

Othello Error:¹ Facial Profiling, Privacy, and the Suppression of Dissent

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In this article, Professor Herbert challenges the U.S. Transportation Security Administration's post-September 11, 2001, use of Paul Ekman and Wallace Friesen's Facial Action Coding System (FACS) to identify potential terrorists in American airports. Professor Herbert asserts that invasive visual examination of travelers' faces and facial expressions for law enforcement purposes under the auspices of protective administrative searches ineffectively protects national and airport security and violates reasonable expectations of privacy. FACS improperly provides unreasonable governmental activity with a legitimizing scientific imprimatur that conceals governmental agents' race- and ethnicity-based prejudices, which leads to targeting minorities' faces as portents of danger. Professor Herbert assesses the concept of facial privacy in public, and in doing so, rejects the Supreme Court's Katz v. United States test and argues in support of constitutional protection of public privacy.

The face is not an envelope exterior to the person who speaks, thinks, or feels. The form of the signifier in language, even its units, would remain indeterminate if the potential listener did not use the face of the speaker to guide his or her choices.²

¹ The phrase "Othello Error" was coined by Paul Ekman in his book, TELLING LIES (1985) [hereinafter LIES]. According to Ekman, "Othello Error" occurs when a suspicious observer discounts cues of truthfulness, given the observer's need to conform her observations to her suspicions, which are usually of deception. Essentially, Othello Error occurs "when the lie catcher fails to consider that a truthful person who is under stress may appear to be lying." *Id.* at 169–70. Ekman took the name from Shakespeare's play, "Othello," which provides an "excellent and famous example" of what can happen when fear and distress upon confrontation do not signal deception. There, upon confronting his wife, Desdemona, about her love for another, she cries and denies, all the while aware that her mien will be taken as evidence of guilt by her jealous husband. Seeing his wife's emotional distress, Othello ignores alternative, innocent explanations—like the possibility that she did not love another—and kills her, as his preconceptions biased his observation and, therefore, his judgments. *Id.* at 170–71. Given the topic of this Article and the discussion, *infra*, the terminology is exquisitely ironic.

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² GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 167 (1987).

I. INTRODUCTION

As a result of the September 11th attacks on the United States,³ Congress promulgated, and President George W. Bush signed, the Aviation and Transportation Security Act of 2001 [ATSA].⁴ Congress enacted ATSA specifically to improve American airport and airliner security.⁵ ATSA spawned the Transportation Security Administration [TSA], an independent agency whose main function is to ensure safety throughout U.S. airports.⁶ TSA sought to improve American airport and airliner safety against future terrorist attacks via screening passengers and their baggage.⁷ With the advent of ATSA and TSA, Congress and President Bush asserted federal control over American civil aviation security, making it a direct federal responsibility. ATSA requires TSA to detect and thwart would-be terrorists via passenger screening by training qualified employees and by placement of federal law enforcement officers at airport screening locations.

Despite specialized training of TSA personnel, safety problems have persisted.⁸ TSA screeners failed to detect weaponry, such as knives, box cutters,

³ See Civil Aviation Security Rules, 67 Fed. Reg. 8340-41 (Feb. 22, 2002). According to the legislative history:

The September 11, 2001, terrorist attacks involving four U.S. commercial aircraft that resulted in the tragic loss of human life at the World Trade Center, the Pentagon, and southwest Pennsylvania, demonstrate the need for increased air transportation security measures. The Al-Qaeda organization, which was responsible for the attacks, possesses a near global network. The leaders of the groups constituting this organization have publicly stated that they will attack the United States, its institutions, and its individual citizens. They retain a capability and willingness to conduct airline bombings, hijackings, and suicide attacks against U.S. targets: the December 22, 2001, attempted bombing of a U.S. carrier on a flight from Paris illustrates the continuing danger. Finally, it should be underscored that, although other potential threats to U.S. civil aviation may be overshadowed at present, they are no less important. For example, the uncertain course of the Middle East peace process, negative reactions to the U.S.-led military campaign in Afghanistan, and Iraqi opportunism in response to continued United Nations sanctions are among the developments that could give rise to attacks by groups or individuals not linked to the September 11 atrocities.

Civil Aviation Security Rules, 67 Fed. Reg. 8340 at 8340-41.

⁴ 49 U.S.C. §§ 44701-26 (2000); 49 U.S.C. § 44901 (*amended by* Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597).

⁵ See Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597.

⁶ 49 U.S.C. § 114 (Supp. 2001).

⁷ 49 U.S.C. § 44901(c)(2000); *see also* 49 C.F.R. §§ 1544.207, 1546.207 (2004).

⁸ See *Improving Prescreening of Aviation Passengers Against Terrorist and Other Watch Lists: Hearing Before the Subcomm. on Economic Security, Infrastructure Protection and Cybersecurity of the H. Comm. on Homeland Security*, 109th Cong. 12 (2005) (quoting Paul Rosenzweig, Senior Legal Research Fellow, Heritage Foundation) (“We have a CAPPS I system that uses behavioral rules that, as the chairman said in his opening, are fairly well known outside of TSA and thus fairly ineffective and fairly easy to avoid. And we have a no-fly list watch matching system that, as Mr. Anderson’s experience shows, is ineffective and catches the wrong people.”). See also

guns, and even a fake bomb in at least one airport.⁹ Individuals listed on “no-fly” lists slipped past TSA’s screeners and onto scheduled flights.¹⁰

In an effort to improve terrorist threat detection, TSA introduced Screening Passengers by Observation Technique [SPOT] at more than a dozen U.S. airports in June 2003.¹¹ SPOT has been characterized mostly as a behavior-pattern recognition system “rooted in the notion that people convey emotions” through subconscious gestures and facial expressions.¹² SPOT is not a facial recognition system (which would allow governmental officials to recognize identified criminals or known terrorists). SPOT is not technologically-based or automated. Instead, under SPOT, TSA Behavior Detection Officers [BDOs] stationed at airport security checkpoints employ “non-intrusive means of identifying potentially high-risk individuals”¹³ by observing travelers.¹⁴

Carl Hulse, *Lawmakers Criticize Bush’s Air Safety Efforts*, N.Y. TIMES, Aug. 9, 2003, at A7; Editorial, *TSA Has Lost Focus, Integrity*, DENVER POST, Apr. 25, 2005, at B7 (“One report disclosed that screeners continue to miss knives, guns and other prohibited items in checkpoint undercover tests. While screeners are diligent, the report said, they are not better than they were before the Sept. 11 attacks.”).

⁹ See Corey J. Adamson, Comment, *Changing of the Guard: A United Nations Security Council Decision on a Uniform Airport Security Standard for Member Nations*, 24 PENN. ST. INT’L L. REV. 661, 663–64 (2006) (citing examples of TSA screeners missing “24.8% of fake bombs,” finding, then losing one; missing numbers of knives, guns, and other weaponry—including box cutters, the very weapons used by the hijackers in the September 11 attacks).

¹⁰ See *id.* (citing TSA’s failure to prevent from boarding an aircraft and flying Yusuf Islam, nee Cat Stevens, who had been listed on a “no-fly” list).

¹¹ See Paul Ekman, *How to Spot a Terrorist on the Fly*, WASH. POST, Oct. 29, 2006, at B3 [hereinafter *On the Fly*]. Ekman and his colleague, Wallace V. Friesen, created a taxonomy of facial expressions, coming up with forty-three such movements, tagged “action units.” The action units for five muscles were then layered upon each other, allowing the creation of ten thousand facial expressions; only three thousand or so were deemed meaningful, leading to a catalogue of an essential repertoire of human facial expressions that display emotion. See also, Eric Lipton, *Faces, Too, Are Searched at U.S. Airports*, N.Y. TIMES, Aug. 17, 2006, available at <http://www.nytimes.com/2006/08/17/washington/17screeners.html>.

¹² Thomas Frank, *Experts: Suspects’ Body Language Can Blow Their Cover*, USA TODAY, Dec. 27, 2006, at A3.

¹³ “The program was developed and implemented to observe normal passenger characteristics and anxieties and identify anomalies to detect individuals who may be a threat to aviation and/or transportation security.” See *Aviation Security—Reviewing the Recommendations of the 9/11 Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 3–4 (2006) (statement of Kip Hawley, Assistant Secretary, Transportation Security Administration, U.S. Department of Homeland Security) (noting that extant technology cannot “provide a fully-automated approach, and even with extensive use of technology, we will always need the critical thinking skills of people to adapt to emerging threats”). Disturbingly (or not—it is a matter of perspective), at Boston’s Logan Airport—the origin of the planes that destroyed the World Trade Center—it seems that everyone who works at the airport is required to receive training in what is characterized as “behavior pattern recognition,” a method aimed toward detecting suspicious behavior that may divulge or cover terrorist plans. The training is, at best, uneven, in that it ranges from a one-hour course for local police, cab drivers, and bus drivers to three hours of training for the Massachusetts State Police. See *PBS Newshour: New Method for Identifying Suspicious Persons*

Although characterized as a behavior-pattern recognition system, the core of SPOT's claim to non-intrusiveness is the Facial Action Coding System [FACS], created and published in 1978 by Paul Ekman and Wallace Friesen.¹⁵ FACS, a 500-page tome that catalogues over ten thousand facial muscle combinations, is described as a "comprehensive, anatomically based system for measuring all visually discernible facial movement."¹⁶ FACS purports to standardize a method of analyzing facial behavior for deception cues.

Ekman and Friesen determined that humans share seven basic emotions.¹⁷ One of the seven is a positive emotion; the other six are negative.¹⁸ According to Ekman and Friesen, faces manifest each emotion similarly, irrespective of race, ethnicity, or gender. Ekman and Friesen also determined that notwithstanding purposeful or subconscious attempts to conceal, these emotions manage to appear as micro expressions, which last one-twenty-fifth to one-fifth of a second or less.¹⁹ Via SPOT's use of FACS, BDOs are trained to identify and score certain micro expressions of travelers, identified as revelatory regarding the identification of "high-risk" individuals.²⁰ A high (enough) score provides screening personnel reason to approach and interrogate, at a minimum. Within one to two years, TSA will be able to identify via surveillance cameras and FACS "anyone whose facial expressions are different from the previous two dozen people in line."²¹

SPOT has yet to nab a terrorist. It has, however, led to the arrests of suspected common criminals for drug smuggling, possession of false documents

Used at Some Airports, (PBS Television Broadcast, Sept. 27, 2006), available at http://www.pbs.org/newshour/bb/transportation/july-dec06/security_09-08.html.

¹⁴ See Jonathan Karp & Laura Meckler, *Which Travelers Have 'Hostile Intent'? Biometric Device May Have the Answer*, WALL ST. J., Aug. 14, 2006, at B1 (describing TSA's collaboration with the Israeli's Suspect Detection Systems Ltd. on technology to discern passengers with "'hostile intent'"); see also Sam Ser, *The Sabra Approach to Preventing a New 9/11*, JERUSALEM POST, Sept. 7, 2006, at 14.

¹⁵ See *On the Fly*, *supra* note 11. See also MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 201-05 (2005).

¹⁶ See Erika L. Rosenberg, *The Study Of Spontaneous Facial Expressions In Psychology*, in *WHAT THE FACE REVEALS: BASIC AND APPLIED STUDIES OF SPONTANEOUS EXPRESSION USING THE FACIAL ACTION CODING SYSTEM (FACS)* 13 (Paul Ekman & Erika L. Rosenberg eds., 2005) [hereinafter *FACE REVEALS*].

¹⁷ See PAUL EKMAN & WALLACE J. FRIESEN, *UNMASKING THE FACE: A GUIDE TO RECOGNIZING EMOTIONS FROM FACIAL EXPRESSIONS IX-X*, 1 (1975) (identifying anger, surprise, disgust, fear, sadness, happiness, and contempt as the basic seven) [hereinafter *UNMASKING THE FACE*].

¹⁸ *Id.*

¹⁹ See *id.* at 214.

²⁰ See Press Release, Transportation Security Administration, *TSA Expands Career Opportunities for Transportation Security Officers* (July 17, 2006), http://www.tsa.gov/press/releases/2006/press_release_0684.shtm.

²¹ See *On the Fly*, *supra* note 11.

and other crimes.²² Nevertheless, TSA plans to institute SPOT nationwide,²³ with over five hundred BDOs to be SPOT-trained by December 2008.²⁴ Trainees will undergo four days of classroom instruction on SPOT, behavior observation, and analysis, taught by a former criminal corrections officer who relies upon his experiences with the incarcerated.²⁵ Training also incorporates demeanor and deception items also culled from law enforcement experience. Trainees will also get twenty-four hours of on-the-job training inside an airport security checkpoint.

TSA praises SPOT for the ability to “detect people who are a danger.”²⁶ The agency touts SPOT’s ability to detect “someone who is contemplating a terrorist or criminal act.”²⁷ SPOT is also praised for being untainted by the scourge of racial profiling “because the program is based on human behavior, not [physical] attributes.”²⁸ According to TSA, airport security checkpoint screeners are trained to read and only look for troubling facial expressions universally found in humans

²² See, e.g., *Man Charged With Murder SPOTted at Minneapolis-St. Paul Airport*, Screening Passengers By Observation Techniques, Additional SPOT News & Information, http://www.tsa.gov/press/happenings/man_spotted.shtm (last visited Sept. 30, 2007) (hailing SPOT as an “antidote to profiling because referrals are solely based on the behavior of the passenger” after arrest of a Mexican male, who had been deported to Mexico in 2000 regarding a subsequently dismissed double-murder case); *BDOs SPOT More Than Just Opportunities at TSA*, Screening Passengers By Observation Techniques, Additional SPOT News & Information, April 2007, http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm (hailing use of SPOT in nabbing kidnapper with child victim in tow; kidnapper also possessed unlawfully large amounts of prescription medication, \$20,000 cash, and someone else’s passport); *Illegal Immigrants Again Put on the ‘SPOT’ at Dulles*, Screening Passengers By Observation Techniques, Additional SPOT News & Information, http://www.tsa.gov/press/happenings/iad_spot.shtm (last visited Sept. 30, 2007) (crediting SPOT with identifying five male illegal immigrants with suspicious behavior); *Newark TSOs Help Thwart Kidnapping*, Screening Passengers By Observation Techniques, Additional SPOT News & Information, May 2007, http://www.tsa.gov/press/happenings/newark_kidnapping.shtm (noting additional screening of a nineteen year old Indian woman that allowed the woman the opportunity to inform an agent of physical abuse at the hands of her father, who was also traveling and attempting to take her to India against her will).

²³ See Transportation Security Administration, *Where We Stand: TSA Trains Hard for New Threats*, http://www.tsa.gov/press/where_we_stand/training.shtm (last visited Sept. 30, 2007) (characterizing SPOT as using “behavior observation and analysis techniques to identify potentially high-risk passengers, individuals that exhibit suspicious behaviors, such as physical and psychological reactions, may be required to undergo additional screening”).

²⁴ *BDOs SPOT More Than Just Opportunities at TSA*, Screening Passengers By Observation Techniques, Additional SPOT News & Information, April 2007, http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm.

²⁵ *Id.*

²⁶ Zeke Minaya & Michael Hedges, *Airports Here Will Screen Behavior, Too*, THE HOUSTON CHRON., Aug. 18, 2006, at A1 (quoting TSA spokeswoman Andrea McCauley’s characterization of SPOT’s purpose).

²⁷ *Id.*

²⁸ Karp & Meckler, *supra* note 14 (quoting TSA chief Kip Hawley: “It may be the only thing I know of that favors the human solution instead of technology.”).

irrespective of racial or ethnic origin. According to TSA, face—not race or color—attracts agents' attention.

However, in the United States, race matters.²⁹ This is particularly true in the context of policing. Officer discretion while using criminal and drug-courier/smuggler profiles has long revealed (for those who were unaware) that police correlate minority status to criminality. Because of this police perception, people of color have been targeted and disproportionately subjected to intrusive investigative scrutiny so much that the term “racial profiling”³⁰ has become part of our national parlance. As a society, we now know that racial profiling by law enforcement happens when police single out members of racial minority groups and decide that these people are more likely to be involved in illegality. As a result, people of color disproportionately enter our criminal justice system via arrest and remain there via conviction.³¹ This “color/criminality correlation” has not been limited to “street-level” criminal investigation. It has occurred on the nation's highways³² and in its skies, where police profiles are often the starting point for airline security screeners' work.³³

²⁹ Much fine legal and other scholarship exists that covers this proposition quite well. A few include: RANDALL ROBINSON, *QUITTING AMERICA: THE DEPARTURE OF A BLACK MAN FROM HIS NATIVE LAND* (2004); GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002); BEVERLY TATUM, PH.D., “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?,” AND OTHER CONVERSATIONS ABOUT RACE (1997); TIM WISE, *WHITE LIKE ME: REFLECTION ON RACE FROM A PRIVILEGED SON* (2005); MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* (2006); and of course, CORNEL WEST, *RACE MATTERS* (1993).

