

TERRORISM, RACE AND A NEW APPROACH TO CONSENT SEARCHES

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Much of the talk in the press and on television about racial profiling is ideologically charged and simplistic. No one has a comprehensive definition of "racial profiling," and it is often not clear what is being condemned. Is it always morally offensive and unconstitutional to use race when it is relevant to the probabilities of arresting the right person? I think the answer is no. We should not, for example, require police to ignore race when the victim has identified the race of the man who robbed her. Even if we thought this a good idea, it would be an unenforceable edict. Police would take race into account in that case and seek a way to predicate the stop or arrest on some other ground.

Of course, race or ethnicity can be used to "profile" suspects in much more pernicious ways. To use race or ethnicity as the basis for making routine stops or searches is morally offensive and should constitute a violation of the Constitution. In *Whren v. United States*,¹ the Supreme Court unanimously held that the Fourth Amendment is not offended if the police choose to make a traffic stop because of the driver's race.² As long as the police have probable cause to make the stop, the Court held, their motive is irrelevant.³ The Court suggested that the constitutional protection

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¹ 517 U.S. 806 (1996).

² *Whren*, 517 U.S. at 813.

³ *Id.* at 817-19.

against bad police motives lies in the Equal Protection Clause.⁴ As others have concluded, it will be almost impossible to prove an equal protection violation in the shadowy world of police stops, frisks and searches.⁵ Thus, we need a different approach to discourage police from acting on bad motives. Unlike some,⁶ I accept *Whren's* conclusion that motive by itself does not violate the Fourth Amendment. Looking for another solution, the second part of this paper will offer a change in Fourth Amendment doctrine that will, as a practical matter, make it much more difficult for police to "hide" bad motives and much less likely that police can use race in an impermissible way.

In sum, uses of race or characteristics roughly linked to race can be relevant and constitutional. Other uses of race are both offensive and unconstitutional. The first part of this paper will sketch a narrow category in which the use of race in creating a profile might be appropriate. I stress "might be appropriate." Any reliance on race to support inferences about people recalls our sordid history of slavery, Jim Crow laws and repression of racial minorities. A poignant example of this repression can be found in James Patterson's book, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*.⁷ In 1949, George McLaurin, a sixty-eight-year-old black educator, sought admission to the doctorate program at the all-white University of Oklahoma:

The state reluctantly admitted him . . . but forced him to remain in an anteroom off the regular classrooms where course work was given. In the library he was made to sit at a segregated desk behind a pile of newspapers in the mezzanine. In the cafeteria he had to eat in a dingy alcove by himself and at a different hour from the whites.⁸

Integration, as understood by the University of Oklahoma in 1949, relieved white students of the obligation of coming in close contact with Mr. McLaurin, even of seeing him in the dining hall or the library.⁹ The destructive power of racial intolerance cannot be exaggerated.

The insidious intolerance that lurks when we use race to

⁴ *Id.* at 813.

⁵ See, e.g., David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326-27.

⁶ See *id.* at 329.

⁷ JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 17 (2001).

⁸ See *id.* at 17, 19 (illustrating McLaurin's segregated anteroom).

⁹ *Id.* at 17-19.

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identify or predict behavior requires a strong presumption against those uses of race. But, as illustrated earlier, that presumption can sometimes be rebutted, as in the use of race in the description of a suspect. David Harris draws a distinction between the use of race to describe, versus the use of race to predict, future behavior. It is the latter, he argues with force, that is always offensive and always unconstitutional.¹⁰

Perhaps. It will be much more difficult to overcome the strong presumption of unconstitutionality in the predictive use of race. I am unsure that the presumption *can* be rebutted. But I will sketch the strongest argument in favor of a limited use of race to make predictions and let you decide whether David Harris is right that a predictive use is always wrong. I will then argue for a change in Fourth Amendment law that would make racial profiling more difficult to accomplish in the routine, run-of-the-mill cases.

I.

I begin by asking whether Middle Eastern origin¹¹ can be used to create a “terrorist profile.” As this is a thought experiment and not proposed legislation, I offer no specific definition of “terrorist.” For purposes of this paper, I will assume that a “terrorist” is a member of al Qaeda or any other group that has sworn our destruction. Can this use of race be squared with the Constitution?

The Fourth Amendment has very specific requirements

¹⁰ David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 Miss. L.J. 423 (2003).

¹¹ I suppose one could argue that “Middle Eastern” or “Arab” is not a racial description, but I do not think that argument gets very far. The Supreme Court considers Hispanics to be a minority for purposes of equal protection analysis even though Hispanics are considered white for purposes of the census. Compare *Hernandez v. New York*, 500 U.S. 352, 358-60 (1991), with Introduction to Census 2000 Data Products, U.S. Census Bureau (showing race and “Hispanic or Latino origin” as different categories), at <http://www.census.gov/prod/2001pubs/mso-01icdp.pdf>. The evil in racial profiling is not limited to technical definitions of race. Indeed, profiling hippies or bikers or gays is offensive and has nothing to do with race at all. Moreover, most scientists conclude that race is an artificial construct without scientific meaning. See Alessandra Stanley, *Television Review: Race as a Fiction Invented by the Ruling Classes*, N.Y. TIMES, May 17, 2003, at B9 (attributing this view to “some of the most respected scholars in the country”). All of this suggests that using Middle Eastern appearance as part of a “terrorist profile” is a type of racial profiling. Whether it violates the Fourth Amendment is, I will argue, a separate question.

about the issuance of warrants and, beyond that, a vague observation that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹² Thomas Davies has concluded that “unreasonable” meant something quite different to the Framers than it does to us today.¹³ Today, it has a relativistic meaning—roughly, conduct that is inappropriate in the particular circumstances.¹⁴ One may act reasonably, under tort law, by driving eighty miles an hour to get a badly injured person to the hospital but not by driving eighty miles an hour on icy roads for the thrill of it.

The Framers, according to Davies, understood the term in a much more formal way. Lord Coke used it as a synonym for “unconstitutional.” In the seventeenth and eighteenth centuries, “[t]o say that a statute was ‘against reason’ was to say that it violated basic principles of legality.”¹⁵ When James Otis argued against the writs of assistance in 1761, he cited, and probably quoted, an opinion by Lord Coke that used “against reason” to mean “so contrary to the principles of common law as to be ‘void.’”¹⁶ Davies concludes, “Because ‘unreasonable’ was a pejorative synonym for gross illegality or unconstitutionality . . . the Framers would have understood ‘unreasonable searches and seizures’ as the pejorative label for searches or arrests made under that most illegal pretense of authority—general warrants.”¹⁷

Thus, the original meaning of the Fourth Amendment is:

The right of the people to be secure in their persons, houses, papers, and effects, against [general warrants] 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.¹⁸

So we search history in vain for a meaning of “unreasonable” that extends beyond the condemnation of general warrants.

But the Supreme Court has followed modern relativistic usage—as Thomas Clancy puts it, the Court’s Fourth

¹² U.S. CONST. amend. IV.

¹³ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

¹⁴ *Id.* at 686.

¹⁵ *Id.* at 688.

¹⁶ *Id.* at 690 & n.409. Davies concludes that Otis would have quoted Coke’s “against reason” language because Otis spoke for four hours. *Id.*

¹⁷ *Id.* at 693.

¹⁸ *Id.* at 557 (quoting U.S. CONST. amend. IV) (suggesting modifications according to Davies’s historical evidence).

