include: "(1) the weight and immediacy of the government interest; (2) 'the nature of the privacy interest allegedly compromised by' the search; (3) 'the character of the intrusion imposed' by the search; and (4) the efficacy of the search in advancing the government interest."[215] The court cited prior cases upholding highway sobriety checkpoints and random airport searches to illustrate the reasonableness of the subway searches and the minimum level of intrusion.[216]

The Second Circuit affirmed the District Court's finding that preventing terrorist attacks on subways was a special need, noting that courts have traditionally found special needs in cases involving either latent or hidden hazards to public safety or mass transportation systems, such as trains, airplanes, and highways.[217] Accordingly, the court held that preventing a terrorist from bombing subways was a special need distinct from an ordinary criminal purpose.[218] The Second Circuit rejected the plaintiff's argument that terrorist checkpoints could serve special needs only in cases of imminent attack as an "extraordinarily

209. *Id.*

210. *See, e.g.*, United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004); Nicholas v. Goord, 430 F.3d 652, 669 (2d Cir. 2005).

211. *MacWade*, 460 F.3d at 269.

212. *Id.* at 269–70.

213. *Id.* at 270 (citing *Nicholas*, 430 F.3d at 666).

214. *Id.*

215. *Id.* at 269 (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 830, 832 (2002)) (internal citations omitted).

216. *Id.* at 268 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); United States v. Marquez, 410 F.3d 612, 614 (9th Cir. 2005)).

217. *Id.* at 270.

218. *Id.* at 271.

broad legal principle."[219] Even though the Program served a special need, the Second Circuit subjected the Program to a balancing analysis of interests to determine its reasonableness.[220] The court ultimately affirmed the District Court and concluded that the Program was reasonable and constitutional.[221] The court rejected the plaintiffs' argument that the lack of a specific threat to the subway system weakened its immediacy and held that no express threat was required.[222] All that was required was a real and substantial threat, and preventing terrorists attacks on subways was an immediate and substantial need.[223] Although subway users had a full expectation of privacy, the impediment to the privacy interests was minimal, and the Program was reasonably effective.[224] In affirming the District Court's findings as not clearly erroneous, the Second Circuit said it would not "second-guess" City officials' beliefs regarding the number of checkpoints and their deterrent effect on terrorism.[225] The court declined to engage in a searching analysis of the deterrent effect of the checkpoints.[226]

The application of the special needs analysis to subway checkpoints poses many problems under the special needs doctrine, and several commentators have criticized this application.[227] First, after acknowledging that subway passengers had a full expectation of privacy, the *MacWade* court then diminished those privacy interests and broadened the ability of the government to advance suspicionless, warrantless searches.[228] The Second Circuit specifically held that "the special needs doctrine does not require, as a threshold matter, that the subject of the search posses a reduced privacy interest."[229] In the special needs context, the government's articulated need to protect public safety against unknown terrorist threats would always trump the privacy interests of an individual in their right to be secure in their persons,

219. *Id.*
220. *Id.*
221. *Id.* at 275.
222. *Id.* at 272.
223. *Id.*
224. *Id.* at 272–75.
225. *Id.* at 274.
226. *Id.* at 275.
227. *See, e.g.*, Recent Case, *Criminal Law—Fourth Amendment—Second Circuit Holds New York City Subway Searches Constitutional Under Special Needs Doctrine*—MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006), 120 HARV. L. REV. 635, 642 (2006) ("*MacWade*'s broad construction of the special needs doctrine threatens the privacy interests that the Fourth Amendment was designed to protect.").
228. *Id.* at 636.
229. *MacWade*, 460 F.3d at 270.

papers, and effects against unreasonable searches and seizures.[230] Second, the random nature of the subway searches was unlike airport searches or roadblock checkpoints where every person or vehicle is stopped.[231] Random searches allow for the opportunity for individualized discretion and searches based on impermissible factors, such as race or ethnicity.[232] Further, one could argue that subway searches are sui generis of mass transportation in general.[233] This raises the question of whether society would regard such searches as a reasonable trade-off for security. Would searches on mass transportation, such as of subways, buses, ferries, or trains, be justified as an exception to requiring *Terry*-type individual suspicion?

In *Cassidy v. Chertoff*, the Second Circuit upheld the warrantless searches of passenger belongings and automobiles on ferries pursuant to the Maritime Transportation Security Act.[234] The plaintiffs alleged that the policy requiring passengers to submit to security checks of bags and cars before boarding the ferries violated the Fourth Amendment.[235] They also alleged that passengers retained an undiminished and full expectation of privacy in their carryon baggage and automobiles onboard ferry.[236] Plaintiffs relied on *Bond v. United States* where the Supreme Court found that travelers on an intra-city bus enjoyed a full expectation of privacy in their carryon luggage because they did not expect bus employees to feel their bags in an exploratory manner.[237] However, the Second Circuit, in an opinion by Judge Sotomayor, did not accept the plaintiff's contention that *Bond* precluded a finding of an undiminished privacy interest and held that, as with any privacy interest analysis, such expectations depend on the context.[238] The Second Circuit found that passengers had a full, undiminished expectation of privacy in their belongings, as distinct from their automobiles.[239] Nonetheless, the court assessed whether there was a special need to justify the warrantless search of the luggage and cars and held that

230. *See* Charles J. Keeley III, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 FORDHAM L. REV. 3231, 3278 (2006).

231. *Id.* at 3280.

232. *Id.* at 3281.

233. *Id.* at 3270.

234. Cassidy v. Chertoff, 471 F.3d 67, 70 (2d Cir. 2006).

235. *Id.* at 74.

236. *Id.* at 76–77.

237. *Id.* at 76; *see* Bond v. United States, 529 U.S. 334, 338–39 (2000).

238. *Cassidy*, 471 F.3d at 76. In this context, the passenger searches took place on mass transportation. *Id.*

239. *Id.* at 78.

prevention of terrorist attacks on large vessels engaged in mass transportation, as determined by the Coast Guard to be at heightened risk of attack, constituted a special need.[240] Applying *MacWade*, the Second Circuit held that deterring large scale terrorist attacks was a distinct need from general law enforcement.[241] While the special needs doctrine as applied to warrantless searches at checkpoints on mass transportation is unsettled doctrine under the Fourth Amendment, the fact remains that individual privacy interests and expectations are subject to change in response to the government's interests in preventing terror attacks.

IV. ASSAULTS ON REASONABLE EXPECTATIONS OF PRIVACY INTERESTS

As courts expand the special needs doctrine in support of the government's interests in combating terrorism, the Fourth Amendment privacy interests of the American public continue to diminish. The expansion of warrantless searches to include subway searches under the special needs exception has further broadened the category of reasonable searches under Fourth Amendment analysis.[242] The government's interest in protecting national security has successfully trumped individual liberty and privacy interests since the 9/11 World Trade Center attacks. "In the weeks after the attacks, an ABC/*Washington Post* poll found that 66 percent of those surveyed were willing to give up some of their civil liberties to prevent future terrorist attacks."[243] Passenger screening devices at airports, public buildings, and sporting venues are now widely accepted.[244] Personal identification checks and searches of personal belongings at airports are so commonly accepted as to be reasonably expected.[245] Thus, one can assume there is a diminished expectation of privacy in airport travel.[246] Further, mass

240. *Id.* at 78, 82–85. The plaintiffs argued there was no special need to protect the ferries of Lake Champlain where there was no obvious terrorist threat. *Id.* at 83. The Second Circuit noted, "[t]he Supreme Court, however, has held that the government need not adduce a specific threat in order to demonstrate a 'special need.'" *Id.* at 83 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls, 536 U.S. 822, 835–36 (2002)). The Second Circuit gave great deference to the Coast Guard's determination of a high risk of terrorist attack. *Id.* at 84.