³⁰ For the purposes of this Article, “racial profiling” will mean [t]he inappropriate use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation. The use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident. In evaluating whether or not to use race as part of a profile, law enforcement should utilize these guidelines: (a) how effective is such a strategy?; (b) what effect will this strategy have on community relations?; (c) will this strategy be perceived as violating basic civil rights?; (d) how many innocent people will be stopped as a result of the investigative strategy?; and (e) could an alternative race-neutral strategy be crafted to accomplish the law enforcement goal?

Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1205 (2003).

³¹ See *Race and Incarceration in the United States*, Human Rights Watch, Feb. 27, 2002, available at <http://www.hrw.org/backgrounders/usa/race/>.

³² See Ramirez et al, *supra* note 30, at 1198 (citing empirical data proving racial disparity in vehicular traffic stops by Maryland and New Jersey state police departments).

³³ See John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46, 46–47 (1999) (reporting Black women's experiences at the hands of U.S. Customs Service, which led to a class action lawsuit for racial profiling), cited in Devon Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 n.120 (2002); Mike Dorning, *Black Women Most Likely Targets of Airport Searches*, CHI. TRIB., Apr. 10, 2000, at A1 (describing U.S. General Accounting Office survey results which determined that Black women were more likely than all other airport travelers to be x-rayed and strip-searched).

Before September 11, 2001, in the context of national security, race has mattered. The early state and federal bigotry and racism against Asian Pacific Islanders is well-documented.³⁴ After Japan bombed Pearl Harbor, removal of Americans with Japanese ancestry from their American homes was found to be constitutionally permissible by the United States Supreme Court, because:

we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.³⁵

These citizens' disloyalty to the United States was never proven; their involvement in traitorous "sleeper cells" was merely alleged; they were forced to exist in internment camps, segregated from American society. This occurred despite the lack of evidence of even one act of sabotage.³⁶

³⁴ According to Victor M. Hwang:

Although the API community in the U.S. is very diverse, with dozens of distinct cultures and languages, it shares a common legacy of discrimination because it has often been viewed and treated as a single racial group. Again and again, the arrival of new groups of API immigrants to this country inspired fear and prejudice in the majority population. Anti-immigrant sentiment welled up in California and other western states, where many API people had come to meet the labor need for backbreaking work that white workers were unwilling to do. As each wave of API immigrants arrived—first the Chinese, then the Japanese and Koreans, South Asians, Filipinos and others—each faced discrimination and exclusion from the privileges of citizenship. The fear and perceived threat in California resulted in de jure and de facto discrimination against API people in the form of laws and policies banning them from marrying, becoming citizens, voting, testifying in court, owning land, attending schools, and enjoying many other basic rights granted to other Americans.

Victor M. Hwang, *Brief of Amici Curiae Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in Support of all Respondents in the Six Consolidated Marriage Cases, Lancy Woo and Christy Chung et al., Respondents, v. Bill Lockyer et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 ASIAN AM. L.J. 119 n.3 (2006). The sentiment of the day was not uncommonly expressed in the following hyperbole: "[w]ere the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of the amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth." *Id.* at 127 (quoting John F. Miller at the 1879 California Constitutional Convention).

³⁵ *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

³⁶ See COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT: PERSONAL JUSTICE DENIED, PART TWO: RECOMMENDATIONS 88–92 (1983).

After September 11, 2001, and in the context of American airports and national security, ethnicity may matter as much as race.³⁷ Since the start of the “War on Terror,” profiling claims have been leveled against law enforcement by Arabs, Muslims, and those perceived as members of those populations. These individuals now complain that they are also disproportionately singled out by police for traffic stops, harassment, discrimination, and airport searches, simply because police correlate terrorist acts and national security threats with these groups.³⁸

TSA’s use of SPOT—under the auspices of protecting national security in a post-September 11 nation—will unfairly punish political dissent by travelers, not thwart terror. SPOT provides the government with unfettered discretion to select and investigate certain individuals. If public sentiment³⁹ and history⁴⁰ are our guides, SPOT is destined to disproportionately target race, ethnicity, and color, not to detect terrorist activity.⁴¹ A former criminal corrections officer who relies upon his experiences with the incarcerated—populations that disproportionately consist of people of color⁴²—provides instruction to hundreds of SPOT-trained BDOs.⁴³

Accordingly, this Article asserts that use of SPOT in American airports by governmental officials violates travelers’ Fourth Amendment right to be free of unreasonable governmental searches and seizures. In asserting this claim, this Article rejects the “search” standard set forth in *Katz v. United States*,⁴⁴ arguing that probing visual examination and investigation of travelers’ faces and their expressions by governmental officials, even in public locations (including airports, where travelers are wrongly said to have waived or assumed the risk of losing their Fourth Amendment protections), constitutes a violation of the Fourth Amendment right to be let alone and its prohibition against unreasonable searches and seizures.

³⁷ See, e.g., Ramirez et al., *supra* note 30, at 1200–01.

³⁸ See COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CENTER, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2002: STEREOTYPES AND CIVIL LIBERTIES 9 (2002), <http://www.cair.com/CivilRights/CivilRightsReports/2002Report.aspx>.

³⁹ See, e.g., Ramirez et al., *supra* note 30, at 1195 (noting after September 11, 2001, public sentiment suddenly approved of racial profiling that singled out Arab-Americans or those perceived as such).

⁴⁰ See *Korematsu*, 323 U.S. at 218 (affirming Japanese ancestry as a basis for excluding individuals from their West Coast American homes permissible exercise of military discretion, given such exclusion from a “threatened area” was closely related to “the prevention of espionage and sabotage”).

⁴¹ See, e.g., Ramirez et al., *supra* note 30, at 1197–98 (noting criminal and drug courier profiles during the War Against Drugs were reduced to racial profiling).

⁴² See U.S. Department of Justice Bureau of Prisons Statistics, “Inmate Breakdown,” <http://www.bop.gov/news/quick.jsp#2> (last visited June 22, 2007).

⁴³ *BDOs SPOT More Than Just Opportunities at TSA*, April 2007 http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm. The officer, Tony Mills, asserts that his experience as a corrections officer “helped . . . develop a sense of when someone was attempting to be deceptive.”

⁴⁴ 389 U.S. 347 (1967).

Specifically, under SPOT, governmental agents in American airports will overreact to travelers' facial expressions by using FACS to inappropriately characterize disagreeable ones as criminally suspicious.

This Article further discusses the increased likelihood that disfavored facial expressions will be disproportionately found in minority travelers' faces, particularly those minority travelers whose facial expressions signal disdain and dissent toward security screeners who inappropriately facially profile under the cover of law. This Article argues that SPOT—which “can be used as a virtual script for the abusive officer . . . [in that it] gives a ready-made list of elements that can be claimed as reasonable suspicion”⁴⁵—coupled with the supposedly unbiased, but significantly limited, research methodology of FACS, along with agents' unconscious prejudices and racial biases, converge upon and target minority travelers. This targeting violates Fourth Amendment reasonableness, given that agents' prejudices, not evidence of terrorist threat, serve as a proxy for Fourth Amendment reasonableness. FACS, via SPOT, serves only to conceal investigatory seizures based not upon a terrorist threat, but faces that, inadvertently, terrorize.⁴⁶

Part II of this Article provides an introduction to FACS—a somewhat incomplete and rather dated facial expression coding system—and gives some indication of how FACS may be out of its league, given the coding system's origins as well as its current (mis)use in post-September 11 American airports. Part II explains in more detail why this is so and how FACS can be so poorly suited for the job of identifying terrorist suspects. Specifically, FACS is quite vulnerable to coder and contextual vicissitudes, making FACS unreliable. To the extent errors are made, there is no system for error detection, correction, or review. This is quite troubling, given the stubborn, often unconscious, stigma against racial and ethnic minorities in this country, much of it activated by a mere glance at a person's facial features. These biases have a profound impact on who is regarded as potentially dangerous by law enforcement agents, judges, airport screeners, and run-of-the-mill citizens. Given this reality, allowing the government to target

⁴⁵ Thomas Frank, *Experts: Suspects' Body Language Can Blow Their Cover*, USA TODAY, Dec. 28, 2005, at A3 (quoting Jonathan Turley, George Washington University law professor).

⁴⁶ This is particularly true, given the importance of screener training. Evidence has shown that where potential law enforcement agents are trained with images of racial or ethnic minorities cast as the “bad guy,” such training increases these agents' use of force against members of minorities, particularly in a situation perceived as life-or-death. See Cynthia Lee, *But I Thought He Had a Gun: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POV. L.J. 1, 6 (2004) (suggesting that disparities in police use of force that disfavor minorities result because, subconsciously, minorities “appear to be more threatening to the officer” and that subconscious threats influence officers' decisions to use force, even if it is deadly). Cf. Sean Gardiner, *Gangbanger as “Terrorist,”* THE VILLAGE VOICE, June 27, 2007 (quoting New York Homeland Security Official's characterization of post-September 11 Anti-Terrorism Act of 2001's use against “a diminutive Bronx gangbanger” as an “unanticipated application,” given that the accused, Edgar “Puebla” Morales had no connection with international or domestic terrorism, but was accused of murder, gun possession, and assault in connection with a “small time” rival gang dispute).

travelers of color via FACS is tantamount to racial and ethnic profiling. Travelers who are subjected to such treatment are seldom happy about it; they are, in fact, often disgusted about this biased governmental conduct, and their fear of such abuse may itself provoke facial “micro expressions” that FACS users will interpret as signs of dangerousness. Unfortunately, as detailed in Part III, there is, under current case law, no privacy in one’s face at an airport because of its exposure to the public. However, in Part III, the Article also rejects the Court’s failure to recognize “public privacy,” i.e., a right to privacy in public, and explains how even a limited concept of public privacy is not only reasonable, but necessary. The Article concludes with Part IV and the recommendation that use of FACS in American airports cease.

II. THE FALLACY OF ACCURACY

SPOT’s justification for intruding upon privacy is that it catches terrorists. There are no empirical studies to prove that it does. Moreover, even if this is true, the accuracy rate is too low to justify the intrusions it imposes upon personal liberty. Its (in)accuracy turns on these factors: (1) it relies upon an identification system not designed to catch terrorists nor shown to be accurate outside laboratory settings and upon administrators whose accuracy in implementing the system is not routinely calibrated or cross-checked for accuracy, but who are instead given excessive, non-reviewable discretion that allows for the free play of subconscious biases, and (2) subconscious racial biases are particularly likely to skew results because FACS permits the racial profiling so soundly condemned in other areas.

A. “Face-ing” FACS’s Origins

Ekman’s study of emotions to evaluate truthfulness or deception was not his idea. Rather, it originated in his class of psychiatric trainees, who wanted to use his facial expressions research to “see the true emotion beneath a false mask” of hospitalized psychiatric patients.⁴⁷ Ekman had been, for the immediate year prior, filming admission and discharge interviews with psychiatric inpatients. He began his research with a film of “Mary,” a forty-year old who had attempted suicide and who had lied about her emotions, smiled, and spoken cheerily in order to get a weekend pass with the hidden goal of killing herself. Ekman and Friesen examined Mary’s tape repeatedly and at varying speeds to measure her facial expressions frame by frame to locate evidence of her deception. It was in this footage that Ekman and Friesen recognized “micro expressions,” incredibly fast facial movements which lasted one-twenty-fifth to one-fifth of a second. The researchers learned that micro expressions produced nonverbal leakage that made apparent Mary’s true feelings.⁴⁸ What Ekman and Friesen discovered was that

⁴⁷ PAUL EKMAN, EMOTIONS REVEALED 213 (2007) [hereinafter EMOTIONS].

⁴⁸ *Id.*

almost automatically, and sometimes unexpectedly, emotions activate muscle actions in the face. If a person experiencing emotion seeks to suppress it, she usually is able to do so only after one-twenty-fifth of a second and after the emotion begins to appear. Observers who blink or are distracted will fail to see it.⁴⁹

As it turned out, two other psychologists had discovered micro expressions several years earlier and believed at the time that micro expressions were invisible in real time and the result of repressed emotion. Ekman and Friesen discovered that micro expressions can be seen in real time, but only if the observer knew what to look for while reading the face. They continued researching the phenomenon, amassing a body of work, and ultimately concluding that micro expressions appear when humans: (1) attempt to conceal an emotion or (2) repress an emotion (meaning that there is no awareness of the emotion or its repression).⁵⁰

According to Ekman, facial expressions are full, subtle, and combined. Full expressions are evident across the entire face. Subtle facial expressions may be partial, slight, and micro. Slight expressions involve little muscle contraction and are subtle. Emotions that are not intense or that may be intense but are just beginning to show on the face manifest as slight expressions. Weak or diminished emotions register as slight facial expressions. Failed attempts to conceal an emotion also manifest as slight facial expressions. Partial expressions are evident in one area—but not across the entire face. When people are attempting to regulate their emotions to diminish their signs, slight or partial expressions may also manifest. However, failed attempts to erase any sign of the emotion at all may result in a micro expression. Micro expressions are the most briefly displayed expressions upon the face. The hardest faces to recognize and code properly are those which combine all three subtle expressions.⁵¹

FACS was created as a face-based system for reliably recording visually distinguishable facial movements. Specifically, FACS distinguishes forty face-based “action units”—visible muscle movement at four levels of intensity: non-active, occurs slightly, occurs with a medium intensity, and occurs at maximum intensity, yielding 160 possible analysis items for scientists who code behavior, either as captured on photographs or film (when viewing film footage, precise coding requires analyzing twenty-five frames per second (so one minute involves 480,000 items)). Knowing if an action unit is active is as important as knowing that it is not.⁵² Head positions, blinks, gazing toward a partner, and audible laughter also receive FACS codes. Researchers who employ FACS begin their analysis by recording the *initial* state of the face to be observed and then record

⁴⁹ See ALDERT VRIJ, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE 40 (2000). See also EMOTIONS, *supra* note 47, at 216.

⁵⁰ See EMOTIONS, *supra* note 47, at 215.

⁵¹ See *id.* at 261–62.

⁵² See Michael Heller & Veronique Haynal, *Perspectives for Studies of Psychopathology and Psychotherapy*, in FACE REVEALS, *supra* note 16, at 506–07.

what changes occur and when.⁵³ The interpretation of data occurs later and independent of the recording.⁵⁴

1. The Laboratory Research

FACS is considered by a number of researchers as both seminal and the most comprehensive method of coding facial displays to date.⁵⁵ Ekman, now a professor emeritus of psychology at the University of California at San Francisco and pro bono advisor to TSA,⁵⁶ asserts that via FACS training, detecting micro expressions can be learned. But mastering FACS takes weeks.⁵⁷ It is “inherently laborious,”⁵⁸ and expensive, and requires “thorough training,” given that facial expressions are not reducible to simplistic formulas,⁵⁹ and over time “coding criteria may drift” (coders change their criteria over time)⁶⁰ or even “decay” (coders become less consistent). Only after extensive training and education can observers achieve “acceptable levels of interobserver reliability in coding facial displays.”⁶¹ Even with the training, human ability to accurately detect truth or lies—even when highly trained to do so—remains close to chance.⁶² Ekman, who can only detect deception via FACS with seventy-six percent accuracy,⁶³ acknowledges that deception detection in facial expressions is not foolproof.⁶⁴ FACS may provide observers a means by which to identify facial action units;⁶⁵

⁵³ See *id.* at 507.

⁵⁴ See Eva Banninger-Huber, *Prototypical Affective Microsequences in Psychotherapeutic Interaction*, in FACE REVEALS, *supra* note 16, at 514.

⁵⁵ See Paul Ekman et. al., *Smiles When Lying*, in FACE REVEALS, *supra* note 16, at 205.

⁵⁶ *On the Fly*, *supra* note 11.

⁵⁷ GLADWELL, *supra* note 15, at 205.

⁵⁸ See M. Brewster Smith, Foreword, in FACE REVEALS, *supra* note 16, at vi.