Amendment jurisprudence lacks “a principled analysis.”¹⁹ Lacking principles, the Court often balances the degree of intrusion against the need for the search. This balance underlies the *Terry v. Ohio*²⁰ stop and frisk doctrine and various iterations of the principle that administrative inspections can proceed without any suspicion at all.²¹ The Court has told us, over and over, that “[t]he touchstone of our analysis under the Fourth Amendment is always `the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.’”²² An example is *Maryland v. Wilson*, where the Court held that the Fourth Amendment did not require police to have any level of suspicion before ordering passengers out of stopped vehicles.²³ The Court explicitly balanced the “public interest” of police officer safety against the “personal liberty” of passengers.²⁴

Tracey Maclin demonstrated that nothing in the Court's Fourth Amendment jurisprudence can be read to permit any kind of “terrorist profile.”²⁵ Morgan Cloud has shown in his earlier work that various iterations of the drug courier profile do not provide an acceptable benchmark for deciding when the Fourth Amendment has been violated.²⁶ To justify a “terrorist profile” will require a new Fourth Amendment theory, drawing on the “public interest” versus “personal liberty” balance that the Court has so often used. While the theory will be new, the principle is not. We can begin with Blackstone. In 1765, he recognized that society has a right to

¹⁹ Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 629 (1995).

²⁰ 392 U.S. 1 (1968).

²¹ *Terry*, 392 U.S. at 19.

²² *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (quoting *Terry*, 392 U.S. at 19); see *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (noting “touchstone” of reasonableness concerning invasion of privacy); see also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting “touchstone of the Fourth Amendment is reasonableness”); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (noting the “touchstone” of reasonableness).

²³ *Wilson*, 519 U.S. at 414-15.

²⁴ *Id.* at 413-15; see also *Mimms*, 434 U.S. at 108-09 (using same balance when it is driver's liberty interest at issue).

²⁵ Tracey Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men: *The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471 (2003).

²⁶ Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843 (1985).

employ “first principles” of self-protection during extraordinary times “when the contracts of society are in danger of dissolution, and the law proves too weak against the violence of fraud or oppression.”²⁷ Perhaps a Fourth Amendment that does not recognize the al Qaeda threat is too weak against the violence of oppression implicit in their threat to destroy our culture.

Even before the attacks of September 11, Akhil Amar speculated that a 0.1 percent chance of a bomb on a plane justifies a search of the passengers.²⁸ It seems right to say that even the smallest risk of death to dozens or hundreds of innocent people fully justifies a seizure, interrogation and search of each passenger. If, on the other hand, the harm risked by a suspect is violation of the drug laws, it seems right to require the police to be pretty sure that he is carrying drugs before a search can be made of his person. This “sliding scale” definition of probable cause, based on the immediacy and scope of threatened harm, is intuitively appealing. After all, when the Court balances the public interest with the intrusion into liberty, why would the public interest not weigh more heavily in the bomb case than in the drug case? Drawing on a modern, relativistic meaning of “reasonable,” perhaps it means “reasonable given the harm sought to be avoided.”²⁹

While the Court has never embraced a case-by-case sliding scale of probable cause, it has implicitly adopted a category-by-category sliding scale. Some administrative seizures require no suspicion at all. In *Michigan Department of State Police v. Sitz*,³⁰ the Court upheld suspicion-less drunk driving checkpoint stops, at least when the checkpoints have been set up pursuant to guidelines “governing checkpoint operations, site selection, and publicity” that were issued by an advisory committee.³¹ The asserted public interest, of

²⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *243.

²⁸ AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 32 (1997).

²⁹ Professor Matthew Hall asked during the symposium if a better defense of a terrorist profile might lie in carving out a national security exception to the Fourth Amendment. If the Fourth Amendment simply does not apply to the use of a terrorist profile in narrow circumstances, then I would not have to work so hard to defend the use of Middle Eastern origin as reasonable. I suspect it makes no difference to those who would support, or reject, a terrorist profile whether one uses my approach or the one suggested by Professor Hall. As one who can remember Richard Nixon's use of national security to defend all sorts of things that seemed indefensible to me, I guess I prefer working the “reasonable search” side of the street.

³⁰ 496 U.S. 444 (1990).

³¹ *Sitz*, 496 U.S. at 447.

course, was the “increasing slaughter on our highways.”³² The permitted intrusion into liberty was pretty minimal; vehicles “would be stopped and their drivers briefly examined for signs of intoxication.”³³ Because the use of the public highways is a privilege and not a right, the balance tilted in favor of the State.

No one doubts that entry into courthouses and particular areas in airports can be conditioned on submitting to questioning and on having one's luggage and person examined.³⁴ Presumably, in the wake of September 11, entry into other public areas could be similarly conditioned. The question I pose is whether authorities can stop and examine *only* men thought to be linked to al Qaeda. One might think, logically, that if the police could search everyone who sought to enter an area that might be a terrorist target, they could search any sample from that population. But as odd as it might sound (as odd as it did sound to then-Justice Rehnquist), the administrative search/seizure context embodies the adage: “misery loves company;” police can stop all vehicles to check for registration, for example, but cannot conduct random stops.³⁵ The underlying rationale is roughly that when police discharge community care-taking functions, they should not be searching for evidence of crime. When they search for evidence of a crime, they should have whatever level of suspicion the Fourth Amendment requires.³⁶ Thus, *Sitz* and the other administrative search cases that refuse to allow authorities to single out particular persons would be of no use in seeking to justify a “terrorist profile.”

Another doctrine that departs from strict probable cause is *Terry v. Ohio*,³⁷ where the Court held that reasonable suspicion to believe that crime is “afoot” and that the suspect

³² *Id.* at 451 (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

³³ *Id.* at 447, 451-52.

³⁴ See, e.g., Clancy, *supra* note 19, at 624-25 (concluding that Justice Stevens's analysis in his dissent in *Sitz* would permit these types of searches).

³⁵ *Delaware v. Prouse*, 440 U.S. 648, 664 (1979). The “misery loves company” reference is from Justice Rehnquist's dissent. *Prouse*, 440 U.S. at 664 (Rehnquist, J., dissenting). It still sounds odd to Thomas Clancy. See Clancy, *supra* note 19, at 622-23 (noting that the discretion of officers in field was not “evil that the Fourth Amendment was designed to combat”).

³⁶ *Prouse*, 440 U.S. at 653-54. Checkpoint stops looking for evidence of drunk drivers are a bit of a blend between community care-taking and searching for evidence of a crime. The hybrid nature of the checkpoints explains why the Court approved only a stop and brief examination of the driver.

³⁷ 392 U.S. 1 (1968).

is armed and dangerous justifies a temporary “stop” to investigate.³⁸ This stop typically includes brief questioning.³⁹ While the majority opinion is vague about whether the “stop” always permits a “frisk” for weapons, Justice Harlan's concurring opinion made this plain: “Where such a stop is reasonable . . . the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence.”⁴⁰ Because the interference with liberty—the stop—was less severe than an arrest, police needed only reasonable suspicion rather than probable cause. Though the Court has never said exactly how much “lower” the threshold is for reasonable suspicion than probable cause, it has told us that a lesser quantum and quality of suspicion is acceptable.⁴¹

Given what we now know about al Qaeda's threat, perhaps we can apply the *Terry* stop and frisk regime, permitting brief questioning as well as a frisk for weapons, when three factors are present—the suspect is a man between the ages of, say, eighteen and forty; he is from the Middle East; and he is attempting to board a commercial airliner or enter a public building, public utility or sports facility. The right of the police to stop and question those who might pose a danger to the community can be traced back to the nightwatch, “the major instrument of police protection in New York City” and in the other major cities of Europe and America in the eighteenth century.⁴² This procedure was “extensively treated both by statute and by judicial decision as a reasonable and necessary police authority for the prevention of crime and the preservation of public order.”⁴³

But the *Terry* stop requires, if the nightwatch stop did not, a reason to believe that the person poses a threat.⁴⁴ The Court has insisted under the *Terry* doctrine that “an officer's

³⁸ *Terry*, 392 U.S. at 30.

³⁹ *Id.*

⁴⁰ *Id.* at 33 (Harlan, J., concurring).

⁴¹ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (noting that “the likelihood of criminal activity need not rise to the level required for probable cause”).

