

Fall 1998

Passenger Profiling: A Greater Terror Than Terrorism Itself, 32 J. Marshall L. Rev. 167 (1998)

Donna Smith

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Air and Space Law Commons](#), [Constitutional Law Commons](#), [Fourth Amendment Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [National Security Law Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Donna Smith, Passenger Profiling: A Greater Terror Than Terrorism Itself, 32 J. Marshall L. Rev. 167 (1998)

<https://repository.law.uic.edu/lawreview/vol32/iss1/2>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

PASSENGER PROFILING: A GREATER TERROR THAN TERRORISM ITSELF?

DONNA SMITH*

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.¹

INTRODUCTION

In August of 1996, Laura Fadil booked a flight from Newark to Haifa, Israel, to visit relatives she had never met.² As she checked in at the ticket counter at El Al, Israel's national airline, security personnel questioned her about her ethnicity and the origin of the name "Fadil."³ Upon hearing that Fadil was an Arab name, the security personnel subjected Laura to a litany of intrusive questions.⁴ At the end of this interrogation, and after inviting the security personnel to conduct a hand search of her belongings, Laura was labeled a "security risk" and the security personnel refused to allow her to board the plane.⁵ Laura never boarded that El Al flight, or any other flight to Israel that day. Instead, El Al arranged for her to fly with another airline the next day.⁶

Laura was singled out because she "fit the profile."⁷ Laura displayed characteristics that led El Al security personnel to select her as one likely to be a terrorist.⁸ Prior to 1972, a serious

* J.D. Candidate, June 1999.

1. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

2. Sam Hussein, *Making the Skies Safer; Profile in Unfairness; What Happened to TWA 800 Is No Reason to Endanger Passengers' Civil Rights*, WASH. POST, Nov. 24, 1996, at C3.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* See also *United States v. Meulener*, 351 F. Supp. 1284, 1288 (C.D. Ca. 1972) (explaining that the FAA developed a hijacker profile to assist airport security personnel in determining those passengers who are most likely to be hijackers, while allowing most passengers to pass through the security checkpoints without delay).

8. See *United States v. Cyzewski*, 484 F.2d 509, 511 (5th Cir. 1973) (weighing the burden of airport security measures against the need for

increase in hijackings prompted the development of various pre-flight surveillance techniques, some of which we still use today, including magnetometers⁹ and passenger profiling.¹⁰ Though most of the criteria used to assess an individual's profile remain classified in an effort to avoid undermining the system, some criteria are available through public documents or are reported by government aviation officials.¹¹ Airport security personnel may

enhanced security measures). When the profile is applied and a passenger fits the criterion, airport security personnel will classify the individual as a "selectee." *Id.* Selectees are subjected to more intense screening procedures. *Id.* The security personnel will request that the passenger answer questions and/or produce identification. *Id.* If the security personnel have any doubt as to the selectee's identity, the security personnel will continue to ask the passenger questions and possibly insist that he or she pass through the magnetometer. *Id.*

9. *See* United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972) (explaining the operation of magnetometers and discussing their constitutionality). Magnetometers are metal detecting devices, which security personnel use to reveal metal concealed in carry-on luggage or in a passenger's clothing. *Id.* A passenger passes through the magnetometer prior to boarding the airplane. *Id.* If the magnetometer indicates the presence of metal, then the security personnel will determine whether the passenger is carrying a dangerous metal object by asking him what metallic items he is carrying or asking him to empty the metallic contents of his pockets. *Id.* The passenger will pass through the magnetometer again until he elicits no positive reading. *Id.* The use of the magnetometer is generally considered to be an "electronic search." *Id.* *See also* Klarfeld v. United States, 944 F.2d 583, 586 (9th Cir. 1991) (finding an attorney's constitutional rights were not violated when he was required to walk through a magnetometer at the courthouse in his stocking feet because his shoes contained metal). If a passenger is unable to pass through a magnetometer, even after emptying the contents of his or her pockets, the security personnel may then use a hand-held magnetometer to perform a more thorough search. *Id.*

10. NATIONAL RESEARCH COUNCIL, AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES vii (1996) [hereinafter Passenger Screening Implementation Report] (considering the non-technical issues and obstacles related to the implementation of the new passenger security screening methods). The FAA enlisted the services of the National Research Council to compile this report. *Id.* The National Research Council gathered together a panel of "experts in human factors, risk perception and psychology, imaging science, electrical engineering, chemical detection, health effects of radiation, and legal issues." *Id.* at 11. The panel heard presentations by experts on passenger screening technologies, read technical literature provided by the FAA and the National Research Council, and participated in workshops during which outside organizations presented their suggestions. *Id.* The panel reviewed the recommended passenger screening methods, assessed the potential concerns relating to each, considered how the methods might be effectively implemented, and suggested other methods for passengers who are unwilling to comply. *Id.* at vii. They considered the security screening methods in light of health and privacy concerns, travel comfort, effectiveness and public acceptance. *Id.*

11. Gregory T. Nojeim, *Civil Liberties Implications Of Aviation Security, Passenger Profiling* (The Int'l Conference on Aviation Safety and Security in the 21st Century) 3 (1997) (speaking on behalf of the American Civil Liberties

select a passenger for increased security measures based on the following variables: information contained in the passenger's travel documents, the passenger's conduct, travel destination or starting point, whether the flight is one way or round-trip, or on the basis of forty or so other pieces of data, most of which remain confidential.¹²

It would be interesting to know what characteristics Laura Fidel shared with a "typical" terrorist and what factors El Al security personnel considered to come to that conclusion. Certainly we may infer that her Arabic last name had some bearing upon El Al's decision to subject Laura to such close scrutiny and ultimately prohibit her from boarding the flight. Did they take into account that she was a nursing student at Yale University?¹³ They must have. Why else would they have asked her about her scholarship?¹⁴

Assuming that nationality is not a key factor in the formation of a profile, the issue then becomes one of privacy. How comfortable is the typical passenger with the idea that, as they move through an airport attending to the usual pre-travel arrangements, airport personnel are compiling many bits of

Union concerning the privacy and discrimination issues associated with passenger profiling). Mr. Nojeim is Legislative Council for the American Civil Liberties Union's Washington National Office.

12. *Id.* Security personnel form a passenger profile based on both physical characteristics, such as nervousness, sweating, or the amount of baggage checked or carried, and information independent of the passenger's demeanor, such as method of payment, whether the passenger is traveling alone and whether the passenger will rent a car. *Id.* This is based on the profiling system that the FAA is currently developing with Northwest Airlines for domestic flights. *Id.* In *United States v. Riggs*, the airline personnel described defendant as "a young female Negro wearing a brilliant orange coat and large gold hoop earrings." *United States v. Riggs*, 347 F. Supp. 1098, 1100 (E.D.N.Y. 1972). They further noted that she had no baggage and bought three one-way tickets for a flight from Detroit to New York with cash from a brown paper bag. *Id.* The airline personnel also noted she was traveling with two African American males. *Id.* These factors as a whole were suspicious to the security personnel, causing them to label her "a selectee pursuant to the FAA 'behavioral profile' system." *Id.* In determining that a passenger fits a terrorist profile, airport personnel are supposed to consider specific factors as guidelines. An American Airlines ticket agent in *United States v. Lopez-Pages* based his judgment on the facts that Lopez-Pages paid for his tickets in cash, did not give a phone number, was Hispanic, was traveling within the range of Cuba, bought two one-way tickets, and did not check any baggage. *United States v. Lopez-Pages*, 767 F.2d 776, 778 (11th Cir. 1985). See also *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973) (concluding the police were justified in searching defendants when defendants lied to police officers, were obviously nervous, changed lines at the ticket counter, later changed airlines, and the defendant had a bulge in his pocket that led police to believe that he was armed and dangerous).

13. Husseini, *supra* note 2, at C3.

14. *Id.*

personal data with the ultimate goal of classifying each passenger as threatening or non-threatening? If the passenger is unlucky enough to fit the terrorist profile, the passenger may be merely detained or embarrassed, or the inconvenience may rise to the level of humiliation in the form of handcuffing, a strip search,¹⁵ or the dumping of the passenger's luggage onto the floor of a public area.¹⁶ Like Laura, the passenger may be denied the opportunity to board altogether, no matter what level of indignity the passenger is willing to withstand.

This Comment explores the method and implementation of passenger profiling historically and analyzes its application in concert with modern approaches and techniques. The ultimate conclusion is that the Federal Aviation Administration (FAA) should not employ this procedure in its current format unless modifications are implemented that would bring passenger profiling in line with the protections afforded by the United States Constitution. Part I provides a historical background of passenger profiling, and how it has developed in this country, including the FAA's influence on airport security. Part I also examines President Clinton's Commission on Aviation Safety and Security and its efforts to develop a strategy for dealing with aviation security concerns. Additionally, the commission's plans to use passenger profiling in conjunction with new technology and its efforts to address civil rights issues are analyzed in Part I. Part II examines searches that result from the application of passenger profiles in light of the Fourth Amendment. Part II also reviews the Fourth Amendment exceptions that have traditionally served to justify airport searches, including voluntary consent, "Terry" stops and administrative searches, and suggests why these should not apply to a search pursuant to a passenger profile. Part III assesses the effectiveness of passenger profiling as a security measure. Part IV analyzes the impact of passenger profiling on a passenger's reasonable expectation of privacy. Part V proposes a solution to the present problems with the implementation of the passenger profiling system, including the redevelopment of the profile criteria, creation of a civil rights panel, and improved training procedures.