⁵⁹ See *id.*

⁶⁰ See Jeffrey F. Cohn et al., *Automated Face Analysis by Feature Point Tracking Has High Concurrent Validity With Manual FACS Coding*, in FACE REVEALS *supra* note 16, at 371, 372. “Drift,” also referred to as “rater drift,” occurs when observers “unintentionally redefine criteria and standards over time or across a series of ratings.” THE EVALUATION CENTER, WESTERN MICHIGAN UNIVERSITY, LIST OF EVALUATION GLOSSARY TERMS, <http://ec.wmich.edu/g.htf?trm=rater%20drift> (last visited July 27, 2007).

⁶¹ See Cohn et al., *supra* note 60, at 372.

⁶² See VRIJ, *supra* note 49, at 75 (noting professionals’ ability to accurately detect lies “mostly fall[s] in the range 45–60%, when an accuracy rate of 50% is expected by chance alone”).

⁶³ Jeffrey Kluger & Coco Masters, *How to Spot a Liar*, TIME, Aug. 28, 2006, at 46, 47, available at <http://www.time.com/time/printout/0,8816,1229109,00.html>.

⁶⁴ See EMOTIONS, *supra* note 47, at 224 (suggesting that “[s]ometimes detecting a lie has nothing to do with the liar’s demeanor”).

⁶⁵ See Paul Ekman, *What We Have Learned by Measuring Facial Behavior*, in FACE REVEALS, *supra* note 16, at 616 (explaining the necessity of observers reassembling facial action units after the units combined or overlapped for proper analysis of the configurations under FACS).

however, observer differences in coding skill or scoring methodology may have an impact on interpreting or translating FACS.⁶⁶

The role of the observer and his or her inferences cannot be underestimated. Although “[t]he main advantage of FACS is the possibility to measure facial behavior objectively,”⁶⁷ subjective measurement is absolutely possible. Even if the facial behavior has been coded objectively, it is crucial that *interpretation* also occur objectively—not through an observers’ subjectively inferential judgments about what emotion is present upon a scrutinized face. Additionally, even if one is trained and capable of detecting micro expressions, no amount of training will provide an observer with knowledge or understanding of the micro expression’s source. FACS is no magical genie-in-a-bottle⁶⁸ or “as simple as a Pinocchio phenomenon.”⁶⁹ People differ in their experiences and processing of emotions: the quickness with which the emotion arises, the intensity or duration of the emotion at its height, and how long the emotion will take to return to its baseline levels.⁷⁰ Such differences may matter when reading people via FACS, particularly when one considers that even differences in personality may affect the reliability and validity of polygraph results.⁷¹ Accordingly, FACS seems somewhat limited by individual differences in humans’ physical processing of emotions.

As such, FACS advocates have been criticized for venerating the veracity and reliability of the coding system.⁷² Given the utter complexity and seemingly

⁶⁶ See *id.* at 616–17 (critiquing one study based upon the observer’s failure to reassemble facial action units after the units combined or overlapped).

⁶⁷ See Eva Banninger-Huber, *From PAMS to TRAPS: Investigating Guilt Feelings with FACS*, in *FACE REVEALS*, *supra* note 16, at 529–30.

⁶⁸ See Smith, *supra* note 58, at vi.

⁶⁹ This comment comes from Mark Frank, who helped Ekman devise the FACS catalogue. See Kluger & Masters, *supra* note 63, at 47 (illustrating that the fictional puppet/boy, Pinocchio, possessed a nose that visibly grew longer whenever he told a lie).

⁷⁰ See Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511, 517. For example, those familiar with the accuracy of deception detection via polygraph examination understand that differences in human biological functioning may affect the accuracy of the data and, therefore, reading. See *VRII*, *supra* note 49, at 173, 199–200, 202–04 (noting the ineffectiveness of polygraph deception detection in the face of e.g., innocents’ fear of false accusations, countermeasures, i.e., examinees’ purposeful attempts to increase their physiological reactions during the examination to increase the likelihood of a finding of non-deception and deception without physiological indicia of arousal, as is often exhibited by psychopaths). In fact, these differences matter so significantly in the usefulness of the test results, that some experts denounce substantive use of even these machines which—unlike human detectors—have been calibrated to the individual tested. See Dan Eggen & Shankar Vedantam, *Polygraph Results Often in Question*, *THE WASH. POST*, May 1, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/30/AR2006043001006.html> (citing “comprehensive” 2002 federal study of “federal panel of distinguished scientists” who discounted polygraph’s accuracy).

⁷¹ *VRII*, *supra* note 49, at 216.

⁷² See Beth Azar, *What’s in a Face?*, 31 *MONITOR ON PSYCHOL.* 1 (2000), available at <http://www.apa.org/monitor/jan00/sc1.html> (noting criticism leveled against Ekman’s linkage of

infinite variety of total human emotional expressions, these critics note that expressions covered by FACS may represent merely the tip of an iceberg of the “total repertoire used by a person during his daily life.”⁷³ In short: FACS is not necessarily comprehensive. Researchers confess that when using FACS, they are limited to coding only the facial expressions and muscle movements recognized by FACS. However, non-FACS muscle movements and facial expressions remain, yet are unrecorded, as the researchers are limited to coding only what FACS recognizes, not every movement that occurred. A dearth of empirical information regarding certain, potentially determinative, nonverbal phenomena results.⁷⁴

Moreover, despite the ability of trained observers to detect micro expressions, once detected, the micro expression does not itself describe or reveal whether it is the result of a repressed or concealed emotion. After detection, then, how does one go about determining whether one saw a micro expression or some other facial phenomenon? The distinction may matter, given the difficulty both in distinguishing the phenomena and reliably identifying and accounting for

facial expressions to basic emotions and communicativeness of internal states). Critics, such as Azar, who reject Ekman’s use of facial expressions as the “‘gold standard’ of emotion” range from those who believe that there is no relationship between the two—that facial expressions possess no inherent meaning about mental states—to those who accept that there is some link, i.e., facial expressions may provide some information about a person’s emotions, to a linkage of social intent conveyed via facial expressions in a variety of social situations, but without inner experience of the emotion the expression is supposed to represent. *See id.*

⁷³ *See* Heller & Haynal, *supra* note 52, at 507–08 (noting that “our own limits and our due respect for reliability prevents us from noting down some subtle facial expressions, which we nevertheless perceive as having a powerful impact.”).

⁷⁴ For example, when scientists attempt to define and describe facial expressions and particular sub-sequences that compose the expressions, they will develop what is known as a “process model of the affective regulation.” *See* Banninger-Huber, *supra* note 54, at 514. In developing these models, scientists endeavor to describe, interpret, and understand “the facial expressions with respect to their intrapsychic as well as their interactive meaning.” *Id.* at 515. Levels of the models of the affective regulation process must be contemplated—from high-level concepts to low-level concepts. Yet, “empirically proved operationalizations are not yet available for all connections between low- and high-level data,” particularly for those emotions “not considered to belong to the basic emotions,” such as those relevant to self-regulation. *Id.* at 516. “Operationalizing” is the process of defining operations of definitions and is a foundational step in the most basic scientific research methodology. In the realm of scientific research, concepts are defined solely through the operations by which we measure them. Thus, we measure distance in different ways: for example, measuring leagues, miles, light years. One must determine and define the measuring operations used, given measuring rods are used in one way while light years are used in another; the selected measurement is operationalizing that concept. So, if a social scientist wants to measure emotional deception, she has to operationalize the concept, as it cannot be measured directly, given that it is not only intangible, but capable of being measured in multiple ways. The scientist, then, might choose micro expression appearance while the person is reading from a script of lies versus a script of truths as a measure of emotional deception. Micro expressions do not provide the only possible evidence of emotional deception; vocal tone or pitch, eye movement, or lip-licking could also be selected. However, the selection of one methodology for the purpose of measuring the phenomenon to be observed is an operationalization. For further understanding of this concept, see, e.g., EARL BABBIE, *SURVEY RESEARCH METHODS* 375 (Wadsworth Publishing Co., 2d ed. 1990) (1973).

individual differences in facial expressions. These individual differences remain more determinative than the display of macro, micro, or even “squelched” expressions.⁷⁵ For example, one whose personality reacts to certain circumstances by creating the emotion of fear while still being truthful requires lie detectors to discount a sign of emotion that would, for different personalities, evidence deception.⁷⁶ Essentially, the question of “why” the facial phenomenon occurred remains. Answers may depend on one or more of the following.

Context: Because micro expressions do not identify their triggering source, attempts to make that determination “must be determined by the context in which it occurs, and often requires further questioning.”⁷⁷ The same micro expression in different contexts “might have very different significance.”⁷⁸ One way to ascertain context comes from the nature of the conversational exchange. However, to the extent that the micro expression is observed in the absence of conversation, the ability to ascertain the possible source of the micro expression is unavailable. In that situation, the observer is left to his or her own devices and understanding of what caused the emotion: repression, deception, or something else entirely? History of the relationship, too, may allow an observer to place the micro expression in context: “what has been the nature of previous contacts between the person being evaluated and the evaluator? And what does each expect and want their future relationship to be?” A speaker’s conversational turn can also provide context for the micro expression as well. Did the micro expression appear while listening or speaking? Finally, congruence also helps place the emotion in context. Congruence may be assessed by asking “whether the emotion shown in the micro expression fit or contradict[ed] the content of the person’s simultaneous speech, the sound of his or her voice, and his or her gestures and postures?” Essentially, congruence seems to detect whether or not the emotion fits with what is being said.⁷⁹

Deception Regarding . . . ? Deception, according to Ekman, is “a deliberate choice to mislead a target without giving any notification of the intent to do so.”⁸⁰ As deceivers sometimes are unsuccessful, i.e., they fail to mislead targets despite a clear intent to do so, Ekman’s understanding is incomplete and has been rejected by other scholars. One prefers to define deception as “a successful or unsuccessful

⁷⁵ See LIES, *supra* note 1, at 131–32. Recall that micro expressions constitute emotional leakage. “Squelched” expressions are those which not only last longer, but are incomplete. The squelched expression is an expression interrupted. On the other hand, the micro expression is a full, albeit incredibly quick, display of a leaked emotion.

⁷⁶ See LIES, *supra* note 1, at 175 (cautioning observers that they “must discount the sign of an emotion as a clue to deceit if the suspect’s personality would make the suspect likely to have such a feeling even if the suspect was being truthful”).

⁷⁷ EMOTIONS, *supra* note 47, at 215.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See VRII, *supra* note 49, at 6 (quoting Paul Ekman & Wallace V. Friesen, *Felt, False, and Miserable Smiles*, 6 J. NONVERBAL BEHAVIOR 238 (1982)).

deliberate attempt, without forewarning, to create in another a belief which the communicator considers to be untrue.”⁸¹ Given the ability to possibly detect deception via FACS, this more textured definition seems useful, particularly when one considers how an observed individual who does want to deceive by concealing her true feelings of, e.g., annoyance, may attempt not to manifest an accurate facial expression, but an “appropriate” one. Again, as FACS does not provide observers with the ability to discern the nature of the deception, the observed’s micro expression of annoyance may trigger more invasive governmental conduct when, in fact, she has no terrorist inclination or involvement. Discerning an emotion’s source may be achieved after additional inquiry of the traveler; however, her involuntary muscular movements—which she even attempted to suppress—at least at the outset may, per FACS, merit as much governmental intrusion as if she had waved a box cutter.⁸² The micro expression may be indicative of deception but it is not necessarily so. If airport security screeners are unaware of this possibility or uninterested in it, given their orientation toward the competitive enterprise of ferreting out crime, SPOT’s unjustified stop levels will more likely mirror those of police officers on America’s streets and highways.

Chatter: Even while paying attention to another’s face, one can miss a micro expression. This is true because micro expressions are often in competition with macro expressions for observer attention. Additionally, language, tone of voice, volume, gestures, hair movement, mouth anomalies, and other such competitors also may obfuscate what the micro expression is saying. Add to that environmental distractions, such as temperature, thought, surprise, ambient noise, and a host of other occurrences that command attention, and it becomes easy to see why micro expressions go undetected.⁸³

The Exceptional Liar: Social scientists are aware of three methodologies to detect human deceit: (1) non-verbal behavior analysis (as lying “does not necessarily require the use of words”⁸⁴), (2) speech content analysis, and (3) physiological response measurement.⁸⁵ All meet with varying degrees of success because of the liar’s expertise and comfort with lying. There are good liars, mediocre ones, and poor ones. Lie detectors work, when they do, because they indicate contradictions in the liar’s statements. Good liars do not manifest such contradictions. They exhibit fewer deception cues, their cues are subtle (making them difficult to detect), and unlike lesser-skilled individuals with intent to deceive, good liars have no cognitive difficulty telling falsehoods or creating false impressions. Good liars’ emotions do not give them away.⁸⁶ In fact, good liars do

⁸¹ See *id.* at 5–6 (providing others’ definitions of deception that differ from Ekman’s).

⁸² See *id.* at 29.

⁸³ See EMOTIONS, *supra* note 47, at 216.

⁸⁴ See VRIJ, *supra* note 49, at 6.

⁸⁵ See *id.* at 209–10.

⁸⁶ *Id.* at 212 (noting lesser-skilled liars differ in their emotions while lying versus truth-telling).

not experience any emotions when they lie. “[S]ome people don’t leak,”⁸⁷ meaning that they do not manifest micro expressions. Good liars are also careful about their communications, often saying things that are impossible to verify outside of significant and extensive investigation (impossible in, for example, an airport setting). Moreover, they know that concealing information is better than lying. Even faking memory loss is better than creating a fictional story or fact, given that the latter allows for contradiction or detection. But even when some substantive response is required, good liars are quick and original in their thinking, articulately providing “information” difficult to verify.⁸⁸

Observer Error: Liars, even exceptional ones, may exhibit micro expressions. It bears repeating: micro expressions are ephemeral—coming and going so quickly that they may be missed at the observer level. Additionally, observers may fail to notice unexpected deception cues, i.e., the cues are not those that lie detectors expect liars to show. So even when detectors see cues that certain individuals are, in fact, lying, the cues still “do not lead the lie detector to believe that the person is lying.”⁸⁹ Some detectors refuse to believe their lying eyes.⁹⁰

The Case of the Missing Micro Expression: Ekman notes the issues of “whether SPOT misses people whose behaviors are on its checklist; whether other behaviors should be included on the list; and whether additional training would increase observers’ accuracy—could all help to improve the program.”⁹¹ Essentially, micro expressions may also go missing because FACS fails to recognize them.⁹² Although humans have not changed regarding the basic skeletal and muscular foundation, FACS, as already mentioned, does not include every facial muscle movement or combination thereof in its scoring. Additionally, humans have managed to innovate in a number of realms that may have an impact on facial expressions, but are an unlikely part of the FACS compendium. So, for example, the proliferation of plastic surgery (where countless teens receive nose jobs as thirteenth or sixteenth birthday gifts and rites of passage) and other cosmetic treatments, such as Botox or Restylane facial injections, thwart, interfere with, or minimize facial muscle movements in ways unseen prior to 1978. Ekman revised a portion of his 1978 FACS catalogue in 2002, updating graphics and scoring;⁹³ he did not infuse his decades-old listing with the effects of these procedures upon the human face, facial muscle movements, and facial expressions. Given the effects of these quite new procedures on the human head, face, mouth, nose, eye, chin, neck, and even ear muscles, one would expect the treatments

⁸⁷ LIES, *supra* note 1, at 188.

⁸⁸ See VRIJ, *supra* note 49, at 210–11.

⁸⁹ *Id.* at 213 (emphasis added).

⁹⁰ See *id.* at 2 (noting “some lies go undetected because observers do not want to detect a lie”).

⁹¹ See *On the Fly*, *supra* note 11, at B3.

⁹² See Ekman, *supra* note 65, at 620–24.