⁴² DOUGLAS GREENBERG, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, in 1 THE COLONIES AND EARLY REPUBLIC, at 266, CRIME AND JUSTICE IN AMERICAN HISTORY (Eric H. Monkkonen ed., 1991).

⁴³ *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964) (citing *Lawrence v. Hedger*, 128 Eng. Rep. 6 (C.D.P. 1810); 2 HALE, PLEAS OF THE CROWN 89, 96-97 (Amer. ed. 1847); 2 HAWKINS, PLEAS OF THE CROWN 122, 129 (6th ed. 1777)).

⁴⁴ *Terry*, 392 U.S. at 30. I know of no evidence that indicates whether nightwatchmen could stop anyone or whether they had to have some level of suspicion. Nightwatchmen could arrest only for crimes “committed before their eyes or if they were acting under the direction of a police officer.” James Richardson, THE NEW YORK POLICE, COLONIAL TIMES TO 1901, at 18 (1970).

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reliance on a mere 'hunch' is insufficient to justify a stop."⁴⁵ In a recent *Terry* case, the Court held that an anonymous tip describing someone who was then selling drugs on a street corner will not permit the police minutes later to frisk a person who matched that description.⁴⁶ It would be very difficult to square these cases with a blanket rule that reasonable suspicion exists to stop and frisk all young Middle Eastern men who seek access to certain public areas.

A more helpful line of cases are the administrative search cases where the Court requires probable cause but understands probable cause in a way different from probable cause to suspect crime. In *Camara v. Municipal Court*,⁴⁷ the Court held that a warrant, based on probable cause, was necessary before a town could compel compliance with a municipal code inspection scheme.⁴⁸ But the "probable cause" for these warrants need not show probability of finding a violation in a particular home.⁴⁹ Rather, the Court suggested that the probable cause standards,

which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.⁵⁰

The Court justified this "generic" probable cause (criticized in an earlier case as authorizing "synthetic search warrants"⁵¹) on the ground that it "gives full recognition to the competing public and private interests here at stake."⁵² The public interest identified in *Camara* was the protection of the public from "development of conditions which are hazardous to public health and safety."⁵³ Inspectors would not know *ex ante* how many units in a given area contain dangers to the public health and safety.⁵⁴ Yet the risk that one, a few or many might pose a risk permits authorities to obtain warrants that

⁴⁵ *Id.*

⁴⁶ *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

⁴⁷ 387 U.S. 523 (1967).

⁴⁸ *Camara*, 387 U.S. at 538.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Frank v. Maryland*, 359 U.S. 360, 373 (1959).

⁵² *Camara*, 387 U.S. at 539.

⁵³ *Id.* at 535.

⁵⁴ *Id.* at 536.

authorize inspectors to compel entry into homes.⁵⁵

In light of *Camara*, and given the risk of catastrophic harm that we have already seen realized, perhaps the authorities have *Camara*-style probable cause to search all young Middle Eastern men who seek access to potential terrorist targets. In *Camara*, the Court found probable cause based on an unknown probability of finding a safety or health code violation.⁵⁶ The risks that these violations pose if undiscovered—fire, disease carried by animals, unsightly conditions that depress property values⁵⁷—are limited to the building or the neighborhood and are far less imminent and harmful than the failure to stop the September 11 terrorists proved to be.

If we probe a bit deeper, *Camara* provides even stronger support for a “terrorist profile” based on “generic” probable cause. In *Camara*, the Court recognized that the purpose of the administrative inspection was to protect public health and safety: “Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property.”⁵⁸ Of course, it is likely that criminal offenses will be uncovered during these inspections—the very failure to maintain premises in a safe condition may be a municipal code criminal violation—but uncovering crime is not the dominant purpose of the inspections. The Court has distinguished routine drug testing of customs agents from routine drug testing of pregnant mothers on precisely this ground, finding that in the former case, but not the latter, the dominant purpose was to protect public safety rather than to uncover and threaten to punish drug violations.⁵⁹

When authorities deploy a terrorist profile, their principal purpose is to protect the American public from catastrophic harm. To be sure, a secondary purpose is to apprehend terrorists who cause catastrophic harm, but the following thought experiment should be considered. Suppose the authorities on the evening of September 10 had a choice

⁵⁵ *Id.* at 539.

⁵⁶ *Id.* at 538.

⁵⁷ *Id.* at 535.

⁵⁸ *Id.*

⁵⁹ Compare *Nat'l Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 677 (1989) (permitting testing of customs agents), with *Ferguson v. City of Charleston*, 532 U.S. 67, 68 (2001) (invalidating Charleston drug testing policy because of its reliance on use of law enforcement “to coerce patients into substance abuse treatment”).

between foiling the plot and causing the terrorists to flee or arresting all nineteen hijackers after the planes had done their destruction. (I have no idea how this would be possible, but it is only a thought experiment). In the former case, the escape of the nineteen terrorists presumably increases the chances that the network would regroup and seek to accomplish its destructive goals at a later time. But on the time tested theory that it is always best to defer pain and death, I think the authorities would have chosen option number one, even if it meant no one was arrested. If I am right about that, the dominant purpose in profiling terrorists is to protect the public safety.

In *New York v. Burger*,⁶⁰ the Court upheld an “inspection” scheme that seemed directed more at unearthing crime than protecting the public from harm.⁶¹ A New York statute required “chop shops” (vehicle dismantlers) to keep records and permit inspections without regard to individualized suspicion.⁶² The Court conceded in the first paragraph of the opinion that the “ultimate purpose” of the regulatory scheme was “the deterrence of criminal behavior”⁶³ yet upheld a criminal conviction based on evidence uncovered in a suspicionless “inspection.”⁶⁴ A terrorist profile is indistinguishable. Its ultimate purpose would be to deter criminal behavior that causes catastrophic harm. If that goal also produced arrests of terrorists, *Burger* stands for the proposition that the “discovery of evidence of crimes” does not “render the search illegal or the administrative scheme suspect.”⁶⁵ And it goes without saying that the goal of protecting the public from stolen auto parts pales in significance when compared to protecting the public from terrorism on the scale of September 11.

Thus, of all the Fourth Amendment doctrines, I think *Camara* provides the best argument for the constitutionality of a terrorist profile. I read Thomas Clancy to agree that this is the best argument. Prior to September 11, he concluded that the “potential for mass harm” underlies many

⁶⁰ 482 U.S. 691 (1987).

⁶¹ *Burger*, 482 U.S. at 716.

⁶² *Id.* at 694.

⁶³ *Id.* at 693.

⁶⁴ *Id.* at 719.

⁶⁵ *Id.* at 716.

applications of the *Camara* scheme.⁶⁶ Whether the potential for mass harm justifies the use of race to construct a *Camara*-style profile remains a difficult question. My terrorist profile is based on *more* than Middle Eastern origin. It is also based on sex and age. Moreover, unlike the “bad” racial profiling for drugs, the terrorist profile intervention is limited to places where a terrorist could cause mass harm. Police could not use the terrorist profile to harass individuals on the street in Arab-American communities or to pull over vehicles on the New Jersey turnpike.

Even so, this reading of the Fourth Amendment ensures that almost all of the terrorist stops and searches would be of completely innocent men. The probability that a particular Middle Eastern young male intends to blow up an airliner or public building is surely much less than 0.1%. But in applying *Camara*, courts need not quantify the likelihood that a particular dwelling is in violation of the relevant municipal codes. The goal is to protect the public safety. As long as al Qaeda threatens catastrophic harm to American interests, perhaps courts need not quantify the harm that a particular individual is a member of al Qaeda.⁶⁷

I do not know whether this approach is consistent with the Fourth Amendment or the Equal Protection Clause. But assume you had been working airport security on September 11 in either Logan Airport or Newark Airport and you had advance knowledge from the CIA that al Qaeda had a plan to hijack commercial airliners and slam them into the World Trade Center, the Pentagon and the White House. The CIA does not know when the plan will be attempted or even whether it will be attempted, but the CIA has solid information that the plan exists. Would you have permitted these young Middle Eastern men to board the planes without searching them?