15. *Id.* Security personnel detained Abraham Ahmad in Oklahoma. *Id.* His ultimate destination was Jordan, but because security personnel identified him as a potential suspect in the Oklahoma City Bombing due to his ethnicity and travel destination, he was held and questioned over a three day period. *Id.* During that time he was made to answer questions about his religious practices, handcuffed and strip searched. *Id.*

16. Council on American-Islamic Relations, *CAIR Meets With Officials on Passenger Profiling*, *1 (Press Release 1997) <<http://www.cair-net.org/cair/presses/press62697.htm>>.

I. PASSENGER PROFILING, PAST AND PRESENT

This Part offers a foundation for examining how society responds to the threat of terrorism by acquiescing to more invasive security measures. A brief description of the development and history of passenger profiling will provide a basis for understanding profiling's ultimate objective, and how it is used in conjunction with modern security approaches.

A. *The History of Passenger Profiling*

In the late 1940's, a domestic dispute inspired a woman to hire assassins to kill her husband.¹⁷ The assassins planted a bomb on the Philippine Airlines plane that the husband was taking from Daet to Manila. The success of this mission resulted in the first commercial flight bombing recorded in history.¹⁸ The first commercial flight bombing in the United States occurred in 1955 when a passenger's son packed a bomb in the passenger's luggage so that he could collect the proceeds from an insurance policy.¹⁹

The first United States commercial flight hijacking occurred in 1961.²⁰ This new form of terrorism became a source of national anxiety when, in 1968, the United States became the target of seventeen attempted hijackings.²¹ The first passenger profiling procedure materialized during this period of panic and was extremely ineffective in subverting terrorist activity.²² In fact, in 1972, the last year airport security personnel used profiles in this country, there were twenty-eight hijackings.²³ Once magnetometers were developed, hijackings decreased to the point that only two United States carriers have been hijacked in the past eleven years.²⁴

In response to the hijacking dilemma, the FAA and other federal agencies collected and examined information on the characteristics of known terrorists and hijackers.²⁵ Researchers used this information to create a list of distinguishing characteristics that would differentiate a terrorist for

17. Passenger Screening Implementation Report, *supra* note 10, at 9.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Nojeim, *supra* note 11, at *5. Profiling techniques are inadequate as a security measure because those who don't fit the profile proceed unnoticed. *Id.* at *4. "What terrorist profile would have picked up the seminary student returning to his studies from a visit to his mother who was detained by law enforcement officers in Florida . . . when he tried to board an airplane with an assortment of weapons that included hand grenades?" *Id.*

23. *Id.* at *5.

24. *Id.* One explosion occurred on Pan Am flight 103 and the other on a TWA flight near Athens in 1986. *Id.*

25. *United States v. Bell*, 464 F.2d 667, 670 (2d Cir. 1972).

identification purposes.²⁶ A scientific, sociological and psychological foundation formed the basis for the profile.²⁷ Ideally, airport personnel would effectively use the profile independently of their own subjective interpretation.²⁸ While generally supporting the profiling procedure, courts have recognized the potential for the “serious abuse of individual rights.”²⁹

B. *The Legal History of Passenger Profiling*

The Airport Security Act empowers the FAA to implement procedures designed to improve security technology.³⁰ Historically, courts have supported the FAA in its efforts to implement new technology or procedures, even when those procedures go further than merely locating dangerous objects.³¹

The Supreme Court tends to avoid ruling on broad cases involving profiling, instead focusing on the specific facts of each individual case.³² With some notable limitations and exceptions, federal and state courts accepted the use of passenger profiling security measures when this issue first surfaced in the late 1960's and early 1970's.³³ Courts were resolute in noting, however, that

26. *Id.* The traits of an individual, as well as the circumstances surrounding the purchase of the ticket, are taken into consideration. *Id.*

27. *Id.* See *United States v. Lopez*, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971) (explaining the basis for profiling and how an accurate profile is developed). Researchers used visual and photographic studies of boarding air passengers in conjunction with thorough investigations of known hijackers. *Id.* The researchers found that hijackers were not “highly motivated or resourceful” people and they displayed specific observable features that differentiated them from the general traveling public. *Id.*

28. *Bell*, 464 F.2d at 670.

29. See *id.* at 676 (Mansfield, J., concurring) (comparing the use of a profile in airport searches to searches of a home based on police hunches).

30. Passenger Screening Implementation Report, *supra* note 10, at 34.

31. *Id.* However, as the screening technology becomes more intrusive, the legal problems associated with its use must be closely scrutinized. *Id.* President Clinton's Commission on Aviation Security and Terrorism recognizes that fundamental freedoms are threatened as security measures increase. *Id.*

32. Robert Derocher, *Friendly Skies?* J. MARSHALL L. SCH. MAG. Summer 1997 40 at 46 (quoting Professor Timothy O'Neill, Criminal Law Professor, The John Marshall Law School).

33. *Lopez*, 328 F. Supp. at 1101 (holding that evidence should be suppressed in cases where airport personnel do not adhere to the formal profile screening procedure). In *Lopez*, a Pan American Passenger Service Manager “updated” the profile, eliminating one factor from the FAA official profile and adding two additional categories. *Id.*

One of the characteristics added introduced an ethnic element for which there is no experimental basis, thus raising serious equal protection problems. The second added criterion called for an act of individual judgment on the part of airline employees. The effect of these changes was to destroy the essential neutrality and objectivity of the approved profile.

no matter how serious the hijacking problem, Constitutional concerns could not be ignored.³⁴ In the face of unexplained disasters to come, however, individual rights could again be threatened.

C. *The Aviation Safety and Security Commission*

On July 17, 1996, TWA Flight 800 exploded, leaving few clues as to its cause.³⁵ Theories ranged from a bomb smuggled on board, to a surface-to-air missile fired from a ship,³⁶ to an Islamic fundamentalist attack.³⁷ Almost immediately, reports on the insufficiency of the current aviation security and the need for expensive new devices appeared in the newspapers, seemingly on a daily basis.³⁸ Not only in the United States, but across the world, airport officials sought ways to render their airports invulnerable.³⁹

Against this backdrop of fear and uncertainty, President Clinton established the White House Commission on Aviation Safety and Security (Commission) and appointed Vice President Gore to Chair the Commission.⁴⁰ The Commission consisted of

Id. Accord Bell, 464 F.2d at 670 (stressing that an effective profile is one that may be "objectively employed by the ticket seller without requiring any subjective interpolation"); *United States v. Ruiz-Estrella*, 481 F.2d 723, 730 (2d Cir. 1973) (holding that evidence should be suppressed where defendant, though he fit the profile, was not subjected to the magnetometer test and had done nothing suspicious); *People v. Kuhn*, 33 N.Y.2d 203, 208 (N.Y. 1973) (noting that defendant was only searched after he elicited a positive reading from the magnetometer and that this procedure was applied to all passengers passing through the magnetometer).

34. *See Cyzewski*, 484 F.2d at 511 (recognizing that warrantless airport searches must be guided by the standard of reasonableness); *see also United States v. Moreno*, 475 F.2d 44, 45 (5th Cir. 1973) (balancing an individual's Fourth Amendment rights against public concern over the threat of hijacking).

35. Rick Hampson, *TWA Flight 800 Explosion, FBI Exploring Terrorism Theory. No Conclusions Reached Yet; Missile Pretty Much Ruled Out*, CIN. ENQUIRER, July 20, 1996 at A1.

36. *Id.* Just before the explosion, radar picked up a signal that led FBI agents to believe that there might have been a missile involved. *Id.*

37. Derocher, *supra* note 32, at 41.

38. *See Stephen C. Fehr, Pena Addresses Price of Airline Safety; Terrorism May Force Massive Upgrade of System, Secretary Says*, THE WASH. POST, Aug. 2, 1996 at A13 (commenting that conventional x-rays are no longer sufficient, and that \$4.2 billion would be needed to develop a bomb-detection system and computerized bag matching system); *see also Passenger Screening Implementation Report*, *supra* note 10, at 13-21 (describing the proposed screening technologies, including "chemical trace-detection techniques that can see through clothing").