⁹³ *Id.* at 624.

would have a radical effect upon every manner of facial presentation and appearance. Certainly, those who invest in the treatments not only expect, but require, that they do exactly that.⁹⁴

2. Non-reviewable Observer Discretion

Almost everyone correctly reads some overt facial expressions (“macro expressions”⁹⁵). Few people realize, however, when they read the expressions incorrectly and why. They also are unaware of how they routinely may make reading mistakes, even repeating the same ones. Though the FACS manual allows for an accuracy check, observers often do not realize—and therefore, can neither articulate nor proffer for outside scrutiny—the source of their incorrect impression, hunch, or intuition. Even when an observable emotion appears on the face, observers are often unaware of the emotion’s target.⁹⁶ Perhaps some trained observers can accurately ascertain their need for FACS correction or honing. Without such self-awareness, “trained” observers will never possess the ability to self-correct or even seek outside review.⁹⁷

Ekman determined that such feedback and correction are “essential elements” of the proper use of FACS.⁹⁸ His own research proved that observers’ use and employment of FACS improved as a result of “immediate feedback about whether they are correct in their judgment, repeated practice, and visually contrasting the expressions most often confused with each other.”⁹⁹

Although Ekman is quite positive about the capacity of FACS to do what it purports, he is quite aware of law enforcement officers’ likely inability to come to FACS “clean” or to benefit fully from it, particularly considering the influence of law enforcement officer training as well as “expertise” in detecting deception (as well as skepticism regarding an academic’s practical information).¹⁰⁰ Specifically, those in law enforcement or national security positions currently are either taught

⁹⁴ Carol Lewis, *Botox Cosmetic: A Look at Looking Good*, FDA Consumer, Office of Public Affairs, July-Aug. 2002, available at http://www.fda.gov/fdac/features/2002/402_botox.html (describing festive parties and joyful sharing among those who have undergone facial and other cosmetic surgery as well as non-surgical, invasive procedures to erase aging signs or other aesthetically displeasing concerns). Ekman concedes that those who inject such solutions to slow or hide facial aging “do[] so at the cost of making the face wooden, the person less animated and unemotional in appearance.” *EMOTIONS*, *supra* note 47, at 52 (citing such aesthetics as “recent use”).

⁹⁵ See *UNMASKING THE FACE*, *supra* note 17, at 15.

⁹⁶ See *EMOTIONS*, *supra* note 47, at 221–23.

⁹⁷ See *id.* at 226. Presently, there is no data on the endurance of FACS training on its SPOT trainees. A refresher course may or may not be necessary to maintain any improvements obtained by the initial training, as well as provide trainees with the feedback, practice, and comparison from trainers that is so crucial in Ekman’s own estimation. *Id.*

⁹⁸ See *id.* at 216.

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 225–26.

nothing about how to conduct an interview to detect deception or are taught based upon mistaken and debunked notions regarding “surefire clues” to spotting a liar.¹⁰¹ “Anyone who says there is an absolutely reliable signal that someone is lying is either misguided or a charlatan.”¹⁰² Nevertheless, these law enforcement personnel say they witness identifiable expressions or patterns of expressions—not subject to challenge, given the evanescence of many a facial expression—that have caused them to understand how liars lie and deception occurs.¹⁰³ Worse, when these professionals rely upon an unreliable clue or cue, they are rarely given feedback to let them know that they have made a mistake in judgment, or if they find out, it is usually so much later that they can no longer remember what it was that led them to make an incorrect judgment.¹⁰⁴

As lie detection’s advances have been glacial—polygraphs were introduced eighty-five years ago—and the threat of another September 11 looms large, FACS, via SPOT, certainly fills a detection void. It is not physically invasive (although it is intrusive, *see infra*), and it promises to detect accurately terrorist threats.

However, there is legitimate skepticism that airport personnel, TSA employees, or even police can successfully and correctly detect terrorists via SPOT.¹⁰⁵ There should be. Studies have shown that human ability to detect lies and truths is only slightly better than that predicted by a coin toss: 56.6 percent.¹⁰⁶ Some studies indicate even less ability, tracking accurate lie-detecting occurring only 44 percent of the time.¹⁰⁷ Certain elite and highly trained professionals acting under certain circumstances do somewhat better. Still, their results are also unremarkable. In fact, research indicates that “professional” lie-detectors, such as police officers, are more confident in their abilities to detect deception than non-professionals. However, increased confidence does not translate into increased accuracy.¹⁰⁸ This is particularly true with professionals who continue to rely upon discounted deception cues in their work.¹⁰⁹ Unfortunately, the majority of those

¹⁰¹ *See id.* at 224.

¹⁰² *Id.* at 224.

¹⁰³ *See id.* at 222–23 (citing example of Ekman’s “exonerating” a murder suspect whom the police believed was lying because he had evidenced “duping delight,” i.e., emotional signs during his interview that may have been mistaken for deception, but were, in fact, evidence of the suspect’s disdain and contempt for the police, particularly given no other signs suggesting that he was lying).

¹⁰⁴ *See id.* at 225.

¹⁰⁵ *See* Karp & Meckler, *supra* note 14, at B1 (quoting Gregory T. Nojeim, associate director of the American Civil Liberties Union: “[G]iving TSA screeners this kind of responsibility and discretion can result in their making decisions not based on solid criteria but on impermissible characteristics such as race.”).

¹⁰⁶ *See* VRIJ, *supra* note 49, at 75.

¹⁰⁷ *See id.* at 69.

¹⁰⁸ *See id.* at 217–18.

¹⁰⁹ *See id.* at 4 (citing law enforcement’s continued use and publication of discounted deception cues, such as placing a hand over the mouth, gaze aversion, and self-manipulation, even

who are trained in evaluating truthfulness are fed information and use tactics not based upon any legitimate science or empirical evidence. They even use training information that scientific studies have found to be just flat-out wrong.¹¹⁰ This continues despite errors and low accuracy rates.¹¹¹

Deception detection by law enforcement agents is somewhat tricky, even in the context of criminal investigations. Generally, it is disquieting to know that we make bad decisions, so much so, that we shun alternatives and silence—subconsciously or consciously—self-critical reasoning. Police, in particular, often have preconceived notions of suspects' guilt. This preconceived notion may not escape the accused and may influence his or her reaction to the detector. Additionally, preconceived notions of wrongdoing, even if not of guilt *per se*, could also have an influence on the administrator's methodology. Individuals may not trust the police for various reasons. The dynamic of distrust may queer the interaction, touching upon not deception, but "hot spots," loci that generate an abundance of reasons why, as evidenced by a micro expression, an emotion has been concealed.¹¹² It is as if law enforcement officers (and, by extension, society) are consumed by an "incredible hunger to have some test that separates truth from deception—in some sense, the science be damned."¹¹³

This hunger has kept vibrant even the heavily discredited polygraph test, despite even this "objective" detector's substantial numbers of mistakes. There, too, accuracy of the test itself can only be determined reliably by testing it with evaluators who have access to the same data and the results. Additionally, accuracy rates seem less accurate when independent evaluators of the same data read the evidence.¹¹⁴ Given the inaccuracy and unreliability of these test results, some experts continue to object to their use as substantive evidence in a court of law,¹¹⁵ as the machine as a screening tool has been "judged thoroughly unreliable" and its accuracy in detecting "actual or potential security violators from innocent

those "not identified as [deception cues] in the existing literature concerning the relationship between non-verbal behaviour and deception").

¹¹⁰ See, e.g., Margaret Talbot, *Duped: Can Brain Scans Uncover Lies?*, THE NEW YORKER, July 2, 2007, at 52 (discussing the oft-cited, much discredited training text used by law enforcement officers to this day); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986) (reinforcing the mythology of the "twitchy liar"). The latter authors have been relied upon for years by countless police departments.

¹¹¹ EMOTIONS, *supra* note 47, at 225. In one experiment, an independent laboratory trained people using the clues taught by one of the companies that currently trains police—in fact, it trains more police officers than any other organization in the United States—and found that those trained in that manner became less accurate in evaluating truthfulness. *Id.*

¹¹² *Id.* at 218.

¹¹³ See, e.g., Talbot, *supra* note 110, at 54 (quoting Steven Hyman, psychiatrist and provost of Harvard).

¹¹⁴ See VRIJ, *supra* note 49, at 205.

¹¹⁵ *Id.*

test takers' was deemed 'insufficient to justify reliance on its use.'"¹¹⁶ Even these machines are seen as requiring additional field studies to ensure accuracy, quality training of the examiners (given their crucial role in grading the polygraph), and administrators independent of law enforcement agencies.¹¹⁷

B. *The Particular Danger of Racial and Ethnic Biases*

Under FACS, neither skin color nor facial features communicate emotion messages.¹¹⁸ In fact, scrutinizing these aspects of an individual's face for information and emotion messages is "futile."¹¹⁹ Ekman acknowledges, however, that skin color and facial features "may affect your impression."¹²⁰

Ekman understates. It seems unquestionable that facial features have the power to affect judgment by triggering the application of racial stereotypes within, as well as between, racial groups. All other factors being equal, once Black facial features appear, nothing is equal. Observers rely upon Afrocentric facial features to infer negative character traits that are stereotypic of African Americans.¹²¹ The more Afrocentric the face, the more apt the Black stereotype, which means, in the American criminal justice system, and in airports, the more criminality observers see.¹²² The victims of such disfavor are additionally burdened with the understanding that they are "more threatening, more dangerous, less remorseful, and more culpable," deserving of harsher treatment and less forgiving judgments in the eyes of their observers.¹²³

¹¹⁶ See, e.g., Talbot, *supra* note 110, at 54.

¹¹⁷ See VRIJ, *supra* note 49, at 206–07.

¹¹⁸ See UNMASKING THE FACE, *supra* note 17, at 11–12 ("If a person has a thin or fat face, a wrinkled or smooth face, a thin- or thick-lipped face, an old or young face, a male or female face, a Black, [Asian], or Caucasian face, that does not tell you whether the person is happy or angry or sad.").

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1172 (2006) (discussing study results in which law enforcers concluded Black faces were more criminal than White faces and stereotypic Black faces of non-criminals more criminal than faces less stereotypically Black).

¹²² See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006), available at <http://ssrn.com/abstract=901453> (noting that the more stereotypically Black a person's facial features appear, the more that person is perceived as criminal).

¹²³ William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 350 (2005).

Subconscious race-based bias is rampant in American society, existing in realms both surprising¹²⁴ and sobering.¹²⁵ Numerous scholars detail why such a bias is wrong; they speak passionately about why racial profiling cannot work, agreeing that profiling on the basis of race, as well as ethnicity or nationality, is an

¹²⁴ See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, NY TIMES, May 1, 2007, available at <http://graphics.nytimes.com/packages/pdf/sports/20070501-wolfers-NBA-race-study.pdf> (finding referees in the National Basketball Association called fouls at a greater rate against Black players than against White ones during thirteen seasons, so much so, that the race-based bias “is large enough that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game”). Despite the strongly Black composition of the teams that compose the National Basketball Association, these researchers found that “the league’s historical tendency to hire white referees has a disparate impact on black NBA players,” as there was “a robust difference between a player’s performance when officiated by an own-race versus opposite-race refereeing crew.” *Id.* at 23. On nights in which Black players’ race matched that of the assigned refereeing crew, “players earn[ed] up to 4% fewer fouls and score[d] up to 2 ½% more points.” *Id.* at 30.

¹²⁵ See, e.g., Matthew R. Durose et al., *Contacts Between the Police and the Public*, 2005, Bureau Of Justice Statistics Special Report 215243 (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/cpp05.htm> (determining that during traffic stops, Black motorists were more likely to be arrested, threatened or suffer from the use of force, and searched at higher rates than White motorists); John Donohue & Steven Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367 (2001) (finding, *inter alia*, an increase in the number of White police associated with an increase in arrests of Blacks); Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342–45 (2004) (finding Whites perceive Black faces angrier and racially ambiguous faces are more likely by Whites to be characterized as Black when presenting angry facial expressions than when presenting happy expressions); Andrew Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 124 (2006) (arguing “race overwhelms other factors” especially when cross-racial identifications are attempted by witnesses to crimes, even when race is ambiguous and observing Whites consciously reject race-based stereotypes).

Recent research has shown that “among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a ‘black’ crime.” Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO STATE J. CRIM. LAW 19, 29 (2007). Mauer notes that the racial dimensions of the criminal justice system manifest in a number of ways, including the following: the great disparity in federal criminal mandatory minimum sentencing rates handed down for offenses involving pharmacologically identical crack (used by low-income minorities) versus powder cocaine: “[i]n the twenty years since enactment of the law, more than 80% of crack cocaine sentences have been imposed on African Americans”; disproportionate incarceration rates of Black and Latino populations compared to Whites; and “widespread racial profiling” by local and state law enforcement agencies during traffic and pedestrian seizures and searches of minorities during the “war on drugs.” *See id.* at 20-26. Even so-called “race neutral” sentencing policies—found, e.g., in statutes which more harshly criminalize drug offenses that occur near a school zone and those that more harshly penalize habitual offenders (“Three strikes; you’re out”)—in actuality, are not. Because the racial dynamics of the criminal justice system spawn a disproportionately high percentage of Black and Latino arrestees (and, later, inmates), when applied, these neutral laws have a disproportionate impact upon Blacks and Latinos. *Id.*

utterly ineffective means by which to assess a criminal threat.¹²⁶ This is so because the numbers do not compute:

[S]tudies done over the last few years demonstrate conclusively that hit rates—the rates at which police actually find contraband on people they stop—run contrary to long-held “commonsense” beliefs about the effectiveness of racial profiling. The rate at which officers uncover contraband in stops and searches is *not* higher for blacks than for whites, as most people believe. Contrary to what the “rational” law enforcement justification for racial profiling would predict, *the hit rate for drugs and weapons in police searches of African Americans is the same as or lower than the rates for whites*. Comparing Latinos and whites yields even more surprising results. Police catch criminals among Latinos at *far lower rates* than among whites. These results hold true in studies done in New York, Maryland, New Jersey, and other places. We see the same results in data collected by the U.S. Customs Service, concerning the searches it does of people entering the country at airports: the hit rate is lower for blacks than it is for whites, and the hit rate for Latinos is lower still.¹²⁷

¹²⁶ See, e.g., Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 376–79 (1998) (arguing against the use of racial profiling in traffic stops as poor policing and public policy, failing to fight crime and creating ire in profiled populations). See also Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 80 (2003) (characterizing as “flawed reasoning” post-September 11 criminal profiling justifications “where suspicion emanates from race or ethnicity rather than individualized, suspicious conduct”). Davies notes that:

at times, race *can* play a proper role in . . . the resolution of questions of criminality . . . more important, the probative value of racially-identifying information provided by a crime victim is always greater when it is used as a means for *excluding* a person (or really, a group of persons) from the circle of suspicion, than when it is used [as] a means to *include* a person within the circle of suspicion.

Id. at 65. Davies further asserts that the futility of racial profiling was demonstrated in the face of so-called “home-grown terrorist acts” committed by Timothy McVeigh (whose horrific bombing of the Alfred P. Murrah Federal Building was considered, prior to September 11, 2001, the most deadly act of terrorism to strike America) and Ted Kaczynski (whose years-long string of terrorist bombings as “The Unabomber” led to the death of several and injuries to dozens). See *id.* at 79–80. In the face of these lethal actors, there was no public or legislative outcry to racially profile:

And why not? I suspect that it is because, when we are faced with the criminality of a white suspect who may have accomplices, we do not fall prey to the same tortured reasoning to which we seem so easily to fall prey when we are faced with a minority suspect. In such a setting, we seem instinctively to know that the odds of capturing additional culprits by treating all young, white males with suspicion are so astronomically small, and the burdens we place on innocent white males in the process are so astronomically large, that it is a course of investigative conduct that makes no logical sense.

Id. at 79 (footnote omitted).

¹²⁷ DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 13 (2002).

Nevertheless, American society remains stubbornly “blind[,] deny[ing] the salience of continued racial subordination in our society”¹²⁸

Judgments are historically and culturally influenced.¹²⁹ As a society, we continue to “unconsciously participate in the reification of race and its dehumanizing effects,”¹³⁰ allowing subconscious bias to be the machinery through which observers process perceptions, make decisions, and even achieve (or fail to achieve) empathetic understanding.¹³¹ It is a powerfully fixed unconscious conceptualization that guides our perceptions.¹³²

Research has demonstrated how biases are pervasive,¹³³ largely unconscious,¹³⁴ yet predictive of the bias-holder’s behavior.¹³⁵ Social scientists have identified “implicit attitudes,” meaning, often hidden, sometimes unconscious, positive or negative evaluations of an object that can rub off on associated objects.¹³⁶ “Implicit stereotypes” are powerful and unconscious beliefs that members of a group possess one or more characteristics, simply by virtue of group membership.¹³⁷

Although unconscious, these beliefs can be identified. The Implicit Association Test is a self-administered, internet-based tool that allows website visitors to examine personally-held hidden biases, attitudes, and stereotypes. The test allows a hands-on opportunity for website test-takers to learn the effects of their own “stereotypic and prejudicial associations acquired from their socio-

¹²⁸ Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 559 (2003).

¹²⁹ See, e.g., Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 118 (2000) (calling for individuals to recognize that their judgments are historically and culturally influenced).

