

**THE NEW YORK CITY POLICE DEPARTMENT'S
RANDOM BAG SEARCH POLICY: WITHSTANDING
FOURTH AMENDMENT SCRUTINY IS ONLY THE
FIRST STEP IN COMBATING TERRORISM**

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I. INTRODUCTION

September 11, 2001 (9/11) will be remembered as a turning point in American history. When the terrorist attacks occurred, the United States had been enjoying a significant period of overall national prosperity and relative peace on the home front.¹ 9/11 signified that global terrorism would be taken to new extremes and that nobody was safe.² At the same time, challenges and doubts from both home and abroad shed light on a problem just as important as the problem of preventing terrorists from carrying out their sinister plans.³ How much of our individual liberties, as Americans, could we sacrifice for the sake of national security before we gave up precisely those rights that make us American? This is the issue that courts face when forced to determine the legality of anti-terrorism measures such as the random search policy of the New York City Police Department (“NYPD”) in city subways.⁴ While the basic desire for survival dictates that national security measures be taken to protect our very existence,

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¹ William E. Gibson & Rafael Lorente, ‘A Remarkable Resilience’ From Recession and Shark Attacks to a Rebirth of American Spirit, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 30, 2001, at 6.

² See Editorial, *Finish the Job*, DETROIT NEWS, Sept. 11, 2002, at 8A.

³ See Editorial, *Don’t Sacrifice Civil Liberties*, OREGONIAN, Nov. 3, 2001, at E4.

⁴ See Kit R. Roane et al., *Drawing a Line in the Subway*. (*New York Civil Liberties Union Sues the City of New York Over Random Subway Passenger Searches*), U.S. NEWS & WORLD REP., Nov. 14, 2005, at 26.

we must never forget that our existence derives much of its meaning from certain rights and freedoms.

This Comment addresses the constitutionality of the NYPD's random search policy under the Fourth Amendment's search and seizure clause⁵ and possible legal initiatives that can make this anti-terrorism measure, and others, more effective. Part I provides the context in which the controversy surrounding the search policy is to be understood. Part II undertakes a constitutional analysis of the search policy under the Fourth Amendment,⁶ including a review of the decision by the United States District Court for the Southern District of New York.⁷ Part III examines the weaknesses of the current search policy, even assuming the policy is constitutional. Part IV considers possible modifications to the policy and broader governmental and societal changes that would allow for a more effective fight against terrorism.

II. BACKGROUND

A. 9/11 Terrorist Attacks

On the morning of 9/11, under a clear, blue, sunny sky, thousands of men and women made their way to the World Trade Center to report for work, as they would on any Tuesday morning. Little did they realize that they would be witness to the cold, calculated mass murder of thousands of innocent people that fateful day. At 8:45 a.m., American Airlines Flight 11, a hijacked passenger airplane carrying ninety-two people from Boston to Los Angeles, smashed into One World Trade Center, exploding on impact and leaving behind a trail of smoke and fire where there was once office space.⁸ Less than twenty minutes later, United Airlines Flight 175, another hijacked passenger airplane—this one carrying sixty-five people from Boston to Los Angeles—followed suit, crashing into Two World Trade Cen-

⁵ The search and seizure clause is part of the Fourth Amendment: *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.*

U.S. CONST. amend. IV (search and seizure clause in italics).

⁶ *Id.*

⁷ *MacWade v. Kelly*, No. 05 Civ. 6921, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005) [hereinafter *MacWade I*].

⁸ Paul Moses, *Terrorist Attacks/A Day of Infamy/Hijacked Planes Hit WTC and Pentagon*, *NEWSDAY* (New York), Sept. 12, 2001, at W02.

ter.⁹ On the streets, onlookers watched in horror as people jumped out of the buildings to their deaths in an effort to avoid the unbearable flames above.¹⁰ Officially, the death toll from the destruction of the World Trade Center was 2749, including tenants and visitors of the towers, rescue personnel, airplane crew and passengers, and individuals on the street and in adjacent buildings.¹¹ Combined with two related and deadly incidents on that same day, a hijacked airplane crash into the Pentagon and a foiled terrorist attack, which resulted in the crash of a hijacked airplane into an open Pennsylvania field, the events of 9/11 told Americans they were no longer safe.¹²

The United States responded quickly and decisively to the terrorist attacks. President George W. Bush created the Office of Homeland Security and officially initiated a war against global terrorism,¹³ preparing the way for military action in Afghanistan and Iraq.¹⁴ Both houses of Congress, within days of 9/11, approved a forty billion dollar emergency aid package to help victims of the attacks and to help bring those responsible for the attacks to justice.¹⁵ Six-and-a-half weeks after 9/11, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act),¹⁶ a measure designed to give the government broader powers in fight-

⁹ *Id.*

¹⁰ *Id.*

¹¹ Eric Lipton, *Study Maps the Location of Deaths in the Twin Towers*, N.Y. TIMES, July 22, 2004, at B3.

¹² Moses, *supra* note 8. At 9:43 a.m., hijackers, holding knives and box-cutters, crashed American Airlines Flight 77, which carried more than fifty passengers and pilots, into the Pentagon. David Whitman, *Day of Infamy: A Timeline of Terror (September 11, 2001)*, U.S. NEWS & WORLD REP., Sept. 14, 2001, at 18. Within an hour, all federal buildings, including the White House, Congress, the Justice Department, the State Department, and the Supreme Court, were evacuated. *Id.* At 10:10 a.m., United Airlines Flight 93, commandeered by hijackers and carrying forty-five passengers, crashed near Shanksville, Pennsylvania, about eighty miles southeast of Pittsburgh. *Id.* The plane was believed to be heading towards the U.S. Capitol, the White House, or Camp David. *Id.*

¹³ George Bush, President of the United States, Address to a Joint Session of Congress and the American People (September 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

¹⁴ See Mark Thompson & Michael Duffy, *Is the Army Stretched Too Thin?*, TIME, Sept. 1, 2003, at 36.

¹⁵ *Senate Vote Lets Bush Wage War; \$40 Bil to Rebuild and Fight Back*, INVESTOR'S BUS. DAILY, Sept. 17, 2001, at A01.

¹⁶ Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the United States Code).

ing terror at home.¹⁷ Key provisions of the original USA PATRIOT Act included the following: the ease with which the federal government could conduct electronic surveillance, including roving wiretaps;¹⁸ the FBI's access to certain private records;¹⁹ the ability to detain immigrants suspected of terrorism for up to a week without being charged with a crime;²⁰ and the requirement that banks find the sources of money in certain large private accounts.²¹ Sixteen of the more contentious²² sections of the USA PATRIOT Act, including the roving wiretap and FBI access provisions mentioned above, were scheduled to expire at the end of 2005.²³ On March 8, 2006, President Bush signed the renewal of the USA PATRIOT Act.²⁴

Though the country witnessed a rare display of unity in the immediate aftermath of 9/11, as evidenced by the outpouring of grief and determination to overcome the trauma of that day, tension quickly began to mount in response to some of the government's anti-terror measures. Throughout the nation, there emerged a debate regarding the appropriate balance between protecting civil liberties and protecting national security.²⁵ News and print media openly questioned and criticized the government's anti-terror policies as going too far in curtailing civil liberties.²⁶ Organizations such as the American Civil Liberties Union denounced the fight against terrorism as a war against immigrants, especially pointing out the mass detention of hundreds of immigrants, some of whom were

¹⁷ Ann McFeatters, *Bush Signs Anti-Terror Bill, Says Tough Law Will Preserve Constitutional Rights*, PITTSBURGH POST-GAZETTE, October 27, 2001, at A6.

¹⁸ 50 U.S.C. § 1805 (2000 & Supp. II 2002).

¹⁹ 50 U.S.C. § 1861 (Supp. II 2002).

²⁰ 8 U.S.C. § 1226a (Supp. II 2002).

²¹ 31 U.S.C. § 5318(a)(3)-(4) (Supp. II 2002); McFeatters, *supra* note 17, at A6.

²² Editorial, *Patriot Act Renewal*, BALT. SUN, Oct. 5, 2005, at 12A.

²³ 18 U.S.C. § 2510 Note (Supp. II 2002) (Termination Date of 2001 Amendment).

²⁴ *Bush Celebrates a Victory, Though Not an Easy One*, N.Y. TIMES, Mar. 10, 2006, at A16. The renewed Act contained several changes as compared to the original. Charles Babington, *Congress Votes to Renew Patriot Act, With Changes*, WASH. POST, Mar. 8, 2006, at A3. Libraries functioning in their traditional capacities are no longer subject to "National Security Letters," which are subpoenas for financial and electronic records without a judge's approval. *Id.* Recipients of subpoenas granted by the Foreign Intelligence Surveillance Act Court have the right to challenge the subpoena's gag order requirements. *Id.* While most of the original provisions become permanent, the roving wiretap provision and the government access to business records provision are again set to expire in four years. *Id.*

²⁵ See Elizabeth Bell, *Real-Life Lessons Contra Costa and Tri-Valley Teachers Try to Tie Sept. 11 to Everyday Class Work*, S.F. CHRON., Feb. 1, 2002, at 1.