One might argue that the situation we now face is a harder case because we do not have, as far as I know, solid evidence about what the next terror act will be. But perhaps the case is not harder. Al Qaeda leaders continue to “promise”

⁶⁶ Clancy, *supra* note 19, at 617. I do not mean to suggest that Clancy agrees with these cases or agrees that my terrorist profile is constitutional. In general, Clancy believes the Court has gone too far in permitting searches without individualized suspicion.

⁶⁷ One reader noted that my terrorist profile is also under-inclusive as it would not pick up Jose Padilla or other non-Arab Muslims. True enough, but all inspection schemes are under-inclusive. At any given moment in America's large cities, thousands of health and safety code violations are present and undiscovered.

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that they will hit America and hit it hard.⁶⁸ Osama Bin Laden has said on many occasions that our complete destruction is his goal.⁶⁹ We have seen in Bali, Morocco and Saudi Arabia that al Qaeda still possesses the ability to engage in terror that kills hundreds of innocent civilians.⁷⁰ So we *do* possess solid information that al Qaeda will attempt another attack and seek to kill hundreds or thousands or tens of thousands. That we do not know when or where simply makes the suspicion transferable from one particular venue—commercial airliners—to other plausible venues such as sports stadiums, public buildings, public utilities and tourist attractions.

Robert Mueller, the director of the FBI, said in December, 2002, that the authorities had foiled one hundred planned terrorist attacks in the months since September 11, 2001.⁷¹ Without supporting evidence, one is permitted to be skeptical. But even if the number of foiled attacks that posed catastrophic risk is only a handful, that is clear evidence that we continue to be at risk from terrorist groups.

In recognition of the heightened terrorist threat to American security, the Department of Justice Civil Rights Division permits authorities more latitude when they seek to protect the public from catastrophic harm. The “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” promulgated in 2003,⁷² forbids some routine law enforcement practices that rely on race even when they “might otherwise be lawful” under federal law and the

⁶⁸ Susan Sachs & Bill Carter, *A Nation Challenged: Al Qaeda: Bin Laden Spokesman Threatens Westerners at Home and in the Gulf*, N.Y. TIMES, Oct. 14, 2001, at B1.

⁶⁹ Associated Press, *Statement Allegedly from Al Qaeda Threatens Attacks*, CHI. TRIB., Nov. 17, 2002, at C21; Tim Weiner, *A Nation Challenged: The Leader—A Man in the News: Seizing the Prophet's Mantle: Muhammed Omar*, N.Y. TIMES, Dec. 7, 2001, at B3. One of Bin Laden's lieutenants said in November that America's only chance to avoid destruction was to cease supporting Israel and convert to Islam.

⁷⁰ Rajiv Chandrasekaran, *Purported Bin Laden Tape Lauds Bali, Moscow Attacks*, WASH. POST, Nov. 9, 2002, at A15; Ellen Nakashima & Alan Sipress, *Jailed Indonesian Suspect Details Links to Bombings: Man Said to Describe Bali Attacks as “Revenge” on U.S.*, WASH. POST, Nov. 9, 2002, at A15.

⁷¹ Dan Eggen, *Mueller Defends FBI's Performance*, N.Y. TIMES, Dec. 20, 2002, at A41; *FBI: Many Attacks Thwarted Since 9/11*, NEWSDAY, Dec. 15, 2002, at A17.

⁷² For the sharp-eyed reader who wonders how a paper given in 2002 can cite guidelines published in 2003, be assured that I have not discovered time travel. This paragraph was added while the paper was being prepared for publication.

Constitution⁷³—i.e., the rules for the use of race in routine law enforcement are meant to be stricter than the minimum required by law. But when law enforcement activities involve “threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or . . . the integrity of the Nation's borders,” the Justice Department may consider race and ethnicity to the extent permitted by the Constitution and federal law.⁷⁴ If my argument that the Constitution permits a limited use of Middle Eastern status were to prevail, the new federal guidelines would also permit that use.

One weakness in this argument is that the only way the authorities, in most cases, can identify a young man as Middle Eastern is from his appearance. Should the appearance of being from the Middle East permit authorities to stop and search young men who seek to board airliners or to enter public buildings or other public areas that are particularly vulnerable to attack? Because I start with the presumption that profiling based on race is morally offensive, I am torn by this question. To answer in the affirmative recalls the horrible times in our past where people have been stereotyped and openly discriminated against on the basis of skin color or appearance.

Yet to say that authorities are forbidden to act on an inference that arises from the al Qaeda threat might concede too much to those who would destroy us. When police profile by race in the “war on drugs,” they are making an inference about the probability that if we knew the universe of those who transport or sell drugs, we would find certain racial groups over-represented. It is this unproven inference, I believe, that is morally offensive. But if we could identify the universe of al Qaeda terrorists, it would be almost exclusively Muslim men. Indeed, nineteen men on September 11 hijacked four planes simultaneously, killed three thousand innocent people and did billions of dollars in damage. Had they managed to strike the White House or the Congress, the blow to our polity would have been immense. Of those nineteen terrorists, one hundred percent were young Middle Eastern men.

If a particular group—al Qaeda in this case—consists of one race, perhaps it is not morally or constitutionally

⁷³ See Civil Rights Div., U.S. Dep't of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

⁷⁴ *Id.*

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offensive to use that fact to make predictions. The Ku Klux Klan has bombed black churches in the past. In the midst of one of these bombing sprees, would it violate the Constitution if the police searched any young white man who approached within so many feet of a black church? Maybe not. Moreover, while the inference that many Middle Eastern men are anti-American is certainly offensive, one significant strand of the Islamic faith preaches the destruction of the West. Unlike the "Red Scare" in the 1950s, we have solid evidence that al Qaeda possesses the ability to infiltrate our country and kill thousands of Americans and cause billions of dollars in damage.

European countries typically permit a stop without any suspicion to check identification as a routine part of their attempt to maintain a safe society.⁷⁵ Some European countries permit what amounts to an arrest and a search based on pretty low suspicion that the individual poses a threat.⁷⁶ A terrorist profile fits roughly into this framework; however, I have sought to defend it here as an application of the *Camara* administrative search scheme which does not rely on particularized suspicion. Many will reject a terrorist profile as going too far. They may well be right. As soon as we can safely conclude that there is no longer a realistic terrorist threat, any justification for a terrorist profile would disappear, and that would be a happy day indeed. But the continuing threat that we face today might justify reading the Fourth Amendment in the way I have sketched. As many have noted, the world has grown smaller, and we are now vulnerable to those who would harm us. Indeed, given our generally lax laws and lax enforcement on immigration and identification, we are probably more vulnerable than most European countries.

I have sketched a liberty-restricting reading of the Fourth Amendment. I have also tried to describe the problems with

⁷⁵ See, e.g., Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 151-52 (Craig Bradley ed., 1999) (noting that French law specifically permits stops to demand identity within twenty kilometers of "certain borders, or in the public areas of designated ports, airports, train stations, and truck depots open to international traffic"); Rachel Vanclve, *Italy*, in *id.* at 247; Richard Vogler, *Spain*, in *id.* at 375.

⁷⁶ See Vogler, *Spain*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 75, at 376 ("[T]he search of a person disembarking from a bus which had come from an area well-known for drug dealing would not be considered to be in breach of constitutional protections.").

that reading. You decide which is the better way to read the Fourth Amendment. I now discuss the part of my proposal that benefits civil liberties by making offensive racial profiling harder to disguise.

II.

Consent is an acid that has eaten away the Fourth Amendment. It allows police to “fish” for evidence without any suspicion whatsoever. One police detective said that as many as ninety-eight percent of the searches he conducts are consent searches.⁷⁷ That might be an exaggeration—I know of no data on this point—but it is no exaggeration that police routinely request consent. In the last few years, we have seen a lot of evidence that the consent “fishing pond” is well-stocked with fish. Almost everyone gives consent when asked by police, and, surprisingly, a large percentage of guilty suspects consent to the very search that will turn up evidence against them.