¹³⁰ Andrews, *supra* note 128, at 559–60.

¹³¹ See Rana El Kaliouby & Peter Robinson, *Real-Time Inference of Complex Mental States from Facial Expressions and Head Gestures*, in Conference, 10 COMPUTER VISION & PATTERN RECOGNITION WORKSHOP 154 (2004), available at <http://doi.ieeecomputersociety.org/10.1109/CVPR.2004.427>.

¹³² See Lisa Feldman Barrett & Paula M. Niedenthal, *Valence Focus and the Perception of Facial Affect*, 4 EMOTION 266, 272 (2004).

¹³³ Seventy-five to eighty percent of those who self-identified as Whites and Asians and who took the Implicit Association Test “show an implicit preference for racial White relative to Black.” See Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php> (last visited Aug. 30, 2007) [hereinafter Project Implicit Information].

¹³⁴ See *id.* Ordinary people, even those who perceive themselves without negative race-based associations are, nevertheless, “found to harbor negative associations in relation to various social groups” *Id.*

¹³⁵ See *id.*

¹³⁶ See Project Implicit, FAQs, <https://implicit.harvard.edu/implicit/demo/background/faqs.html> (last visited Aug. 30, 2007) [hereinafter Project Implicit FAQs] (answer to question 19).

¹³⁷ *Id.* (answer to question 20).

cultural environment.”¹³⁸ The test is unique, in that it reveals two types of test-taker deception common in self-reports: where the test-taker is unwilling or, alternately, unable to answer truthfully.¹³⁹

For example, research has demonstrated the effect of biases against Blacks in normal decision-making and when rendering certain judgments. The Black-White Implicit Association Test examines hidden race-based biases and stereotypes by focusing on Black and White faces.¹⁴⁰ Faces (as opposed to names) were specifically chosen as test stimuli “because of the ease of judgment.” Test-takers needed no particularized knowledge to judge faces.¹⁴¹

Results from the Black-White Implicit Association Test revealed a number of “automatic” associations, i.e., implicit or unconscious mental associations so well-established as to operate without awareness, intention, or control.¹⁴² Whites—even those who consider themselves “liberal” on matters political, including race—showed an automatic preference for Whites.¹⁴³ Asian Americans also showed an automatic preference for Whites.¹⁴⁴ Blacks showed an automatic preference for Blacks; however, relative to Whites, the Black automatic preference was moderated.¹⁴⁵ Fifty percent of Blacks showed automatic Black preference; the remaining fifty percent showed automatic White preference. Blacks may harbor such negative stereotypes against Blacks and may not show an automatic

¹³⁸ See Project Implicit Information, *supra* note 133. The test taker is asked to associate words such as “joy” with randomly distributed faces that represent two racial groups.

¹³⁹ See *id.*

¹⁴⁰ The test is available at <https://implicit.harvard.edu/implicit/demo/selectatest.html> (last visited Oct. 1, 2007) (The test can be accessed by selecting the Race IAT button).

¹⁴¹ See Project Implicit FAQs, *supra* note 136.

¹⁴² See *id.* (answer to question 22).

¹⁴³ See *id.* The test also revealed that White children as young as six and ten years old demonstrated the same level of automatic preference for White as White adults (and, of course, Asian adults). *Id.* (answer to question 10). See also Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2392 (2003) (citing surprise experienced by self-identified liberal, Ian Ayers, who learned via an Implicit Association Test that, “despite his liberal bona fides,” he subconsciously prefers Whites to Blacks).

¹⁴⁴ See Project Implicit FAQs, *supra* note 136 (answer to question 8).

¹⁴⁵ See *id.* (The scientists concluded that such results for Blacks represents “some combination of an automatic preference for one’s own, moderated by what one’s learns is regarded to be ‘good’ in the larger culture.”)

Although the majority of White respondents show a preference for White over Black, the responses from Black respondents are more varied. Although some Black participants show liking for White over Black, others show no preference, and yet others show a preference for Black over White. Data collected from this website consistently reveal approximately even numbers of Black respondents showing a pro-White bias as show a pro-Black bias. Part of this might be understood as Black respondents experiencing the similar negative associations about their group from experience in their cultural environments, and also experience competing positive associations about their group based on their own group membership and that of close relations.

preference or positive association for their own group because they also live in, and are affected by, the very same society that criminalizes and stigmatizes Blacks:

Automatic White preference may be common among Americans because of the deep learning of negative associations to the Black group in this society. High levels of negative references to Black Americans in American culture and mass media may contribute to this learning. Such negative references may themselves be more the residue of the long history of racial discrimination in the United States than the result of deliberate efforts to discriminate in media treatments.¹⁴⁶

These implicit associations pervade American society subconsciously, racializing a wide range of evaluative decision-making. Thus, a strong, surprisingly unconscious, and “automatic” pro-White preference will affect the way in which behavior manifests whenever Blacks are present. The more an observer perceives a face as “Afrocentric,” the more the observer sees crime and criminality.¹⁴⁷ The more the observer sees Black crime and criminality, the more the observer inflicts harsh punishment.

In a set of recent studies, scientists learned just how intractable this racialized decision-making can be. In fact, even when warned against it, many cannot disengage from it. In the first study, subjects were asked to differentiate individual head-and-shoulder photos of Black and White males to determine the degree to which each manifested “Afrocentric features.”¹⁴⁸ As one might expect, African American faces received higher Afrocentric features ratings than did White faces, meaning that the two groups varied in the degree to which they displayed perceivable racial face differences, which can be perceived by varied observers with a high degree of consensus.¹⁴⁹

In the second study, subjects were next required to match photos of faces with descriptive language that varied along two dimensions: “how stereotypic they were of Whites or African Americans and whether they described someone who was generally sympathetic and likeable or someone who was not.” As in the first study, irrespective of their actual race, faces possessing stronger Afrocentric features were given “significantly higher probability ratings in the descriptions that were stereotypic of African Americans and significantly lower probability ratings in the descriptions that were stereotypic of Whites.” Essentially, the Afrocentric

¹⁴⁶ *See id.* (answer to question 18).

¹⁴⁷ Pizzi et al., *supra* note 123, at 331–32.

¹⁴⁸ *See id.* For the purpose of the studies run, “Afrocentric features” were considered to be “any facial features associated with African Americans, including, for example, hair texture, nose width, and lip fullness.”

¹⁴⁹ *Id.* at 334.

features influenced and guided the stereotypic inferences that were determinative of the subjects' (negative) judgments about the photographs.¹⁵⁰

The third study, which mixed photographs of both Black and White faces with varying degrees of Afrocentric facial features, determined whether those features influenced and guided the observers' (negative) judgments about the photographs, even when observers could rely upon the subjects' race as a basis upon which to make a stereotypic judgment. They did. In fact, Afrocentric features were determinative; they guided the stereotypic inferences made by the observers, who had no clue that the features were having such an effect. These results occurred even after observers were given cautionary instructions warning them against feature-based stereotypic decision-making. Nevertheless, observers could not stop themselves from judging on the basis of facial features. Moreover, once such features were (subconsciously) identified, observers judged subjects who possessed the determinative features as more likely to be aggressive.

There is further sobering proof outside of these laboratory experiments that race and visible ethnicity affect nearly everything, including lie detection (in)accuracy, what constitute deception cues, and credibility assessment.¹⁵¹ When it comes to the power to punish and the power to pronounce condemnation, researchers also learned that *actual courtroom judges* also use facial features to infer traits of criminality. Researchers randomly selected and stratified from the state of Florida's inmate databanks photographs of Black and White males who were serving terms of incarceration after having either pleaded or been found guilty.¹⁵² Each man had been given sentences by judges who had discretion—within the contours of the charges brought (pursuant to the charging document), proved (at trial), or agreed to (plea agreement) by the prosecution—to depart upward from the sentencing guidelines to impose the maximum sentence permitted for the particular criminal offense without appellate review.¹⁵³ Scientists who conducted statistical analyses of the selected inmates' crimes, criminal records, and imposed sentences determined that—given equivalent criminal records and controlling for race, date of sentence imposition, and seriousness of offense—judges imposed longer sentences on those inmates whose faces contained Afrocentric features.¹⁵⁴ The judges imposed harsher sentences even when those with fewer or no Black features engaged in the identical criminal conduct as those

¹⁵⁰ See *id.* at 335.

¹⁵¹ See, e.g., Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 18–25 (2000) (noting impact of race in domestic and foreign cultures as well as variables that may influence deception cues and lying in mono-cultural versus multicultural societies).

¹⁵² See Pizzi et al., *supra* note 123, at 345 (citations omitted).

¹⁵³ See *id.* (citation omitted). Downward departures “from below the shortest sentence in the sentencing range,” however, are subject to appellate review. *Id.*

¹⁵⁴ See *id.* at 352.

with more Black features. This was so even for White convicted felons who had Black facial features.¹⁵⁵

This pernicious stereotyping appears unconscious and uncontrollable. Yet it absolutely plays a crucial role in, as further examples, cross-racial eyewitness (mis)identifications, wrongful criminal convictions, racial stereotyping in law enforcement, and policing.¹⁵⁶ The appearance of facial race—or a raced face—affects the processing of a myriad of decisions and decision-makers in and around the criminal justice system.

Those who are or appear to be immigrants from Middle Eastern, Indian, Asian and other heavily Muslim- or Arab-populated nations are likely to be subjected to similar stereotyping. Indeed, there is a given growing sentiment that

[w]e cannot stop each one of them and make an individualized determination of risk. We have to develop some type of profile. The fact is profiling is a legitimate statistical device. And it's a device that we may have to use if we're going to have a meaningful security process at these airports.¹⁵⁷

Despite much language concerning the danger of homegrown terrorism and governmental officials warning against such ethnic stereotyping,¹⁵⁸ the power of these ethnicity-based implicit assumptions promises simply to be too great.

Popular support for ethnic profiling has grown, given presidential and popular perceptions about September 11 hijackers, warring insurgents in Afghanistan, Saddam Hussein, Iraqis, and al-Qaeda. Politicians and academics voice support for implementing religious, ethnic, and national origin profiling, dismissing the losses of civil and personal liberties on the basis of immutable physical features,

¹⁵⁵ *See id.*

¹⁵⁶ *See* Taslitz, *supra* note 125, at 123–24. This is true even when the subject's race is ambiguous. Changing “just one facial feature to a stereotypical racial marker triggers the racial categorization identification process rather than the more accurate intra-racial configural detail process.” *Id.* at 124. This process is extraordinarily unyielding for White observers, even if they consciously reject racial stereotyping. *See id.* at 125.

¹⁵⁷ *Morning Edition: Use of Profiling to Discover Would Be Terrorists* (NPR radio broadcast Feb. 12, 2002), (transcript on file with Lexis). *See also* Sherry F. Colb, *Profiling With Apologies*, 1 OHIO ST. J. CRIM. L. 611, 616–17 (2004) (justifying post-September 11 racial profiling based on the “extremely high probability that an aspiring terrorist will turn out to be Arab and/or Muslim” and such action protects a compelling governmental interest); William Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002) (defending post-September 11 racial profiling that would include authorizing police to conduct suspicionless group searches and seizures, a “healthy bribe” that would be, according to Stuntz, less discriminatory to the individual and induce police “to self-regulate their execution of that expanded authority or topple under the sheer weight of it”).

¹⁵⁸ Press Release, Office of the Press Sec'y, Remarks by the President at Photo Opportunity with House and Senate Leadership Sept. 19, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010919-8.html>.

which have “no causal relationship to terrorist activity.”¹⁵⁹ Those perceived as Arab or Muslim are also by some perceived as “either complicit in the acts precipitating September 11 or prone to such acts in the future.”¹⁶⁰ For these populations, September 11, 2001, brought with it aggressively hostile applications of immigration and criminal law.¹⁶¹ Professor Juliet Stumpf labels this conflation “crimmigration.”¹⁶² Crimmigration requires those who are deemed to “look” or “appear” as if they are in the United States illegally to be criminally regarded until proven otherwise.¹⁶³ Because those who appear to be immigrants are identified with unwelcome criminals at best,¹⁶⁴ and terrorists at worst,¹⁶⁵ crimmigration allows governmental officials to “bring[] to bear only the harshest elements of each

¹⁵⁹ See, e.g., Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215, 224 (2003).

¹⁶⁰ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and the Sovereign Power*, 56 AM. U. L. REV. 367, 395 (2006).

¹⁶¹ See *id.* at 385–96 (detailing how immigration law has converged with criminal law such that non-citizens, particularly those from countries designated as Muslim or Arab, have even fewer substantive and procedural rights under a criminalized use of immigration law than they would have under U.S. criminal law, including that “circumstances under which noncitizens may find themselves detained are much broader than in the criminal context”).

¹⁶² See *id.* at 376.

¹⁶³ See *id.* at 416–18.

¹⁶⁴ See, e.g., Nick Miroff, *Fear Seizes Pr. William Immigrant—Legal and Not*, WASH. POST, July 15, 2007, at A1. A unanimously- and recently-approved anti-illegal immigrant resolution in a Virginia community by the Prince William Board of Supervisors is relevant. There, the county has experienced a significant increase in its Latino populations over the last decade. A number are suspected as being there illegally. In response, the board of county supervisors unanimously passed a coterie of anti-illegal immigrant measures, given that illegal immigrants cause “economic hardship and lawlessness” in the county and allow police to “verify the residency status of anyone in custody whom they suspect to be an illegal immigrant.” *Id.* The measures did not provide police with implementing procedures. However, those legally within the county’s borders are frightened, considering moving, circumscribing their comings and goings, or steeling themselves against abusive police profiling by, e.g., staying indoors or giving children “copies of their green cards to carry to summer classes in elementary school.” *Id.* According to the county board’s chairman, Corey A. Stewart, “[i]f you’re pulled over and you’re a citizen or legal immigrant, you’ve got nothing to worry about.” *Id.* See also The Associated Press, Pa. City Defends Illegal Immigrant Law in Court, MSNBC (March 12, 2007), <http://www.msnbc.msn.com/id/17576996/?GTI=9145> (discussing Hazleton, Pennsylvania’s defense of its Illegal Immigration Relief Act, which fined and denied business permits to those who rented residential property to illegal immigrants).

¹⁶⁵ See, e.g., Olivia Albrecht, *Border Troubles: Drugs, Immigrants Today; Terrorists, Bombs, Tomorrow*, FOXNEWS.COM, Feb. 22, 2006, <http://www.foxnews.com/story/0,2933,185760,00.html> (warning “there is every reason to believe that al-Qaeda and other such nefarious types will utilize it as a fluid passageway into the states”). See also Tamar Jacoby and Mark Krikorian, *NRO Debates: Jacoby v. Krikorian on Immigrants and the War*, NATIONAL REVIEW ON LINE (Feb. 12, 2003), <http://www.nationalreview.com/debates/debates021203.asp> (warning by Krikorian that securing American borders through immigration control is a means by which “[t]errorists have exploited all aspects of our feckless immigration system to penetrate our society,” including exploiting amnesties, fraudulent marriages, and insinuating themselves into the lawful work force).

area of law,” particularly given the nation’s anxiety about foreign terrorists on American soil and abroad.¹⁶⁶

Facial behavior, the *raison d’être* of FACS, pales (figuratively and, perhaps, literally) in the presence of the physiology of race. People are judged and judge harshly based on facial appearances of race, color, and ethnicity. Yet, Ekman’s failure to appreciate the magnitude of facial race and ethnicity¹⁶⁷ calls into question his assertions that use of FACS in American airports is without such limitations.¹⁶⁸ His characterization is an untested hypothesis. Without contemplation of the effects of implicit—nay, explicit—racial or ethnic biases, FACS observers and advocates will rely upon improper precepts to draw conclusions that may condemn innocent minority travelers to the use of a tool flawed with an underdeveloped methodological awareness.¹⁶⁹

As Othello was incapable of resisting his urge to jump to a negative conclusion about his wife’s remonstrations, it seems that we are incapable of resisting jumping to negative conclusions about racial and ethnic minorities. It may be “hard to overestimate the importance of emotions in our lives.”¹⁷⁰ Even harder may be overestimating the importance of race. “Face-ism” is too powerful to ignore.¹⁷¹

III. FACS INVADES REASONABLE PRIVACY EXPECTATIONS

Current Supreme Court case law holds that “knowingly exposing” information—be it to the public or to a few intimates—generally defeats governmental invasion of privacy claims under the Fourth Amendment. Current case law thus nearly obliterates Fourth Amendment protection as soon as one leaves the home. This occurs because doing so automatically knowingly exposes one’s body to public observation. Correspondingly, therefore, there is no legally recognized reasonable expectation of privacy in one key part of the body in public places: the face.