39. *Crash Launches New Talks on Security*, J. REC., Aug. 26, 1996 at *1. In explaining how Rome's Fiumicino International Airport has increased security measures, Francesco Girasoli, a police security official at the airport said, "[t]his happens during periods of emergency." *Id.*

40. Exec. Order No. 13,015, 3 C.F.R. 213 (1996).

members from the public and private sectors, each contributing some degree of security expertise.⁴¹ The Commission had forty-five days to develop a strategy for dealing with the aviation security concerns.⁴² A proposal for automated passenger profiling was among the Commission's final recommendations.⁴³

Noting that "there is no silver bullet," the Commission recommended that the federal government treat aviation as a national security issue and allocate money to upgrade the entire system.⁴⁴ In October, 1996, in response to the Commission's recommendations, Congress approved over \$400 million to fund the Commission's mandates.⁴⁵

The Commission suggested that passenger profiling could "complement technology" by using information that is currently stored on databases to personalize the profile.⁴⁶ To support its position, the Commission cited the use of profiling by other agencies, such as the Customs Service, and recommended that the Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA) be involved in developing the most effective profiling system possible.⁴⁷ Recognizing the civil liberties concerns certain to arise from the implementation of many of the recommendations, the commission sought the advice of a panel of leading civil libertarians.⁴⁸

D. The Panel on Passenger Screening

The Panel on Passenger Screening (Panel) identified five non-technical potential problem areas relating to new passenger screening technologies. These include: health concerns, legal issues, operational questions, privacy issues and passenger

41. *Id.*

42. Derocher, *supra* note 32, at 41.

43. *Id.* Other recommendations included the use of baggage matching devices and baggage and body-screening technology. *Id.* These security measures have the disadvantage of being expensive and time consuming and are intended to be used in tandem with passenger profiling to limit the number of passengers detained. *Id.*

44. *Final Report to President Clinton, White House Commission on Aviation Safety and Security*, *1, *22 (1997). Congress agreed to the Commission's initial request of approximately \$160 million in federal funds for improvement of safety systems. *Id.* The report further concluded that the federal government should continue to designate around \$100 million in funds each year for the improvement of safety systems. *Id.*

45. *Id.* at *4.

46. *Id.* at *24-25. Profiling can help security personnel to effectively use the technological and training advancements to their full potential. *Id.* Security personnel could access information that is already in computer databases to determine which passengers might pose a threat. *Id.*

47. *Id.* at *25.

48. *Id.*

convenience.⁴⁹ The Panel clearly identified the correlation between the perceived risk to be avoided through passenger screening methods and the level of intrusiveness that people are willing to tolerate.⁵⁰ For example, passengers are willing to undergo more time consuming, exhaustive security procedures for an international flight than a domestic flight because they perceive a greater threat of danger.⁵¹ Interestingly, the Panel further identified acceptance of passenger screening procedures as a “trade-off,” between an individual’s personal liberties and the perceived threat of danger.⁵² By this rationale, fear of terrorism, whether founded in truth or not, could fuel the fire that envelopes our civil rights.⁵³

The Panel relied on presentations by experts in the field of aviation security, among them Dan Issacharoff, the former head of security for El Al Airlines of Israel, in forming their conclusions.⁵⁴ El Al has developed a comprehensive security screening program pursuant to which passengers are directly questioned.⁵⁵ The method that El Al uses to label potentially dangerous passengers involves the categorization of five types of passengers. These range from naive terrorists, who would not know that their luggage concealed explosive devices, to suicide terrorists, who would knowingly carry explosive devices with the intent to destroy the airplane.⁵⁶

The Panel recommended that El Al’s screening system, along with the custom-made passenger interrogation technique the airline has developed to fit each profile type, could serve as a model for other air carriers.⁵⁷ This may mean that what happened

49. Passenger Screening Implementation Report, *supra* note 10, at 1-2.

50. *Id.* at 52. The panel suggests that the FAA use this link between the public’s perception of the gravity of the threat and their tolerance of invasive security measures to create a workable strategy for dealing with future threats. *Id.*

51. *Id.* at 2. Similarly, passengers will tolerate increased security measures when they believe that an unusual threat exists. *Id.* Cf. Timothy J. McNulty, *Trading Privacy for Security in Other Countries, Public Tamefully Submits to Required Indignities*, CHI. TRIB., Apr. 21, 1995, at 15 (questioning the individual acceptance of invasive security measures that are the direct result of public reaction to terrorist activity). “Whether submitting to airport interrogations, opening purses at the entrances to public buildings or watching police rummage through toiletries, squeezing out toothpaste, life in the name of security becomes a collection of personal indignities.” *Id.* The writer is concerned that fear of terrorism will turn into a panic that will change the way we live and our willingness to assert our constitutional rights. *Id.*

52. Passenger Screening Implementation Report, *supra* note 10, at 10.

53. Hussein, *supra* note 2, at C3.

54. Passenger Screening Implementation Report, *supra* note 10, at 13.

55. *Id.*

56. *Id.*

57. *Id.* at 14.

to Laura Fadil could become a common occurrence on all airlines, and that the aviation industry will even praise such "passenger interrogation" techniques.⁵⁸ "History reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquillity alike."⁵⁹

II. THE FOURTH AMENDMENT IMPLICATIONS OF A SEARCH PURSUANT TO A PASSENGER PROFILE

The airport setting is a "critical zone" in which each individual passenger poses an ominous threat to fellow passengers and flight crews.⁶⁰ As such, a more intrusive search is reasonable in an airport setting than would be authorized for on-the-street encounters.⁶¹ This broad discretion is not without limits.⁶² Concerns over airport safety cannot justify the deprivation of constitutional safeguards.⁶³

The Fourth Amendment of the United States Constitution ensures that "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."⁶⁴ Some exceptions to the Fourth Amendment applicable to the airport setting include searches carried out with the consent of the person being searched,⁶⁵ less-

58. Husseini, *supra* note 2, at C3. Aviation officials repeatedly praise El Al Airlines for their excellent security methods. *Id.* Further, El Al alumni train other carriers to implement these methods. *Id.*

59. *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring).

60. *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir. 1973).

61. *Id.*

62. *United States v. Cyzewski*, 484 F.2d 509, 517 (5th Cir. 1973) (Thornberry, J., dissenting).

63. *Id.* at 515 (Thornberry, J., dissenting).

64. U.S. CONST. amend. IV.

65. *People v. Heimel*, 812 P.2d 1177, 1181 (Colo. 1991). A passenger may choose to leave a security checkpoint area before the actual screening process begins. *Id.* When a passenger approaches the security checkpoint area with notice that a screening process may lead to a search of his person or luggage, and the screening process actually begins, the passenger consents to the search. *Id.* See also *United States v. Lopez-Pages*, 767 F.2d 776, 778 (11th Cir. 1985) (noting that when the passenger voluntarily approaches an airport security area, no probable cause or even reasonable suspicion is required to search that passenger). A "mere suspicion of possible illegal activity" is adequate justification for a search under such circumstances. *Id.*; *People v. Kuhn*, 33 N.Y.2d 203, 208 (N.Y. 1973) (holding that defendants' voluntary consent to be searched is a waiver of their Fourth Amendment rights absent evidence of coercive tactics by security personnel). Evidence of coercive questioning methods may be determined by the nature of the questions or the location where the questioning took place. *Id.* But see *McGann v. Northeast*

intrusive “Terry” searches,⁶⁶ and administrative searches.⁶⁷ This Part describes each of these Fourth Amendment exceptions, and explains how they are inapplicable to a search pursuant to the utilization of a passenger profile. However, before addressing the question of whether a Fourth Amendment exception applies, the first step is to determine that a search pursuant to a passenger profile is a “government” search.

A. Government or Private Search?

The threshold issue in determining whether an airline security search comes within the limitations of the Fourth Amendment is whether the government is responsible for the

Ill. Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1179 (7th Cir. 1993) (noting other courts' holdings that the decision to use air transport implies consent to the search of the passengers person or luggage); *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986) (holding that passengers impliedly consent to a visual inspection and limited search of their luggage when they place the luggage on the magnetometer conveyor belt).

66. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Terry* gives police officers the authority to conduct a self-protective search of an individual to check for weapons where the officer has reason to believe the individual may be armed and dangerous. *Id.* The officer need not show probable cause or be positive the individual is carrying a weapon. *Id.* The standard for determining an officer's reasonableness is an objective standard, based on whether a reasonably prudent person in the officer's position would be justified in determining that his safety and/or the safety of others was threatened. *Id.* The scope of this authority is very narrow and not justifiable unless the officer has a reasonable apprehension of danger. *Id.* This limited search is not to be used to discover evidence that is not reasonably related to the discovery of “guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Id.* at 29. Any weapon seized in accordance with this limited search “may properly be introduced into evidence against the person from whom they were taken.” *Id.* at 31. The officer must be able to articulate rational inferences, stemming from specific facts which would justify the search. *Id.* at 21.