²⁶ See, e.g., Nat Hentoff, *Fierce Watchdog of the Constitution*, THE VILLAGE VOICE, Aug. 12, 2003, at 24.

abused in prison.²⁷ At its core, the argument espoused by advocates of protecting civil liberties is that surrendering individual rights in the name of increasing national security would entail giving up what it means to be an American.²⁸

B. Terrorist Attacks in London

With the United States making a strong recovery after 9/11, the national mood quickly shifted from tense, patriotic fervor into a growing sense of complacency. Although Americans regularly dealt with heightened terror alerts and news of terrorism in foreign countries, with each passing day when no 9/11-type events occurred locally, the feeling that the country was shielded from attacks was beginning to creep back into the national psyche, even if only in the farthest reaches of America's consciousness.²⁹ Such was the psychological state of the American people when they learned of the London terrorist attacks during the summer of 2005.³⁰

During the morning rush hour of July 7, 2005, a series of bombs exploded throughout London's public transportation system, specifically three subway trains and a bus, killing at least thirty-seven people and injuring hundreds more.³¹ The attacks were the deadliest on the city since bombings by German airplanes during World War II³² and were eerily reminiscent of the 9/11 attacks, although not in terms of sheer magnitude. Immediately, British Prime Minister Tony Blair blamed Islamic extremists, stating that they planned the attacks to coincide with the opening of the G-8 summit in Scotland, a gathering of leaders from eight of the world's most economically powerful nations.³³

²⁷ Thomas Powers, *Liberty and Justice for Almost All*, THE WKLY. STANDARD, June 16, 2003, at 12.

²⁸ See Hentoff, *supra* note 26, at 24.

²⁹ See Evan Thomas & Stryker McGuire, *Terror At Rush Hour*, NEWSWEEK, July 18, 2005, at 24.

³⁰ See *id.*

³¹ Robert Barr, *Terrorists Blast London 37 Dead, More than 700 Injured in Four Early Morning Bombings*, BURLINGTON COUNTY TIMES, July 8, 2005, at 1.

³² *Id.*

³³ *Id.* Member nations include the United Kingdom, France, Russia, Germany, the United States of America, Japan, Italy, and Canada. G8 Gleneagles 2005 G8 Background and History, <http://www.g8.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1078995911932> (last visited Nov. 4, 2006). The G8 Summit is a gathering of the leaders of the member nations for the purpose of discussing major current issues and reaching informal agreements to reach their goals effectively. G8 Gleneagles 2005 What is the G8 Summit?, <http://www.g8.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1078995913300> (last visited Nov. 4, 2006).

In the United States, the London bombings served to remind Americans that the battle with terrorism was still very close to home. The Office of Homeland Security raised the threat level to orange, or high-risk³⁴ for mass transportation, added police officers, and increased video surveillance, as well as inspections of trash bins and other potential hiding places for bombs.³⁵ Major cities across the country added their own security measures.³⁶ With these additional security measures, the London bombings triggered renewed fears in America that another 9/11 could happen at any moment.

As London was recovering from the deadly bombings, just two weeks later on July 21, 2005, another series of blasts went off, again targeting three subway trains and a bus.³⁷ This time, however, the bombs caused no injuries, apparently because they failed to explode properly.³⁸ Speculation regarding potential suspects naturally focused on terrorists, with eyewitnesses reporting men on the subways and on the bus fiddling with knapsacks.³⁹ If the message was not clear before, it was now, as both the Americans and the British—as well as the rest of the modern world—understood that no place was off limits to terrorists.

C. *The New York City Police Department's Random Bag Search Policy*

In response to the latest series of bombings in London, the city of New York, with other large cities paying close attention, took un-

³⁴ The Homeland Security Advisory System provides warnings in the form of a set of color-coded, graduated "Threat Conditions," which correspond to varying levels of terrorist threats. Homeland Security Presidential Directive-3, <http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html> (last visited Jan. 9, 2007). There are five Threat Conditions: low (green), guarded (blue), elevated (yellow), high (orange), and severe (red). *Id.* The assignment of each Threat Condition triggers the implementation of appropriate "Protective Measures." *Id.* Under a high Threat Condition, federal departments and agencies should consider coordinating security efforts with federal, state, and local law enforcement agencies; taking precautions at public events, including cancellation; preparing to execute contingency procedures; and restricting access to threatened facilities. *Id.*

³⁵ Sara Kehaulani Goo & Dan Eggen, *U.S. Increases Threat Level for Mass Transit, But Chertoff Says There Is No Sign of Imminent Attack*, THE WASH. POST, July 8, 2005 at A18.

³⁶ *Id.* In New York, city officials placed police officers in every train during the morning commute and increased the number of police assigned to the transit system to 6000, about twice the normal amount. *Id.* In Boston, subway system messages urged passengers to report suspicious activities, and in Chicago, city police used bomb-sniffing dogs to patrol the El. *Id.*

³⁷ Letta Tayler, *London Blasts a Sober Reminder*, ALBANY TIMES UNION, July 22, 2005, at A1.

³⁸ *Id.*

³⁹ *Id.*

precedented action by implementing a broad, city-wide random bag search policy in its subways.⁴⁰ According to the NYPD, subway passengers are selected randomly but regularly.⁴¹ Police Commissioner Raymond Kelly stressed that search selections would not be based on race, ethnicity, or religion, with supervisors checking to make sure that the guidelines are being followed.⁴² The searches generally take place before passengers pass through the turnstiles, but the police reserve the right to conduct searches inside the subway system as well.⁴³ Passengers who are asked to be searched may refuse the search, but they then have to leave the subway station.⁴⁴ The city provides advance notice about the searches, indicating beforehand at which stations the searches will take place.⁴⁵ The searches, which focus on backpacks and containers large enough to hold explosives, ideally discourage subway riders from carrying backpacks and large bags in the subway system.⁴⁶

On August 4, 2005, the New York Civil Liberties Union (“NYCLU”), on behalf of five individual plaintiffs who are patrons of the New York subways, filed a lawsuit⁴⁷ in the United States District Court for the Southern District of New York against Police Commissioner Kelly and the City of New York, seeking a declaratory judgment that the random search policy is unconstitutional and an injunction against further enforcement of the policy.⁴⁸ The NYCLU’s complaint alleged that the search policy is a violation of the Fourth⁴⁹ and Fourteenth⁵⁰ Amendments to the United States Constitution and of 42 U.S.C. § 1983.⁵¹ The problem, according to the NYCLU, lied in how the city configured the operations of the search policy.⁵² In support of its lawsuit, the NYCLU raised a number of points.⁵³

⁴⁰ Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, N.Y. TIMES, July 22, 2005, at A1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See* Chan & Fahim, *supra* note 40, at A1.

⁴⁷ Complaint, *MacWade v. Kelly*, No. 05 Civ. 6921, 2005 WL 1943185 (S.D.N.Y. Aug. 4, 2005) [hereinafter Complaint].

⁴⁸ *Id.* at 3–4.

⁴⁹ U.S. CONST. amend. IV.

⁵⁰ U.S. CONST. amend. XIV.

⁵¹ Complaint, *supra* note 47, at 11.

⁵² *See id.* at 1–8.

⁵³ *Id.*

First, the NYCLU asserted that the search policy is not likely to catch or deter terrorists because advance notice of searching is given, passengers selected for searches are free to walk away, and searches are conducted at a small proportion of the city's subway entrances at any given time.⁵⁴ Second, the NYCLU argued that the only people being searched are innocent passengers.⁵⁵ The complaint points out that millions of people depend on the subway system and that many of these people carry bags, briefcases, and other such items in which they have an expectation of privacy.⁵⁶ Third, the NYCLU contended that the search policy was not a response to any specific threat against the city.⁵⁷ Fourth, the NYCLU claimed that the NYPD may search a passenger without having any suspicion that the passenger has engaged in or will engage in any wrongdoing.⁵⁸ Furthermore, the NYCLU believes the search policy creates the potential for impermissible racial profiling.⁵⁹ Since there is such a high volume of subway users, it is not realistic to expect that the NYPD will be able to adhere to a truly random search formula, such as one in every five passengers.⁶⁰ Rather, it is more likely that police will arbitrarily select passengers for searches, opening the door for racial profiling.⁶¹ Finally, the NYCLU suspects that police may be able to arrest a person after a search reveals that he or she has committed a crime.⁶² This may be problematic because searches and seizures by government actors are ordinarily unreasonable in the absence of individualized suspicion.⁶³ Evidence obtained by unreasonable, and thus invalid, searches is prohibited from use in both federal⁶⁴ and state⁶⁵ courts.

On December 2, 2005, the United States District Court for the Southern District of New York, in *MacWade v. Kelly*,⁶⁶ issued its decision on the constitutionality of the NYPD's search policy. Judge Berman's opinion held that the search policy is constitutional.⁶⁷ On

⁵⁴ *Id.* at 7–8.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 4–5.

⁵⁷ Complaint, *supra* note 47, at 5.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 7.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.* at 8.

⁶³ *Chandler v. Miller*, 520 U.S. 305, 308 (1997). An exception to this general rule is the “special needs” doctrine. *See* discussion *infra* Part III.B.1.

⁶⁴ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

⁶⁵ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁶⁶ *MacWade I*, No. 05 Civ. 6921, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005).

⁶⁷ *Id.* at *1.

December 19, 2005, the NYCLU appealed the Southern District's ruling.⁶⁸

III. ANALYSIS UNDER THE FOURTH AMENDMENT'S SEARCH AND SEIZURE CLAUSE

A. *Introduction to the Fourth Amendment's Search and Seizure Jurisprudence*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶⁹ The American colonists drafted the Fourth Amendment as a check against governmental intrusions into the peoples' privacy, after years of unlimited intrusions by the British government.⁷⁰ As the Supreme Court of the United States has recognized, the "central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials."⁷¹

For the search and seizure clause to apply, the following elements must exist: 1) governmental action,⁷² and 2) conduct that constitutes either a search⁷³ or a seizure.⁷⁴ A search, for purposes of the Fourth Amendment, is understood to mean a governmental invasion of a person's privacy.⁷⁵ However, not every invasion of privacy will constitute a search because only those invasions that intrude upon certain expectations of privacy will qualify for protection.⁷⁶ The test

⁶⁸ NYCLU appeals ruling on subway searches, http://www.nyclu.org/mta_searches_suit_pr_121905.html (last visited Jan. 9, 2007). The United States Court of Appeals for the Second Circuit affirmed the southern district's decision. *MacWade v. Kelly*, 460 F.3d 260, 275 (2nd Cir. 2006) [hereinafter *MacWade II*].