But current case law is wrong. Privacy is better understood as individual control over self-revelation to avoid being misunderstood or mis-defined by observers. Under this conception of privacy, persons care not just that they are being observed, but also by whom and for what purposes. Privacy is thus not

¹⁶⁶ Stumpf, *supra* note 160, at 378.

¹⁶⁷ See UNMASKING THE FACE, *supra* note 17, at 11–12 (acknowledging that race “may affect” observer impressions of a face).

¹⁶⁸ See *On the Fly*, *supra* note 11 (proclaiming that his one day observations of SPOT “confirmed . . . that SPOT violates no one’s civil rights”).

¹⁶⁹ “Any hypothesis untested by research or experimentation is relatively useless.” Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 681 (2000) (discussing social perceptions that resist human cloning).

¹⁷⁰ EMOTIONS, *supra* note 47, at xxi.

¹⁷¹ See Pizzi et al., *supra* note 123, at 336–38.

entirely lost merely by appearing in public, so the Fourth Amendment does not apply to government surveillance of the face. That does not mean that FACS is necessarily unconstitutional, but it does mean that it must be administered, if at all, in a reasonable fashion. For the Court, privacy in public is oxymoronic.

This section of the Article first reviews the Court's current "assumption of the risk" approach to reasonable privacy expectations, the critiques of it, defending the alternative vision of privacy as control over the degree and scope of self-revelation. Under this new approach, the section concludes, FACS might be reasonable under a set of circumstances that do not exist. Accordingly, as currently conceived and administered, FACS is unconstitutional.

A. *The Assumption of the Risk Theory of Privacy*

1. The *Katz* Test

Modern constitutional understanding of privacy under the Fourth Amendment was first articulated by the U.S. Supreme Court in *Katz v. United States*.¹⁷² There, Katz had been convicted of illegally transmitting wagering information via telephone from Los Angeles to Miami and Boston.¹⁷³ At trial, the government introduced evidence of the substance of Katz's conversations, obtained after FBI agents attached an electronic listening and recording device to the outside of the public telephone booth Katz used to place his calls. The court of appeals affirmed Katz's conviction and rejected his contention that the government obtained the recordings in violation of the Fourth Amendment given that "[t]here was no physical entrance into the area occupied by [Katz]."¹⁷⁴

The Supreme Court granted certiorari. Justice Stewart, writing for the majority, rejected the notion that the Fourth Amendment "translate[s] into a general constitutional 'right to privacy'"¹⁷⁵ but nevertheless concluded that protecting certain privacy expectations against governmental intrusion was a key purpose of that amendment. According to the majority, that Katz's conversation occurred in a public place—a location from which he might be seen, given that the booth was partially constructed of glass—was not determinative of his ability to rely upon the Fourth Amendment's protection against unreasonable governmental searches and seizures.¹⁷⁶ Additionally, because Katz entered the phone booth, shut the door behind him, and paid the toll that enabled him to place the calls made, he was "entitled to assume that the words he utter[ed] into the mouthpiece will not be broadcast to the world." The majority stressed that on *Katz's* facts, the Fourth

¹⁷² 389 U.S. 347 (1967).

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 349 (quoting *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966)).

¹⁷⁵ *See id.* at 350.

¹⁷⁶ *Id.* at 352 ("He did not shed his right to [exclude others] simply because he made his calls from a place where he might be seen.").

Amendment protected him not against the “intruding eye” but the “uninvited ear.”¹⁷⁷

The Court also rejected the government’s position that because its agents did not physically penetrate the telephone booth to obtain Katz’s conversations, that disqualified him from Fourth Amendment protection.¹⁷⁸ Justice Stewart thus decoupled notions of property, space, and place from the privacy that the Fourth Amendment protects.¹⁷⁹ Holding that the government violated the privacy upon which Katz justifiably relied while speaking within the phone booth, the Court concluded that the government’s activities in electronically listening to and recording Katz’s words constituted a Fourth Amendment “search:” “the Fourth Amendment protects people, not places.”¹⁸⁰ The Court continued, what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁸¹ However, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”¹⁸²

It is the concurring opinion of Justice Harlan that has since governed the test regarding governmental searches and seizures under the Fourth Amendment: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁸³

2. *Katz*, De-Clawed

Initially, the Court’s decision in *Katz* was hailed as precedent which focused upon the ultimate question of “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”¹⁸⁴

¹⁷⁷ *Id.* at 352.

¹⁷⁸ *See id.* at 353 (“The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.”).

¹⁷⁹ *Id.* (“The premise that property interests control the right of the Government to search and seize has been discredited.”) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

¹⁸⁰ *Id.* at 352.

¹⁸¹ *Id.* at 351 (citing *Ex parte Jackson*, 96 U.S. 727 (1877)).

¹⁸² *Id.* (citing *Lewis v. United States*, 385 U.S. 206 (1966) and *United States v. Lee*, 274 U.S. 559 (1927)).

¹⁸³ *Id.* at 361 (Harlan, J., concurring).

¹⁸⁴ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

The characterization was premature, as the Court has failed to “pursue the implications of [Katz’s] insight.”¹⁸⁵ The Court’s initial expansion of Fourth Amendment protection in *Katz* was rather quickly reversed in a set of decisions which evidenced the Court’s lack of sympathy toward those who unwisely or unwittingly share information with others, only to learn subsequently that the information did not remain with the initial recipient. Despite reasonable expectations possessed by these criminal defendants, the Court has consistently rejected Fourth Amendment claims where individuals supposedly assumed the risk that private information shared with a third party will remain private (even if the third party is an institution).¹⁸⁶

Instead of crafting a nuanced jurisprudence which could sustain constitutional protection of privacy while accommodating the vicissitudes of modernity, the Court has miniaturized constitutional protection of privacy to an “in or out,” all-or-nothing proposition, offering sanctuary only to those who have managed to hermetically seal all items, information, and interests from each actual or hypothetical outside eye or ear.

3. Assumption of the Risk Rears Its Head

One of the earliest of these decisions is *United State v. White*.¹⁸⁷ There, narcotics informant Harvey Jackson wore a hidden radio transmitter while having an incriminating conversation with White, which Jackson electronically recorded. Based on evidence of these incriminating conversations (and White’s improperly placed trust in Jackson’s silence), White was convicted of violating federal narcotics laws and sentenced to incarceration.¹⁸⁸ The Court determined that although White likely had a subjective expectation of privacy in his conversations with Jackson, his expectation was objectively unreasonable, as “one contemplating illegal activities must realize the risk that his companions may be reporting to the police.”¹⁸⁹

In *United States v. Miller*,¹⁹⁰ the Supreme Court held that a bank depositor has no legitimate expectation of privacy in financial information voluntarily conveyed to his bank in the ordinary course of business. The Court emphasized:

¹⁸⁵ Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1174 (1983) (quoting Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540 (1975)).

¹⁸⁶ *United States v. Miller*, 425 U.S. 435 (1976).

¹⁸⁷ 401 U.S. 745 (1971).

¹⁸⁸ *Id.* at 746.

¹⁸⁹ *Id.* at 752.

¹⁹⁰ 425 U.S. 435 (1976).

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.¹⁹¹

Because the depositor had “assumed the risk”—subjectively or objectively—when he disclosed his personal information that the bank would share his information with the government, it would be unreasonable for him to expect, post-disclosure, that his financial records would remain private.

The scope of a person’s reasonable expectation of privacy was narrowed still further when the Court returned to the use of telephones in *Smith v. Maryland*¹⁹² a few years later. There, the Court held that use of a pen register by a telephone company to gain incriminating information does not constitute a “search” within the meaning of the Fourth Amendment.¹⁹³ Patricia McDonough, a robbery victim, gave the police in *Smith* a description of the robber and the getaway car. Shortly thereafter, McDonough began receiving threatening phone calls from a man identifying himself as the robber, telling her on one specific occasion to step out onto her porch.¹⁹⁴ When she did, she saw the getaway car she had described to the police. The police learned that the getaway car was registered in the name of the defendant, Michael Lee Smith.¹⁹⁵ They instructed the telephone company to install a pen register at its central office that would record the numbers dialed from the defendant’s home, however, no warrant authorized the police action.¹⁹⁶ The register ultimately revealed that the defendant had placed a call to McDonough’s home.¹⁹⁷ On this basis, the police obtained a warrant to search the defendant’s home, and, after finding a phone book turned to the page of Ms. McDonough’s number, the defendant was arrested and indicted for robbery.¹⁹⁸

Pretrial, the defendant sought but failed to suppress “all fruits derived from the pen register” on the ground that the police had failed to secure a warrant prior

¹⁹¹ *Id.* at 443.

¹⁹² 442 U.S. 735 (1979).

¹⁹³ *Id.* at 742–43.

¹⁹⁴ *Id.* at 737.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* A pen register “is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.” *Id.* at 736 n.1.

¹⁹⁷ *Id.* at 737.

¹⁹⁸ *Id.* at 737.

to its installation.¹⁹⁹ After he was found guilty based on the evidence stemming from the register, Smith appealed to the Maryland Court of Special Appeals, asserting that installation and use of the pen register constituted an illegal search. The court of appeals affirmed the judgment, holding that “there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company.”²⁰⁰ Certiorari was ultimately granted to resolve the conflict as to the restrictions imposed by the Fourth Amendment on the use of pen registers.²⁰¹

Justice Blackmun, writing for the majority, announced that, per *Katz*, application of the Fourth Amendment depends upon “whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”²⁰² Blackmun stated that since the pen register was installed on telephone company property at the telephone company’s central offices, the defendant could not claim that his “property” was invaded or that the police intruded upon a “constitutionally protected area.”²⁰³ Further, he concluded that this case differed significantly from *Katz*, as pen registers do not acquire communications’ content. In fact, pen registers only show what numbers the tapped telephone dialed.²⁰⁴

Blackmun went on to state that it was doubtful that people in general have any actual expectation of privacy in the numbers that they dial, as dialers realize the telephone company must see numbers to connect calls. Further, dialed numbers appear on monthly bills; users must be aware that the telephone company logs their calls.²⁰⁵ Blackmun concluded that there is no reasonable expectation of privacy regarding dialed phone numbers. The conduct of the defendant was monitored; still, the content of his calls remained private.²⁰⁶

Blackmun further opined that even if the defendant did have a subjective expectation of privacy, it was not “one that society is prepared to recognize as reasonable”:²⁰⁷ “[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”²⁰⁸

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 738.

²⁰¹ *Id.*

²⁰² *See id.* at 740 (citation omitted).

²⁰³ *Id.* at 741.

²⁰⁴ *Id.* at 741 (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 167 (1977)).

²⁰⁵ *See id.* at 742. Telephone companies also use pen registers in order to check billing operations and detect fraud, and identify the originating point of obscene phone calls. *Id.* (citation omitted).

²⁰⁶ *Id.* at 743.

²⁰⁷ *Id.* (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)).

²⁰⁸ *Id.* at 743–44 (citation omitted).

Even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence will not be betrayed by the third party, the information is not protected by the Fourth Amendment.²⁰⁹ Since Smith was held to have voluntarily conveyed the numerical information when he used the phone and “exposed” the information to the telephone company,²¹⁰ he assumed the risk that the telephone company would give the information to the police. Even if Smith harbored a subjective expectation of privacy (i.e., that the phone numbers dialed would remain private), the Court concluded it was not legitimate, so there was no “search.”²¹¹

4. There Is No Privacy In Public

According to the Court, individuals may also relinquish their expectations of privacy, simply by participating in society. When one participates—dialing telephones, banking, driving, traveling—very little can be entirely or continuously concealed. Per *Katz*, failure to conceal what one seeks to protect is fatal to a Fourth Amendment privacy claim, a conclusion supported by a range of additional cases covering electronic tracking, open fields, electronic surveillance, and aerial surveillance.

i. Electronic Tracking

The government is not barred from surveilling areas one knowingly leaves open for public view, nor are governmental agents required to ignore items in plain view when the officer is lawfully present and able to observe.²¹² Even if officers use vision aids²¹³ or change their position to get a better view, so long as they do not invade a protected interest in doing so, no Fourth Amendment search has occurred.²¹⁴ Even when officers direct individuals physically to assist officers’ observations—e.g., lawfully ordering occupants and the driver to get out of a car after a traffic stop or show identification—officers’ observations do not implicate the Fourth Amendment.²¹⁵ Even where such officers intend to locate or identify

²⁰⁹ See *id.* at 743 (quoting *United States v. Miller*, 435 U.S. 435, 443 (1976)).

²¹⁰ *Id.* at 744.

²¹¹ See *id.* at 744–45.

²¹² Under this doctrine, officers may not only observe an object in plain view while lawfully on the premises, but officers may seize the object if its incriminating nature is immediately apparent. See *Horton v. California*, 496 U.S. 128, 136–37 (1990).

²¹³ See *United States v. Dunn*, 480 U.S. 294, 305 (1987) (using flashlight not a search); *United States v. Lee*, 274 U.S. 559, 563 (1927) (using search light not a search).

²¹⁴ Compare *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (finding officer’s movement of stereo equipment suspected as stolen a Fourth Amendment search, in that physical manipulation of object violated defendant’s protected interest in information contained).

something of interest to their investigation, they do not “search” in the Fourth Amendment sense.²¹⁶

Additionally, individuals have no right of privacy in their observable movements when traveling from place to place on public thoroughfares, even if that observation is assisted by electronic tracking devices. In *United States v. Knotts*,²¹⁷ police received a tip that the respondent, Armstrong, had been stealing chemicals that could be used to manufacture illegal drugs and was also buying a similar substance at a chemical company. Law enforcement officers installed a beeper inside a container of chloroform, a manufacturing component in the illegal enterprise. As planned, Armstrong purchased the rigged container, enabling police to follow his public movements, even while outside the officers’ visual field. Armstrong drove to Petschen’s home and transferred the container to Petschen’s car. Petschen drove; police followed. Petschen attempted to evade his followers; unbeknownst to him, the beeper continued to signal the container’s movement, enabling the police to track him to a cabin in the woods.²¹⁸

Police secured a search warrant for the cabin and found both a drug laboratory and amphetamine manufacturing agents. The owner of the cabin, Knotts, did have a reasonable expectation of privacy in the cabin, and the information gleaned via the beeper inside the cabin constituted a “search” under the Fourth Amendment.²¹⁹ The defendant, however, was convicted of conspiracy to manufacture controlled substances.²²⁰ The circuit court of appeals reversed, finding the beeper’s use violated the defendant’s reasonable expectation of privacy.²²¹

The United States Supreme Court granted certiorari and reversed.²²² The Court found no invasion of the defendant’s reasonable expectation of privacy and held that individuals traveling in an automobile on public roads have no reasonable expectation of privacy in their movements, as they occur in the public realm. Any expectations of privacy therein were unreasonable:²²³

[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to

²¹⁵ See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (illustrating the car example); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185 (2004) (illustrating the identification example). See also Thomas K. Clancy, *What is a “Search” Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 22 (2006) (noting examples of plain view observations which “demonstrate that the Court has rarely construed the concept of a search as broadly as it did in *Katz*”).

²¹⁶ See *Soldal v. Cook County*, 506 U.S. 56, 68 n.13 (1992).

²¹⁷ 460 U.S. 276 (1983).

²¹⁸ *Id.* at 278.

²¹⁹ *Id.* at 282.

²²⁰ *Id.* at 279.

²²¹ *Id.*

²²² *Id.* at 280.

²²³ *Id.* at 282.

another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.²²⁴

As plain view observations are not searches “in the Fourth Amendment sense,” courts fail to find a Fourth Amendment right to privacy in an individual’s appearance.²²⁵ Cases that address Fourth Amendment challenges regarding the privacy of attributes and features such as the voice, handwriting,²²⁶ hands,²²⁷ and eyes²²⁸ do not typically reach *Katz*’s prong two, as the challengers fail at prong one. The determinative factor consistently appears to be that the challenging party “failed” to manifest his or her subjective expectation of privacy in the feature, area, or item(s) of interest, given their public exposure, even in an otherwise private place, such as the home.