241. *Id.* at 82 (citing MacWade v. Kelly, 460 F.3d 260, 272 (2d Cir. 2006)).

242. *See supra* Part III.F.

243. JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE 55 (2005).

244. Power, *supra* note 139, at 60.

245. *See id.*

246. *See id.* Polling data of public attitudes following 9/11 illustrate certain findings. People are willing to part with some measure of individual privacy as a part of the war on terror, but at the same

video surveillance on the public streets, through cameras and biometric identifications, are changing societal expectations of privacy.[247]

The government's use of power to respond to the war on terror has abrogated the traditional Fourth Amendment search doctrine and is expanding. The National Security Administration's ("NSA") increasing use of warrantless wiretapping and data surveillance to gather foreign intelligence information, for example, is impacting individuals' privacy interests. The Terrorist Surveillance Program ("TSP") and the secret wiretapping of an American citizen's telephone calls have been justified on a perceived basis of national security interests and inherent presidential power to enact wartime measures.[248] The constitutionality of these measures is premised on the argument that Fourth Amendment protections do not apply to the government's need to conduct domestic intelligence gathering.[249] Yet, such arguments completely ignore judicial precedent, as well as explicit legislative enactments, such as the Foreign Intelligence Surveillance Act ("FISA").[250] Further, Congressional responses to terror, including the Patriot Act and FISA Amendments, have broadened the government's power to conduct warrantless investigations.[251]

The government's interception of international telephone and internet communications of certain individuals without the benefit of a warrant or probable cause completely bypasses the Fourth Amendment's warrant requirement. After 9/11, the Bush Administration secretly launched the Terror Surveillance Program without congressional authorization or judicial oversight.[252] The program was established by

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time they are increasingly aware of inroads on privacy and are concerned about giving up too much. *See* ROSEN, *supra* note 243.

247. *See* ROSEN, *supra* note 243, at 37. Professor Jeffrey Rosen argued, for example, that government video surveillance to deter terrorist activities threatens privacy interests, promotes social conformity, and threatens traditional values of equality. *See id.* at 53–54. Rosen wrote that the British system of widespread video cameras had reduced terrorist attacks and crime, but had also required conformity because people behaved differently if they perceived they were being viewed on camera. *See id.* at 37–38.

248. John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 565 (2007); Press Release, *supra* note 29.

249. *See* Press Release, *supra* note 29.

250. *See* 18 U.S.C. § 2511(2)(f) (2006) (making FISA the exclusive means by which electronic surveillance of foreign intelligence communications may be conducted); United States v. U.S. Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297, 320 (1972) (rejecting the government's claim of a national security exemption from the Fourth Amendment for domestic security).

251. Mell, *supra* note 35, at 378. Mell addressed some of the provisions of the Patriot Act and its severe restrictions of the privacy protected by the Fourth Amendment. *Id.* The author noted that several provisions of the Patriot Act reduce privacy interests by allowing governmental surveillance without judicial oversight and the probable cause and warrant requirements. *Id.* at 379.

252. Press Release, *supra* note 29.

secret order of the President in 2002 and reauthorized at least thirty times.[253] The TSP first became public through an article in the *New York Times* on December 16, 2005.[254] The following day, the President confirmed the existence of the program to combat terrorist threats to the homeland.[255] The program allowed the interception of communications where one party to the communication is outside the United States and where the NSA has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[256] President Bush announced the program on his own authority without a finding of probable cause or a judicial warrant.[257] He completely bypassed the congressional framework established in FISA, which requires a warrant based on probable cause for domestic surveillance of foreign communications.[258] The President based his authority on the Authorization for the Use of Military Force adopted by Congress and the inherent powers of the President under Article II of the Constitution.[259] The Attorney General claimed that the program was very limited and aimed solely at obtaining information from the enemy.[260] The TSP was subsequently challenged in federal district court by the ACLU and a group of journalists, lawyers, and academias who claimed the program violated the First and Fourth Amendments, the Separation of Powers clause, and FISA.[261] The plaintiffs contended that the TSP violated their Fourth Amendment rights and their legitimate expectations of privacy in overseas communications.[262] The plaintiffs also asserted a "well grounded belief" that their communications were being taped or intercepted under the TSP in violation of the Fourth Amendment and FISA.[263] They further contended that FISA was the exclusive means by which international electronic surveillance could be conducted and the TSP operates outside

253. Radio Address, *supra* note 29.
254. Risen & Lichtblau, *supra* note 29.
255. Radio Address, *supra* note 29.
256. Press Release, *supra* note 29.
257. *See id.*
258. *Id.*; *see* 50 U.S.C. § 1805 (2006).
259. *See* Press Release, *supra* note 29; Radio Address, *supra* note 29; *see also* Yoo, *supra* note 248, at 570.
260. Press Release, *supra* note 29.
261. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *rev'd*, 493 F.3d 644 (6th Cir. 2007).
262. *See id.*
263. *Id.*

of that statute.[264] In response, the NSA invoked the state secrets doctrine, asserting that the disclosure or admission of relevant evidence would expose confidential matters which would be detrimental to national security.[265] The NSA argued that without the privileged information none of the named plaintiffs could establish standing for the alleged injuries.[266] Based on this privilege, the District Court dismissed one of the plaintiffs' claims but did not dismiss the plaintiffs' remaining claims challenging the validity of the TSP.[267] The court granted the plaintiffs a partial summary judgment and issued an order enjoining the program, finding that the warrantless surveillance program violated the First and Fourth Amendments, the Separation of Powers clause, and the statutory requirements of FISA.[268]

After a brief discussion of the history of executive abuses through the British writs of assistance, the District Court found that the Fourth Amendment requires reasonableness in all searches and that searches conducted without prior judicial or magistrate approval were per se unreasonable.[269] The court also engaged in a brief history of electronic surveillance, addressing Title III of the Omnibus Crime and Control and Safe Streets Act (governing domestic wire and electronic interceptions) and the establishment of FISA as the exclusive means by which electronic surveillance of foreign intelligence may be conducted.[270] The court noted that Congress allowed concessions for the executive to engage in surveillance by complying with the statutory scheme of FISA.[271] The court found that the TSP violated FISA requirements and

264. *See id.*

265. *Id.* at 758–59.

266. *Id.* The state secrets privilege shields such lawsuits from discovery. *Id.* at 759. The privilege "is an evidentiary rule developed to prevent the disclosure of information which maybe detrimental to national security." *Id.* The privilege has been applied as both an evidentiary privilege and a rule of non-justiciability. *Id.*

267. *Id.* at 766.

268. *Id.* at 782.

269. *Id.* at 773–75.

270. *Id.* at 771–73. Title III contained specific requirements for warrants for domestic eavesdropping (including the name of target, place to be searched, and duration of the search) and provided for emergency measures and a post interception warrant within forty-eight hours. 18 U.S.C. § 2518(1) (2006).