⁶⁹ U.S. CONST. amend. IV. The Fourth Amendment also provides for the proper issue of warrants, which must be based on probable cause. *Id.* However, obtaining a warrant is not a prerequisite for a reasonable search or seizure. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). It is permissible to search or seize without a warrant or probable cause when doing so would be reasonable based on the circumstances. *Id.* at 20–22. For example, the quick decisions and actions of police officers on the beat are generally not subject to the warrant procedure. *Id.* at 20.

⁷⁰ Denise Robinson, Supreme Court Review, *Kaupp v. Texas: Breathing Life Into The Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 761, 762 (2004) (citing Alan C. Yarbusko, Note, *Brown to Payton to Harris: A Fourth Amendment Double Play by the Supreme Court*, 43 CASE W. RES. L. REV. 253, 257–58 (1992)).

⁷¹ *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

⁷² *See, e.g., Walter v. United States*, 447 U.S. 649, 656 (1980).

⁷³ *See, e.g., Oliver v. United States*, 466 U.S. 170, 178 (1984).

⁷⁴ *See, e.g., Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988).

⁷⁵ *Oliver*, 466 U.S. at 177–78.

⁷⁶ *Id.* at 177.

for determining whether a privacy expectation is legitimate asks whether an individual has an actual subjective expectation of privacy and, then, whether that expectation is reasonable from society's objective viewpoint.⁷⁷ For example, curbside garbage does not receive Fourth Amendment protection because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public," and therefore, there is no reasonable expectation of privacy in those items.⁷⁸ A seizure, under the Fourth Amendment, occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁷⁹ Circumstances indicating a potential seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."⁸⁰ In *California v. Hodari D.*,⁸¹ the Supreme Court of the United States clarified the definition of a seizure. Justice Scalia explained that the condition of a reasonable person believing that he was not free to leave is necessary, but not sufficient, to satisfy the test for a seizure.⁸² In narrowing the scope of a seizure, the Court held that, with respect to a show of authority (as opposed to an application of physical force), there is no seizure if the subject does not yield.⁸³

B. Reasonableness of Searches and Seizures

1. General Factors to Consider

Although there are several factors that should be considered in determining whether a given search or seizure is reasonable under the Fourth Amendment, the single most important factor may be the balance between privacy rights and governmental interests. The Supreme Court of the United States has explained that "reasonableness . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by

⁷⁷ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁷⁸ *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

⁷⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

⁸⁰ *Id.*

⁸¹ 499 U.S. 621 (1991).

⁸² *Id.* at 628.

⁸³ *Id.* at 626. Some states have rejected *Hodari D.* under their state constitutions. See, e.g., *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993); *People v. Bora*, 634 N.E.2d 168, 169-70 (N.Y. 1994).

[the government].”⁸⁴ Under the Supreme Court’s test, a search or seizure is reasonable if the government’s need for the search or seizure outweighs the privacy interest in the intrusion upon the individual.⁸⁵ In undertaking this balancing analysis, courts “must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”⁸⁶ The balancing analysis is not one that can be applied mechanically; rather, the test must be applied on a case-by-case basis.⁸⁷

A determination of reasonableness requires a court to consider the totality of the circumstances surrounding the search or seizure in question.⁸⁸ The Supreme Court, for the most part, has avoided using per se rules in the context of Fourth Amendment analysis.⁸⁹ In *United States v. Drayton*,⁹⁰ the Court considered whether police officers violated the defendants’ Fourth Amendment rights by boarding a bus to ask questions and conduct searches.⁹¹ In *Drayton*, three plainclothes police officers conducted a routine drug and weapons check of a Greyhound bus at a refueling stop.⁹² One of the officers walked down the bus aisle asking individual passengers about their plans and attempting to match passengers with their luggage in the overhead racks.⁹³ Passengers were free to leave the bus without argument at any time.⁹⁴ During the course of this search, one of the officers asked the two defendants for permission to check their persons and both defendants consented.⁹⁵ The defendants were arrested when the searches revealed that they were concealing drugs.⁹⁶ The Court reasoned that, even though the searching officer did not expressly inform passengers of their right to refuse searches, the officer did ask for permission to check bags and persons, indicating to a reasonable

⁸⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

⁸⁵ *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *United States v. Drayton*, 536 U.S. 194, 201 (2002).

⁸⁹ *Id.*

⁹⁰ 536 U.S. 194 (2002).

⁹¹ *Id.* at 197–200.

⁹² *Id.* at 197.

⁹³ *Id.* at 198.

⁹⁴ *Id.*

⁹⁵ *Id.* at 199.

⁹⁶ *Drayton*, 536 U.S. at 199.

person that he or she was free to refuse.⁹⁷ Thus, finding that consent was voluntary, the Court held that the searches were reasonable.⁹⁸

In contrast to the totality-of-the-circumstances approach, the Supreme Court has also warned that undertaking case-by-case analyses of governmental need could open the door to litigation every time a dispute arises in the Fourth Amendment context.⁹⁹ In *Atwater v. City of Lago Vista*,¹⁰⁰ the petitioner was arrested for a seatbelt violation pursuant to a state law that authorized warrantless arrests for seatbelt violations.¹⁰¹ The Court rejected as impractical the petitioner's arguments that the validity of warrantless arrests should hinge on distinctions between major and minor crimes.¹⁰² In the Court's opinion, the key is to create "standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made."¹⁰³ The Court explained that a balancing-test analysis of a particular situation is unnecessary when probable cause exists.¹⁰⁴ Accordingly, the Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."¹⁰⁵ As a prerequisite to individualized judicial review of a Fourth Amendment claim, the defendant must overcome the preference for categorical treatment of such claims by "mak[ing] a colorable argument that an arrest, with or without a warrant, was 'conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests.'"¹⁰⁶ Thus, the Court seems to reveal a preference for administrative convenience and practicality.

In determining reasonableness, the courts distinguish between individualized searches and generalized schemes.¹⁰⁷ The general rule is that a search or seizure is unreasonable if there is no suspicion against specific individuals.¹⁰⁸ However, an exception may be made

⁹⁷ *Id.* at 206.

⁹⁸ *Id.* at 207.

⁹⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

¹⁰⁰ 532 U.S. 318 (2001).

¹⁰¹ *Id.* at 323–24.

¹⁰² *Id.* at 347–50.

¹⁰³ *Id.* at 347.

¹⁰⁴ *Id.* at 354.

¹⁰⁵ *Id.*

¹⁰⁶ *Atwater*, 532 U.S. at 352–53 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996) (second alteration in original)).

¹⁰⁷ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–40 (2000).

¹⁰⁸ *Id.* at 37.

for “intrusions undertaken pursuant to a general scheme without individualized suspicion.”¹⁰⁹ For example, a highway checkpoint normally does not serve to stop individuals based on any specific suspicion; but programmatic purposes, such as keeping the roads free of drunk drivers, may make the checkpoint constitutional.¹¹⁰ In *United States v. Davis*,¹¹¹ a case involving an airport screening procedure, the Supreme Court explained that “searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation . . . may be permissible under the Fourth Amendment though not supported by a showing of probable cause.”¹¹²

The Court may also utilize the “special needs” doctrine to justify searches that are conducted in the absence of individualized suspicion.¹¹³ The court explained the doctrine by stating that “in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”¹¹⁴ For example, in *Board of Education v. Earls*,¹¹⁵ the Court found that a special need existed in a public school district’s policy of drug testing students involved in extracurricular activities because the state is responsible for maintaining their discipline, health, and safety.¹¹⁶

Consent is another factor that may be considered in determining reasonableness.¹¹⁷ If an individual consents to a search or seizure, there is no need to address the question of reasonableness because the search or seizure is valid by virtue of the individual’s consent.¹¹⁸ In order for valid consent to exist, the government does not necessarily have to establish that the individual subject to search or seizure had express notice or knowledge of the right to refuse consent.¹¹⁹ Valid consent can be established by showing, based upon a totality of the circumstances, that individuals could reasonably infer from the

¹⁰⁹ *Id.* at 45–46.

¹¹⁰ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

¹¹¹ 482 F.2d 893 (9th Cir. 1973).

¹¹² *Id.* at 908.

¹¹³ *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)).

¹¹⁴ *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

¹¹⁵ 536 U.S. 822 (2002).

¹¹⁶ *See id.* at 829–32.

¹¹⁷ *United States v. Drayton*, 536 U.S. 194, 200–01 (2002).

¹¹⁸ *See id.* at 206.

¹¹⁹ *Id.* at 206–07.

situation that they were free to refuse consent.¹²⁰ In *Drayton*—where the defendants gave express verbal consent for their bags and persons to be searched¹²¹—the police officers did not brandish any weapons, did not make any intimidating movements, left the aisle free for passengers to exit, and spoke to passengers individually in a polite voice.¹²² Based on these facts, the Supreme Court reasoned that the defendants' consent was not coerced.¹²³ The Court also supported the proposition that law enforcement officials may ask for consent to search, even when there is no apparent reason to be suspicious, if cooperation is not coerced.¹²⁴ Furthermore, the Court explained that a seizure does not occur where “a reasonable person would feel free to terminate the encounter.”¹²⁵

Another relevant factor with respect to reasonableness is the scope of a search or seizure.¹²⁶ To determine whether the scope of the intrusion was within the standards of reasonableness, courts ask whether the search or seizure “was reasonably related in scope to the circumstances which justified the interference in the first place.”¹²⁷ In the oft-cited case of *Terry v. Ohio*,¹²⁸ the Supreme Court considered whether a police officer's pat-down search and subsequent seizure of concealed weapons from individuals he deemed to have been acting suspiciously on the street were reasonable under the Fourth Amendment.¹²⁹ The Court, analyzing the scope of the search and seizure, applied an objective test: whether a man of reasonable caution would believe the officer's actions were appropriate, given the facts available to the officer at that moment.¹³⁰ Applying this standard, the Court concluded that the officer's patting down of the individuals' outer clothing was reasonable in scope in light of his justifiable belief, based on observable actions, that the men were armed.¹³¹ In later

¹²⁰ *Id.*

¹²¹ *Id.* at 198–99.