*United States v. Dionisio*²²⁹ provides the Court’s analysis on this matter. There, the Court considered whether an individual possesses a reasonable expectation in the privacy of his voice.²³⁰ Although the “rare recluse who chooses to live his life in complete solitude”—unlike the general public—may possess a right to privacy because he has not exposed his voice to the public but perfectly maintained privacy, the rest of us do not, as our voices are “constantly exposed to the public . . . repeatedly produced for others to hear.”²³¹ According to the Court, “[n]o person can have a reasonable expectation that others will not know the sound

²²⁴ *Id.* at 281–82. See also *United States v. Karo*, 468 U.S. 705 (1984) (suppressing cocaine and evidence of drug manufacturing and finding Fourth Amendment violation when police used beeper in a container of ether to track movements of suspects within a home prior to obtaining a search warrant for the home because the beeper continued to reveal new information once inside the house that would not be available to persons on the public street).

²²⁵ See *Soldal v. Cook County*, 506 U.S. 56, 68 n.13 (1992).

²²⁶ See *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (citing *United States v. Doe* (Schwartz), 457 F.2d 895, 898–99 (2d Cir. 1972)).

²²⁷ See, e.g., *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968), which analyzed the right to privacy in one’s hands. The *Richardson* court held that examining the petitioner’s hands under an ultraviolet light before arrest and without a warrant did not constitute a search under the Fourth Amendment. *Id.* The court relied heavily on the fact that the petitioner had agreed to the search, “gambling on his ability to convince the officers of his innocence.” *Id.*

²²⁸ See *State v. Shearer*, 30 P.3d 995 (Idaho Ct. App. 2001), where the Idaho Court of Appeals rejected a petitioner’s claim that his right to privacy in his eyes was violated when he was pulled over by a police officer and asked to remove his sunglasses. The court held that there is no reasonable expectation of privacy in a person’s eyes and stated that “taking minimal steps to temporarily conceal a facial characteristic that is ordinarily and frequently exposed to the public is, in our view, insufficient to create a legitimate expectation of privacy.” *Id.* at 1000.

²²⁹ 410 U.S. 1 (1973).

²³⁰ *Id.* at 14.

²³¹ *Id.*

of his voice, any more than he can expect that his face will be a mystery to the world.”²³²

ii. Open Fields

When it decided the (post-*Katz*) *Knotts* case, the Court made note of the “open fields” doctrine announced in *Hester v. United States*.²³³ Although the doctrine precedes the *Katz* reasonable expectation of privacy test, the doctrine remains vibrant and is today best understood as translated into *Katz*-like terms. Under the doctrine, even when one overtly seeks to conceal and preserve an area as private by excluding others, the failure to maintain as impenetrably secret what is being held out as private may prove fatal to Fourth Amendment protection.

This was evidenced in *Oliver v. United States*.²³⁴ There, police ignored explicit manifestations of an expectation of privacy when they disregarded a battery of “No Trespassing” signs, entered Oliver’s property, and discovered a growing field of marijuana.²³⁵ When the defendant proffered this explicit evidence of his reasonable expectation of privacy in his own property, the Court rebuffed his claim, noting that such property was neither a Fourth Amendment “effect” nor “house.”²³⁶ Justice Powell, delivering the Court’s opinion, pronounced that the growing marijuana was outside the curtilage of Oliver’s home, located in “open fields.” As no expectation of privacy legitimately attaches to open fields—which need be “neither ‘open’ nor a ‘field’ as those terms are used in common speech”²³⁷—activities which occur therein are without the Fourth Amendment’s protection; accordingly, individuals cannot constitutionally expect privacy for activities that occur beyond the curtilage and within open fields.²³⁸ There is no search when—contrary to the owner’s actual manifestation of an expectation of privacy—the government inspects an owner’s open fields.

iii. Aerial Observations

Failed efforts to protect private realms from public view defeat Fourth Amendment claims of reasonable expectations of privacy. In *California v. Ciraolo*,²³⁹ police officers saw marijuana in the defendant’s backyard while flying

²³² *Id.*

²³³ 265 U.S. 57 (1927) (cited in *United States v. Knotts*, 460 U.S. 276, 282 (1983)).

²³⁴ 466 U.S. 170 (1984). *Oliver* involved two cases of criminal defendants who were charged for illegally cultivating marijuana. *Id.* at 173–74.

²³⁵ *Id.*

²³⁶ *Id.* at 176–77.

²³⁷ *Id.* at 180 n.11.

²³⁸ See *United States v. Dunn*, 480 U.S. 294 (1987) (distinguishing “open fields” versus curtilage under the Fourth Amendment).

²³⁹ 476 U.S. 207 (1986).

in a private plane at a thousand feet. The police decided to observe what they had seen from the air, as *Ciraolo* surrounded his marijuana plants with a high fence that had obstructed their street-level view. There, Chief Justice Burger employed *Katz* and determined that the plants remained observable from a particular height. The Chief Justice was therefore undecided as to whether the defendant had shown a subjective expectation of privacy or whether he merely hoped “that no one would observe his unlawful gardening pursuits.”²⁴⁰

The *Ciraolo* Court then considered whether there was a reasonable expectation of privacy against aerial observations over *Ciraolo*’s backyard, concededly within *Ciraolo*’s home curtilage. Despite citing the common law view that “[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened,” the Court determined that even curtilage did “not itself bar all police observation.” Relying on *Katz*, Chief Justice Burger found no Fourth Amendment protection against governmental observations of *Ciraolo*’s curtilage, as “[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed.”²⁴¹

Similarly, in *Florida v. Riley*,²⁴² a Pasco County sheriff circled twice over the defendant’s property in a helicopter at 400 feet. Through a hole in the roof of a greenhouse in *Riley*’s yard and on his property, the sheriff spied what he thought to be marijuana. Based on what he observed, he obtained a warrant, which was executed, resulting in the recovery of the marijuana.

In a plurality decision, the Court recognized *Riley*’s actual privacy expectation, noting that he “no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation.”²⁴³ Nevertheless, given the exposure from the breach in the greenhouse roof, *Riley*’s expectation of privacy was undermined, as the police saw “from a public vantage point” incriminating information from a place where they had a right to be. Like the public, the police were free to observe the yard from the vantage point of an aircraft flying in navigable airspace, as this plane was.

The bottom line: to the Court, whatever is shown to any member of the public—including the face—cannot be private. But this position cannot be justified.

²⁴⁰ *Id.* at 212.

²⁴¹ *Id.* at 213–14.

²⁴² 488 U.S. 445 (1989).

²⁴³ *Id.* at 450.

B. A Better Way: Privacy As Protection Against Mis-definition

1. Staring

Despite being in public, in polite American society, we do not stare, as it is considered rude, intrusive, embarrassing, and even boorish. Accordingly, when one is being visually probed by onlookers without permission, they violate what sociologist Erving Goffman called our “involvement shields.” The spectator is taking in information not clearly proffered to him, rendering him a voyeur.²⁴⁴

When strangers meet in the public square, “civil inattention” is the standard that rules.²⁴⁵ When observers violate that standard, the target is likely to manifest facial expressions to punish the observer, signaling the desired cessation of the faux pas. “Only citizens who respect one another’s privacy are themselves dignified with divine respect.”²⁴⁶ Staring at a stranger’s face is an intimate act, a liberty typically taken only with permission.

Staring—particularly at another’s face—is not merely looking. Rather, it is an intense, extended examination, violating politeness rules and experienced as an invasion of the self. The invasion stems from the sense that the observer is looking for a reason, namely to judge us, perhaps finding our expressions odd, our appearance displeasing, or our perceived character weird or unkind. But such judgments are based upon little information. It takes time to learn another’s nature. To judge us based on such limited information is thus to *mis*judge us, to define us in a way we neither want nor consider fair. Yet that tendency to judge our very nature based on little data is well-documented, dubbed by researchers “the devil’s-horn” effect.²⁴⁷

²⁴⁴ JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 15–16 (2000) (discussing the etiquette of making one’s face available or off-limits to public observers).

²⁴⁵ *Id.* at 16.

²⁴⁶ *Id.* at 19.

²⁴⁷ *See id.* at 143. The “devil’s-horn effect” is the corollary of the “halo effect.” Under the halo effect, people “tend to expand a few bits of favorable information into a unified theory of someone’s good character.” *Id.* at 137–38. However, under the devil’s-horn effect, people “are even more likely to generalize from past crimes or offensive acts that someone is a bad person and to overlook any exculpatory information.” *Id.* at 138. *See also* Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1047 (1984). Gustav Ichheiser has described the effects of this need to oversimplify:

[The mental processes] function so as to transcend in many ways and many directions the pure raw material and to construct out of this material a more or less well-organized and integrated image of the given personality. This image construction is usually endowed in our minds with only those alleged characteristics which promise to help us explain, as a manifestation of the underlying personality, the behavior with which we are confronted. In other words, we have the tendency to consider a partial structure of personality which happens to be visible to us as if this partial structure were the total personality “itself.”

Unwanted glances by strangers may titillate. However, unwanted gazes offend and intrude. They are an offense against privacy, trespassory in their intensity and timing. America needs a definition of privacy that not only contemplates but respects “social boundaries that protect us from being simplified and objectified and judged out of context.”²⁴⁸

Katz and its progeny, thus, provide far too insufficient a level of privacy protection, for *Katz* would permit such mis-definition of the human personality, allowing not just staring at our faces but staring *by the government*, the entity whose judgment most readily and certainly condemns us, often with serious consequences.

2. Broadening the Lessons of Staring

The staring example offers broader lessons about the nature of privacy. Few acts are more threatening than describing someone. “Identity is social because how other people treat us and how we treat them is also constitutive of our nature.”²⁴⁹ Particularly when race or ethnicity is involved, the danger is quite high that an observer will judge a target unfairly, based on the isolated, yet emotionally charged, socially significant factor of race, color, or ethnicity, without regard to much more. These observers—who may or may not be cognizant of the rationale for their conduct and conclusions—mistake such physical markers for knowledge of the subjects’ essential nature, their identity.²⁵⁰ Such misjudgment of observed members of racial minorities is thus experienced by them as a violation of the self, a breach of its boundaries because the observers re-describe the observed in ways that the latter will not accept.

In situations where persons know that they are not only being observed, but also evaluated, that scrutiny can increase the likelihood that the observed person will react in a way that increases the observer’s suspicion. An observer can, of course, reduce the likelihood that a truthful observed person will fear being disbelieved, but the evaluator can also do the exact opposite: increase the likelihood that a truthful observed person will fear being *disbelieved*. The former is accomplished by the communication of the observer’s open mind; the latter occurs when the observed person understands that the observer has prejudged the former’s guilt.²⁵¹

Id. See also ROSEN, *supra* note 244, at 143 (explaining that the “lasting legacy” of the devil’s-horn effect is that it “inevitably distracts us from making reliable judgments” about the individual’s character).

²⁴⁸ See *id.* at 20.

²⁴⁹ Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 156 (2002).

²⁵⁰ See ROSEN, *supra* note 244, at 200–01 (characterizing danger of being judged on the basis of isolated information taken out of context).

²⁵¹ EMOTIONS, *supra* note 47, at 221–22.

Accordingly, upon realization that one is being observed much like an animal in a zoo or a public spectacle, facial rejection may be accomplished by closing or shifting of the eyes; it can also be communicated by a turn of the head to either the left or right.²⁵² For some who are a bit more offended by the rejected observer's "presence," a bit of "facial draw bridging" is employed by, e.g., tilting the rejecter's nose up, a dismissal and attempted prevention of the intruder's reentry.²⁵³ For certain faces, these are "do not enter" signs; for these faces, such machinations are the equivalent of planting "no trespassing" warnings on property. Casting one's eyes downward is the facial equivalent of dimming the lights in one's home; visitors are not normally welcome after either signal.²⁵⁴ Latex, fabric, or other covering masks that obscure or distort the true face and its expressions would also work the same purpose; however, in a post-September 11 American airport, less provocative means are better employed. Sans external masks, these expressions often suffice to shut access to information, decline invitations to share and engage. These expressions cut off uninvited communication, stiff-arming as a bodyguard would, thwarting others' intent to intrude. "Entering" after that point would be intrusive and violative of the person's facial privacy, as whatever had been properly or not construed as available is no longer.

According to Jeffrey Rosen:

[o]ther legal systems . . . have less trouble describing the injury that results when people are observed against their will. Jewish law, for example, has developed a remarkable body of doctrine around the concept of *hezzek re'iyah*, which means the "injury caused by seeing" or "the injury caused by being seen." This doctrine expands the right of privacy to protect individuals not only from physical intrusions into the home but also from surveillance by a neighbor who is outside the home, peering through a window in a common courtyard. Jewish law protects neighbors not only from unwanted observation, but also from the *possibility* of being observed.²⁵⁵

Recognizing that unwanted observation is a Fourth Amendment privacy violation acknowledges the harm that occurs upon the identification of one who was, for all intents and purposes, anonymous while in the public sphere. Anonymity is a form of, or at least a close cousin of, privacy; its loss at the hands

²⁵² Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 82 (2007). "Shutting the phone-booth door was Katz's exercise of his power to withhold consent—the withholding of consent to have others, especially the government, listen in on his conversation." *Id.*

²⁵³ See ROSEN, *supra* note 244, at 16.

²⁵⁴ See *id.* at 18–19 (discussing "off-limits to the public" signals which, socially, require respecting the signaling party's privacy).

²⁵⁵ *Id.* at 20.

of the government is violative. This is particularly true in public, as there often is no other choice for the individual who chooses to be not a recluse but a participating member of society. One must engage; one must attend; one must appear. But in the participation, one is not truly choosing to relinquish identity by being looked at in a way that strips the target of his or her dignity. More specifically, when one seeks to travel, there is an indignity that results when governmental officials look at you in a way that substitutes a part of you—your race, color, or ethnicity—for the whole of who you are.²⁵⁶ That type of indignity invades the traveler's sense of self and personal integrity, thus being an invasion of privacy.²⁵⁷

The complete lack of public privacy seems dysfunctional for members of this free nation (some would say most free). However, given current Fourth Amendment privacy law, there is no calibration when it comes to disclosure or “outside” awareness of privacy. Information is either private or not. There is no small, little, measured, or sliver of disclosure. The Court treats purposeful disclosure that is also both discrete as if the discloser had thrown open her shutters and yelled the information for all to hear.

3. Building on *Bond*

Yet, the Court has acknowledged the notion of limited disclosures of privacy recently in *Bond v. United States*.²⁵⁸ There, a Greyhound bus passenger was confronted with a Border Patrol agent who manipulated the passenger's carry-on bag, located in the luggage compartment immediately above his seat. The agent squeezed Bond's bag, reported feeling a hard brick-like object. After Bond confessed ownership, he allowed the agent to open it; inside, there was a brick of methamphetamine “wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants.”²⁵⁹ Bond's motion to suppress was denied; he was found guilty and sentenced to prison.²⁶⁰ On appeal, Bond conceded that other passengers had access to his bag; however, he asserted that the agent manipulated it in a way that Bond's fellow riders would not.²⁶¹ The Fifth Circuit rejected this argument and found irrelevant the agent's intent while manipulating Bond's bag. The district court's denial of Bond's motion was affirmed and the Fifth Circuit declined to

²⁵⁶ See *id.* (discussing the indignity of unwanted gazes in the context of sexual harassment, in that harassing observers look at a woman “in a way that substitutes a part of the woman's body for the whole of her personality”).

²⁵⁷ See *id.* (characterizing unwanted reductive gaze upon a woman “more precisely described not primarily as a form of gender discrimination but instead as an invasion of privacy”).

²⁵⁸ 529 U.S. 334 (2000).

²⁵⁹ *Id.* at 336.

²⁶⁰ *Id.*

²⁶¹ *Id.*

characterize the agent's manipulation of Bond's bag as a Fourth Amendment "search."²⁶²

The Supreme Court disagreed. Although bus passengers expect that their bags will be handled by other passengers and bus employees, they do not expect "other passengers or bus employees will, as a matter of course, feel the bag *in an exploratory manner*."²⁶³ Though the actual observation of Bond's luggage was not protected by the Fourth Amendment, the contents—which only could be revealed by tactile manipulation or opening the luggage—were subject to a reasonable expectation of privacy. Thus, Bond's expectation of privacy in the contents of his bag was reasonable, to the extent that he did not disclose the bag's contents to others. As the Court noted in *Kyllo*, the intrusion—not the resultant information—is the Fourth Amendment issue. This despite Bond's knowing exposure of what he sought to keep private to some of the public. The importance of *Bond*, therefore, is its recognition that the passenger's exposure of his bag's contents to the risk of being touched in certain ways by bus drivers or other passengers did *not* mean that he assumed the risk that *the police* would touch his bag in more intrusive ways, namely, by squeezing it. Who observes us, how, and for what purposes thus mattered to the Court in *Bond* in gauging what expectations of privacy were reasonable. *Bond* is thus more consistent with the mis-definition approach to privacy than the all-or-nothing approach to privacy in the Court's other assumption of risk case law.