67. *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973). An administrative search is defined as a search conducted for an administrative purpose, rather than to obtain evidence of a crime. *Id.* Administrative searches are an exception to the Fourth Amendment in that probable cause is not a necessary component of the search process. *Id.* General searches for evidence of crime are a prohibited application of the administrative search authority. *Id.* at 909. As such, evidence obtained from a general search is inadmissible. *Id.* An administrative search must be reasonable as mandated by the Fourth Amendment standard. *Id.* at 910. To meet the test of reasonableness, an administrative search must implement the least intrusive means possible to accomplish the administrative end which justifies the search. *Id.* The search must be limited to the discovery of weapons or explosives and must be minimally invasive to determine the presence or absence of those items. *Id.* at 913. The authority to conduct a valid administrative search is counterbalanced by the passenger's right to avoid the search by choosing not to board the airplane. *Id.* at 910-11. Whether the passenger was aware of his right to refuse is only one component in assessing the reasonableness of the search. *Id.* at 914.

search.⁶⁸ The Fourth Amendment applies only to government searches, not searches carried out by a private entity.⁶⁹ However, a search is considered a government search for purposes of the Fourth Amendment when the government contributes significantly to any phase of the search, including the planning stages.⁷⁰ Without question, the United States has played a substantial role in airport security measures since the threat of hijacking first became an exigent concern in 1968.⁷¹ Since the early days of the hijacking crisis of 1968, the government's level of involvement in airport security measures has been so extensive as to bring any search conducted pursuant to those measures under the protection of the Fourth Amendment.⁷²

Toward the end of 1968, an FAA committee, including representatives of the Department of Justice and the Department of Commerce, developed the first passenger profile.⁷³ In December 1968, the FAA organized a conference on the development of passenger screening devices.⁷⁴ The airlines and the FAA then combined their efforts to design the first "anti-hijacking system."⁷⁵

However, by 1971 the FAA was no longer content to accept the airlines' voluntary cooperation. The FAA recommended instead a new rule forcing each airline to develop a security screening plan meeting FAA approval.⁷⁶ In 1972, the FAA went

68. Passenger Screening Implementation Report, *supra* note 10, at 34.

69. *Id.*

70. See *Davis*, 482 F.2d at 896-97 (defining what constitutes a government search for purposes of the Fourth Amendment). When the government involves itself with a private person whose conduct violates the Fourth Amendment to such a degree that the private person and the government are jointly reliant upon each other, it is said to be a "state action." *Id.* at 897 n.3. In this situation, even though the government might not actually perform the search, it does fall within the scope of the Fourth Amendment. *Id.* at 896-97.

71. *Id.* at 897-98. In 1961, Congress enacted a statute making aircraft hijacking and activities linked to hijacking federal crimes, and permitted airlines to deny boarding to anyone the airline believed might pose a threat to security. *Id.* at 897-98. In 1968, federal officials, in cooperation with air carriers, developed search and surveillance techniques. *Id.* In 1969, when the number of successful hijackings of U.S. planes had grown to 33 (of 40 attempts), it was the government who entered into international conventions and undertook domestic action to extinguish the hijacking problem. *Id.* at 898.

72. *Id.* at 904.

73. *Id.* at 898.

74. *Id.*

75. *Davis*, 482 F.2d at 898. The system included the use of the passenger profile, followed by the use of the magnetometer for those matching the profile, and then a search of passengers who triggered the magnetometer (or a search of their luggage). *Id.* The FAA assisted the airlines in the implementation of the system, even providing United States Deputy Marshals and Customs Service agents to handle searches and arrests. *Id.* at 899.

76. *Id.* at 900. On Feb. 1, 1972, the rule ordering each airline to develop a security screening plan that met FAA approval was put into practice. *Id.* The

one step further by mandating that airlines prevent any passenger fitting the profile from boarding unless the passenger successfully passed through a magnetometer or submitted to a "consent search" before boarding.⁷⁷

B. Voluntary Consent to a Search as a Waiver of Fourth Amendment Rights

The police may approach and question any individual in a public place concerning any matter.⁷⁸ They may ask questions, even offering the individual's voluntary responses as evidence in a criminal prosecution, as long as the individual is willing to listen and respond to the officer's questions.⁷⁹ An individual may allow the police to go further, consenting to a search of the individual's person or effects, or producing identification upon the officer's request without triggering any Fourth Amendment protection.⁸⁰

Fourth Amendment protection arises only when the police insinuate that "compliance with their requests is required,"⁸¹ or that the individual is not free to leave.⁸² The standard for determining when a mere request for information rises to the level of a seizure is whether a reasonable person would feel free to refuse to comply or to completely end the conversation with the

airlines were given 72 hours to implement a plan and convince the FAA that it would be effective in screening baggage and passengers for weapons. *Id.* Under the rule, the airlines were to subject each passenger to a passenger profile, magnetometer screening, identification check, hand search, or a combination of these. *Id.*

77. *Id.* at 901. The government further provided armed law enforcement officers authorized to arrest individuals "under Federal, State, or other political subdivision authority." *Id.* at 902. These officers were responsible for the supervision of the airline personnel as they performed the security screening procedure. *Id.*

78. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The officer need not have any suspicion of wrongdoing to question an individual as long as the questioning is consensual. *Id.*

79. *Florida v. Royer*, 460 U.S. 491, 497 (1983). *See also Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968) (distinguishing mere questioning from a seizure under Fourth Amendment standards). All interactions between policemen and citizens do not rise to the level of a seizure of the citizen. *Id.* However, the moment the officer uses physical force or invokes his authority, such that the citizen does not feel free to leave, the interaction becomes a "seizure" under Fourth Amendment standards. *Id.*

80. *Bostick*, 501 U.S. at 434-35. *See United States v. Legato*, 480 F.2d 408, 413 (5th Cir. 1973) (noting that consent must be "an intelligent relinquishment of a known right or privilege" to qualify as a legitimate waiver of Fourth Amendment rights). *Cf. People v. Heimel*, 812 P.2d 1177, 1180-81 (Colo. 1991) (noting that when an individual consents to a search, the police officer need not justify the search by any showing of probable cause or reasonable suspicion).

81. *Bostick*, 501 U.S. at 435.

82. *Id.*

officer.⁸³ This determination is made by considering the individual's response in light of the totality of circumstances.⁸⁴ The courts carefully scrutinize consent searches to avoid condoning official coercion.⁸⁵

Implied consent is one way in which the government uses the consent theory to justify airport searches.⁸⁶ This theory is based on the idea that passengers approaching security checkpoints can clearly see that passing through the checkpoint may result in a search of their belongings or person.⁸⁷ Their continuation through the checkpoint is a manifestation of their implied consent to the search.⁸⁸ In electing to fly, a passenger is, in effect, consenting to some level of interrogation and searching.⁸⁹ Passengers must weigh their Fourth Amendment interests against their need for

83. *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984). The term seizure is defined here as a "meaningful interference, however brief, with an individual's freedom of movement." *Id. Accord Bostick*, 501 U.S. at 435-36.

84. *Bostick*, 501 U.S. at 437. The relevant factors for proving voluntariness which must be considered as a whole are:

voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and significantly, the defendant's belief that no incriminating evidence will be found.

United States v. Chemaly, 741 F.2d 1346, 1352 (11th Cir. 1984). Voluntariness is determined by weighing all of these factors, but stronger indications of coercion, such as the retention of travel documents or identification weigh more heavily. *Id.* An individual's ignorance of his right to refuse the search may also be indicative of implied coercion. *Id.* at 1353. Other highly decisive factors in determining whether police behavior is coercive are blocking an individual's path, impeding his progress, or keeping him from proceeding on his way. *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982). Also, if an officer focuses on a specific person in a crowd of many, that individual may be justified in believing that cooperation with the officer is required. *Id.* Some factors that might suggest a seizure, even when the individual did not try to leave, are as follows: the intimidating presence of more than one officer, an obvious weapon about the person of one of the officers, the police officer's tone of voice and words chosen, or physical touching of the individual. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A defendant may have the impression that he or she is not free to leave as a result of the environment in which the questioning takes place. *United States v. Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973). The court in *Ruiz-Estrella* rejected the consent theory, finding the defendant was only obeying apparent lawful authority when he was questioned in an enclosed stairwell with only himself and the questioner present. *Id.*

85. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

86. *McGann v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1179 (7th Cir. 1993).

87. *Id.*

88. *Id.*

89. *Derocher*, *supra* note 32, at 46.

convenience.⁹⁰ In a random search situation, however, “this choice is no choice at all.”⁹¹

The consent theory may apply to a magnetometer search,⁹² but physical searches pursuant to passenger profile matches cannot be based on implied consent. The level of intrusiveness of a magnetometer search simply does not compare to that of a physical search,⁹³ handcuffing⁹⁴ or “the dumping of luggage onto floors of public areas.”⁹⁵ Nothing prepares passengers for the possibility they may be chosen because something in their demeanor suggests they might be a terrorist.⁹⁶ There is no

90. *Id.*

91. *Bostick*, 501 U.S. at 450 (Marshall, J., dissenting). In *Florida v. Bostick*, police engaged in a random sweep of a bus that revealed contraband in the defendant's luggage. *Bostick*, 501 U.S. at 429. The court found that the defendant's sense of detention was the product of his decision to take the bus, not the nature of the police questioning. *Id.* at 436. Justices Marshall, Blackmun, and Stevens dissented, noting that this interpretation of the facts effectively made the defendant responsible for his own feeling of confinement. *Bostick*, 501 U.S. at 449 (Marshall, J., dissenting).