¹²² *Id.* at 203–04.

¹²³ *Drayton*, 536 U.S. at 204.

¹²⁴ *Id.* at 200–01.

¹²⁵ *Id.* at 201.

¹²⁶ *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

¹²⁷ *Id.* at 20.

¹²⁸ 392 U.S. 1 (1968).

¹²⁹ *Id.* at 4–8.

¹³⁰ *Id.* at 21–22.

¹³¹ *Id.* at 27–30. Where two men were hanging out at a street corner, apparently not waiting for anyone or anything, and alternately walking up and down a street to peer into a store window about twenty-four times, it was reasonable for the officer to think that the individuals were planning a robbery and were thus armed. *Id.* at 22–23, 28. The scope of the officer's search was reasonable because it was justified by

cases, the Court also explained that the scope of a search is generally defined by the nature of the object sought and the places in which there is probable cause to believe it may be found.¹³²

One final point regarding the reasonableness of searches and seizures is the applicability of the plain view doctrine,¹³³ which justifies a police officer's warrantless seizure of an article of evidence in his plain view, if "the initial intrusion that [brought] the police within plain view of such . . . article is supported . . . by one of the recognized exceptions to the warrant requirement."¹³⁴ The plain view doctrine is also applicable when a police officer "is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object."¹³⁵ The doctrine should be understood "as an extension of whatever the prior justification for an officer's 'access to an object' may be."¹³⁶

2. Examples of Legitimate Governmental Interests that Justify Suspicionless Searches and Seizures

Generally, a governmental interest is legitimate if it is concerned with the public's safety and welfare. For example, highway safety is a valid governmental interest that arises in the context of searches and seizures occurring during highway checkpoint stops.¹³⁷ In *Michigan Department of State Police v. Sitz*,¹³⁸ the Supreme Court considered whether seizures in the form of state sobriety checkpoints were reasonable under the Fourth Amendment.¹³⁹ Holding that the checkpoints were constitutional, the Supreme Court used a three-pronged test that balanced the governmental interest, the extent to which the checkpoint advanced that interest, and the individual privacy inter-

the desire to protect himself and others nearby. *Id.* at 29. In addition to limiting his search to a pat-down of the outer garments, the officer did not place his hands in the pockets or under the surface of the outer garments until he felt weapons. *Terry*, 392 U.S. at 29–30.

¹³² *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding that permission to search car for narcotics included authority to search containers within the car); *United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that authorization to search car for contraband allowed officer to search every part of the vehicle and its contents).

¹³³ *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) ("It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.").

¹³⁴ *Id.*

¹³⁵ *Id.* at 466.

¹³⁶ *Texas v. Brown*, 460 U.S. 730, 739 (1983).

¹³⁷ *See, e.g., Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449 (1990).

¹³⁸ 496 U.S. 444 (1990).

¹³⁹ *Id.* at 447.

est.¹⁴⁰ The Court found that the prevention of drunken driving was a legitimate governmental interest,¹⁴¹ that sobriety checkpoints effectively advanced that interest (1.5% arrest rate for one of the checkpoints in question),¹⁴² and that intrusion into individual privacy was minimal (stops were brief and caused a minimal amount of fear and surprise in law abiding motorists).¹⁴³ In *Delaware v. Prouse*,¹⁴⁴ the Supreme Court provided an example of a constitutionally invalid highway seizure.¹⁴⁵ The seizure in *Prouse* consisted of stopping a car on a public highway to check a driver's license and vehicle registration, where there was no reason to believe the driver was violating any laws.¹⁴⁶ Justice White supported the Court's decision by explaining that "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials."¹⁴⁷ The Court left open the possibility, however, that states could develop constitutional methods for spot checks "that do not involve the unconstrained exercise of discretion[,]" such as "[q]uestioning of all oncoming traffic at roadblock-type stops."¹⁴⁸

The prevention of illegal immigration is another valid governmental interest in the context of Fourth Amendment searches and seizures. For example, in *United States v. Martinez-Fuerte*,¹⁴⁹ the Supreme Court held that fixed border patrol checkpoints—where the occupants of stopped vehicles are briefly detained for questioning, even though there is no reason to suspect that such vehicles would harbor illegal aliens—are constitutional under the Fourth Amendment.¹⁵⁰ The Court further held that such fixed checkpoints did not require prior authorization by judicial warrants.¹⁵¹ The Court also accepted giving a wide degree of discretion to Border Patrol officers

¹⁴⁰ *Id.* at 448–49, 455 (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)).

¹⁴¹ *Id.* at 451.

¹⁴² *Id.* at 453–55.

¹⁴³ *Id.* at 451–53.

¹⁴⁴ 440 U.S. 648 (1979).

¹⁴⁵ *Id.* at 663.

¹⁴⁶ *Id.* at 650.

¹⁴⁷ *Id.* at 661.

¹⁴⁸ *Id.* at 663.

¹⁴⁹ 428 U.S. 543 (1976).

¹⁵⁰ *Id.* at 545.

¹⁵¹ *Id.*

with respect to the individuals selected for questioning, even if selections are based on apparent Mexican ancestry.¹⁵²

Although roadway checkpoints set up to promote highway safety and to prevent illegal immigration are constitutional, checkpoints may not be operated as a general crime control measure.¹⁵³ In *City of Indianapolis v. Edmond*,¹⁵⁴ the Supreme Court held that the city's checkpoint program violated the Fourth Amendment "[b]ecause the primary purpose . . . [was] ultimately indistinguishable from the general interest in crime control. . . ."¹⁵⁵ The city's checkpoint program conducted roadblocks for the purpose of intercepting the transportation of illegal drugs.¹⁵⁶ Although the program was relatively successful,¹⁵⁷ the relevant issue for the Court was the reasonableness of the seizures under the Fourth Amendment.¹⁵⁸ The Court refused to dispense with the general rule that individualized suspicion be present for seizures, stating that "[the court] cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."¹⁵⁹ In considering the reasonableness of suspicionless checkpoints operated pursuant to a general scheme of law enforcement, purpose becomes a relevant issue, and in *Edmond*, the court found that drug interdiction falls under the impermissible category of general crime control.¹⁶⁰

Crime control may be a permissible aim, however, if the checkpoint is designed to apprehend individuals connected to very specific and known crimes.¹⁶¹ In *Illinois v. Lidster*,¹⁶² the Supreme Court held that a highway checkpoint stop organized for the purpose of investigating a recent fatal crime was constitutional.¹⁶³ The court applied the three-pronged balancing test¹⁶⁴ enunciated in *Brown v. Texas*:¹⁶⁵ 1) the seizure advanced a grave public concern (finding the perpetrator

¹⁵² *Id.* at 563–64.

¹⁵³ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

¹⁵⁴ 531 U.S. 32 (2000).

¹⁵⁵ *Id.* at 48.

¹⁵⁶ *Id.* at 34–35.

¹⁵⁷ *See id.* The arrest rate at the checkpoints was approximately nine percent. *Id.*

¹⁵⁸ *Id.* at 37.

¹⁵⁹ *Edmond*, 531 U.S. at 44.

¹⁶⁰ *Id.*

¹⁶¹ *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004).

¹⁶² 540 U.S. 419 (2004).

¹⁶³ *Id.* at 427–28.

¹⁶⁴ *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448–49 (1990) (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)); *see supra* text accompanying note 140.

¹⁶⁵ 443 U.S. 47 (1979).

of a specific crime); 2) the seizure significantly advanced this grave public concern (police were able to obtain information from drivers, some of whom may have seen something relevant); and 3) the intrusion into personal liberty rights was very minimal (individuals waited a few minutes in line and had a few seconds of contact with the police).¹⁶⁶ Thus, the balancing analysis weighed in favor of a finding that the checkpoint stop in *Lidster* was reasonable and, therefore, constitutional.¹⁶⁷

An interesting area of Fourth Amendment law, due to the exigencies of modern society, is found in the realm of airport security. In *United States v. Marquez*,¹⁶⁸ the United States Court of Appeals for the Ninth Circuit held that random airport searches that subject passengers to handheld magnetometer wand scans are constitutional under the Fourth Amendment.¹⁶⁹ Airport screening searches are not considered crime control searches, but rather administrative searches designed to deter passengers from carrying weapons or explosives and to stop them if they actually do carry weapons or explosives.¹⁷⁰ The test for reasonableness of airport screening searches considers whether: 1) the search is “no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; 2) it is confined in good faith to that purpose; and 3) passengers may avoid the search by electing not to fly.”¹⁷¹ In *Marquez*, the Ninth Circuit, as other courts have done,¹⁷² found that random metal detector scans of persons are reasonably necessary and not overly intrusive given the interests at stake.¹⁷³ The court reasoned that “the randomness of the selection for the additional screening procedure arguably increases the deterrent effects of airport screening procedures because potential passengers may be influenced by their knowledge that they may be subject to random, more thorough screening procedures.”¹⁷⁴ The court also added that the validity of airport screening

¹⁶⁶ *Lidster*, 540 U.S. at 427–28.

¹⁶⁷ *Id.*

¹⁶⁸ 410 F.3d 612 (9th Cir. 2005).

¹⁶⁹ *Id.* at 614.

¹⁷⁰ *Id.* at 616–17.

¹⁷¹ *Id.* at 616 (quoting *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1089 (9th Cir. 2002)).