The consent search doctrine is the handmaiden of racial profiling.⁷⁸ On the street, police can approach young men and ask for consent to search solely on the basis of race. The Court has made plain that these “consensual encounters” are not Fourth Amendment events,⁷⁹ despite how unrealistic an interpretation of “seizure” this may be.⁸⁰ At a roadblock, or following a traffic stop, police can use race and only race to decide which cars merit further attention or which drivers to ask for consent to search their cars.⁸¹ As we all know from experience as drivers, probable cause to believe that a particular car has violated one of hundreds of traffic laws is

⁷⁷ RICHARD VAN DRUIZEN ET AL., *THE SEARCH WARRANT PROCESS* 21 (1984).

⁷⁸ I do not intend to claim that police only ask for consent from racial minorities. They surely engage in hunches based on other factors, some likely to be useful inferences and some based on other kinds of stereotypes. A student of mine drove across country with Grateful Dead stickers all over his van and was stopped in Kansas and detained for an hour while the police thoroughly searched his van with his consent.

⁷⁹ The Court has said repeatedly that the police need no suspicion at all to approach a suspect in a public place. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 431, 434 (1991).

⁸⁰ For an excellent critique of the Court's “consensual encounter” Fourth Amendment doctrine, see Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 *SAN DIEGO L. REV.* 507 (2001).

⁸¹ Police can set up roadblocks to check for drunk driving or vehicle registration. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990) (sobriety checkpoints); *Delaware v. Prouse*, 440 U.S. 648, 656-57 (1979) (dictum) (vehicle inspection checkpoints); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973) (consent given after traffic stop).

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pretty easy to obtain. The New Jersey Supreme Court said recently that “it is virtually impossible to drive and not unwittingly commit some infraction of our motor vehicle code.”⁸²

If police are routinely rewarded with consent, they have little incentive to develop individualized probable cause or to worry about racial profiling. If they concentrate their “consensual encounters” and their persuasive powers on racial minorities who are dressed in particular ways because they think this improves the “yield” in terms of successful drug busts,⁸³ it would be difficult for anyone to prove racial profiling. Police can turn a consensual stop on the street or a routine traffic stop into a consensual search in a wide variety of ways. They can, of course, testify falsely that the suspect consented when in fact he did not. Moreover, given how often suspects mumble when confronting a police officer, at least in reported cases,⁸⁴ the officer can often testify that he understood the answer to give consent without having to tell an outright lie.

There is no way to know how often police turn an evasive answer or an outright refusal into consent when testifying before the suppression judge, but I believe most suspects give some kind of grudging consent or acquiescence to searches that produce evidence of criminal activity.⁸⁵ The seeming irrationality of this act can be explained along two, probably overlapping, lines. First, the suspect might think that the act of giving consent will persuade the officer that there is nothing to be found and he will not bother to search (and we do not know how often police do in fact move on to another, and presumably better, target). Second, the suspect likely believes that he has no choice but to consent. Faced with no choice and the chance to appear innocent, many suspects “give it up” by consenting.

⁸² State v. Carty, 790 A.2d 903, 908 (N.J. 2002).

⁸³ Data exists suggesting that while Hispanics and blacks are no more likely to be found in possession of narcotics than whites or Asians, they are more likely to be in possession of large amounts of narcotics. See George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 RUTGERS RACE & L. REV. 39, 41-43 (2000) (discussing data analyzed by Dr. Illya Lichtenberg).

⁸⁴ See, e.g., Terry v. Ohio, 392 U.S. 1, 7 (1968).

⁸⁵ See Clancy, *supra* note 19. I once had college student clients who told me that they gave consent to the deputy sheriff to search the trunk of their car even though they knew it contained cocaine.

Consent probably flows even more easily during vehicle stops than on the street. Unlike the pedestrian, who at least in theory can simply ignore the officer's request and proceed on his way, the motorist knows that she cannot proceed until the officer chooses to let her go. In addition, the suspect who is stopped on the street may be close to home or in the presence of friends and thus feel more capable of resisting the pressure to consent. Most cars contain only the driver, and the vehicle is often far from the driver's neighborhood. If the motorist is alone and far from home, the incentive to cooperate, or to appear to cooperate, is particularly strong.

But is this acquiescence to the apparently inevitable a reasonable search under the Fourth Amendment? Or, turning the question around, why does consent make the Fourth Amendment disappear? We saw in the last Part that there is no original understanding of a "reasonable" search, and that the Court has simply followed modern, relativistic usage in creating categories of searches that are, and are not, reasonable. Consent is, however, different from all the other categories. First, consent is unlike administrative inspections because the purpose of asking for consent is to search for evidence of a crime. Moreover, consent is unlike the doctrines that permit a search for evidence because consent substitutes for suspicion of wrongdoing. So how does the Court justify admitting evidence seized without grounds to suspect wrongdoing?

The Court has offered two theories. First, consent could be a waiver of the Fourth Amendment's protection. Defendants can waive the right to a lawyer and to all the protections associated with trial. Indeed, a guilty plea waives all of those rights. Symmetry with other criminal procedure rights suggests that a suspect could also waive the Fourth Amendment's protections.

Second, irrespective of waiver, consent could be viewed as making the search reasonable.⁸⁶ The Court has settled on the second conceptual justification for the consent search doctrine. Consent satisfies the Fourth Amendment as long as it was voluntarily given. The State need not show waiver. This is a significant doctrinal development because waiver must be knowing and intelligent as well as voluntary.⁸⁷ If the State

⁸⁶ See *Illinois v. Rodriguez*, 497 U.S. 177, 183-84 (1990).

⁸⁷ This waiver standard first appears in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), in conjunction with the waiver of the right to counsel. It is the standard the Court established in *Miranda v. Arizona*, 384 U.S. 436, 460-62 (1966), for the waiver of the Fifth Amendment privilege against compelled self incrimination. See also *Barber v. Page*, 390 U.S. 719, 724-26 (1968) (waiver of

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cannot show a knowing and intelligent relinquishment of the right not to be searched without probable cause, why does consent nonetheless satisfy the Fourth Amendment? The Court hasn't provided much of an explanation. In *Schneckloth v. Bustamonte*,⁸⁸ the Court spoke vaguely about an accommodation of the need for the evidence and the intrusion into the suspect's liberty.⁸⁹ The Court decided this balance went the State's way as long as the consent was voluntarily given: "As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."⁹⁰

But this is a pretty thin justification, especially since all of the Court's early consent cases assumed that waiver was the proper standard.⁹¹ *Amos v. United States* is the earliest of the Court's Fourth Amendment cases raising "consent,"⁹² and its discussion is typical of the pre-*Schneckloth* cases. Here is the Court's entire discussion of this issue:

The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.⁹³

It is impossible to read this paragraph as based on a theory other than waiver. To reject waiver as the operative principle on the vague ground that voluntary consent is a better accommodation of the competing values is a remarkable judicial sleight of hand that passed almost unnoticed.⁹⁴ Though *Schneckloth* was one of the first cases

right to confront witnesses); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942) (waiver of right to jury trial).

⁸⁸ 412 U.S. 218 (1973).

⁸⁹ *Schneckloth*, 412 U.S. at 224-25.

⁹⁰ *Id.* at 227.

⁹¹ See, e.g., *Amos v. United States*, 255 U.S. 313, 317 (1921).

⁹² *Amos*, 255 U.S. at 317.