Obviously, a person's 'voluntary decision' to place himself in a room with only one exit does not authorize the police to force an encounter upon him by placing themselves in front of the exit. It is no more acceptable for the police to force an encounter on a person by exploiting his 'voluntary decision' to expose himself to perfectly legitimate personal or social constraints.

Id. at 450. The dissent concluded that suspicionless searches put passengers in the difficult position of either cooperating with the police or leaving the bus in what may be an unfamiliar or dangerous area, where they could be left behind if the bus leaves. *Id.* This rationale would, presumably, extend to trains, airports, or any other mode of transport that could strand a passenger in an unfamiliar location. “It is exactly because this ‘choice’ is no choice at all that police engage in this technique.” *Id.* “This is not Hitler's Berlin nor Stalin's Moscow, nor is it white supremacist South Africa. Yet, in Broward County, Florida, these police officers approach every person on board buses and trains and check identification and tickets, and ask to search luggage, all in the name of ‘voluntary cooperation’ . . .” *Id.* at 443. See also *United States v. Albarado*, 495 F.2d 799, 807 n.14 (2d Cir. 1974) (reasoning that to force a passenger to choose between a necessity of modern living, airplane travel, and a constitutional right is coercion).

92. *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972). A person would not generally even be aware of a magnetometer search because the invasion is so minimal. *Id.*

93. *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968). Without question, a police officer's public search of an individual who is powerless to resist cannot be called a “petty indignity.” *Id.* It is an embarrassing, humiliating intrusion that must not be treated lightly. *Id.*

94. *Husseini*, *supra* note 2, at C3.

95. Council on American-Islamic Relations, *supra* note 16, at *1.

96. *But see Albarado*, 495 F.2d at 807 (noting that a general search conducted in an airport setting is commonplace and not overly intrusive). Just because many people must endure the humiliation of a stop and frisk does not mitigate the invasiveness of the search, but it is less offensive to be one of an entire group that is subjected to the procedure. *Id.* If only a few individuals

checkpoint to pass through, no beeping noise or red light to explain their detention. The security personnel cannot even publicly articulate a set of factors leading to the conclusion that a particular passenger might be dangerous.⁹⁷

The average passenger submits to the magnetometer because he or she knows that, at worst, the security personnel will impose an inconvenient delay while the passenger removes the spare pocket change or keys that may be causing the magnetometer to go off.⁹⁸ It is precisely the objective nature of the search that makes it reasonable.⁹⁹ The minimal flexibility that security personnel have in implementing the magnetometer search protects passengers from arbitrary and unnecessarily intrusive searches.¹⁰⁰ The security personnel are not exercising their own independent judgment.¹⁰¹ The invasion is minimal and the search is limited to dangerous devices.¹⁰² No such objectivity protects the passenger who is the victim of an overzealous security person with free reign to conduct any manner of arbitrary search as long as it is based on a few random factors that coincide with a profile.¹⁰³

In *Klarfeld v. United States*,¹⁰⁴ the court found the use of the magnetometer to be justified in part because everyone is subjected

are selected to be searched, those chosen are stigmatized. *Id.*

97. *United States v. Lopez*, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971). In this case, the factors that comprised the profile used to classify the defendant were reviewed in camera because if any of the factors that comprise the terrorist profile were revealed, the entire system would be jeopardized. *Id.* Terrorists would change their behavior and appearance to avoid detection. *Id.*

98. *Klarfeld v. United States*, 962 F.2d 866, 867 (9th Cir. 1992) (denial of en banc review) (Kozinski, J., dissenting). Going through a magnetometer is described as "a bother," "a nuisance," "a pain in the neck." *Id.* Most travelers tolerate it without complaint, though, because the effectiveness of the magnetometer as a deterrent substantially outweighs the burden on the passenger. *Id.*

99. *Id.* at 869-70.

100. *Id.* at 869.

101. *Id.* Limiting security personnel to objective procedures and constitutional requirements guarantees the effectiveness of the security procedure. *Id.* When security personnel have less flexibility in implementing the procedures, they are less likely to misuse their authority. *Id.*

102. *See United States v. Pulido-Baquerizo*, 800 F.2d 899, 902 (9th Cir. 1986) (stating that this privacy intrusion is one that society is willing to permit because it is a relatively minor intrusion, limited in scope, and minimally embarrassing).

103. *Klarfeld*, 962 F.2d at 867 (denial of en banc review) (Kozinski, J., dissenting). Administrative and consent searches are not instituted for general law enforcement purposes. *Id.* Police officers avoid Fourth Amendment scrutiny only when the security screening is geared toward ensuring the safety of passengers. *Id.* When security officers move outside these parameters, such as when they search for evidence of drug trafficking, they are operating in violation of the Fourth Amendment. *Id.*

104. 962 F.2d 866 (9th Cir. 1992).

to the magnetometer.¹⁰⁵ There is a commonality of experience that renders the invasion less embarrassing.¹⁰⁶ Individuals are not singled out because the security person dislikes them or wants to embarrass them.¹⁰⁷ The search is further justified by the fact that it does not involve the disclosure of personal information, or give security personnel authority to search for contraband, and it does not give them a chance to examine passengers' personal effects.¹⁰⁸ Passenger profiling gives security personnel this unacceptable level of authority.

C. The "Terry" Stop As A Limitation On Fourth Amendment Rights

Airport searches are also justified according to the standards set out in *Terry v. Ohio*.¹⁰⁹ Police officers are forced to deal with unpredictable situations during encounters with citizens on city streets, and they generally have very little time to effectively evaluate the potential for danger.¹¹⁰ In *Terry*, the Supreme Court empowered the police to frisk individuals suspected of carrying weapons.¹¹¹ This decision was predicated upon the practical and constitutional arguments that balance the grave danger the police are exposed to every day against the minor inconvenience to the individual of a pat down search.¹¹²

Acknowledging that the Fourth Amendment requires a substantial basis in reason for any invasion of an individual's protected privacy interest,¹¹³ the Court imparted this power upon the police with the restriction of reasonableness.¹¹⁴ An officer's "inarticulate hunches,"¹¹⁵ even if based on good faith, are not

105. *Id.* at 870.

106. *Id.*

107. *Id.*

108. *Id.*

109. 392 U.S. 1, 27 (1968). See *supra* note 66 for an elaboration of the standards.

110. *Terry*, 392 U.S. at 10.

111. *Id.* at 30. A frisk is a limited search for weapons, not to be confused with an actual arrest. *Id.* at 26-27. A frisk is merely a brief invasion of an individual's privacy. *Id.* An officer may stop and briefly question an individual based on a reasonable suspicion that the individual may be engaged in criminal activity. *Id.* If the officer develops a concern that the individual may be armed, then the officer may frisk the individual for a weapon. *Id.* If the "stop" and "frisk" give rise to probable cause and an implication the individual has committed a crime, then the officer may arrest and fully search the individual. *Id.* at 10.

112. *Id.* at 10-11.

113. *Id.* at 19-21.

114. *Id.* at 21-22. The reasonableness of the officer's decision to search an individual is determined according to an objective standard. *Id.* An officer must act as a reasonably cautious person would under the particular circumstances of the search. *Id.*

115. *Terry*, 392 U.S. at 22.

enough to warrant a "Terry" stop.¹¹⁶ To warrant the intrusion, the police officer must be able to indicate specific facts from which it may be reasonably inferred that the intrusion is justified.¹¹⁷ Evidence that police obtain outside the very narrow confines of a "Terry" search is not admissible in court.¹¹⁸ This ensures that police officers use the "Terry" search only for the limited purpose for which it is intended.¹¹⁹

The specific and articulable facts upon which an officer bases a "Terry" search amount to a substitution for the probable cause element necessary for a search under the Fourth Amendment.¹²⁰ This exception relies upon a balancing of the extent of the intrusion on a persons Fourth Amendment interests against the governmental interest intended to justify the intrusion.¹²¹ *Terry* demands that an officer have at least some articulable reason for searching an individual specifically to safeguard against abuses of this Fourth Amendment exception.¹²² Furthermore, the scope of the search must be confined to acts reasonably calculated to uncover weapons.¹²³

A profile cannot automatically act as a substitute for the necessary reasonable suspicion upon which a "Terry" stop is predicated.¹²⁴ Suspicion must stem from an individual's behavior.¹²⁵ It is not enough that an individual resemble some

116. *Id.* If reasonableness were determined by a subjective, good faith standard, the protections of the Fourth Amendment would be rendered worthless. *Id.*

117. *Id.* at 21.