271. *ACLU*, 438 F. Supp. 2d at 772–73. FISA was established as a result of concerns of the domestic abuse of surveillance by the government following findings by the Church Committee. *Id.* at 772. Under FISA, a court may issue a warrant upon application by the government to obtain foreign intelligence if there is probable cause to believe that the target of the surveillance is a foreign power or agent of a foreign power. 50 U.S.C. § 1805 (2006). It is distinguishable from a traditional warrant in that there is no requirement that there be probable cause that a crime has been committed. *See id.* The FISA warrant proceedings are ex parte. *Id.* After the 9/11 attacks, Congress passed the Patriot Act which amended FISA to expand its coverage. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat.

the First and Fourth Amendments.[272]

The NSA appealed the decision to the Sixth Circuit, arguing that the plaintiffs lacked standing to challenge the TSP and that the state secrets doctrine prevented a decision on the merits.[273] The Sixth Circuit agreed and reversed the District Court, finding that the plaintiffs lacked standing to raise their clams and that the state secrets doctrine prevented them from establishing that they had ever been subject to the alleged wiretapping.[274] The court held that the plaintiffs had only asserted a well-founded belief that they had been subject to search by the TSP.[275] According to the court, the plaintiffs' main argument was that the NSA violated their legitimate expectation of privacy in overseas telephone and email conversations without complying with FISA, yet the plaintiffs could not produce evidence that their communications had ever been intercepted or were ever subject to search.[276] The plaintiffs' alleged injury stemmed only from their refraining from communications to their clients.[277] The court said it would be unprecedented to allow plaintiffs to litigate the Fourth Amendment claim "without any evidence that [they] have been subjected to an illegal search or seizure."[278] The court engaged in a detailed analysis of the standing doctrine and held that the plaintiffs failed to establish standing for their constitutional challenges, as well as their statutory claims.[279] The court concluded that the plaintiffs could not establish standing under FISA for the same reason they could not maintain their Fourth Amendment claim—they could not establish that they were actually the target of, or subject to, NSA's surveillance and, thus, were not aggrieved persons under FISA's statutory scheme.[280] The Sixth Circuit decision reversed the District Court on standing grounds, thereby precluding any decision on the constitutionality of the TSP and its impact on the privacy rights of Americans.[281]

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272 (2001) (codified as amended in scattered sections of U.S.C.).

272. *ACLU*, 438 F. Supp. 2d at 782.

273. ACLU v. Nat'l Sec. Agency, 493F.3d 644, 650 (6th Cir. 2007).

274. *Id.* at 653, 687–88.

275. *Id.* at 654.

276. *Id.*

277. *Id.* at 656.

278. *Id.* at 673–74.

279. *Id.* at 658–87.

280. *Id.* at 683. The court also held that the plaintiffs had not demonstrated that the NSA wiretapping satisfied the statutory definition of electronic surveillance as required by FISA and that FISA did not authorize the declaratory or injunctive relief sought by the plaintiffs. *Id.*

281. *See id.* at 687–88.

Public criticism of the TSP has been overwhelming. The public first learned of the program through a report published in the *New York Times*.[282] Civil liberties groups, law professors, and members of Congress criticized the TSP for infringing on privacy rights of American citizens.[283] Some legal scholars, however, were critical of the District Court's reasoning in invalidating the program on First and Fourth Amendment grounds and the failure by the court to engage in sufficient analysis of the role of the FISA.[284] They also criticized the decision for its failure to take into account the special needs exception to the warrant requirement.[285] Members of Congress later called for a special investigation into the TSP, a program reminiscent of the widespread domestic spying in *United States v. United States District Court* ("Keith Case").[286] They contended that respect for the rule of law commands that the wiretapping program comply with the FISA requirements or other congressionally mandated means to conduct counter intelligence.[287] The Court's decision in 1972 in the Keith Case squarely addressed a question left open in *Katz*—whether domestic eavesdropping, even for national security purposes, required a judicial warrant.[288] The Court declined to address whether the Fourth Amendment applied to foreign intelligence.[289] The decision only rejected the government's claim of a national security exception for domestic spying because of its impact on civil liberties.[290] The Court concluded:

> [t]he Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this

282. *See* Risen & Lichtblau, *supra* note 29.

283. *See, e g.*, Adam Liptak, *Many Experts Fault Reasoning of Judge in Surveillance Ruling*, N.Y. TIMES, Aug. 19, 2006, at A1.

284. *Id.*

285. *Id.*

286. Letter from Rep. Zoe Lofgren et al., to President George W. Bush (Feb. 26, 2006), *available at* http://hosted.ap.org/specials/interactives/wdc/documents/060224congress_nsa.pdf [hereinafter Lofgren Letter]; United States v. U.S. Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297 (1972).

287. Lofgren Letter, *supra* note 286.

288. *U.S. Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. at 299. The Keith Case involved electronic eavesdropping authorized by the Attorney General of a defendant's conversations because the defendant was charged with bombing the Central Intelligence Agency. *Id.* at 299–300. The wiretaps were not authorized by law or a judicial officer. *Id.* at 301. The government claimed that the surveillance was lawful to protect national security as a reasonable exercise of governmental authority. *Id.*

289. *Id.* at 321–22.

290. *Id.* at 321.

> inconvenience is justified in a free society to protect constitutional values.[291]

Many commentators also believed that evidence obtained through the TSP without a warrant may have been used in applications for FISA warrants.[292] Recent revelations in April 2009 have now indicated that the NSA had been engaged in an over-collection of domestic communications of American citizens, even after efforts to bring the program under the statutory authority of FISA.[293] Again, the public was alarmed and President Barack Obama and members of Congress called for a review of the operations of the TSP.[294]

The public outcry over the TSP has produced controversy and swift reform. Numerous lawsuits challenged the TSP on constitutional grounds and as a violation of FISA.[295] The Bush Administration abandoned the program in the midst of public outcry over the failure to follow the Fourth Amendment and the FISA warrant requirements.[296] Later in the Summer of 2007, Congress passed the Protect America Act ("PAA"), which amended FISA to include the type of surveillance under the TSP.[297] The Administration contended that gathering foreign intelligence of targets overseas did not require a warrant.[298] The new law changed the Foreign Surveillance Intelligence Act to exclude "surveillance directed at a person reasonably believed to be located outside of the United States."[299] It changed the requirements for a warrant by giving authority to the Attorney General and Director of National Intelligence ("DNI") to authorize telecommunication companies to acquire foreign intelligence of persons believed to be outside the United States up to a period of one year.[300] It was later

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291. *Id.*

292. *See, e.g.*, Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceed Law*, N.Y. TIMES, April 16, 2009, at A1.

293. *Id.*

294. *See id.*

295. *See, e.g.*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007).

296. Letter from Att'y Gen. Alberto R. Gonzalez to Comm. of the Judiciary Chariman Patrick Leahy and Senator Arlen Specter (Jan. 17, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.

297. Protect America Act of 2007, Pub. L. No. 110-55,121 Stat. 552 (codified as amended at 50 U.S.C. §§ 1801–1805 (2006 & Supp. 2009)), *repealed by* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

298. Radio Address, *supra* note 29.

299. Protect America Act of 2007 § 2, 50 U.S.C. § 1805a (Supp. 2009) (repealed by Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 § 403).

300. *Id.* § 1805b(a).

renewed following a six month sunset provision.[301]

Under the new law, if the purpose of wiretapping was to gather information on persons outside the United States who communicated with persons inside the United States, such communications would not fall under FISA.[302] Thus, there was no longer a requirement of a prior judicial warrant to gather surveillance evidence.[303] Moreover, the authority was now shifted to the Attorney General and the DNI and away from the judicial process.[304] The PAA came under new criticism as well for broadening surveillance powers.[305] The TSP only authorized warrantless surveillance of Americans communicating with al Qaeda and/or persons associated with al Qaeda.[306] The PAA contained no such limitation for the purposes of gathering of information.[307] The original FISA statutory scheme, which required judicial warrants, was based on protecting a person's reasonable expectation of privacy.[308] There were no such statutory safeguards in the PAA.[309] The legislation did, however, provide for minimization procedures to minimize the privacy impact on United States citizens.[310] Moreover, the determination by the DNI and the Attorney General that a person reasonably thought to be outside the United States and communicating with persons in the United States was subject to judicial review by the FISA court.[311] This same statutory framework was later included in the subsequent legislation by Congress, the FISA Amendment Act of 2008.[312] Civil liberties groups challenged the PAA as violating the First and Fourth Amendments because it allowed for broader surveillance of communications.[313]

The extent to which the Fourth Amendment constrains Congressional

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301. *See* Protect America Act of 2007 § 6.