⁹³ *Id.*

⁹⁴ Justice Marshall's dissent in *Schneckloth* raises the lack of authority for the Court's holding, but only in a footnote. *Schneckloth*, 412 U.S. at 279 n.5

argued in the Term, it was one of the last decided. Justice Stewart placed his clerk's draft of the opinion in the top drawer of his desk and purposely ignored it.⁹⁵ The absence of any instructions for revisions or comments led the clerks to joke among themselves about whether anyone had seen *Schneckloth*.⁹⁶ At one point, Stewart's clerk asked the Justice, "Have you seen *Schneckloth*?"⁹⁷ Stewart opened his desk drawer and said, "Yes . . . I can see it any time I want."⁹⁸ The clerk believed that Stewart was holding the opinion so that he could circulate it late in the Term, leaving little time for "yet another grueling debate over the Fourth Amendment."⁹⁹ Perhaps the lack of time for debate and consultation explains the Court's vapid justification for holding that voluntary consent effectively waives the Fourth Amendment.

When the Court returned to this issue almost twenty years later, it did no better. In *Illinois v. Rodriguez*,¹⁰⁰ the Court was faced with a search based on apparent authority.¹⁰¹ Waiver theory could not, of course, justify a search on apparent authority. If the one giving consent lacked actual authority to consent, there would be no basis by which a court could find that the owner had waived his Fourth Amendment rights, as Justice Thurgood Marshall argued in his dissent.¹⁰² With almost no explanation, the Court extended *Schneckloth* to hold that a consent search can be reasonable under the Fourth Amendment even when, as a factual matter, the party giving consent lacked the authority to do so.¹⁰³ The Court cautioned that one who consents "is assured by the Fourth Amendment . . . not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"¹⁰⁴

But if consent searches are ultimately explained as simply reasonable searches, it might be that a consent search can be unreasonable *even if the police obtain actual consent*. This could be true in two ways. First, actual consent based on

(Marshall, J., dissenting). Most of Marshall's quite powerful dissent is aimed at the Court's underlying premise that consent can be valid even though the person giving it did not know of his right to refuse. *Id.* at 277-90 (Marshall, J., dissenting).

⁹⁵ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 270-71 (1979).

⁹⁶ *Id.* at 270.

⁹⁷ *Id.* at 271.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 497 U.S. 177 (1990).

¹⁰¹ *Rodriguez*, 497 U.S. at 179.

¹⁰² *Id.* at 189-98 (Marshall, J., dissenting).

¹⁰³ *Id.* at 186.

¹⁰⁴ *Id.* at 183.

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acquiescence or the belief that one has no choice might not suffice to comply with the Fourth Amendment because it might not be voluntary. Presumably, the solution to that problem, explicitly rejected by the Court in *Schneckloth*, would be to require police to give suspects *Miranda*-type warnings to inform them that they need not consent. Construing the New Jersey state constitution, the state supreme court has followed the path the United States Supreme Court rejected. In *State v. Johnson*,¹⁰⁵ the state court found the *Schneckloth* “totality of the circumstances” test inadequate to ensure that a consent search was reasonable, preferring instead the waiver standard.¹⁰⁶ The court held that the State had the burden of proving that consent was given knowingly and voluntarily, a burden that included proving the suspect knew that he “had a choice in the matter.”¹⁰⁷ The New Jersey State Police subsequently developed a “Consent to Search” form that authorizes the trooper to conduct a complete search of the vehicle or other premises described on the form.¹⁰⁸ The form itself states that the individual has been advised of the right to refuse giving consent as well as the right to withdraw consent at any time.¹⁰⁹

The second way that actual consent might fail to meet Fourth Amendment standards is that the Fourth Amendment might require particularized suspicion before police can search for evidence of a crime. While this argument sounds radical—you mean suspects are not *permitted* to consent to a search?—I think on closer inspection, it is not so radical after all. The consent search category is really the radical idea, not the other way around. The consent doctrine is an outlier compared to other categories of reasonable warrantless searches. Searches based on exigent circumstances, searches of vehicles and searches incident to arrest¹¹⁰ all require

¹⁰⁵ 346 A.2d 66 (N.J. 1975).

¹⁰⁶ *Johnson*, 346 A.2d at 68.

¹⁰⁷ *Id.* at 68. A dissenting opinion in *Johnson* would have gone even farther and required an “express warning to the individual as to his rights.” *Id.* at 76 (Pashman, J., dissenting).

¹⁰⁸ *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002).

¹⁰⁹ *Carty*, 790 A.2d at 907.

¹¹⁰ I exclude from my typology the various types of regulatory inspections and plain view observations because neither is truly a search in the Fourth Amendment sense. An inspection or inventory has as its central goal ensuring compliance with a regulatory regime rather than looking for evidence. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 373-76 (1976). The Supreme Court has told us that what is in plain view and knowingly exposed to the public is not

probable cause. Moreover, each can be traced back to colonial times. The common law recognized search incident to arrest, though the precise scope of the search that was permitted is unclear.¹¹¹ Warrantless searches of ships based on probable cause were authorized by statutes passed before and after the Fourth Amendment was ratified.¹¹² Arrests of suspects caught by the “hue and cry,” and based on probable cause, were the forerunner to exigent circumstance searches.¹¹³ That consent is a “newfangled” theory for finding a search reasonable,¹¹⁴ and that it requires no probable cause or any suspicion might explain why the Court did not embrace consent as a reasonable search until 1973. Perhaps it is time to rethink consent searches. I think it coherent, if not inevitable, to conclude that searches produced largely by acquiescence to police authority are simply not reasonable searches.

The New Jersey Supreme Court agrees to a point. A quarter century after the state court required knowing consent in *Johnson*, the court in *State v. Carty*¹¹⁵ found that even informed consent was inadequate to protect privacy

even protected by the Fourth Amendment. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹¹¹ Davies explains the scope problem, this way:

The most likely reason that little was said in the common-law sources about the scope of searches incident to arrest is that such searches were conducted primarily in connection with arrests made in fresh pursuit. Except in that setting, officers would not usually have made arrests for theft until after the property was discovered with a search warrant for stolen goods; without the recovered property, it would usually have been difficult to justify the arrest.

Davies, *supra* note 13, at 647 n.277.

¹¹² See, e.g., Act of Mar. 2, 1799, ch. 22, 1 Stat. 627, 677-78 (repealed) (after ratification); Act of Feb. 18, 1793, ch. 8, 1 Stat. 305, 315 (after ratification); Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (prior to ratification). Davies makes a powerful case that the Framers would have regarded ships as not included in “persons, houses, papers, and effects” because ships were *sui generis*. Davies, *supra* note 13, at 605-08. Thus, my claim in the text is only that vehicle searches can be traced back to searches recognized at the common law, not that vehicle searches were themselves recognized. That we treat vehicles differently from houses for Fourth Amendment purposes today can be explained by some of the reasons that ships were viewed as outside the Fourth Amendment. As Davies puts it: “Even during the prerevolutionary struggle with Parliament, American Whigs accepted the legitimacy of extensive government regulation and inspection of shipping.” *Id.* at 605. Vehicles are today heavily regulated and subject to inspection much more than homes.

¹¹³ Davies, *supra* note 13, at 622 (noting that “hue and cry” seems to have been used largely in response to “fresh” crimes, “especially robbery and escapes”).

¹¹⁴ The Framers likely would not have considered the possibility that a lowly constable would ask for consent to search or that any freeman would give consent to someone of that class. The common law permitted resistance to an unlawful arrest and would probably have permitted resistance to any attempt by a constable to search in the absence of an arrest.

¹¹⁵ 790 A.2d 903 (N.J. 2002).