¹⁷² *E.g.*, *United States v. Doe*, 61 F.3d 107, 109–10 (1st Cir. 1995) (“Routine security searches at airport checkpoints pass constitutional muster because the compelling public interest in curbing air piracy generally outweighs their limited intrusiveness.”).

¹⁷³ *Marquez*, 410 F.3d at 617.

¹⁷⁴ *Id.*

searches depends upon the recognition of an individual's right not to be searched—by not boarding the plane.¹⁷⁵

Although the Supreme Court has never decided a case involving a search or seizure program designed primarily as an anti-terrorism measure, presumably, combating and deterring terrorist attacks—since such interests fall under the broader category of public safety and welfare—is a legitimate governmental interest. Notably, in *Edmond*, Justice O'Connor wrote in dicta that “an appropriately tailored roadblock set up to thwart an imminent terrorist attack” would be valid under the Fourth Amendment.¹⁷⁶

C. *Constitutional Analysis of the NYPD's Search Policy Under the Search and Seizure Clause of the Fourth Amendment*

Initially, a court must address whether the NYPD's random bag checks constitute searches and/or seizures within the scope of the Fourth Amendment. Since subway passengers are free to walk away from bag checks and are given advance notice of checks, thus avoiding the possibility of being checked, it seems that these bag checks do not constitute seizures.¹⁷⁷ With respect to the question of whether these checks are searches, however, the answer is clearly yes. Since the bag checks of subway passengers are handled by NYPD officers and are authorized by the city, the government action requirement is satisfied,¹⁷⁸ and since the bag checks are governmental invasions of individual privacy, they constitute searches.¹⁷⁹

A more difficult question is whether subway passengers have a legitimate expectation of privacy in their belongings so that the bag checks fall within the reach of the Fourth Amendment.¹⁸⁰ There is little doubt that passengers—at least some of them—have individual subjective expectations of privacy, as evidenced by the NYCLU's lawsuit on behalf of five individual subway riders.¹⁸¹ It is also easy to understand that this expectation of privacy is objectively reasonable

¹⁷⁵ *Id.* (citing *United States v. Davis*, 482 F.2d 893, 910–11 (9th Cir. 1973)).

¹⁷⁶ *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

¹⁷⁷ See *United States v. Drayton*, 536 U.S. 194, 201 (2002); *supra* note 125 and accompanying text.

¹⁷⁸ See *Walter v. United States*, 447 U.S. 649, 656 (1980); *supra* note 72 and accompanying text.

¹⁷⁹ See *Oliver v. United States*, 466 U.S. 170, 177–78 (1984); *supra* note 75 and accompanying text.

¹⁸⁰ See *Oliver*, 466 U.S. at 177; *supra* note 76 and accompanying text.

¹⁸¹ Complaint, *supra* note 47, at 8–11. Plaintiffs were offended by the search and felt that it was a violation of the Fourth Amendment. *Id.*

from society's standpoint.¹⁸² Often, the reason that people keep personal belongings and items in bags, briefcases, purses, and backpacks is precisely because those items are private in nature. It is reasonable to expect that such privacy will be maintained while traveling in public places. Therefore, since the NYPD's random bag checks clearly constitute searches, they fall within the ambit of the Fourth Amendment's search and seizure clause.

The next phase of the Fourth Amendment analysis is to balance the governmental interest with the individual privacy interests and determine whether the random search policy advances the government's interest.¹⁸³ Here, the governmental interest is a public safety concern, preventing and deterring terrorism. This is certainly a legitimate and very serious governmental interest since millions of human lives, as well as tremendous amounts of personal and public property, are at stake. In comparison, the burden on the individual privacy interest is minimal. Subway passengers selected for searches will ordinarily have to sacrifice a few seconds of their time and a couple minutes at the most. This is reasonable in light of the fact that the searches are supposed to prevent the very serious threat of terrorism.¹⁸⁴ Presumably, the manner in which the searches are conducted is also reasonable.¹⁸⁵ This is not a case of overly hostile police officers subjecting passengers to outright humiliation by conducting strip searches, which are ordinarily unreasonable absent special circumstances,¹⁸⁶ or even pat-down searches.¹⁸⁷ Rather, the police officers look briefly into selected bags and then allow the passengers to move on.¹⁸⁸ Even if the intrusion into privacy was more than minimally burdensome, however, some courts would still find in favor of reasonableness. In *United States v. Bell*,¹⁸⁹ a Second Circuit case involving

¹⁸² See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *supra* note 77 and accompanying text.

¹⁸³ *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448–49 (1990) (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)); *supra* note 140 and accompanying text.

¹⁸⁴ See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004) (upholding the validity of a highway checkpoint designed to apprehend perpetrators of a specific crime where stops were for a few minutes at most); *United States v. Martinez-Fuerte*, 428 U.S. 543, 546–47 (1976) (upholding the validity of fixed border patrol checkpoints where average length of stop is three to five minutes).

¹⁸⁵ See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *supra* note 127 and accompanying text.

¹⁸⁶ See, e.g., *State v. Stevens*, 495 A.2d 910, 914 (N.J. Super. Ct. Law Div. 1984).

¹⁸⁷ See *Terry*, 392 U.S. at 4–8; *supra* note 129 and accompanying text.

¹⁸⁸ Tom Hays, *NYPD Implements Random Bag Search on City's Subways*, July 22, 2005, <http://www.securityinfowatch.com/online/The-Latest/NYPD-Implements-Random-Bag-Search-on-Citys-Subways/4946SIW306>.

¹⁸⁹ 464 F.2d 667 (2d Cir. 1972).

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an airport search, Chief Judge Friendly, in a concurring opinion, expressed his belief that:

[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.¹⁹⁰

The balance between the governmental interest in preventing terrorism and the individual privacy interest weighs in favor of the governmental interest. However, the more difficult issue is whether the NYPD's random search policy meaningfully advances that governmental interest.¹⁹¹ The trouble with this issue is that there is no way to know for sure that the search policy is working, even if it is successful. To illustrate, suppose that, back in June 2005, a terrorist was planning to execute a suicide-bombing mission in the subway system. After the city announces its random search policy for the subways, the terrorist abandons his plans. This is an example where the search policy met its goal of deterring terrorism, but there is no way for an outsider to know about this success unless he personally knew the terrorist. Even if one could know about such accounts of deterrence realized, it is not clear at what rate such realizations would have to occur to qualify the search policy as worthwhile. Arrest rates may be relevant in this analysis. For example, if one in every 10,000 passengers is caught with explosives, the question is whether that is enough to proclaim that the governmental interest is being advanced. On the other hand, arrest rates probably are not an accurate measure of the search policy's success because such statistics do not take into account the effect of deterrence. With respect to deterrence, given the nature of the search policy, it is difficult to say whether the searches indeed deter terrorists. After all, at any given time, many subway stations are not subject to random searches, and those that are subject to searches provide advance notice.¹⁹²

Although there are doubts about the effectiveness of the NYPD's search policy, notwithstanding the difficulty in measuring with any certainty the degree to which random searches advance the city's in-

¹⁹⁰ *Id.* at 675 (Friendly, C.J., concurring) (footnote omitted).

¹⁹¹ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448–49 (1990) (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)); *supra* note 140 and accompanying text.

¹⁹² Complaint, *supra* note 47, at 1–2.

terest in preventing terrorist attacks, the searches are still reasonable because the intrusion into privacy rights is so minimal compared to the risk of terrorism. The prudent course of action in a situation such as this is to adopt Judge Friendly's approach.¹⁹³ Since the stakes—potentially millions of human lives—are so high, even if the search policy deters or prevents only one serious terrorist attack over a span of several years, the better viewpoint is to suppose as true that the policy advances the governmental interest. In doing so, a totality-of-the-circumstances approach is taken. Reasonableness is judged by looking at the big picture, in terms of both time span and space. Considering that New York City will likely be a prime terrorist target well into the future, in light of the current geo-political climate in which Americans live, stopping a percentage of subway riders for brief bag checks is really not too much to ask.

Two other factors weigh in favor of reasonableness. First, subway passengers have the right to refuse consent to the searches.¹⁹⁴ If a passenger is selected for a search and the passenger objects, he or she is free to simply walk away at the cost of not boarding the subway train at that particular station.¹⁹⁵ Since passengers have knowledge of the right to refuse consent, if they submit to searches, they will be presumed to have voluntarily consented to those searches. This is significant because voluntary consent weighs in favor of a valid search,¹⁹⁶ and seizures of evidence found in the course of a valid search are reasonable.¹⁹⁷ Second, the programmatic purpose of deterring terrorism is relevant here.¹⁹⁸ The general rule that individualized suspicion justify each search is inapplicable here because such a requirement renders a random search policy aimed at stopping terrorism completely unworkable.¹⁹⁹ Furthermore, searches undertaken

¹⁹³ See *Bell*, 464 F.2d at 675 (Friendly, C.J., concurring); *supra* note 190 and accompanying text.

¹⁹⁴ Chan & Fahim, *supra* note 40, at A1.

¹⁹⁵ *Id.*

¹⁹⁶ See *United States v. Drayton*, 536 U.S. 194, 206–08 (2002) (finding that police officers could proceed with search where there was voluntary consent).

¹⁹⁷ *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *supra* note 134 and accompanying text. Furthermore, seizures of evidence related to non-terrorist crimes, such as drugs or weapons, will be reasonable pursuant to the plain view doctrine. See *Coolidge*, 403 U.S. at 466; *supra* note 135 and accompanying text. The NYCLU was clearly concerned about this issue. See Complaint, *supra* note 47, at 8; *supra* note 62 and accompanying text.

¹⁹⁸ See *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *supra* note 110 and accompanying text.