302. Protect America Act of 2007 § 2.

303. *See* Juan P. Valdivieso, Recent Development, *Protect America Act of 2007*, 45 HARV. J. ON LEGIS. 581, 581 (2008).

304. *See supra* note 300 and accompanying text.

305. Valdivieso, *supra* note 303, at 589.

306. *Id.*

307. *See supra* note 299 and accompanying text.

308. Valdivieso, *supra* note 303, at 583.

309. *Id.*

310. Protect America Act of 2007 § 2, 50 U.S.C. § 1801(i) (Supp. 2009).

311. *Id.* § 1805(a)(1) (repealed by Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 § 403).

312. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified as amended at 50 U.S.C. §§ 1801–1805).

313. *See, e.g.*, Am. Civil Liberties Union, ACLU Fact Sheet on the "Police America Act," http://www.aclu.org/safefreespying/ (last visited Jan. 15, 2010).

power to authorize foreign surveillance of communications is unsettled.[314] The larger question is whether the *Katz* reasonable expectation of privacy framework and the subsequent special needs doctrine should apply to foreign surveillance conducted for national security purposes. *Katz* itself involved wiretapping for purely general law enforcement purposes and not foreign intelligence.[315] Some have argued that the playing field has changed and that expectations have changed in favor of broadening the government power to conduct warrantless searches for national security purposes.[316] The Supreme Court has not made clear the scope of Fourth Amendment protection within the context of foreign surveillance.[317] Some scholars have argued that searches undertaken for national security should pass the Court's reasonableness test for warrantless searches.[318] They contend that there are compelling reasons for favoring warrantless searches during the war on terror and that the security of the nation is a compelling interest.[319] "[N]o governmental interest is more compelling than the security of the Nation."[320] John Yoo and Glenn Sulmasy, for example, wrote that the *Katz* and FISA framework of probable cause is unworkable in today's national security applications.[321] "[T]he real problem with warrant requirements and Katz [is that s]earches and wiretaps must target a specific individual already believed to be involved in criminal activity.... Rather than individual suspicion, searching for terrorists will depend on probabilities, just as with roadblocks or airport screenings."[322] This is premised on the view that foreign intelligence will require a much larger net to capture necessary information and that the FISA or *Katz* warrant based requirements "sacrifice speed and breadth of information in favor of individualized suspicion."[323] Yet, FISA itself, prior to present amendments, allowed for temporary wiretaps without a warrant in emergency and war situations.[324] Yoo and Sulmasy concluded that *Katz* is inapplicable to searches conducted for national security matters and

314. Valdivieso, *supra* note 303, at 591.
315. *See* Katz . United States, 389 U.S. 347, 348 (1967).
316. *See, e.g.*, Sulmasy & Yoo, *supra* note 103, at 1236–37.
317. *See supra* note 289 and accompanying text.
318. Sulmasy & Yoo, *supra* note 103, at 1236.
319. *Id.* at 1236–37.
320. *Id.* at 1237 (quoting Haig v. Agee, 453 U.S. 280, 307 (1981)).
321. *Id.* at 1224, 1245.
322. *Id.* at 1244–45.
323. *Id.* at 1245.
324. *Id.* at 1250.

would harm national security.[325]

V. SHOULD THE REASONABLE EXPECTATION OF PRIVACY TEST APPLY IN COUNTERTERRORISM?

The elasticity of the reasonable expectation of privacy test bodes ill for protection of an individual's privacy in the context of terrorist threats. Both the courts and the public have acquiesced to intrusive government measures instituted to prevent terrorism and protect national security.[326] As the public accepts each new encroachment on personal liberty as necessary for personal and national safety, the courts acquiesce as well due to the public's reduced expectations of privacy.[327] Since *Katz*, expectations of privacy that once accompanied an individual's walk through the world have shrunk to the threshold of a person's dwelling—the expectation of privacy in one's home. Similarly, the warrant protections of the Fourth Amendment have lost their power due to technological advances that search masses of information without identifying particular individuals, places, or things.[328] Once the data reveals certain patterns of information categorized as potentially threatening to security, however, individuals are then targeted for further investigation or seizure of the content of their communications.[329] Because the gathering of the information does not identify individuals, the searches are deemed both public and innocuous and, thus, not subject to privacy protections.

In the context of the government's technology-enhanced search capabilities, such as dataveillance, the Fourth Amendment appears to offer little or no protection of privacy based on either the reasonableness test or the general warrant clause. Is there any hope, then, for protection of individual privacy when technology enables the government, citing the threat to national security in light of world-wide terrorism, to gather private and personal information?

Courts continue to hold that individuals have a reasonable expectation of privacy in their personal space, at the maximum within their home and at the minimum within their personal effects closely connected to

325. *Id.* at 1222.
326. *See supra* Parts III and IV.
327. *See supra* note 4 and accompanying text.
328. *See* ROSEN, *supra* note 243, at 22–23.
329. *See id.*

their persons, such as traveling bags.[330] Is this rather limited sphere of privacy strong enough to protect other personal items, such as the contents of private communications? If the courts have protected the contents of letters, although not their outside address information, could the courts also accept as a reasonable expectation of privacy the contents of personal communications intended to be private, such as personal email, but not Facebook, Twitter, or mass emailing? Both the reasonable expectations test and the general warrant clause should be re-invigorated for the protection of an individual's person, belongings, and self-expression or self-actualization that does not harm or threaten harm to others.

Modern technology has created a form of the general warrant through the use of mass data surveillance of personal records based on the need for national or domestic security.[331] A form of data profiling has also emerged, creating a prototype of who is to be searched or seized before embarking upon an airplane.[332] Yet, the increased perceived threat to security from unknown terrorists cannot ignore the everyday threat from the erratic, unpredictable criminal suspect who unleashes violence upon public institutions and individuals. Tragically, courthouses, schools, and colleges have been the recipients of both targeted and random acts of violence.[333]

Confronting terrorism and engaging in covert intelligence are necessary measures in protecting national security. Yet individual liberty and privacy as guaranteed by the Fourth Amendment should not be sacrificed for these goals. The nation itself was founded on the perceived needs of safeguarding liberty and security of the individual against unreasonable searches and seizures by the government.[334] The Fourth Amendment requirements of a probable cause based warrant and reasonableness of searches has changed over time, however. For many years, reasonable searches were premised on obtaining a judicial warrant based on probable cause.[335] *Katz* declared that Fourth Amendment protections must be grounded on a reasonable subjective expectation of privacy that society regards as reasonable.[336] Those privacy

330. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001); Bond v. United States, 529 U.S. 334, 338–39 (2000).

331. *See* ROSEN, *supra* note 243, at 22–23.

332. *Id.* at 102.

333. *See, e.g.*, Shaila Dewan, *Suspect Kills 3, Including Judge, Atlanta Court*, N.Y. TIMES, Mar. 12, 2005, at A1.

334. *See supra* notes 41–46.