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rights when a car has been stopped on the highway and the state police ask for consent to search.¹¹⁶ The state court found motorists are at the mercy of state police because, as noted earlier, it is “virtually impossible to drive and not unwittingly commit some infraction of our motor code.”¹¹⁷ Moreover, troopers who have lawfully stopped a car have complete, and thus standardless, discretion to decide from whom to request consent.¹¹⁸ In addition, the articulated basis for the stop is almost never related to the reason to request consent—that is, making a traffic stop, for, say, speeding creates no suspicion that the car contains drugs or evidence of a crime. Finally, “where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent.”¹¹⁹ Thus, the continued detention while obtaining consent and carrying out the search, the New Jersey court held, was itself a violation equivalent to the Fourth Amendment unless the detention was justified by reasonable suspicion.¹²⁰

The “cumulative effect” of these factors led the *Carty* court to conclude that “we no longer have confidence that a consent search under *Johnson* truly can be voluntary or otherwise reasonable.”¹²¹ The italicized portion of that quote is precisely my argument in this paper. In effect, the New Jersey Supreme Court rejected the waiver theory it had endorsed in *Johnson* and returned to the general question of what makes a consent search reasonable. Unlike *Schneckloth*, which found the answer in voluntariness, the New Jersey Supreme Court held that a consent to search is always unreasonable unless the officers had, prior to requesting consent, a reasonable suspicion that a crime has been, or is about to be, committed.¹²² This standard, drawn from the “stop and frisk” case of *Terry v. Ohio*, is a lesser standard than the probable cause standard that would be necessary to justify a search of a car in the absence of consent.¹²³ Thus, *Carty* creates two standards for searching motorists or vehicles. One standard

¹¹⁶ *Carty*, 790 A.2d at 911.

¹¹⁷ *Id.* at 908.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 910.

¹²⁰ *Id.* at 912.

¹²¹ *Id.* at 911 (emphasis added).

¹²² *Id.* at 905.

¹²³ *Carroll v. United States*, 267 U.S. 132 (1925).

regulates requests for consent to search, and one standard governs thorough searches of a car or a motorist without consent.

This is a bold, innovative step in the right direction, but I wonder if the problem with consent searches does not require a bolder step. To my mind, the real problem is not that police do not have standards for deciding whom to ask for consent. The real problem is that police get consent so easily that the Fourth Amendment disappears when police ask for consent. The right solution to *that* problem is not to permit police to ask for consent in a discrete category of cases.¹²⁴ If police need probable cause to search a car in the absence of consent, why would they need less when drivers give consent that the state court decided was the likely product of compulsion? By permitting consent to justify searches based on a lower standard, the New Jersey Supreme Court is counting the consent as a partial justification for the search. In effect, the state court is saying that consent is, as a constitutional matter, a little flawed but not completely flawed.

Janice Nadler, after reviewing empirical evidence, concludes that genuine consent is unlikely in the face of a police request.¹²⁵ If consent to a police search is generally not voluntary, then it makes more sense to me to ignore it entirely. Indeed, although the analogy is imperfect, contract law sometimes effectively disregards the “consent” given in a contract of adhesion.¹²⁶ Courts have disregarded the literal reading of an insurance contract, for example, on the ground that the parties were of unequal bargaining power, and the insured could reasonably have believed that a certain activity was covered even when it plainly was not.¹²⁷ Similarly, if the one who gives consent to an officer reasonably believes that he has no choice, the contract of adhesion theory suggests disregarding that consent entirely, not just requiring the police to have reasonable suspicion before they can act on the consent.

Abolishing consent searches would deprive police of their most effective racial profiling tool. As police can approach

¹²⁴ By definition, when the State relies on consent to justify a car search, the police lack probable cause to arrest; otherwise, they could conduct a thorough search of the arrestee or arrestees and the interior of the vehicle. *New York v. Belton*, 453 U.S. 454, 461-62 (1981).

¹²⁵ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 211.

¹²⁶ A member of the audience at the February 21, 2003, symposium suggested this analogy. I failed to get his name but thank him anyway.

¹²⁷ See, e.g., *Garden State Indem. Co. v. Miller & Pincus*, 773 A.2d 1204, 1206-07 (N.J. Super. Ct. App. Div. 2001).

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anyone on the street to ask for consent and can ask any driver who is stopped for a traffic infraction for consent, police are presently free to use race, and only race, to decide when to ask for consent in a huge number of situations. If police have to show probable cause to conduct a search, on the other hand, their discretion to use race is severely limited. Abolishing consent searches would do far more to remedy racial profiling in the real world than all the equal protection laws or statutory remedies that can be imagined. Abolishing consent would also make unnecessary various middle-ground solutions designed to measure when consent is “real” as opposed to police-induced.¹²⁸

Consent searches still play a role in the Fourth Amendment. Consent could be a reasonable basis to search persons who seek access to airports, bus stations, public buildings, sports stadiums, public utilities and similar sites where catastrophic harm is possible. No one has a right to be in these areas if he poses a risk to the public. Thus, I think it is reasonable, and constitutionally permissible, to permit authorities to request consent to search as a condition for entry into these public areas. If a court were to adopt the first half of my argument about the use of a terrorist profile, authorities would not need consent to search young men of Middle Eastern origin. But al Qaeda is not the only threat to public buildings. To condition entry on consent to search seems a plausible way of more broadly protecting the public. This kind of consent request is, by its nature, subject to much less discretion than the request for consent when the officer sees someone on the street or in a car. People pretty much have to go onto streets, and most of us drive. But we do not have to go to airports, bus stations, sports stadiums and public utilities. The universe of “targets” is thus, to a large degree, self-selected rather than being selected by the police.

Rejecting consent as a general basis for allowing searches moves us back in the direction of the robust Fourth Amendment that the Court created when it first began to consider the right to be secure in our persons, houses, papers and effects. In 1926, the Fourth Amendment was a castle

¹²⁸ See, e.g., Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person.”* 36 *How. L.J.* 239 (1993). In my judgment, these complex solutions, like all complex balancing tests, are ultimately self-defeating because they can be easily finessed by police and avoided by judges seeking to admit reliable evidence of guilt.

against governmental intrusion. Though it may be difficult for modern readers to appreciate, the Fourth Amendment of that era forbade the search of a home for lawfully-possessed evidence *even when the police were armed with a search warrant based on probable cause*.¹²⁹ When the police sought contraband, the Fourth Amendment required a search warrant to search a home.¹³⁰ It permitted a search of a car for contraband without a warrant but only when the car was seized on the open road and the police had probable cause to search it.¹³¹ Fast forward to 2003. A car, a person or a home can be searched without any suspicion if the police obtain consent.¹³² A bus passenger can be searched if he gives “consent” when approached by police who have blocked the aisle in both directions before requesting consent.¹³³ This is not a Fourth Amendment the fiercely independent Framers would have recognized. They would ask the hard question: how did we get ourselves in this mess?

Given their fear of the central government, the Framers would not be surprised that federal police officers and state officers assisting in the federal war on drugs sought a way to detain and search almost anyone they wish. The fear of the writs of assistance suffered under King George III led to the adoption of the Fourth Amendment. Now the federal drug police have something just as good—the power to cajole, wheedle, impede and pressure citizens to give up their Fourth Amendment liberties by acquiescing to a police request for consent. And this new innovation in efficient policing requires neither an Act of Congress nor a trip to a magistrate's office for a warrant.

While the Framers would no doubt expect pressure from the police to search broadly, they would be deeply disappointed in the failure of Congress and the courts to counteract that pressure. One way to rehabilitate Fourth Amendment liberties is to eliminate consent searches outside the public safety context. Is this a radical proposal? I think not. This merely returns us partially to the strong Fourth Amendment that we once had. To eliminate consent as a basis for police to make routine searches merely requires police to have probable cause before they search our cars, our homes

¹²⁹ *Gouled v. United States*, 255 U.S. 298, 304-06 (1921).

¹³⁰ *Weeks v. United States*, 232 U.S. 383, 390-91 (1914).

¹³¹ *Carroll v. United States*, 267 U.S. 132, 155-56 (1925).

¹³² See *United States v. Drayton*, 536 U.S. 194 (2002) (person); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (apartment); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (car).

¹³³ *Florida v. Bostick*, 501 U.S. 429 (1991).

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and our persons. Why would *that* be a radical proposal?

III.