118. *Id.* at 29. If an officer knows that evidence obtained through an unlawful search will always be rejected in court, the officer will make an earnest effort to obtain evidence within the confines of the Fourth Amendment. *Id.*

119. *Id.*

120. *Terry*, 392 U.S. at 35 (Douglas, J., dissenting). A search or seizure can only be constitutional under Fourth Amendment standards if an officer has probable cause to believe that an individual has been, is, or will be involved in criminal activity. *Id.* Probable cause refers to an officer's reasonable belief that a crime is being committed. *Id.* at n.1.

121. *United States v. Place*, 462 U.S. 696, 703 (1983). *Cf. United States v. Cyzewski*, 484 F.2d 509, 517 (5th Cir. 1973) (Thornberry, J., dissenting) (cautioning against allowing every search justified in the name of terrorism). Historically, the right to privacy was assumed, and police needed special justification to search an individual. *Id.* Now, as society puts more emphasis on the potential for danger, the disruption is assumed, and privacy is the exception. *Id.* The need for security certainly justifies greater intrusions upon our Fourth Amendment rights, but we must be wary of stressing the potential for danger when applying the Fourth Amendment reasonableness test. *Id.* at 517-18.

122. *United States v. Berry*, 670 F.2d 583, 601 n.22 (5th Cir. 1982).

123. *Terry*, 392 U.S. at 26.

124. *Berry*, 670 F.2d at 600-01.

125. *Id.* at 600. A legitimate search must be based on some morsel of individualized suspicion to be considered lawful or constitutional. *Id.*

vague sketch of a terrorist.¹²⁶ A profile does not focus on the individual person and situation,¹²⁷ and therefore cannot be a reasonable substitute for probable cause.¹²⁸ *Terry* does not authorize the indiscriminate pat down of arbitrarily selected individuals to suppress criminal activity.¹²⁹

D. *The Administrative Search Exception to the Fourth Amendment*

Another Fourth Amendment exception that applies to the airport setting is the exception for administrative searches.¹³⁰ Administrative searches are “searches conducted as part of [an administrative] scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation”¹³¹ In the airport context, the essential purpose of the administrative scheme is not to actually arrest people who carry weapons, but to guarantee airport safety and make sure passengers do not board the plane with weapons.¹³²

Like “*Terry*” stops, administrative searches must meet the

126. *Id.* at 601. An officer cannot simply refer to a directory of suspicious behavior to determine whether a search or seizure is warranted. *Id.* at 600-01. Some reliance upon facts specific to the individual is required. *Id.*

127. *Id.* A profile may, under some circumstances, provide grounds for a search. *Id.* An officer, in light of his knowledge and experience, must point to specific characteristics grounded in the particular circumstances that lead the officer to conclude an individual is involved in criminal activity. *Id.* If the officer is able to do this, the fact that the characteristic also happens to appear on a profile does not diminish its value as justification for the stop. *Id.* See also *United States v. Legato*, 480 F.2d 408, 411 (5th Cir. 1973) (finding that the “*Terry*” search applies to airport situations and further noting that a more intrusive search might be necessary than that which is authorized by *Terry v. Ohio*). This search is constitutional if based on a specific set of facts that would lead a reasonable officer to believe that the individual searched is armed and a threat to security. *Id.*

128. *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., and Brennan, J., dissenting). An officer needs to be free to make decisions in light of his knowledge and ability. *Id.* Forcing an officer to rely on a list of behavioral factors in deciding whom to detain restricts his ability to make on the spot decisions based on experience. *Id.*

129. *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973). If the requirement that police officers be able to articulate specific facts as a justification for a search were abandoned, there would be no limitation on the power of the police. *Id.* at 907. There is no indication the threat of concealed weapons is more pervasive in an airport environment. *Id.* at 907-08.

130. See *supra* note 67 for a general discussion of administrative searches.

131. *Davis*, 482 F.2d at 908. See also *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting) (stating that administrative searches are general searches that require no suspicion of wrongdoing and generally no warrant). *Id.* Administrative searches are predicated wholly on the urgent need for the search coupled with very strict limitations designed to insure that the search is narrowly focused on fulfilling that need. *Id.*

132. *Davis*, 482 F.2d at 908 n.41.

Fourth Amendment requirement of reasonableness.¹³³ Administrative searches also resemble "Terry" stops in that the scope of the search must be narrowly limited to the circumstances that justify their existence.¹³⁴ When the administrative search moves outside of these narrow parameters, it becomes violative of the Fourth Amendment.¹³⁵ Security personnel are authorized to conduct administrative searches precisely because the search is inflexible and narrowly confined in scope.¹³⁶ These searches are indiscriminate because there is no way to isolate the specific offenders, so the security personnel do not focus on particular individuals.¹³⁷ Administrative searches also give passengers the option of conceding to the search or choosing not to board the plane.¹³⁸ Where there is an indication that law enforcement officials may be operating outside the scope of the administrative search, courts have an affirmative responsibility to inquire further.¹³⁹

For example, if security personnel in airports use administrative searches as an excuse to search passengers for evidence of other criminal activities that do not involve a threat to passenger safety, they are acting beyond the scope of the administrative search.¹⁴⁰ The high percentage of airport searches that uncover drugs as compared to weapons might suggest such an abuse of the administrative search exception.¹⁴¹ There is an obvious overlap between the drug courier profile and the terrorist profile, supposedly two very different profiles.¹⁴² "It is 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

133. *Id.* at 910. See also *People v. Heimel*, 812 P.2d 1177, 1181 (Colo. 1991) (noting that administrative searches are conducted pursuant to matters of compelling governmental importance). An administrative search program must be reasonably applied to support the governmental interest for which it was created with minimal intrusion upon the privacy interest of those being searched. *Id.* The risk here is the lives of hundreds of people and the cost of millions of dollars of property. *Id.* This risk is certainly a valid rationalization for an administrative search as long as the search is conducted in good faith with the intention of minimizing the risk. *Id.*

134. *Davis*, 482 F.2d at 910.

135. *Soyland*, 3 F.3d at 1316 (Kozinski, J., dissenting).

136. *Klarfeld v. United States*, 962 F.2d 866, 869 (9th Cir. 1992) (denial of en banc review) (Kozinski, J., dissenting).

137. *Davis*, 482 F.2d at 907.

138. *Id.* at 913. If the passenger chooses to proceed with the search, the passenger has effectively consented to the government search. *Id.*

139. *Soyland*, 3 F.3d at 1319 (Kozinski, J., dissenting).

140. *Id.* at 1316.

141. *Id.*

142. See *supra* note 12 for a comparison of the terrorist profile and the drug courier profile.

exploding.¹⁴³ Searches pursuant to the identification of a possible terrorist through the use of terrorist profiles are warranted by our great concern for the safety of passengers and crew members.¹⁴⁴ This concession of an individual's Fourth Amendment rights is predicated upon the tremendous threat to life and property posed by an armed terrorist on board a plane, and the vulnerable position of all involved.¹⁴⁵ In the airport setting, a search based on anything less is outside the scope of the administrative search exception to the Fourth Amendment.¹⁴⁶

A growing body of case law indicates that security personnel are using administrative searches to confiscate contraband.¹⁴⁷ Our Fourth Amendment rights are compromised when searches, conducted under the pretext of ensuring security, are used instead to uncover contraband.¹⁴⁸ Though we may be willing to acquiesce to an improper search in the airport setting, the question becomes how to limit the infringement of our rights. The police could certainly wage a more effective war on drugs if they were permitted to make use of the drug courier profile in specific urban neighborhoods, where individuals involved in the sale of drugs are known to reside.¹⁴⁹

143. *United States v. Legato*, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring).

144. *People v. Heimel*, 812 P.2d 1177, 1181 (Colo. 1991).

145. *Id.*

146. *Soyland*, 3 F.3d at 1316 (Kozinski, J., dissenting).