335. Katz v. United States, 389 U.S. 347, 357 (1967).

336. *Id.* at 361 (Harlan, J., concurring).

expectations change over time and in conjunction with the government's expressed need for more intrusive searches. Moreover changes in communications, technology, and surveillance have affected privacy interests as well. "With each new surveillance technique, the Supreme Court attempted to refine the notion of privacy under the Fourth Amendment. As a result, the parameters of privacy rights that may be protected are in flux."[337] However, the Fourth Amendment's warrant requirements have solidified judicial protection of privacy against unreasonable searches and seizures when it comes to an individual's home; courts have stood firm in halting technological intrusion at the front door.[338]

In *Kyllo v. United States*, the Supreme Court determined that the use of thermal imaging devices to gather information regarding the interior of a home without physical invasion constituted a search for Fourth Amendment purposes.[339] The Court stated, "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical invasion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[340] The holding of *Kyllo* was limited to searches of the home and the expectation of privacy in the home, however.[341] Although the Court had previously ruled that pen registers, which register the phone numbers dialed, are not entitled to Fourth Amendment protection,[342] it is unclear if that holding extends to internet and email communications. The *Smith* decision was premised on the notion that pen registers did not reveal the content of oral communications but only the numbers dialed.[343] Yet, present technology that intercepts email and internet communications between persons outside the United States and persons within the United States is now authorized for foreign intelligence gathering purposes.[344] Similar advances in computer technology have affected Fourth Amendment expectations of privacy. As electronic surveillance becomes more intrusive and widespread, privacy expectations will diminish. Other intrusive forms of surveillance technology, such as CCTV cameras forms, GPS locators, and RFID, also enhance the government's ability

337. Mell, *supra* note 35, at 389.
338. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001).
339. *Id.* at 34.
340. *Id.* at 40.
341. *Id.*
342. Smith v. Maryland, 442 U.S. 735, 745–46 (1979).
343. *Id.* at 741.
344. *See supra* notes 295–312 and accompanying text.

to monitor private lives. Although people who share information with others via Facebook, mass emails, or Twitter appear to have limited privacy expectations while using those tools, they do appear to expect privacy in other forms of technologically enhanced communication. Mass datavelliance is different, therefore, and arguably falls within the area of fundamental privacy interests in the home and person that courts continue to protect.

Mass dataveillance of communications originating from the home "gives the government essentially unlimited discretion to search through masses of personal information in search of suspicious activity, without specifying in advance the people, places, or things it expects to find."[345] Thus, dataveillance is like a fishing expedition and could be interpreted to violate the privacy rights of individuals and citizens. The attempts to reform the FISA program to include the TSP-type surveillance of foreign communications outside the United States indicate the continuing existence of an expectation of privacy in those communications. Thousands of emails and telephone calls of Americans have been intercepted under the new surveillance program.[346] It is not clear whether the NSA listened to conversations or simply had access to the email addresses and phone numbers.[347] This kind of government action underscores the real problem with dataveillance—it is not suspicion- or target-based but rather seeks to cast a wide net of information gathering. In the absence of any demonstrated threat to security, it infringes on the privacy rights of innocent persons in the name of national security. Privacy is, thus, harmed not as an abstract value, but as an aspect of liberty affecting freedom to communicate ideas using telecommunications technology. We expect our communications through telephones, emails, or cell phones to be private. Congressional investigations hope to determine if any further searches of the content of the communications violated the Act.[348]

This instance of mass data surveillance is not unique. Other electronic surveillance measures undertaken pursuant to the Patriot Act have also resulted in seizures of email communications and internet communications. The Patriot Act broadens the scope of pen registers and trace statutes to permit the government to track email and internet

345. ROSEN, *supra* note 243, at 148.

346. *See* Eric Schmitt, *Surveillance Effort Draws Civil Liberties Concern*, N.Y. TIMES, Apr. 29, 2009, at A12.

347. *See id.*

348. *See* Lofgren Letter, *supra* note 286.

communications.[349] Under the Act, courts are permitted to authorize the installation of a pen register or a trap and trace device to capture internet and telephone dialing, routing, addressing or signaling information whenever the government believes the information is relevant to an ongoing criminal investigation.[350] In essence, the government can collect information about an individual's online searches.[351] This raises the question of whether privacy interests are infringed. The *Katz* Court long ago held that the wiretapping of a telephone conversation constituted a search under the Fourth Amendment and required a warrant.[352] Websites and internet addresses reveal more than the telephone numbers of a pen register or the addresses on an envelope. They provide insight into an individual's mind and thoughts—the essence of personhood—and should be protected by the Fourth Amendment.[353] An individual's expectation of privacy should not diminish simply because they use the internet or email. The privacy implications are no less important. Distinct from the phone numbers dialed and collected, computer users do not expect the government or the internet providers to monitor their content or web usage. Individuals have an expectation of privacy in their emails and in the use of the internet, although information regarding web browsing may be readily available through software. Further, expectations of privacy should extend to non-content communications, such as addresses.[354] The seizure of email addresses, for example, exposes the content of the communications.[355] Yet, the District Court of Oregon held that there is no Fourth Amendment protection of the "to" or "from" envelop of an email or the IP addresses of websites.[356] This holding was based on the notion that what is communicated to third parties, such as phone numbers dialed, is not subject to Fourth Amendment protection.[357] The court relied on *Smith v.Maryland*,

349. USA PATRIOT Act of 2001 § 1, 18 U.S.C. §§3121–3127 (2006).

350. *Id.* § 3121.

351. *See id.*

352. Katz v. United States, 389 U.S. 347, 353 (1967).

353. *See, e.g.*, Jeremy C. Smith, *The USA PATRIOT Act Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412, 441 (2003). The author argued, "the Fourth Amendment protects all electronic communications, both content and envelope information . . . . The Fourth Amendment requires the recognition of an expectation of privacy because the monitoring of computer usage and communications implicates privacy concerns that are absent in the monitoring of telephone numbers dialed." *Id.* at 441–42.

354. *See supra* note 353 and accompanying text.

355. *Id.*

356. Thygeson v. U.S. Bancorp, No. CV-03-467-ST, 2004 WL 2066746, at *19, *22 (D. Or. Sept. 15, 2004).

357. *Id.* at *22.

which upheld the constitutionality of the use of a pen register to intercept dialed phone numbers but not the content of communications.[358] *Smith* was premised on the notion that there is no privacy expectation in a phone number dialed, even from the privacy of the home, because callers voluntarily give this information to third parties such as the phone companies.[359] The District Court of Oregon extended this rationale to include the addresses of internet communications.[360] However, that reasoning is flawed because email addresses do reveal content, unlike telephone numbers in pen registers or addresses on envelopes.[361]

Recent cell phone technology has also expanded law enforcement's ability to monitor the whereabouts of cell phone users by using the cell phone as a "tracking device."[362] Whenever a phone is turned on, wireless providers can now monitor a cell phone user's location.[363] Operators have recently turned over such data to prosecutors when presented with court orders.[364] Moreover, prosecutors have argued that expansion of powers under the Patriot Act could be read to allow cell phone tracking on less than probable cause.[365] In contrast, the *Kyllo* Court held that the use of digital technology for electronic invasion of the home without a warrant violates Fourth Amendment interests.[366] The *Kyllo* Court expressed limitations on the role of technology used in criminal law enforcement in the home when such technology is not in public use.[367] However, the expansion of government surveillance of private information for national security purposes under the Patriot Act

358. *Id.* (citing Smith v. Maryland, 442 U.S. 735, 741–44 (1979)).

359. *Smith*, 442 U.S. at 744.

360. *Thygeson*, 2004 WL 2066746, at *19.

However, some scholars have criticized the application of the *Smith* rationale to computer information that is subject to surveillance under the Patriot Act. *See, e.g.*, Smith, *supra* note 353, at 447.