"Oppression gave birth to the Fourth Amendment."²⁶⁴ It is the main constitutional provision that "stands between us and a police state, for its central premise is that police (or other governmental) conduct that interferes with a person's liberty, bodily integrity, or right to exclude others from what is hers shall be subject to judicial control."²⁶⁵ That the government may be hindered by Fourth Amendment requirements is not only not a bad thing, it is desirable. The Bill of Rights was created not to make the government's job easier, but to slow, impede, and disrupt the government's forays into individuals' privacy, minds, and realms. A court's attempt to assist in governmental criminal investigations and evidence collection under *Katz* is troubling.

"Without privacy there is no individuality."²⁶⁶ Public visibility in a post-September 11th American airport should not destroy Fourth Amendment privacy claims, even in a traveler's facial expressions. *Katz* and its progeny fail to maintain individuals' personal boundaries, which are off limits to the government.

²⁶² *Id.*

²⁶³ *Id.* at 338–39 (emphasis added).

²⁶⁴ Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 397–98 (2001) (asserting that colonial America's "significant gripes against the English Parliament . . . gave customs officers unbridled discretion to search and seize").

²⁶⁵ JAMES BOYD, WHITE, JUSTICE AS TRANSLATION 177 (1990), cited in Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 145 (1994).

²⁶⁶ See ROSEN, *supra* note 244, at 216 (quoting Leontine Young).

Each of us has an interior region, an essential essence, an internal realm from which governmental incursion must be protected. The governmental need—protecting against terrorists—may be high, but the burden of the governmental invasion of privacy—invasive and stigmatizing—and, as discussed below, other liberty interests, is higher.

4. Unjustified Seizures

One day at Boston's Logan Airport seemed to convince Ekman that SPOT is constitutionally sound. Not a lawyer, Ekman nevertheless declared that his day spent at Logan "confirmed for [him] that SPOT violates no one's civil rights."²⁶⁷ Oblivious to the disruption and indignity suffered by travelers being stopped, questioned, or even interrupted in their comings and goings, Ekman's privileged observer status may have obscured his observation of actual—versus experimentally concocted—human emotion.²⁶⁸ Governmental violation of an individual's constitutional rights should not be condoned merely because, as a result of the violation, evidence of criminality is discovered. Ekman's thinking reflects a common misunderstanding of the doctrine of particularized individualized suspicion prior to governmental intrusions into constitutionally protected realms, as well as highlights what remains unfairly burdensome about race- and ethnicity-based criminal profiling. Quite unlike these profiles, particularized suspicion of an individual's own criminality serves to preclude arbitrary, suspicionless, and general governmental searches and seizures and mandates specific justification for governmental intrusions.

If FACS identifies someone as a potential terrorist, that person will be stopped for further questioning, but that seizure must itself be justified. If FACS has a high error rate or promotes racial profiling, as this Article has argued, then the harms from that seizure are hard to justify. Ordinary airport screening of all passengers is partly justified precisely by its broad applicability; no one being branded as more suspect than anyone else. But additional intrusions of the person—singling out—do far more damage, for the singling out creates significant harms that sound in criminal law and investigation. "Targeting harms" are the problem. These result when law enforcement officers in a variety of contexts focus on an individual as suspicious or otherwise noteworthy. These harms include (1) harm to the individual's privacy, (2) injury suffered from being both publicly singled out by the police and treated like a criminal suspect, (3) the suffering of police violence and physical abuse, (4) discrimination, and (5) "contacts woes," i.e., what results when an individual is repeatedly stopped and formally arrested: a lengthy record of documented incidents, and, given the belief that where there is smoke, there is fire, this reality will almost certainly provide a basis upon which one may reasonably conclude that the individual is trouble, and, though he or she lacks criminal

²⁶⁷ *On the Fly*, *supra* note 11.

²⁶⁸ *Id.*

convictions, they likely have not yet been successfully prosecuted, which then may cause law enforcement agents to be alert to him, in the (likely) event he or she will “do something wrong.”²⁶⁹ FACS and security screeners’ use of it adds to intrusiveness and stigma, as well as smacks of criminal investigative purpose of the most serious sort. Particularly in a post-September 11 American airport, a “FACS stop” shall thus be seen as more like the cases requiring reasonable suspicion for investigatory seizures. FACS may not establish such suspicion yet will be used to support it, as “[r]acial profiling is an institutional practice—a tactic accepted and encouraged by police agencies as a legitimate, effective crime-fighting tool.”²⁷⁰ Ekman advises tolerating ambiguity. But it is highly unlikely that security screeners will willingly consider the possibility that a micro expression is not a deception clue, but perhaps a clue as to how the person feels about being falsely cast as a deceiver.²⁷¹

5. Can FACS Be Reasonable?

The bottom line, therefore, is that under any sound understanding of reasonable expectations of privacy, extended staring by the government, as embodied by FACS, is invasive in a way that implicates the Fourth Amendment.²⁷² But to say that the Fourth Amendment is implicated, that is, it applies to FACS, does not settle the question of FACS’s constitutionality.²⁷³ The overriding mandate of that amendment is that searches must be reasonable.²⁷⁴

²⁶⁹ See Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1284–85 (2000) (quoting William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1218 (1998)).

²⁷⁰ HARRIS, *supra* note 127, at 15.

²⁷¹ See LIES, *supra* note 1, at 174.

²⁷² Foundationally, the right to be secure against the government requires a right to exclude the government. This right to exclude is so essential that it may arguably be equivalent to the right to be secure. Without the former, the latter cannot exist. With the former, “a person has all that the Fourth Amendment promises: protection against unjustified intrusions by the government.” See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 309 (1998).

²⁷³ See *id.* (noting that the Fourth Amendment’s protections are not absolute and protects only “against unreasonable searches and seizures”).

²⁷⁴ “The Supreme Court maximizes every opportunity to remind practitioners that the touchstone of the Fourth Amendment is reasonableness.” Major Charles N. Pede, *Army Lawyer*, ARMY LAW, April 1998, at 80. The following cases refer to reasonableness as the touchstone of the Fourth Amendment: *United States v. Knights*, 534 U.S. 112, 117–18 (2001); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 112, 118 (1995) (“[T]he ultimate measure of the constitutionality of a governmental search is ‘reasonableness’”); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (stating that “reasonableness . . . is the touchstone of the constitutionality of a governmental search”); *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Richards v. Wisconsin*, 520 U.S. 385, 388 (1997); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (stating, “We have long held that the ‘touchstone of the Fourth Amendment is reasonableness’”); *Florida v. Jimeno*,

“Reasonableness” is determined by a process of categorical balancing.²⁷⁵ Thus, faced with a novel problem, the Court balances state against individual interests to determine which is weightier.²⁷⁶ But it does not do so on an ad hoc, case-by-case basis. Rather, it crafts a rule to cover an entire class of similar, future cases. The reasonableness of similar cases—those fitting into the new category—is thereafter determined by application of the new rule rather than a fresh process of interest-balancing.²⁷⁷

There is little doubt that FACS observations, if subjected to the strictures of the Fourth Amendment, would fit into the category of “administrative searches.”²⁷⁸ Ample case law suggests that searches or seizures aimed at preventing potentially imminent physical harm, such as airport passenger screening, are administrative.²⁷⁹ But this category is governed by among the fuzziest of the Court’s Fourth Amendment rules.²⁸⁰ A search is “administrative” if its primary objective programmatic purpose is something other than criminal law enforcement aimed at its target.²⁸¹ But to say this tells us only that in the reasonableness balancing

500 U.S. 248, 250 (1991); *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09, (1977) (per curiam); *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

²⁷⁵ See ANDREW E. TASLITZ ET AL., *CONSTITUTIONAL CRIMINAL PROCEDURE* 175–81 (3d ed. 2007) (describing the Court’s “categorical reasonableness balancing” analytical method) [hereinafter *CRIMINAL PROCEDURE*].

²⁷⁶ See, e.g., Eric P. Haas, *Back To The Future? The Use Of Biometrics, Its Impact On Airport Security, and How This Technology Should Be Governed*, 69 J. AIR L. & COM. 459, 463 (2004) (defining reasonableness as “a compelling governmental interest that overshadows a conflicting intrusion of privacy”).

²⁷⁷ See *CRIMINAL PROCEDURE*, *supra* note 275, at 175–76, 182 (citing the Court’s refusal to rebalance interests that had already been subjected to categorical balancing in *Whren v. United States*, 517 U.S. 806 (1996)).

²⁷⁸ See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674–75 (1989) (approving in dicta lower courts’ findings that the Fourth Amendment permits airport searches, “applying our precedents dealing with administrative searches”). In *Von Raab*, the Court quoted one circuit court holding that the “danger [of terrorism via hijacking] alone meets the test of reasonableness.” *Id.* at 675 n.3. Because the searches were “in response to an observable national and international hijacking crisis . . . [i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.” *Id.* More recently, in *United States v. Drayton*, 536 U.S. 194 (2002), the dissent opined that “anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft.” *Id.* at 208 (Souter, J., dissenting).

²⁷⁹ See, e.g., *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation”) (internal quotation marks and citation omitted).

²⁸⁰ Marc A. Stanislauczyk, Note, *An Evenhanded Approach To Diminishing Student Privacy Rights Under The Fourth Amendment*, 45 CATH. U. L. REV. 1041, 1048 n.38 (1996) (stating that “the line dividing a criminal and administrative search may be very fuzzy”).

²⁸¹ See, e.g., *Brigham City v. Stuart*, 126 S. Ct. 1943, 1948 (2006) (citing *Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000)) (holding courts’ inquiry into programmatic purpose of administrative searches is sometimes appropriate to ensure purpose is distinguishable from crime control).

process, the Court will more readily give state harm-prevention interests more weight than in an ordinary criminal search, being more willing to reduce or eliminate the probable cause and warrant requirements. The Court will still balance, looking to create rules for sub-categories of administrative searches.²⁸² Furthermore, the Court purportedly looks for evidence that adequate limits have been placed on law enforcement discretion, frequently saying that those limits must be equivalent to those that would be imposed by a warrant.²⁸³ Moreover, although not requiring the state to choose the least restrictive alternative, the Court does consider the availability of less restrictive alternatives as a relevant factor in the balancing process. Finally, a program might be unconstitutional as applied but with the suggestion that improved implementing procedures might render it constitutional.²⁸⁴

This Article has already made the case, however, supporting the conclusion that the current version of FACS fails even the pro-state balancing process of the administrative search doctrine. The state's interest protecting airline safety is large,²⁸⁵ but there is little evidence that FACS is an effective means for achieving that goal—and the likely effectiveness of the chosen means is also one of the factors in the administrative search balancing process.²⁸⁶ Furthermore, the Court has suggested in some administrative search cases that the burden of presenting persuasive empirical evidence that its chosen means help to attain a valid, proven governmental interest is on the state.²⁸⁷ For all the reasons noted in Part II of this Article, that is a burden the state has not met.²⁸⁸ Additionally, FACS allows for

²⁸² See, e.g., CRIMINAL PROCEDURE, *supra* note 275, at 402–48 (describing subcategories of administrative searches and the Court's different treatment of each).

²⁸³ See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) (upholding the validity of Federal Railroad Administration regulations that mandated warrantless, suspicionless blood and urine testing of employees involved in train accidents; standardization of the tests and minimal discretion to the regulations' enforcers meant there were "virtually no facts for a neutral magistrate to evaluate," i.e., no warrant was required).

²⁸⁴ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (invalidating a warrantless, suspicionless highway checkpoint program to interdict illegal narcotics; circumstances that may justify such a checkpoint, turning a "program driven by an impermissible purpose" into one "impelled by licit purposes . . . even though the challenged conduct may be outwardly similar").

²⁸⁵ "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)).

²⁸⁶ See CRIMINAL PROCEDURE, *supra* note 275, at 401.

²⁸⁷ See *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (finding that the absence of empirical evidence of a drug problem among the relevant state employees or of the ineffectiveness of less intrusive alternatives to combat it were fatal to the drug testing program there involved); *Skinner*, 489 U.S. at 602 (noting that the state had "well-documented" the existence of a drug abuse problem in the rail industry and the risks that it posed to public safety).

²⁸⁸ See *United States v. Legato*, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring) (finding it "passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep bombs from exploding").

nearly unlimited, unguided exercise of discretion by implementing personnel, discretion subject to no serious review or correction process. That discretion allows for the free play of subconscious biases, particularly those concerning race or ethnicity, such that FACS alerts may in practice result more from bias than science.²⁸⁹ That racial bias in turn imposes heavy burdens on the individuals affected, the racial groups to which they belong, and democratic society as a whole, thereby creating not only weighty individual interests in dismantling FACS but broader societal ones.²⁹⁰ Indeed, by encouraging citizen distrust of the police and a resulting unwillingness to cooperate with them, FACS may in the long-run harm the battle against terrorism.²⁹¹ Additionally, FACS diverts resources from potentially more effective techniques, such as better-trained airport screeners or a focus on crafting affordable and more effective screening technology.²⁹²

Were the FACS system to be substantially improved, increasing its proven accuracy in the field based upon sound empirical studies, crafting simpler guidelines to reduce law enforcement discretion, adding features to minimize the effects of subconscious racial bias, and implementing effective and rapid review, feedback, and error-correction procedures, FACS might, at least in theory, be rendered constitutionally viable. In its current form, however, FACS is unreasonable and should be declared constitutionally dead.

IV. CONCLUSION

*Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.*²⁹³

²⁸⁹ See *supra* Parts II and III.

²⁹⁰ Justice Douglas noted that “[i]nvasions of privacy demean the individual. Can a society be better than the people composing it? When a government degrades its citizens, or permits them to degrade each other, however beneficent the specific purpose, it limits opportunities for individual fulfillment and national accomplishment.” *United States v. White*, 401 U.S. 745, 764 (1971) (Douglas, J. dissenting) (citation omitted).

²⁹¹ See Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 155–56 (2003) (arguing that criminally profiling American minorities after September 11 “creates an ire with a purpose” that threatens national security). See also HARRIS, *supra* note 122, at 231, 233 (asserting that profiling minorities “has the added consequence of alienating the very community most able to help with effective law enforcement,” including Arab and Muslim communities after September 11).

²⁹² See HARRIS, *supra* note 127, at 230 (noting how, through profiling minorities versus “markers of behavior,” society spreads “enforcement resources and efforts more thinly”).

²⁹³ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–37 (1943).

Since 9/11, the “war on terror” has become a “national mantra,” working a pernicious impact on this country’s democratic government as well as the American psyche.²⁹⁴ The culture of fear inspired by the events of 9/11, as well as the notion that America is fighting a “war on terror” bodes ill for democracy.

In its haste to take action as quickly as possible after 9/11 to protect the American airline industry, as well as international and domestic travel, TSA has unfortunately failed to apprehend the possible secondary, constitutional effects of SPOT. The inability to “solve” terrorism or prevent future terrorist acts is maddening and frustrating,²⁹⁵ and for those reasons, the comfort and confidence taken in SPOT are illusory. SPOT substitutes slick profiles for tough, investigative, and effective policing, improperly elevating law enforcement’s raced-based shortcuts rooted in unchallenged, unpunished, and undetected, violations of Fourth Amendment rights for individualized suspicion or fair process.

Police agents in airports should not be in the business of defining who has, and what constitutes, a normal, proper, or acceptable facial expression. Yet, SPOT recklessly legitimizes such policing and unconstitutionally infringes upon Fourth Amendment freedoms. Accordingly use of SPOT should be summarily abandoned.

²⁹⁴ See Zbigniew Brzezinski, *Terrorized by “War on Terror,”* WASH. POST, Mar. 25, 2007, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html>.

²⁹⁵ For example, in *Doe v. City of Lafayette*, the Seventh Circuit marks the first time that “a court has allowed a person to be subjected to punishment based only on the content of his thoughts without any accompanying actions that interfere with the rights of others.” Elizabeth Cloud, Note, *Constitutional Law—First Amendment and Freedom of Thought—Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender’s Ban From Public Parks After Thinking Obscene Thoughts About Children*, 28 U. ARK. LITTLE ROCK L. REV. 119, 145 (2005) (citing *Doe v. City of Lafayette*, 377 F.3d 757 (2000)).