147. *See id.* at 1317 (citing an instance of abuse of administrative searches). The United States Customs Service and the Seattle Port Police had a program rewarding security personnel for finding drugs or large amounts of money. *Id.* The court noted that officers may open packages more frequently than they might have otherwise because they want to receive the reward. *Id.* Whereas, when their only motivation is the detection of firearms and explosives, officers have no reason to search a package unless they believe it might conceal a dangerous item. *Id.* *See also Davis*, 482 F.2d at 909 n.43 (quoting Frank Carman, Director of Security for Pan American World Airways, commenting that the security personnel have "shaken down people" that they considered "thoroughly undesirable to have aboard an airplane, but are not basically hijackers"). Mr. Carman further commented on the frequency with which security personnel were making drug related arrests, describing it as a daily event. *Id.*

148. *United States v. Skipwith*, 482 F. 2d 1272, 1279 (5th Cir. 1973) (Aldrich, J., dissenting). Judge Aldrich suggests that, to discourage security personnel from conducting pretextual searches, the court should exclude evidence of contraband (other than weapons) when the airport searches could not have been independently directed toward uncovering weapons. *Id.*

149. *Id.* at 1275 n.4. Necessity alone cannot justify all non-probable cause searches. *Id.* The court has never allowed random police searches in a particular high crime area, even if such a procedure would result in a decrease in the amount of crime in the area. *Id.*

III. THE EFFECTIVENESS OF PASSENGER PROFILING AS A SAFETY MEASURE

The Fourth Amendment analysis of a search does not end with balancing the compelling need for the search against its intrusiveness.¹⁵⁰ If the search procedure is not fairly certain to be effective in preventing the danger, then it is not reasonable, though it may be necessary and relatively unintrusive.¹⁵¹ Profiles are not effective, in part, because many harmless passengers might fit the profile exactly.¹⁵² If security personnel are free to use a few factors plucked from an exhaustive profile as a basis for searching passengers, many innocent travelers will be left vulnerable to random searches.¹⁵³ Profiles have a "chameleon-like" way of conforming to any situation.¹⁵⁴

The fundamental deficiency of our current passenger screening system is poor operator performance.¹⁵⁵ Airport security operators have challenging jobs and they work in a stressful work environment for about the same amount of money they could expect to make at a fast-food restaurant.¹⁵⁶ These conditions lead to high turnover which is, in itself, a central aspect of the problem.¹⁵⁷ However, it is not simply a matter of low wages.¹⁵⁸ Other factors conspire to make airport security screening positions decidedly unattractive.¹⁵⁹ Lack of training and a high turnover rate lead to ineffective passenger screening procedures.¹⁶⁰ Furthermore, ineffectiveness of the procedures is enhanced when supervisors pressure operators to work faster.¹⁶¹ In the airport

150. *Id.* at 1275.

151. *Id.*

152. *Id.* at 1280 n.1 (Aldrich, J., dissenting).

153. *See Reid v. Georgia*, 448 U.S. 438, 440-41 (1980) (finding the use of certain characteristics of drug courier profiles to be an insufficient substitution for the objective justification governing searches and seizures).

154. *Sokolow*, 490 U.S. 13-14. A number of cases have relied on conflicting factors in supporting passenger profiles. *Id.* Some examples are: suspect was first to deplane; suspect was last to deplane; suspect deplaned from the middle; suspect purchased one-way tickets; suspect purchased round-trip tickets; suspect's flight was nonstop; suspect changed planes; suspect carried no luggage; suspect carried a gym bag; suspect had new suitcases; suspect traveled alone; suspect traveled with someone else; suspect acted nervously; and suspect acted too calmly. *Id.*

155. Passenger Screening Implementation Report, *supra* note 10, at 24.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 24-25. Factors such as the individual's compatibility with the job, opportunity for advancement, development of knowledge and skills, feedback and recognition of performance, status of the job, physical work environment, and social opportunities and activities render the job unattractive to potential and existing employees even if the compensation is attractive. *Id.*

160. *Id.*

161. Passenger Screening Implementation Report, *supra* note 10, at 25.

environment, such pressure to increase operator speed is obviously ever present.

These same operators have very broad authority to decide which passenger's baggage to search.¹⁶² Customs officers or other law enforcement officials at the airport may offer generous rewards to the security screening operators for information regarding the identity of passengers carrying large sums of currency or evidence of crime.¹⁶³ These rewards may prove so alluring that the operators spend more time and energy focusing on personal payoffs rather than air safety.¹⁶⁴ This, in turn, may impair their already limited effectiveness in securing airplane safety and cause unnecessary delays.¹⁶⁵ The delay and confusion might assist an actual terrorist in moving through the airport undetected. This state of affairs eliminates the justification for airport administrative searches because the searches are not an effective means of controlling the narrow exigency on which they are based.¹⁶⁶

IV. A PASSENGER'S REASONABLE EXPECTATION OF PRIVACY

Whatever types of security measures we concede to now, we must be prepared to live with long into the future.¹⁶⁷ Though these security measures develop in response to an immediate crisis, they remain after the crisis subsides in anticipation that it may resurface.¹⁶⁸ Eventually, there may be no threat to necessitate an intrusive security measure.¹⁶⁹ The security measure will become merely a way of life.

Already, evidence of such concessions abound. Surveillance cameras monitor unsuspecting workers in their locker room at a Boston hotel as they sit half-naked, exchanging small talk.¹⁷⁰ New

162. *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1245 (9th Cir. 1989).

163. *Id.*

164. *Id.* at 1245-46. See *United States v. Soyland*, 3 F.3d 1312, 1317 (Kozinski, J., dissenting). When security personnel have the desire to locate weapons and explosives as their only motivation, the traveling public can rely on their judgment because they have no ulterior motive for searching baggage. *Id.* On the other hand, when agents have a dual objective, they may choose to search a passenger's baggage in hopes of earning a reward or the respect of their supervisors. *Id.*

165. *\$124,570 U.S. Currency*, 873 F.2d at 1246.

166. *Id.*

167. *United States v. Albarado*, 495 F.2d 799, 805 (2d Cir. 1974).

168. *Id.*

169. *Id.*

170. Marla Van Schuyver, *Privacy at Work? Don't Expect it[,] It's Often Data Versus Dignity*, BOSTON GLOBE, Oct. 4, 1993, at A3. The Society for Human Resource Management administered a survey to its members in 1991 and found that 11% of the 1,493 employers who responded used video cameras to watch workers, 8% monitored computer terminals, and 5% tapped telephone

Yorkers can expect to be photographed twenty times a day by surveillance cameras if they live and work in the city.¹⁷¹ The latest technological advancement that police are using to fight crime is "thermal imaging" which allows them to monitor heat levels from buildings.¹⁷² Now the police no longer have to rely on outdated methods of ferreting out drug dealers, such as sifting through garbage, watching suspected drug houses from airplanes, and tapping phone lines, though these tried and true methods certainly will not be discarded.¹⁷³ When suspects leave their homes, police in some states are free to attach an electronic vehicle-monitoring device to their car without even obtaining a search warrant.¹⁷⁴ Or perhaps the police would prefer to use an infrared scanner identical to those used in the Gulf War to focus on the suspect even in the dead of night.¹⁷⁵

Not surprisingly, much of the technology used by the police is developed in the airport setting in response to "emergency situations."¹⁷⁶ One such advancement presently under consideration for airport use is imaging technology that would scan for articles under multiple layers of clothing.¹⁷⁷ This contraband detection system would detect metallic and nonmetallic weapons, explosives and other contraband.¹⁷⁸ It would also detect the relative dimensions of breasts or a penis, catheter tubes and bags, evidence of mastectomies, colostomy devices, prosthetic limbs and penile implants.¹⁷⁹

Perhaps the most frightening privacy infringement of all is

lines. *Id.*

171. Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997, at 28, 31.

172. Ted Cilwick, *Ruling Cost Utah Cops a High-Tech Weapon, Court Pours Water on Heat Sensor*, SALT LAKE TRIB., April 8, 1996, at A1. The strong lighting that is needed to grow marijuana plants will produce varying degrees of heat in a building. *Id.* The thermal imager combines the technology of a 35mm camera and a camcorder to detect this heat. *Id.* When it is aimed at a building, if differing temperatures are permeating the walls of the building, sharp coinciding gradations of light will appear in the viewfinder. *Id.* The thermal imager allows the government to "see through" the walls of the home. *Id.*

173. *Id.*

174. *On the Wrong Track*, ORANGE COUNTY REG., Jan. 15, 1997, at B06.

175. Jonathan S. Landay, *Police Tap High-Tech Tools Of Military to Fight Crime; Guns That Shoot Nets*, CHRISTIAN SCI. MONITOR, April 2, 1997, at 1. This type of military technology is particularly frightening to legal experts who believe that allowing the police to use military technology further blurs the distinction between police and soldiers. *Id.*

176. *Klarfeld v. United States*, 962 F.2d 866 (9th Cir. 1992) (denial of en banc review) (Kozinski, J., dissenting). Courthouses and other government buildings use magnetometers. *Id.*

177. Passenger Screening Implementation Report, *supra* note 10, at 14.

178. *Id.*

179. Nojeim, *supra* note 11, at *10.

the result of computer interconnectedness.¹⁸⁰ For years, marketing and insurance companies have collected personal information on databases.¹⁸¹ Governments have gathered information as well for a number of necessary reasons, such as paying Social Security benefits, operating public schools and regulating commerce and national defense.¹⁸² Airport security officials have longed for the day when they would have access to these databases for the purpose of singling out potential terrorists.¹⁸³

The Gore Commission has proposed a passenger screening database system that would work to make passenger profiles more personal.¹⁸⁴ The database would single out certain passengers and enable authorities to obtain personal financial information.¹⁸⁵ The Commission proposes the use of other databases such as those of the United States Customs Service and automated law enforcement databases,¹⁸⁶ including those of the FBI, CIA, and the Bureau of Alcohol, Tobacco and Firearms.¹⁸⁷ The Commission proposed these steps despite the FBI's acknowledgment that thirty-three percent of the criminal record data stored in its database is erroneous.¹⁸⁸ Passengers would not be aware of the procedure unless they were singled out as potential terrorists.¹⁸⁹

During his term, President Clinton successfully passed laws setting up four such databases.¹⁹⁰ Civil libertarians and computer

180. Quittner, *supra* note 171, at 31.

181. George Griffin, *The Fight Is On; Battle Lines Drawn Over High-Tech Invasion of Privacy*, TELEGRAM & GAZETTE, Oct. 27, 1996, at A1.