361. Smith, *supra* note 353, at 447.

362. Matt Richtel, *Live Tracking of Mobile Phones Prompts Court Fights on Privacy*, N.Y. TIMES, Dec. 10, 2005, at A1; Jonathan Krim, *FBI Dealt Setback on Cellular Surveillance*, WASH. POST, Oct. 28, 2005, at A5. Courts in Texas and New York denied the FBI's request to track the location of cell phone users without showing evidence that a crime has occurred or was in progress. *In re* Application of the United States for an Order Authorizing the Use of a Pen Register and a Trap and Trace Device, 396 F. Supp. 2d 294, 327 (E.D.N.Y. 2005); *In re* Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005). The courts did grant the FBI requests for information pertaining to the logs of phone numbers called and received from the cell phones. *In re Application of the United States for an Order*, 396 F. Supp. 2d at 296–97; *In re Application for Pen Register*, 396 F. Supp. 2d at 748, 765.

363. Richtel, *supra* note 362.

364. *Id.*

365. *Id.*

366. Kyllo v. United States, 533 U.S. 27, 40 (2001).

367. *Id.*

has weakened Fourth Amendment privacy interests.

At least a few courts have recognized that privacy interests are at issue in electronic surveillance in the home without a warrant.[368] The District Court for the Southern District of Texas has ruled that "permitting surreptitious conversion of a cell phone into a tracking device without probable cause raises serious Fourth Amendment concerns, especially when the phone is monitored in the home or other places where privacy is reasonably expected."[369] Cell phone tracking obviously aids law enforcement in emergency situations, but it is unclear what standards courts will use in permitting the general use of cell phone tracking without reasonable suspicion of individuals outside the home on public streets. The District Court for the Southern District of New York has ruled that probable cause is not required when the cell phone cite information is used only to track calls made or received by the cell phone user.[370] In that case, no data was disclosed that could triangulate the precise location of the cell phone use.[371]

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Expansion of government searches through video surveillance, cell phone tracking, searches of a passenger's belongings on public transportation, stadium searches, stop and seizures of persons on the streets, and vehicle searches raises concerns about Fourth Amendment privacy interests. Simply because something is viewed publicly does not necessarily lessen one's privacy interests under the *Katz* reasonable expectation test, which provides protection for privacy interests that society regards as reasonable.[372] However, what one exposes to the public or what can be observed from a lawful vantage point has been regarded as not deserving Fourth Amendment protection under the plain view doctrine.[373] This category has been broadened to a large degree by technological surveillances since 9/11. Mass video surveillance, digital face imagery, and biometric surveillance in public reduce objective expectations of privacy and, correspondingly, Fourth Amendment protections. The inherent dangers of unsupervised video data collection

368. *See supra* note 362 and accompanying text.

369. *In re* Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005).

370. *In re* Application of the United States of America for an Order for Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace, 405 F. Supp. 2d 435, 449–50 (S.D.N.Y. 2005).

371. *Id.* at 449.

372. Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring).

373. *Id.* at 351 (majority opinion).

and false positives may be viewed as infringing on liberty interests. Individuals, for example, could be identified for low level crimes and permanently identified in data files for suspected activity. Moreover, surveillance of innocent yet suspicious activity violates privacy interests. Ostensibly to prevent terrorist activities, a growing number of police departments in cities such as Boston, Chicago, and Los Angeles are monitoring public behavior which they deem suspicious.[374] Police have monitored activities such as taking pictures of power plants and public buildings and purchasing police or firefighter uniforms.[375] The police explain this approach as stemming from the behavior of terrorists who typically engage in surveillance of targets before an attack.[376] The information gathered by the police is later catalogued on a terror tips list, which may be used for intelligence gathering purposes.[377] Ultimately, the police hope to have a nationwide reporting system of codes for suspicious activity.[378] The privacy concern that arises here is that the overbroad recording of innocent activity interferes with the privacy rights of individuals. However, such activity is deemed both public and innocuous and, therefore, not subject to privacy concerns despite the paramount liberty interests of innocent individuals.

Even more latitude is given to law enforcement officers in street encounters, regardless of improper motivation. According to the *New York Times*, a twenty-four-year-old Muslim-American journalism student was stopped in September 2007 by Veteran Affairs Police in New York for taking pictures of flags in front of a Veterans Affairs building as part of a class assignment.[379] The officers took the student into custody for questioning and deleted the images from the camera.[380] In a similar situation, a fifty-four-year-old artist and fine arts professor at the University of Washington was stopped, searched, handcuffed, and placed in a police squad car for taking photographs of electrical power lines as part of an art project.[381] Innocent activity, such as taking photographs of public buildings, can trigger application of a terror checklist when

374. Schmitt, *supra* note 346.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*

combined with other factors such as race or ethnicity.[382] Such practices may lead to the potential for abuse and for religious, racial, and ethnic profiling.

These factors alone do not justify individualized suspicion under the *Terry* stop and frisk doctrine. Stopping and seizing a person of Arab descent for taking a picture of a public building should still be an unreasonable search in a free society. Yet, a recent trial in a Georgia federal court of a suspected terrorist, Syed Harris Ashmed, revealed that the defendant used casing videos of the World Bank building in Washington to prove that he could engage in surveillance "when terrorist overseas couldn't even get in the country."[383] However, evidence also showed that Ahmed bought a one-way ticket to a Pakistan military training camp,[384] which combined with the videos was sufficient to bypass privacy protections. Race, national origin, or ethnicity alone cannot form sufficient cause for the police to stop and question the public on the basis of innocent activity.[385]

Individual liberties cannot be curtailed for purposes of intelligence gathering. A public search or seizure without a warrant, probable cause, or reasonable suspicion violates Fourth Amendment liberty and privacy interests.[386] Racial profiling under the *Terry* stop and frisk doctrine had long been condemned prior to the 9/11 terror attacks.[387] According to a Gallop Poll, eighty-one percent of Americans opposed racial profiling.[388] Yet, there now appears to be an emerging public acceptance of some form of ethnic profiling. After 9/11, an ABC/*Washington Post* poll found that seventy-one percent of Americans were willing to give up some liberties to prevent future terrorist attacks.[389] Undoubtedly, there has been some public acceptance of airport passenger profiling based on people of Middle Eastern

382. *See id.*

383. *See* Bill Rankin, *Defendant "Fell Prey" to Extremist, Lawyer Says Ex-Tech Student Offered Help to Terrorists, Prosecutors Say; But Prosecutor Claims Actions "Not Child's Play"*, ATLANTA J. CONST., June 2, 2009, at 10A.

384. *Id.*

385. *See* Power, *supra* note 139, at 69.

386. *Id.* at 47–48.

387. Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERV., Dec. 9, 1999, http://www.gallup.com/poll/3421/Racial-Profiling-Seen-Widespread-Particularly-Among-Young-Black-Men.aspx (last visited Jan. 15, 2010) (more than eighty percent of Americans disapprove of the practice of racial profiling).