I have sketched two controversial proposals. I first raised the possibility that September 11 changed, hopefully for the short run, the reasonableness balance when catastrophic harm is threatened. Thus, perhaps the Fourth Amendment now tolerates a kind of “terrorist profiling” but only in limited cases and for as long as terrorists pose a credible threat against our way of life. Here, too, I think the Framers would approve. These men had faced the threat of destruction from inside or outside pretty much non-stop since the 1760s. Morgan Cloud offers two vivid examples of how a threat to the Union affects even those who believe strongly in liberty and equality.¹³⁴ His Revolutionary War example demonstrates, I believe, that the Framers of the Fourth Amendment would have accepted a procedure designed to identify the enemies who threaten to destroy us.

Indeed, the 1798 Alien Act was an early attempt to flush out enemies in our midst (principally the French and those thought connected to the French). Considered by President Adams as a war measure,¹³⁵ it gave the President the right “to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.”¹³⁶ The parallel to today's war with al Qaeda is obvious. To be sure, the Alien Act was controversial and was “passed over vigorous Jeffersonian opposition.”¹³⁷ Today, we consider the Alien Act a mistake or a political maneuver to rid the country of Jefferson's Republicans. The Columbia Encyclopedia flatly asserts, without citing authority, that the Alien and Sedition Acts

¹³⁴ Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369 (2003).

¹³⁵ DAVID McCULLOUGH, JOHN ADAMS 507 (2001).

¹³⁶ Alien Act, ch. 58, 1 Stat. 570-71 (1798) (emphasis omitted).

¹³⁷ *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 155 (1961) (Black, J., dissenting); see also Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 63 (2002) (noting that “the Act drew forceful opposition from such luminaries as Thomas Jefferson and James Madison”); *id.* at 84 (noting that “[d]espite the war with France, leaders of the Democratic-Republican Party vehemently opposed the Alien Act”).

were “designed to destroy Thomas Jefferson's Republican party.”¹³⁸ But this reading, to the extent it is based on the Alien Act,¹³⁹ is, I think, too revisionist. We think the Alien Act a mistake because we know how the story turned out. That actions taken to preserve the polity are unnecessary is never so clear when one is presently faced with the loss of the country.

As recent scholarship makes plain, the fear of France was based on much more than xenophobia or paranoia whipped up by crafty Federalist politicians. When Presidents Washington and Adams refused to join the French war against Britain, the French seized over two thousand American merchant ships in “a retaliatory war of commercial plunder against America.”¹⁴⁰ Even more ominously, word spread in 1798 that Napoleon Bonaparte had assembled an invasion force aimed at the United States.¹⁴¹ “The Speaker of the House, Jonathan Dayton, speculated publicly that troops already massed in French ports were destined for America. Innumerable others thought a French invasion imminent. To oppose such an invasion, President Adams summoned General George Washington from retirement to command the United States Army.”¹⁴² Washington accepted the command reluctantly, conditioned on a series of demands, one of which was “that he should not be called into the field until a French invasion actually threatened.”¹⁴³ A French emigre wrote in his diary during this period, “People acted as though a French invasion force might land in America at any moment. Everybody was suspicious of everybody else: everywhere one saw murderous glances.”¹⁴⁴ Historian David McCullough, in his Pulitzer Prize-winning biography of Adams, flatly concluded that in the summer of 1798, “the United States was at war [with France]—declared or not—and there were in fact numbers of enemy agents operating in the country.”¹⁴⁵

As for the political motives of the Federalists, if one reads

¹³⁸ *Alien and Sedition Acts*, in COLUMBIA ENCYCLOPEDIA 70 (6th ed. 2001). The Sedition Act was more controversial because it encroached on the First Amendment and gave prosecutors a weapon to use to silence critics of the Adams government.

¹³⁹ Alien Act, ch. 58, 1 Stat. at 596-97.

¹⁴⁰ Fehlings, *supra* note 137, at 64 (citing S. REP. No. 41-10 (1870), reprinted in 46 CONG. REC. 366, 377 (1910) (calculating the total at 2290)).

¹⁴¹ *Id.* at 65.

¹⁴² *Id.* at 66.

¹⁴³ JOHN FERLING, JOHN ADAMS: A LIFE 360 (1992).

¹⁴⁴ Ferling, *supra* note 143, at 67 (quoting MEDERIC LOUIS-ELIE MOREAU DE SAINT-MERY, MOREAU DE ST. MERY'S AMERICAN JOURNEY, 1793-1798, 252 (Kenneth Roberts & Anna M. Roberts trans., eds., 1947)).

¹⁴⁵ McCullough, *supra* note 135, at 505.

the tracts of the era—for example, *Detection of a Conspiracy Formed by the United Irishmen, with the Evident Intention of Aiding the Tyrants in France in Subverting the Government of the United States of America*¹⁴⁶—it seems clear enough that these writers, at least, believed in the threat of violent overthrow of the United States government.¹⁴⁷ Unless these writers were lying to gain political advantage, it is simply too pat to characterize their support for the Alien Act as wholly political. It is even conceivable that the Alien Act was constitutional! Gregory Fehlings recently argued that the Court's "interpretations of the Constitution over the past two centuries strongly suggest that the statute was a valid exercise of federal power to control immigration and to wage war."¹⁴⁸

As fear of foreigners subsided, the Alien Act became a "dead letter"¹⁴⁹ and expired by its own terms on June 25, 1800.¹⁵⁰ Conventional wisdom is that President Adams deported no one pursuant to the Act, though he threatened its use.¹⁵¹ We may look back on the events surrounding September 11 and conclude that the al Qaeda threat was far less substantial than it now appears. We may conclude that al Qaeda was more flash than fire, that it had a genius Plan A but no equivalent Plan B (or that we disrupted its network and prevented Plan B). One can only hope. Without the benefit of a crystal ball, it would be foolish to assume a rosy outcome, but at some point, perhaps when there are democratically elected governments in the Middle East,

¹⁴⁶ Peter Porcupine, *Detection of a Conspiracy, Formed by the United Irishmen, with the Evident Intention of Aiding the Tyrants of France in Subverting the Government of the United States of America*, in 8 PORCUPINE'S WORKS (William Cobbett 1798) microformed on Early American Imprints (1st Series 48395).

¹⁴⁷ See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION ACTS AND AMERICAN CIVIL LIBERTIES* 26 (1956); JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 192 (1951).

¹⁴⁸ Fehlings, *supra* note 137, at 114.

¹⁴⁹ Miller, *supra* note 147, at 192.

¹⁵⁰ *Id.* at 193; see Alien Act, ch. 58, 1 Stat. 572 (1798).

¹⁵¹ DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 386 (1962). Fehlings contends that "scholars have erroneously assumed the Alien Act of 1798 was not used against anyone . . . , having been misled by President John Adams's remark, made many years after expiration of the Alien Act, that the Act 'was never executed by me in any instance.'" Fehlings, *supra* note 137, at 63 n.1 (quoting Letter from John Adams to Thomas Jefferson (June 14, 1813), in 10 THE WORKS OF JOHN ADAMS 42 (Charles F. Adams ed., 1856)). Fehling only contends that one alien was deported under the Alien Act, and his only authority is the *Encyclopedia Britannica*. *Id.* at 105 n.216.

hopefully the need for a “terrorist profile” will cease. Like the Alien Act, terrorist profiling can expire.

The second proposal that I sketched was intended to neutralize the consent acid that is destroying Fourth Amendment liberties. I proposed that, outside the context of public safety requests for consent, the Fourth Amendment should be interpreted so that a search based solely on consent is not a reasonable search. In effect, I argued that consent should be ignored as a basis for a search except when it protects the public safety. Among the salutary effects of this bold move is to remove a law enforcement method that most facilitates racial profiling. If police are required to articulate probable cause to justify searches, they will be much less likely to rely on race as a proxy for status as a likely criminal. In addition, this doctrinal move gives us back much of the Fourth Amendment that the Framers intended.

Requiring police to have probable cause before they search our persons, our cars and our homes is not, I think, too much to ask.