182. *Id.*

183. *Davis*, 482 F.2d at 909 n.43 (quoting the testimony of FAA Administrator Schaffer during the Aircraft Hijacking Hearings). As early as the 1970's, the FAA has had access to law enforcement information, and a desire to use the information to target passengers for more intense screening. *Id.* The system would be activated when a person called to make a reservation, giving their name and other personal information to the reservationist. *Id.* Past criminal records, warrants, or information regarding the person's sinister reputation would be a signal to security personnel that the person should be subjected to heightened security measure. *Id.* The FAA even had hopes of obtaining medical records, both physical and psychological. *Id.*

184. Mindy Blodgett, *Terrorism Bill Pits Safety vs. Privacy*, COMPUTER WORLD, Oct. 7, 1996, at A4.

185. Gary Delsohn & Cynthia Hubert, *How Liberty's Rules Get Fractured In The Quest For Security*, SACRAMENTO BEE, Dec. 4, 1996, at A1.

186. Nojeim, *supra* note 11, at *4.

187. Derocher, *supra* note 32, at 42.

188. *Id.*

189. Roberto Suro, *New Airport Bomb Plan Considered; Computer Profiles, High-Tech Detectors Central to System*, WASH. POST, Aug. 31, 1996, at A01.

190. Nojeim, *supra* note 11, at *8. The other databases include a national worker database used by the Immigration and Naturalization Service to identify newly-hired persons, a national worker database used to identify parents who have failed to pay child support, a national patient database used to follow the health care history of all United States citizens, and a national

professionals are concerned that information such as medical and criminal background and even political affiliation could be included in the database.¹⁹¹ Privacy advocates are concerned about who would have access to the information, and what airline employees would maintain the database.¹⁹² A system whereby personal data would be maintained and used by any number of airline personnel is rife with privacy concerns.¹⁹³ Dishonest airline employees could use the database for money-making schemes.¹⁹⁴ The probability of error increases as the system becomes connected to other databases and is continuously updated.¹⁹⁵ If correcting inaccuracies in airline databases is anything like trying to correct an inaccuracy on one's credit report, the ramifications could be truly disastrous and a threat to safety.¹⁹⁶

The court in *United States v. McDonald*¹⁹⁷ reasoned that travelers on a common carrier, like those walking down a public street, have a lower expectation of privacy than a person within the privacy of his home.¹⁹⁸ This is an unacceptable rationalization.¹⁹⁹ For example, the government is not free to simply announce that all telephone lines will be tapped, and to justify this decision by claiming that the public has no expectation to privacy on the telephone because of its awareness of the phone tap.²⁰⁰ The Constitution affords citizens the right to demand that government intrusion be as limited as possible, consistent with the need to protect against threats to public safety.²⁰¹ In 1971, the court in *United States v. Lopez*²⁰² foresaw the negative possibilities of passenger profiling.²⁰³ In a section of its decision entitled "Disquieting Implications of the System," the court noted that "[e]mploying a combination of psychological, sociological and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society."²⁰⁴ The court went on to note that what anti-utopians like Huxley and Orwell have prophesied could come to bear on future generations.²⁰⁵ These despotisms would be far more powerful than

database of sex offenders. *Id.*

191. Blodgett, *supra* note 184, at A4.

192. Nojeim, *supra* note 11, at *8.

193. *Id.*

194. Blodgett, *supra* note 184, at A4.

195. Nojeim, *supra* note 11, at *8.

196. *Id.*

197. 100 F.3d 1320 (7th Cir. 1996).

198. *Id.* at 1324-25.

199. *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974).

200. *Id.*

201. *Id.*

202. 328 F. Supp. 1077 (E.D.N.Y. 1971).

203. *Id.* at 1100.

204. *Id.*

205. *Id.*

their critics could have imagined, though,²⁰⁶ “for they will be equipped with techniques of inner-manipulation as unobtrusively fine as gossamer.”²⁰⁷

V. REEXAMINING THE METHOD OF PROFILING

Profiling need not be entirely abolished, but it must be reinvented and carefully monitored. Airport employees, airlines and the FAA must be made to answer to a panel of civil libertarians that would monitor complaints and review security procedures. Psychological, scientific, law enforcement and airline experts must formulate a new profile that security personnel can easily and objectively implement without the use of the personal information contained in databases. Courts must exclude evidence obtained pursuant to improper searches to ensure the operators perform only good faith searches for weapons. Ultimately, any system is only as effective as the people who implement that system. All airport security personnel must receive better training and incentives, and have the opportunity to attend refresher training seminars.

A. Panel to Review Civil Rights Violations

In his statement before the International Conference on Aviation Safety and Security, Gregory Nojeim suggested a panel be created to handle complaints concerning offensive security screening procedures.²⁰⁸ This panel of civil libertarians would ensure that the rights of individuals were vigorously protected. The airlines and the FAA would apprise the panel of all new passenger screening and security programs. The panel would then have a voice in directing their implementation.

B. The Development of a New Profile

The FAA and the airlines must work in concert with civil libertarians, law enforcement officials and expert psychologists to develop an effective, easily applied passenger profile. The profiling system that was developed in response to the hijacking crisis over thirty years ago is no longer applicable to our modern terrorism concerns.²⁰⁹ Terrorism can no longer be traced to one geographic source or one particular group,²¹⁰ if it ever could. Airlines and the panel of civil libertarians must monitor the development of new profile factors and confirm that they are applied uniformly. Additionally, security personnel must be held

206. *Id.*

207. *Id.*

208. Nojeim, *supra* note 11, at *11.

209. *Id.* at *5.

210. *Id.* at *6.

accountable for their decisions to detain passengers. The airlines should keep strict records of each passenger detention, to be periodically reviewed by the civil rights panel. The panel would review the records to assess the effectiveness of the profiling system according to a predetermined minimum standard. Failure to meet the standard would automatically result in the redevelopment of a new profiling system with updated factors to reflect societal changes.

The Commission on Aviation Safety and Security's proposal to collect information about individuals on databases is simply unacceptable. A security officer's individualized suspicion must be based on the activities of the passenger as he or she moves through the airport. The potential for inconvenience (at best) and disaster (at worst) is simply too great to condone such methods.

C. The Exclusion of All Evidence Not Related to the Search For Weapons

Judge Aldrich's dissent in *United States v. Skipwith*,²¹¹ which called for the exclusion of all evidence not reasonably related to the search for weapons, offers an excellent method for discouraging security personnel from performing overzealous searches. Judge Aldrich suggests that courts adopt the *Terry v. Ohio*²¹² approach of excluding evidence obtained in a search conducted outside the scope of the authorized search.²¹³ If courts exclude evidence of unrelated crimes, there will be no incentive for security personnel to use administrative searches as a weapon in the war on drugs.²¹⁴ This sound reasoning is applied effectively to searches pursuant to "Terry" stops to discourage police from abusing this constitutional exception.

D. Retrain Airport Security Personnel and Operators

Most importantly, instead of spending billions of dollars on the most technologically advanced gadgetry, the government needs to direct funds toward acquiring top quality security personnel. These employees need incentives to remain in their jobs, such as opportunities for advancement, competitive wages and a reasonable working environment. Airlines should implement programs that would reward superior work performance and immediately reprimand abuses of power.

Most critically, airport security personnel and operators should participate in ongoing mandatory training classes. Giving workers a better understanding of their job would limit turnover

211. 482 F.2d 1272 (5th Cir. 1973).

212. 392 U.S. 1 (1968).

213. *Skipwith*, 482 F.2d at 1280.

214. *Id.* at 1281.

and increase productivity and effectiveness. If passenger profiles are going to be used, security personnel must be carefully trained in the application of the profile and methods for suppressing their subjective interpretations. Furthermore, all employees should be trained to effectively handle security situations with an intent to minimize passenger resentment.

CONCLUSION

As Israeli Prime Minister Benjamin Netanyahu wrote, “[t]here is apparently a moment of truth in the life of modern democracies, when it is clear that the unlimited defense of civil liberties has gone too far and impedes the protection of life and liberty.”²¹⁵ Our nation is facing its moment of truth. We simply cannot allow our fear of an unknown enemy and our petty prejudices to blind us to the slow dissolution of our most treasured constitutional rights. Passenger profiling is merely a symptom of this dissolution, but a definitive one. Before our civil rights are so altered as to be unrecognizable, we must invent new methods for addressing our fears; methods that embody the rights of everyone and discriminate against no one.

215. Delsohn & Hubert, *supra* note 185, at A1.