388. *Id.*

389. ABC News/Washington Post Poll: Response (Sept. 13, 2001), http://abcnews.go.com/images/PollingUnit/864a1%20Response%20to%20Terror.pdf (last visited Jan. 15, 2010).

descent.[390] Police encounters with people of Arab ancestry sharply increased after 9/11.[391] Some have argued that it is rational to stop and question persons of Arab ancestry.[392] Fortunately, civil libertarians have opposed these measures, and airports have adopted rules and regulations requiring screening of all persons aboard a passenger aircraft.[393] Airport searches, it must be noted, are generally viewed as special needs or *sui generis*, so probable cause or reasonable suspicion is not required.[394] Americans, who take pictures of public monuments in Washington during vacations or otherwise, should not expect that their very identities be recorded as part of general surveillance. But, our expectations of privacy may shift when we are in a public space. Public surveillance, however, is quite different from general warrantless physical searches. As preventive measures, physical searches of individuals entering public buildings, such as museums, football stadiums, and public transportation systems, affect Fourth Amendment privacy interests. In addition to searches of handbags or containers for explosive devices, law enforcement has been expanding the scope of physical searches in the name of public security. In *Johnston v. Tampa Sports Authority*, a Tampa Bay football season ticket holder challenged the Tampa stadium authority's practice of requiring all spectators to submit to a pat-down search.[395] The Tampa Bay Buccaneers instituted the policy because the NFL mandated pat-down searches as a condition for entrance to NFL events.[396] As in the New York City subway searches, the NFL policy was instituted following the 2004 and 2005 suicide bombings in London and Madrid and threats made to sporting events, such as the soccer venues in Spain.[397] Prior to this policy, bags, purses, and other containers were searched, but there were no physical searches of persons.[398] Johnston was searched upon entering a Tampa football game and brought suit.[399] The District Court found that the searches violated the Florida Constitution and the Fourth Amendment

390. *See* Power, *supra* note 139, at 65 & n.67.

391. Randa A. Kayyali, *The People Perceived as a Threat to Security: Arab Americans Since September 11*, MIGRATION POL'Y INST., July 2006, http://www.migrationinformation.org/USfocus/display.cfm?ID=409 (last visited Jan. 15, 2010).

392. ABC News/Washington Post Poll: Response, *supra* note 389.

393. Power, *supra* note 139, at 65–66.

394. *See id.* at 55.

395. Johnston v. Tampa Sports Auth., 530 F.3d 1320, 1322 (11th Cir. 2008).

396. *Id.*

397. *Id.* at 1323 n.1.

398. *Id.* at 1323 n.3.

399. *Id.* at 1323.

and granted a preliminary injunction.[400] The Eleventh Circuit reversed, finding that the District Court abused its discretion and misapplied the consent exception to warrantless searches.[401] The Eleventh Circuit held that Johnston's football ticket was a revocable license to attend NFL games and that Johnston had voluntarily consented to the pat-down searches.[402] The Tampa Bay Buccaneers had simply given Johnston a revocable license to enter the stadium to attend football games, which could be revoked or rescinded at any time.[403] The court also held that the consent doctrine was applicable under Florida law.[404] In a footnote, the Eleventh Circuit declined to address whether any other special needs exception applied to the case.[405]

The Circuit Court in *Johnston* noted that it had addressed the constitutionality of warrantless searches in other contexts involving entrance to public lands.[406] In *Bourgeois v. Peters*, the Circuit Court invalidated a municipal policy that required suspicionless magnetometer searches of all persons seeking to attend demonstrations on public property outside of Fort Benning, Georgia.[407] The City justified the searches in light of past conduct of trespassing, smoke bombs, and heightened homeland security threats occurring at demonstrations.[408] The Circuit Court invalidated the program on the ground that it had impaired First Amendment rights, as well as Fourth Amendment rights.[409] Moreover, the City's enacted magnetometer policy served the traditional law enforcement function of public safety and was therefore not a special need.[410] While the Circuit Court in *Johnston* did not

400. *Id.*

401. *Id.* at 1325.

402. *Id.* at 1324, 1326–27 n.7.

403. *Id.* at 1326–27 n.7.

404. *Id.* at 1326. The doctrine of unconstitutional conditions prohibits terminating benefits, though not entitlements, on the basis of relinquishing a constitutional right. *Id.* at 1327 (citing State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000)). The Circuit Court disagreed with the District Court that the consent doctrine did not apply in this case because of the unconstitutional conditions doctrine. *Id.* "Johnston did not have any right or entitlement to enter the stadium." *Id.* Applying the consent factors under Florida law, the court found Johnston had voluntarily consented and was aware that he could refuse to be searched and leave the stadium. *Id.* at 1326.

405. *Id.* at 1326–27 n.7. Because the court found the consent doctrine applicable, the court declined to engage in any special needs analysis. *Id.* It noted, however, that there was "at least a question concerning whether Johnston's constitutional rights would have been violated by the pat-down search, even if he had not consented." *Id.*

406. *Id.*

407. Bourgeois v. Peters, 387 F.3d 1303, 1307 (11th Cir. 2004).

408. *Id.*

409. *Id.* at 1325.

410. *Id.* at 1312–13 ("[I]t is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined.").

address the special needs doctrine, the court said, "Unlike the searches for drugs, bottles, and cans... , the pat-down searches in this case supported an interest well beyond general law enforcement."[411] The NFL clearly instituted the pat-down policy to prevent terrorist attacks and ensure the safety of persons in the stadium.[412] These cases, along with *McWade v. Kelly*, involving subway searches,[413] illustrate an individual's diminished expectation of individual privacy that exists in access to public stadiums and public transit systems based on perceived terrorist threats.

Pat-down searches at stadium sporting events are now widely expected and accepted. Under the *Katz* formulation, such expectations are objectively reasonable even though there may be no credible or reliable threat.[414] In *Johnston*, the NFL adopted the policy on the basis of the suicide bombings in Madrid and London and the threats made to sporting events.[415] The FBI later determined there were no threats to NFL stadiums.[416] Yet, pat-down searches, which restrict individual privacy and liberty, are viewed as reasonable searches under the Court's balancing analysis. These limitations on individual privacy are deemed acceptable as non-emergency matters of public safety.

Although the subway searches and the Tampa stadium search involve perceived external, international threats of terrorist activity under a special needs approach, they pose special concern because Fourth Amendment rights change relative to the weight of the liberty and safety interest at stake.[417] Would such searches be acceptable at entrances to city buses and trains as a routine aspect of American life absent emergency threats to public security? Even under the special needs category, there must in fact be a special need independent of general criminal enforcement of the law.[418] The Supreme Court has never applied the special needs exception to suspicionless searches on subways, public buildings, parks, and stadiums. The administrative search doctrine applicable to housing inspections in *Camara* seems inapplicable to the search of people and their belongings at on public arenas and

411. *Johnston*, 530 F.3d at 1328.
412. *Id.*
413. *See supra* Part III.F.
414. *See supra* note 4 and accompanying text.
415. *Johnston*, 530 F.3d at 1323 n.1.
416. *Id.*
417. *See* POSNER, *supra* note 13, at 41.
418. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

venues.[419]

There are inherent problems in identifying threats to public safety and security as special needs in the absence of an emergency situation. Public safety measures as a part of general law enforcement must meet the requirements of the Fourth Amendment. Emergencies and extraordinary circumstances may justify a limited warrantless search as reasonable to prevent widespread public harm.[420] In such cases, the weight of the intrusion of privacy interests is weighed against the degree of public harm.[421] Emergency measures may be taken when there are extraordinary governmental needs where public security and safety are imminently threatened.[422]

The recent shooting and killing of a security guard at the Washington, D.C. Holocaust museum by a lone gunman illustrates this problem.[423] The Holocaust museum is frequented by millions of visitors each year, hundreds each day.[424] Visitors and their bags and containers are subject to magnetometer searches, and armed security guards are stationed at the public entrances.[425] Yet, a lone gunman was able to enter the building, fire his weapon, kill a security guard, and threaten the safety of hundreds of visitors.[426] At the time, there was no known general terrorist threat.[427] It was later determined that the alleged gunman was a white supremacist, with a history of anti-Semitic writings, who acted alone out of personal hatred of Jews and blacks.[428] Further investigations revealed that the gunman had visited public monuments, churches, and synagogues as possible targets.[429] An increase of security at other museums and public buildings in the Washington area followed the shooting.[430] No one would suggest that security measures should not be taken in such cases, which might include, for example, further pat-down consensual searches. Emergency public safety measures, such as

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419. *See supra* notes 110–20 and accompanying text.