¹⁹⁹ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46 (2000); *supra* note 109 and accompanying text.

pursuant to a generalized scheme are permissible.²⁰⁰ In fact, the NYPD's random search policy is similar to screening procedures implemented at major airports, which are, of course, valid.²⁰¹ Both procedures seek to prevent and deter terrorism, and both procedures occur at mass transportation centers open to the public. The major difference is that subway systems are used for relatively quick intra-city commutes, whereas airports are used for flying much greater distances. The nature of air travel and the logistics of airport operations allow for search procedures that subject all passengers to security measures. This is not currently possible in the New York City subway system. Searching every single passenger, though a much more effective deterrent than the current policy, would create a logjam at subway stations and bring the city to a grinding halt. This is why random searches must suffice.

Considering the various factors at play here—the serious governmental interest in preventing and deterring terrorism, the minimal intrusion on individual privacy rights, the risk that even one act of terrorism could cost unacceptable numbers of human lives and economic damage, the fact that individuals have the right to refuse consent, and the programmatic purpose of the policy—the NYPD's random search policy is reasonable under the Fourth Amendment.

D. MacWade v. Kelly

1. The District Court's Decision

After a two-day bench trial held on October 31 and November 1, 2005, the United States District Court for the Southern District of New York ruled on December 2, 2005 that the NYPD's random search policy²⁰² is constitutional.²⁰³ At the outset, Judge Richard M. Berman noted some important findings of fact.²⁰⁴ First, the New York City subway system operates twenty-four hours a day and is the largest and most used subway system in the United States.²⁰⁵ Second, based on the testimony of city officials, the threat of a terrorist attack in New

²⁰⁰ See *Edmond*, 531 U.S. at 45–46 (2000); *supra* note 109 and accompanying text.

²⁰¹ See *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973); *supra* note 112 and accompanying text.

²⁰² The court refers to the random search policy as the “Container Inspection Program.” *MacWade I*, No. 05 Civ. 6921, 2005 WL 3338573, at *1 (S.D.N.Y. Dec. 7, 2005).

²⁰³ *Id.*

²⁰⁴ *Id.* at *3–*15.

²⁰⁵ *Id.* at *4.

York City's subways is real and substantial.²⁰⁶ Third, the city of New York implemented the random search policy to "address the threat of an explosive device being taken into the subway system in a carry-on container, as had occurred in . . . London."²⁰⁷ Finally, the court, giving deference to city officials and their expert witnesses, found the random search policy to be an effective measure for deterring terrorism.²⁰⁸

The court began its constitutional discussion by establishing the "special needs" doctrine as its legal analytical framework.²⁰⁹ Judge Berman explained the essence of the doctrine by asserting that when "the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."²¹⁰ The judge then enunciated the appropriate standard of analysis under the Fourth Amendment when a special need exists: "a fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests."²¹¹

In the first part of the court's analysis, Judge Berman found that the NYPD's random search policy addressed a special need—the need to decrease the real and substantial public safety risk of a terrorist attack on the subways.²¹² Citing *Edmond*, Judge Berman distinguished between a general interest in crime control and the need to go beyond ordinary law enforcement.²¹³ The judge believed that the search policy was designed for the special purpose of keeping explosives out of the subway, rather than crime control in general, by

²⁰⁶ *Id.* According to Michael Sheehan, the NYPD's Deputy Commissioner for Counter-Terrorism, transportation systems are attractive targets for terrorists for the following reasons: 1) potential for high casualties due to high volume of people, 2) disruption to all or part of transportation system, 3) serious economic consequences, and 4) public fear and demoralization. *Id.* The London bombings in July 2005 were cause for concern regarding New York City's subways because they were carried out by members of groups with links to similar groups in New York, and they were carried out notwithstanding a substantial security system. *MacWade I*, 2005 WL 3338573, at *4.

²⁰⁷ *Id.* at *5. The city was also aware of the 2004 Madrid and Moscow bombings in public transportation systems. *Id.* at *4–*5.

²⁰⁸ *Id.* at *11.

²⁰⁹ *Id.* at *16; *see supra* note 114 and accompanying text.

²¹⁰ *Id.* (quoting *Chandler v. Miller*, 520 U.S. 305, 323 (1997)).

²¹¹ *MacWade I*, 2005 WL 3338573, at *16 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002)).

²¹² *Id.* at *17.

²¹³ *Id.* (citing *Edmond*, 531 U.S. at 37–38, 47–48); *see supra* note 155 and accompanying text.

pointing to the facts that passengers had advance notice and could leave the subway system to avoid searches.²¹⁴

Next, the court found that the random search policy was a reasonably effective measure for furthering the compelling governmental interest of preventing a terrorist bombing of the New York City subway system.²¹⁵ As support for the finding of a compelling governmental interest, Judge Berman emphasized that there is an extremely serious interest in preserving human life.²¹⁶ In determining that the random search policy was a reasonably effective measure of furthering the governmental interest, Judge Berman cautioned that the policy only has to be a reasonable method—not the most effective method—for preventing terrorism in order to survive constitutional scrutiny.²¹⁷ On this point, the court reasoned that the uncertainty and randomness associated with the selection of searches helped generate a reasonably effective means of deterring terrorists.²¹⁸

Finally, the court determined that the random search policy intruded only minimally on the privacy interests of subway passengers.²¹⁹ Judge Berman pointed out that the Fourth Amendment does not require that a search be the least intrusive search possible.²²⁰ Rather, the key is whether there is a close and substantial relation between the governmental interest and the means employed to further that interest.²²¹ In finding that the random search policy met this standard, the court listed four reasons supporting the conclusion that privacy interests were only minimally invaded.²²² First, passengers are given advance notice of searches.²²³ Second, searches are conducted openly so that police officers have limited discretion in selecting passengers for searches except to determine whether a bag is large enough to carry an explosive.²²⁴ Third, passengers selected for searches have the choice to refuse the search and walk away.²²⁵ Fourth, the searches are properly limited in scope and duration be-

²¹⁴ *MacWade I*, 2005 WL 3338573, at *17.

²¹⁵ *Id.* at *17–*18.

²¹⁶ *Id.* at *17.

²¹⁷ *Id.* (citing *Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir. 2000)).

²¹⁸ *Id.* at *18.

²¹⁹ *Id.* at *19.

²²⁰ *MacWade I*, 2005 WL 3338573, at *19 (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002)).

²²¹ *Id.* (citing *United States v. Lifshitz*, 369 F.3d 173, 192 (2d Cir. 2004)).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

cause officers may look only for bags or containers capable of holding explosives and may open or manipulate the contents of the bags or containers only if necessary.²²⁶

Balancing the relevant interests, the court held that since the random search policy reasonably advanced the vitally important governmental interest of preventing terrorism in the subways while only minimally intruding upon privacy, the search policy is valid.²²⁷

2. The Second Circuit's Decision

On August 11, 2006, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment, agreeing that the search policy is a reasonable means of addressing a special need.²²⁸ Before undertaking the reasonableness analysis under the special needs doctrine, the court addressed two initial concerns.²²⁹ First, the court held that the doctrine does not require that an individual subject to a special needs search possess a reduced privacy interest.²³⁰ Rather, the individual privacy interest is a factor to be considered in the balancing analysis.²³¹ Second, the court reiterated that the search policy does indeed serve a special need—that of protecting the public from a terrorist attack.²³²

The heart of the court's opinion came in the balancing of four factors—governmental interest, individual privacy interest, intrusiveness of the search, and effectiveness of the search—to determine the reasonableness of the search policy under the Fourth Amendment.²³³ First, the Second Circuit agreed with the district court that the government's interest in preventing terrorism is immediate and substantial.²³⁴ Second, the court stated that subway passengers have a full expectation of privacy in their containers.²³⁵ Third, the court found the searches minimally intrusive.²³⁶ Finally, the court determined that the

²²⁶ *MacWade I*, 2005 WL 3338573, at *19.

²²⁷ *Id.* at *20.

²²⁸ *MacWade II*, 460 F.3d 260, 263 (2d Cir. 2006).

²²⁹ *Id.* at 269–71.

²³⁰ *Id.* at 270.

²³¹ *Id.*

²³² *Id.* at 271.

²³³ *Id.* at 271–75.

²³⁴ *MacWade II*, 460 F.3d at 271–72.

²³⁵ *Id.* at 272–73.

²³⁶ *Id.* at 273. The court listed the following reasons to support its finding: 1) advance notice of searches; 2) limitation of searches to containers capable of hiding explosives; 3) shortness of searches; 4) openness of the searches, which reduces fear and stigma associated with searches in hidden areas; and 5) lack of discretion by police in choosing whom to search. *Id.*

searches were a reasonably effective means of preventing and deterring terrorism, giving considerable deference to the judgment of law enforcement authorities.²³⁷ Balancing these factors, the Second Circuit concluded that the search policy is reasonable, and therefore constitutional.²³⁸

IV. THE SEARCH POLICY'S WEAKNESSES

A. *The Search Policy Is Not Likely to Deter Terrorists*

A serious flaw with the NYPD's random search policy is that it is unlikely to significantly deter, or even catch, potential terrorists. Accepting the allegations in the NYCLU's complaint as true, "the NYPD is not conducting searches at most subway entrances at any given time," and advance notice is given at those stations where searches are being conducted.²³⁹ Thus, it is easy to see why the NYCLU would characterize the random search program as "virtually certain neither to catch any person trying to carry explosives into the subway system nor to deter such an effort."²⁴⁰ If a terrorist wanted to carry out an attack in the subways and approached a subway station that was conducting searches, he could leave based on the advance notice or by walking away from a search if selected. Then, he would simply have to find his way to one of the many entrances not being searched at that time. Furthermore, since police officers supposedly select individuals for searches at regular intervals, such as one in every five,²⁴¹ a terrorist could just take his chances at a subway station where searches were being conducted and still avoid detection. The problem with this is obvious: "[A] terrorist wired up like a human computer might easily stroll into a train car just so long as he hits the interval right. But a grandma from Great Neck or a Wall Street lawyer from Roslyn could wind up getting the works from the cops."²⁴² Thus, the arbitrary nature of the searches and the fact that the searches are easily avoidable without sacrificing entry into the subway system means that terrorists are probably not deterred in any significant way.