420. *Edmond*, 531 U.S. at 44.

421. Brown v. Texas, 443 U.S. 47, 50–51 (1979).

422. *See Edmond*, 531 U.S. at 44.

423. *See* Carrie Johnson & Spencer S. Hsu, *Museum Suspect's Writings Had Not Triggered a Probe; Case Illustrates Fine Line for Law Officers*, WASH. POST, June 12, 2009, at A4.

424. *See* Michael E. Ruane et al., *At a Monument of Sorrow, a Burst of Deadly Violence; Guard Killed, Suspect Injured Amid Scene of Fear, Chaos*, WASH. POST, June 11, 2009, at A1.

425. Jacqueline Trescott, *Museums Reassess Security*, WASH. POST, June 12, 2009, at C5.

426. *See* Ruane, *supra* note 424.

427. Alex Kingsburgy, *Holocaust Museum Shooing, Other Recent Attacks Prove Domestic Extremism a Threat*, U.S. NEWS & WORLD REPORT, June 10, 2009.

428. *See* Johnson & Hsu, *supra* note 423.

429. *See* Bruce H. DeBoskey, *Fight Back Against Hate*, DENV. POST, June 17, 2009, at B11.

430. *See* Johnson & Hsu, *supra* note 423.

reasonable limited searches of all passengers and belongings entering public buildings such as museums, are needed in cases like this.

As a case of domestic terrorism, although unaffiliated with a known group, the question arose as to whether a prior criminal investigation and surveillance was warranted of the suspect.[431] Surveillance of personal communications must require a warrant, absent emergency circumstances. There are no blanket war on terror measures which justify warrantless searches of domestic communications. Although officials were aware of the alleged holocaust shooter's hateful writings against Jews and religious minorities, no criminal investigation had begun.[432] As one official said, "law enforcement's challenge every day is to balance the civil liberties of the United States citizen against the need to investigate activities that might lead to criminal conduct."[433]

As the Keith Case demonstrated, a warrant is required for purely domestic surveillance.[434] Although acts of domestic terrorism threaten public safety and liberty as well as external terrorist threats, judicial protection should be afforded to Fourth Amendment privacy interests. Law enforcement profiles of terror suspects and investigations of criminal behavior must conform to existing Fourth Amendment protections without regard to the special needs doctrine. Physical surveillance of possible criminal or terrorist activity, as well as private email or internet communications, must conform to the reasonable expectations of privacy protected by the *Katz* doctrine.[435] The Supreme Court has recently reaffirmed *Katz*'s holding that "'searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"[436] In *Arizona v. Gant*, the Court reaffirmed the privacy interest people have in the contents of their cars by holding that police may not search the vehicle following an arrest of an occupant unless it is reasonable to believe that evidence of the arrest might be found in the vehicle.[437] In *Gant*, the occupant was arrested for driving with a suspended license, and it was unlikely that the police would find evidence

431. *See id.*
432. *Id.*
433. *Id.*
434. *See supra* notes 288–91 and accompanying text.
435. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
436. Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz*, 389 U.S. at 351 (majority opinion)).
437. *Id.* at 1719–20.

in the passenger compartment of his car relating to the arrest.[438] In so holding, the Court noted that a rule authorizing searches whenever a traffic offense is committed creates a threat to the privacy of the individuals.[439]

Although *Gant* involved a search of a vehicle following an arrest, it is uncertain whether other precedents will withstand the reasonable expectation of privacy test. In *Bond v. United States*, the Court held that a government agent's physical manipulation of a petitioner's bag aboard a bus violated the Fourth Amendment.[440] The Court held that passengers aboard buses have an expectation of privacy that their carryon bags will not be manipulated in an exploratory manner, although there is no privacy interest in bags being moved or touched aboard a bus by bus employees or other passengers.[441] The inquiry under *Katz* asks whether an individual's privacy interest is one that society regards as reasonable.[442] *Bond* was a pre-9/11 case before the special needs doctrine was expanded to allow container and bag searches on public subways.[443] It is unclear if tactile manipulation of a bag on a public bus or train, without reasonable suspicion or probable cause, would now be an objectively reasonable search under the special needs exception.[444] However, the *MacWade* decision upheld such searches on a random basis in response to an alleged terrorist threat.[445] The court's balancing analysis weighed in favor of the government's demonstrated need, broadened the special needs doctrine, and diminished the expectation of privacy in such warrantless physical searches.[446]

Expansion of warrantless searches in combating domestic or foreign threats under the special needs exception undermines Fourth Amendment privacy interests. Although privacy expectations have reduced in response to perceived threats to domestic security, absent evidence of domestic or foreign threats to national security which

438. *Id.* at 1714, 1719.

439. *Id.* at 1720.

440. Bond v. United States, 529 U.S. 334, 334 (2000).

441. *Id.* at 338–39.

442. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

443. *See Bond*, 529 U.S. at 334.

444. What if the shooter in the Holocaust Museum killing had used a public bus and was subjected to an exterior search of a bag, which when manipulated indicated the presence of a rifle? What if it further indicated explosive devices which were not discoverable absent a search? A search of all bags aboard buses would violate the Fourth Amendment absent an emergency exception involving a threat to public safety. *See id.* at 338–39. But manipulation of luggage is now common place for entrances in public buildings and sporting events. *See supra* notes 395–404 and accompanying text.

445. MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006).

446. *See supra* Part III.F.

warrant extraordinary measures, the warrant requirement is still valid under the Fourth Amendment. There is no mass transportation exception to the Fourth Amendment.

Technological surveillance, data mining, cell phone tracking devices, and other forms of information gathering by the government continue to threaten liberty and privacy interests. The expansion of the special needs category, which now includes DNA testing of persons arrested for crimes, has further diminished expectations of Privacy.[447] The investigatory net has widened in response to the government's need to combat crime and terrorism in the present times. As the need for government searches has grown, reasonable expectations of privacy have fluctuated as well.[448] Courts should continue to provide Fourth Amendment warrant limitations on the government's ability to broadened searches for national security purposes absent extraordinary government circumstances. Absent evidence of extraordinary government circumstances, such as an immediate imminent threat to public safety, the *Katz* test should govern government searches, including physical searches and electronic information gathering from the privacy of the home, which impact Fourth Amendment privacy interests. As Justice Brennan responded to the first special needs case, "only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary."[449]

VI. CONCLUSION

This article has shown that the expansion of physical searches under the special needs exceptions and the warrantless searches of personal communications in the name of national security will erode Fourth Amendment privacy interests unless proper safeguards are observed to protect society's reasonable expectation of privacy and liberty interests from unwarranted government intrusion. Those privacy expectations are grounded in the very structure of the Fourth Amendment which has

447. *See, e.g.*, Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 MINN. L. REV. 1842, 1864 (2005) ("The 'special needs' doctrine has been used to justify warrantless, suspicionless searches in various contexts, including compelled DNA collections from post-convicted persons.").

448. *See* Stuntz, *supra* note 10, at 2142.

449. New Jersey v. T. L. O., 469 U.S. 325, 357 (1985) (Brennan, J., concurring in part and dissenting in part).

not changed.[450] Extraordinary circumstances such as massive terrorist threats in domestic security matters must be weighed against a heightened level of privacy to justify warrantless searches.[451] The warrant clause itself stands as the final bulwark against enhanced intrusions which are at today's virtual doorstep.

450. *See id.*

451. Jonathan H. Marks, *9/11+ 3/11 + 7/7=? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 563 (2006) (discussing the notion of mass terrorism as opposed to smaller scale attacks, our collective responses to such attacks, and how our behavior can influence and shape our counterterrorism policy).