²³⁷ *Id.* at 273–75.

²³⁸ *Id.* at 275.

²³⁹ Complaint, *supra* note 47, at 1–2.

²⁴⁰ *Id.* at 2.

²⁴¹ Paul Sperry, *It's the Age of Terror: What Would You Do?*, N.Y. TIMES, July 28, 2005, at A25.

²⁴² *The Limits of Safety: How Might Random Checks Stop an Intent Suicidal Jihadist?* NEWSDAY (New York), July 30, 2005, at A48.

B. *The Net Effect of the Search Policy Is to Inconvenience Subway Passengers*

Since the search policy in and of itself probably does not and will not deter potential terrorists, the overall effect of the searches is to inconvenience innocent subway passengers. With the subway system congested as it is, the searches have the potential to increase overcrowding and make commute times even longer, potentially decreasing worker productivity. At the least, the city may be wasting political capital on what is viewed by some as a futile policy that will undoubtedly raise the ire of a few subway passengers. Understandably, many commuters have voiced their displeasure. Troy Dowdy of Yonkers, New York had this to say about the searches: "This is a way for them to take away our liberty Tell everybody to read George Orwell's *1984* to figure out what's going on. . . . It gives the illusion that we are safe."²⁴³ David Brown, visiting in New York, stated that the searches "created more anxiety and paranoia than safety."²⁴⁴ Some subway riders seemed upset more because of the inconvenience factor than the intrusion into privacy rights. Andrew Morris, a New Yorker, explained how the searches would test the patience of commuters: "Sometimes you need to get to an appointment, you're running late and a cop stops you to delay you even further? That's going to create a mess."²⁴⁵

C. *The Search Policy Results in a Potentially Inefficient Allocation of Manpower*

Another problem with the search policy, not immediately obvious, is the potentially inefficient allocation of law enforcement personnel for conducting random subway searches. Neysa Pranger, campaign coordinator for the New York Public Interest Research Group Straphangers' Campaign, a subway riders' advocacy group, states that "the MTA and the NYPD could be doing better things with their time," and "[the random searches are] going to do very little to help deter an attack."²⁴⁶ Assuming the random subway searches are

²⁴³ Ainsley O'Connell & James Fanelli, *NYPD Begins Searching Bags of Transit Riders*, NEWSDAY (New York), July 22, 2005, available at <http://www.newsday.com/news/nationworld/world/nyc-secu0722,0,2113455.story>.

²⁴⁴ *Id.*

²⁴⁵ *Random Bag Searches Begin at N.Y. Subway*, BALTIMORE SUN, July 22, 2005, available at <http://www.baltimoresun.com/news/custom/attack/bal-te.newyork22jul22,1,7820993.story?coll=bal-attack-headlines>.

²⁴⁶ Sheryl McCarthy, *Let's Search for Other Ways to Make NY Safe*, NEWSDAY (New York), Aug. 7, 2005, at A29.

not acting as a meaningful deterrent, the NYPD officers may be devoting an excessive amount of time to an effort that may ultimately be fruitless. Rather than being stuck in the subways, these officers could be assigned to more valuable law enforcement tasks that would result in activities more likely to have an effect on crime control or other law enforcement purposes. Thus, reallocation of police officers could result in a better use of taxpayer money. Due to budgetary constraints, the inefficient use of taxpayer funds is a major cause for concern because it could conceivably preclude implementation of better anti-terrorism measures.

V. POSSIBLE CHANGES

A. *Changes Within the Search Policy*

The goal of any modification to the NYPD's random search policy should be to maximize security while minimizing inconvenience and intrusion into the privacy of subway riders. With this goal in mind, this Comment proposes potential changes that would address some of the current policy's weaknesses.

The first change is the elimination of advance notice at subway stations that are conducting searches.²⁴⁷ This would remove the possibility that terrorists could avoid searches just by observing posted notices. Although a small step, eliminating advance notice is a step in the direction of making the search policy a more meaningful tool in the fight against terrorism. A problem that this modification presents is whether the search policy would remain constitutional after implementation. Although implementation of this change may weigh on the side of unreasonableness under the Fourth Amendment,²⁴⁸ it is unlikely to affect the constitutionality of the policy as a whole. This is because the right to refuse consent still permits terrorists, and everyone else, to avoid being searched by turning around and leaving the subway station.²⁴⁹

Another potential change is to conduct the searches on a much larger scale at any given time. Currently, anyone who wants to avoid being searched while still riding the subway can do so by simply finding an entrance where searches are not being conducted. By dramatically increasing the scale of the searches to extend to most, if not all, subway stations at any given time, the road to circumventing the

²⁴⁷ See *supra* text accompanying note 45.

²⁴⁸ See *supra* text accompanying notes 219–223.

²⁴⁹ See *supra* text accompanying note 44.

searches would be much narrower. This would cause the search policy to be a much more meaningful deterrent than it is now. However, feasibility is an issue with implementing such a change due to the extremely high costs involved. William W. Millar, president of the American Public Transportation Association, feels that conducting searches on a comprehensive scale is virtually impossible, and he states that “[i]f you were going to try to check a very high percentage at every station or on every train, it would be incredibly labor-intensive.”²⁵⁰

A very controversial change, but nonetheless one that has its fair share of supporters, is to allow some degree of racial profiling in the search selection process. It is common knowledge, or at least commonly believed, that young Muslim men were responsible for both the 9/11 attacks and the London bombings.²⁵¹ The politically correct approach is to agree with New York City Mayor Michael Bloomberg in declaring that it is impossible to predict what a terrorist looks like, but not everyone agrees.²⁵² If terrorists are most likely to be Muslim men of Arab or South Asian descent, then it seems logical to take a closer look at individuals who fit that description.²⁵³ Although critics of racial profiling say it is prejudicial,²⁵⁴ if done properly, it is possible that racial profiling would subject relatively few young men of Arab or South Asian descent to searches.²⁵⁵ The key to proper racial profiling is to be as specific as possible with profile descriptions.²⁵⁶ A well-designed system of racial profiling would also consider suspicious behavior, in addition to the traditional profile elements.²⁵⁷ Given the sensitivity and controversy surrounding racial profiling, it would behoove police officers to profile politely and respectfully.²⁵⁸ Politicians and government officials must be careful in how they advocate racial

²⁵⁰ Chan & Fahim, *supra* note 40, at A1.

²⁵¹ Sperry, *supra* note 241, at A25.

²⁵² Fred Lucas, *The Right Way to Profile in NYC*, FRONTPAGEMAGAZINE.COM, Aug. 17, 2005, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=19163>. In New York, state assemblyman Dov Hikind, a Brooklyn Democrat, supports the use of racial profiling for bag searches. *Id.*

²⁵³ See Sperry, *supra* note 241, at A25.

²⁵⁴ *Id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.* Profile descriptions may include national origin, gender, and age, among other characteristics. See Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, 33 NAT'L J. 3406, 3406 (2001), available at <http://www.nationaljournal.com/members/buzz/2001/openingargument/110501.htm>.

²⁵⁷ Taylor, *supra* note 256, at 3406.

²⁵⁸ *Id.*

profiling so as not to unnecessarily arouse animosity towards the government in targeted segments of the population. Since there is evidence that suggests many Arab-Americans would actually support additional scrutiny of people with Middle Eastern features or accents,²⁵⁹ the government can build upon this good will. Another way to offset potential charges of prejudice is to search at least one person not of Arab or South Asian descent for every person of Arab or South Asian descent searched.²⁶⁰ Finally, it is important to remember that, despite the potential utility of racial profiling, the advantage of profiling is severely limited if terrorists respond by simply changing their “profile.”²⁶¹ In fact, there are reports that Islamic terrorists have already started to recruit Europeans to fool profilers.²⁶²

Even if city officials agreed that racial profiling is desirable in random bag searches, there are some serious obstacles to overcome in implementing it. Obviously, law enforcement officials must be very careful with racial profiling because of the potential for intentional abuse and even innocent mistakes. For example, during July of 2005, an innocent Brazilian man, who apparently looked Asian,²⁶³ was shot and killed by British police who believed he was involved with the London bombings.²⁶⁴ The potential for abuse and mistakes with racial profiling, however, should not cause city authorities to quickly dismiss the idea. With the appropriate measures, abuse and human error may be sufficiently minimized so that society would be willing to accept the risks of racial profiling in exchange for the benefits. The hard part is to develop and implement such measures. One possible method for effectuating proper racial profiling is to train police officers to detect Muslim terrorists, not simply a Muslim person. This would likely require coordinating the efforts of terrorism experts and high-level federal or state officials to equip police officers with the requisite knowledge to profile based on race. High-level officials

²⁵⁹ *Id.* The author cited a poll of 527 local Arab-Americans by the Detroit Free Press, which revealed that sixty-one percent of Arab-Americans supported extra scrutiny of people with Middle Eastern features or accents. *Id.*

²⁶⁰ *Id.*

²⁶¹ See Clarence Page, Editorial, *Only Smart Profiling Makes Sense*, BALT. SUN, Aug. 23, 2005, at 11A.

²⁶² *Id.*

²⁶³ BBC News, *I Saw Tube Man Shot—Eyewitness*, <http://news.bbc.co.uk/1/hi/uk/4706913.stm> (last visited Nov. 4, 2006). An eyewitness was quoted as saying the man was Asian. *Id.* It is possible that the police initially became suspicious of the victim because they too believed he was Asian, or more specifically South Asian, which in turn could have led to the belief that he looked like a terrorist. *Id.*

²⁶⁴ BBC News, *Shot Man Not Connected to Bombing*, http://news.bbc.co.uk/2/hi/uk_news/4711021.stm (last visited Nov. 4, 2006).

would share specific and credible intelligence that would describe in detail the appearances of actual individuals suspected of being terrorists. Terrorism experts would train officers with respect to protocol in certain situations—how to approach the suspect, how to maintain public safety, etc. The challenges in implementing such a program include cost and overcoming political unpopularity.

Another obstacle in implementing racial profiling is the issue of doing so while retaining the constitutionality of the search policy. With respect to the Fourth Amendment, the central requirement remains reasonableness.²⁶⁵ In light of this standard, proper racial profiling as described above is likely to withstand constitutional challenges. Racial profiling would further a compelling governmental interest (detering terrorist attacks in the New York City subway system)²⁶⁶ with a minimal invasion of privacy (individuals would be searched only if their profiles closely matched specific and credible profiles of known suspects).²⁶⁷ Considering the totality of the circumstances²⁶⁸—we live with the constant and real threat of terrorism—proper racial profiling seems reasonable. Furthermore, if searches and seizures based on racial profiling are valid in the Fourth Amendment context, then the fact that a given police officer is also subjectively motivated by racial considerations by itself does not invalidate the search or seizure.²⁶⁹ Even if racial profiling is valid under the Fourth Amendment, it must still withstand challenge under the Equal Protection Clause of the Fourteenth Amendment.²⁷⁰ Since racial profiling can be classified as an explicitly racial policy, it is subject to strict scrutiny review by the courts.²⁷¹ Therefore, to pass constitutional challenge, the racial pro-

²⁶⁵ See, e.g., *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

²⁶⁶ See *MacWade I*, No. 05 Civ. 6921, 2005 WL 3338573, at *17–*18 (S.D.N.Y. Dec. 7, 2005); see *supra* text accompanying note 215.

²⁶⁷ See *supra* note 256 and accompanying text; see generally *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448–49 (1990) (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)) (explaining three-pronged test that balances governmental interest, extent to which seizure advances that interest, and individual privacy interest); *supra* note 140 and accompanying text.

²⁶⁸ See *United States v. Drayton*, 536 U.S. 194, 201 (2002); *supra* note 88 and accompanying text.

²⁶⁹ See, e.g., *Bond v. United States*, 529 U.S. 334, 339 n.2 (2000) (“The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment.”).

²⁷⁰ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause.”).

²⁷¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

filing policy must be narrowly tailored to advance a compelling governmental interest.²⁷²

As discussed above, the governmental interest is clearly compelling. The question is whether the policy of racial profiling, as described above, is narrowly tailored to further that interest.²⁷³ It seems that a strong case could be made that it is.²⁷⁴ Assuming that it is possible, based on physical appearance, to categorize suspected terrorists within a reasonably narrow range, the government would have in its arsenal a very powerful weapon for fighting terrorism. The ability to pinpoint terrorists with a reasonable degree of accuracy would allow the government to focus its efforts and resources in a manner that would significantly increase the likelihood of preventing and deterring terrorism. There does not seem to be another comparable alternative so easily available to the government. Given the potential effectiveness of racial profiling and the ease with which racial profiling can be implemented, it is reasonable to consider at least the possibility that a wisely designed policy of racial profiling is a narrowly tailored means to further the end of deterring terrorism.

A final proposal of modification to the current search policy is expanding the search to cover the persons of passengers. This makes sense because terrorists do not only carry explosives in bags and containers, but also attach bombs to their bodies. Consider the frequency of suicide bombings in the Middle East where the attackers strap explosives to themselves, hiding them from public view with a coat or baggy clothing. While this modification would probably enhance deterrence, it may very well be unconstitutional. Searching the actual person takes the intrusion into privacy up a notch from looking at the contents of a bag.²⁷⁵ Passengers have higher subjective ex-

²⁷² *Id.* (“[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

²⁷³ See *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (explaining the strict scrutiny test as one that “ensures that the means chosen ‘fit’ [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype”).

²⁷⁴ See Taylor, *supra* note 256, at 3406

We have no good alternative [to racial profiling]. For the foreseeable future, the shortage of high-tech bomb-detection machines and the long delays required to search luggage by hand will make it impossible to effectively screen more than a small percentage of . . . bags. The only real protection is to make national origin a key factor in choosing those bags.

²⁷⁵ See *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). In *Flores-Montano*, the Court explained that “highly intrusive searches of the person,” which implicate the “dignity and privacy interests of the person being searched,” require a higher level of suspicion than routine searches. *Id.* In holding that suspicionless

pectations of privacy when it comes to searches of their persons.²⁷⁶ Moreover, based on society's reliance on subways as a quicker and less-expensive commuting alternative to driving, an objective expectation of privacy exists as well.²⁷⁷ While the justification for the intrusion—preventing and deterring terrorism—is entitled to serious weight, the manner of conducting it—physically touching the person and looking beyond what is observable on the surface—seems problematic.²⁷⁸ Furthermore, such searches would be more time consuming, resulting in greater inconvenience to subway passengers.

B. Changes to Supplement the Search Policy

Supplementing the random search policy with additional anti-terrorism measures would probably be the most effective way to combat terrorism. Such measures include the use of explosives-detection technology, the use of bomb-sniffing dogs, the use of video surveillance, and better intelligence gathering and analysis. Of course, all of these additional measures must survive constitutional scrutiny.

Explosives-detection technology, such as detection of trace amounts of chemicals commonly used in bombs,²⁷⁹ are actually less invasive than hands-on bag checks and thus seem likely to be held constitutional. Since this technology eliminates the need for patting down the passenger,²⁸⁰ it is “no more extensive or intensive than necessary, in light of current technology, to detect weapons or explo-

border searches include the authority to disassemble and assemble a vehicle's fuel tank, the Court declined to apply any “complex balancing tests to determine” whether a border search of a vehicle was “routine.” *Id.* Assuming that a border search of a vehicle meets the threshold for a “routine” search, it seems the NYPD's random bag searches also constitute “routine” searches, given the similarities between the two types of searches (e.g., interest in public safety, generalized as opposed to specific). *See supra* Parts III.B.2., III.C. (discussing governmental interests that justify suspicionless searches and undertaking constitutional analysis of NYPD's search policy, respectively).

²⁷⁶ *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (characterizing a pat-down search as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”).

²⁷⁷ *See supra* text accompanying note 77.

²⁷⁸ *See supra* text accompanying note 86.

²⁷⁹ Patrick McGeehan, *Explosives Detector at Newark Airport Is Expected to Reduce Pat-Down Searches*, N.Y. TIMES, July 27, 2005, at B4. The Transportation Security Administration has already installed a new type of explosives-detection machine known as trace portals at Newark Liberty International Airport. *Id.* The machine works by blowing a series of puffs of air at each person who steps inside it. *Id.* The air forces particles from the person onto the ground, where they are sucked into vents for chemical analysis. *Id.* If chemicals used in explosives are detected, the machine signals an alarm. *Id.*

²⁸⁰ *Id.*

sives.”²⁸¹ If the technology is limited to the purpose of explosives detection and passengers are given the option of avoiding the technology by choosing not to ride the subway, then such technology appears reasonable under the Fourth Amendment.²⁸²

The use of bomb-sniffing dogs has been considered by the Supreme Court of the United States and has been held to be constitutional due to the very limited nature of its invasion into personal privacy.²⁸³ In fact, because canine sniffs do not require any opening of bags, do not expose any personal items that would otherwise have remained hidden from public observation, and are necessarily limited to disclosing the presence or absence of contraband, the Supreme Court has held that they do not even constitute searches under the Fourth Amendment.²⁸⁴

Video surveillance, which would not differ substantially from the type used for security in office buildings, should be constitutional. Since the subway system is a public place, there is arguably no reasonable expectation of privacy.²⁸⁵ Indeed, “surveillance cameras have become commonplace in airports, highway tollbooths, parking garages, stores, malls, banks, ATMs, the Statue of Liberty and at the Golden Gate Bridge,”²⁸⁶ and are generally accepted by the public.

VI. CONCLUSION

The implementation of the NYPD’s random search policy raises the type of issue that will be at the forefront of legal debates and courtroom litigation in the years to come. While the tools of legal analysis will allow lawyers and judges to decide whether measures such as the NYPD’s random search policy are constitutional, that determination is only the first step in fighting terrorism. To truly be most effective in this new war of the modern age, members of the legal community, legislators, and politicians, along with ordinary citizens, will have to work together to battle an enemy that seeks to destroy the American way of life. The proposed changes discussed in this Comment provide a starting point for collaborative effort. Because the enemy is elusive and able to adapt to anti-terror measures,

²⁸¹ United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005); *see supra* text accompanying note 171.

²⁸² *See Marquez*, 410 F.3d at 616; *see supra* text accompanying note 171.

²⁸³ United States v. Place, 462 U.S. 696, 697–98 (1983).

²⁸⁴ *Id.* at 707.

²⁸⁵ *See* Peter T. Kilborn, *For Security, Tourists to Be on Other Side of Cameras*, N.Y. TIMES, Mar. 23, 2002, at A12.

²⁸⁶ *Id.*

the American people must not be narrow-minded in combating terrorism. A combination of measures—for example, random subway searches, new explosives-detection technology, and increased video surveillance—working in conjunction, will act as a better deterrence and prevention system than any measure used alone. Additionally, and somewhat paradoxically, considering the need for open-mindedness, highly controversial measures such as racial profiling may prove to be helpful in identifying and apprehending terrorists. Of course, all of these measures must be balanced against the risk of infringement upon individual liberties and rights, for if too much freedom is sacrificed for the sake of national security, the terrorists will have won anyway. Since this balance is so delicate, both pro-security advocates and pro-civil liberties advocates need to remember that each needs the other more than either may be willing to admit.