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ARE AIRPORT SEARCHES STILL REASONABLE?

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ALTHOUGH the subject of airport security systems has inspired much comment in legal literature,[1] most of the discussion has dealt with initial security systems which consisted of use of the "hijacker profile,"[2] metal detector[3] screening, identification request, and "*Terry*-type" frisk.[4] Few of the commentators, however, have addressed current procedures which dispense with the use of the profile, and subject all passengers (or persons entering the secure portion of the airport) to a metal detector, and to X-ray search of their hand luggage. Most of the earlier writings, as well as the early cases, focused on the *Terry* rationale to reconcile the screening procedures with the fourth amendment.[5] This is clearly

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[1] *See, e.g.*, McGinley & Downs, *Airport Searches and Seizures, A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972); Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036 (1973); McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications*, 39 J. AIR L. & COM. 29 (1973); Maurer, *Skyjacking and Airport Security*, 39 J. AIR L. & COM. 361 (1973); Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657 (1974); Note, *Applying Constitutional Standards to Airport Security Systems*, 5 LOY. (CHI.) U. L. J. 186 (1974); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).

[2] *See* text at notes 16-19, *infra*.

[3] The term "metal detector" is used to denote all electronic search equipment which measures the mass of metal, ferrous or non-ferrous, on the person or object passing through its field. No distinction is made between the earlier "magnetometer," whch reacted to ferrous metals only, and the more sophisticated instruments in use today, which react to ferrous and non-ferrous metal. *See also* Andrews, *supra* note 1, at 659 n.5.

[4] Terry v. Ohio, 392 U.S. 1 (1968), authorized a pat-down weapons frisk for the protection of the officer and bystanders after an investigative stop. An objective test was applied to the police officer's suspicions, and the officer was required "to point to specific and articulate facts which, taken with rational inferences from those facts, warrent[ed] the intrusion [of the frisk]." *Id.* at 21. The protective search did not violate the fourth amendment when the officer reasonably believed the person frisked to be armed and dangerous to the officer and others. In *Terry* a police officer had stopped the appellant after observing him acting in a manner which justified a reasonable suspicion that he intended to rob a store. When the appellant did not respond to a request for identification, the officer frisked him and found a handgun.

[5] U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers,

an inappropriate justification, however, for the kind of indiscriminate searches currently in use, as will be seen.[6] Therefore, this comment will attempt to resolve some continuing constitutional questions concerning the justifiability of current security procedures and will discuss some of the associated problems of current procedures as recently amended.

HISTORY OF AIRPLANE HIJACKINGS AND SECURITY MEASURES[7]

The first recorded hijacking of an aircraft occurred in 1930, when a group of Peruvian revolutionaries took over an airplane for use in dispersing propaganda literature.[8] During the period 1930-1931, there were several other attempted hijackings in South America,[9] but after these initial attempts no more hijackings occurred until the end of World War II. In the post-war period, hijackings became one method used by Eastern Europeans to escape from Communist bloc countries.[10]

The first hijacking of a United States airplane took place in 1961, and resulted in the hijacker's successful transport to Cuba.[11] After five attempted or successful hijackings in 1961, there were

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and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The remedy available for a violation of the fourth amendment as formulated by case law is exclusion of the evidence obtained as a result of the illegal search—the exclusionary rule. Weeks v. United States, 232 U.S. 383 (1914).

[6] *See* note 54, *infra*, and text at notes 129-30, *infra*. *See also* United States v. Anderson, 13 Crim. L. Rep. (BNA) 2395, 2396 (9th Cir. 1973) and People v. Hyde, 12 Cal. 3d 158, 163-65, 524 P.2d 830, 832-34, 115 Cal. Rptr. 358, 360-62 (1974), discussed at notes 160-66, *infra*, and accompanying text.

[7] It is useful to present an abbreviated discussion of the development of aircraft hijacking. It is not, however, the purpose of this comment to deal with it in much detail. For more exhaustive treatment, *see, e.g.*, McGinley & Downs, *supra* note 1, and Andrews, *supra* note 1, at 747.

[8] *See* McGinley & Downs, *supra* note 1, at 294.

[9] *See* Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004, 1006 (1973). In his address Dr. Dailey also discussed other dangers faced in the early days of commercial aviation. Security measures taken at times included the frisking of all passengers and the removal of all "guns, knives, and booze." Passengers objecting to this search were apparently persuaded by the pilot's use of a 5-cell flashlight filled with shot. "To quiet unruly drunks, the crew would put on their oxygen masks and go up until the drunks passed out." *Id.* at 1007.

[10] McGinley & Downs, *supra* note 1, at 294.

[11] *Id.*

only four during the years 1962 through 1967.[12] In 1968, however, the number of hijackings jumped dramatically; in that year sixteen such incidents occurred. This increase continued in 1969 with forty-one attempted or successful hijackings.[13] In 1970 there were twenty-two, and in 1971 and 1972 there were twenty-seven each year.[14]

There was little concern in the non-Communist world over the criminal aspects of hijacking so long as the traffic was inbound from Communist controlled nations. After the first American hijacking in 1961, however, Congress passed a statute making hijacking itself illegal.[15] Prior to the passage of that statute, hijacking had been illegal only to the extent that some other offense was committed during the hijacking.[16] There was little further legislative or regulatory activity in this area until 1968.

As a result of the tremendous increase in hijacking attempts during 1968, the Federal Aviation Administration (FAA) established a task force in October of that year to study the problem.[17] The result of this effort was the "hijacker profile."[18] This profile was developed through the statistical study of previous hijackers, and consisted of twenty-five to thirty objective criteria of behavior[19] which distinguished the potential hijacker from the average air traveler. Several studies indicated that the application of the profile to air travelers would clear 99.5 percent of them, but would clear *no* potential hijackers.[20] A voluntary screening program was insti-

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[12] Andrews, *supra* note 1, at 747 app.

[13] *Id.*

[14] *Id.*

[15] Act of Sept. 5, 1961, Pub. L. No. 87-197, § 1, 75 Stat. 466, *amending*, 49 U.S.C. § 1356 (Supp. V 1975). This statute also prohibited the carrying of weapons or explosives on board aircraft. 49 U.S.C. § 1472(1) (Supp. V 1975).

[16] *See* McGinley & Downs, *supra* note 1, at 295 n.22.

[17] McGinley & Downs, *supra* note 1, at 302.

[18] *Id.* Also, *see generally* Dailey, *supra* note 9.

[19] These behavioral patterns necessarily have been kept confidential, since apparently an acceptable behavior pattern could easily be fabricated by a hijacker with knowledge of the profile. *See, e.g.*, United States v. Bell, 464 F.2d 667, 670 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); McGinley & Downs, *supra* note 1, at 302. *But see* Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 396 n.106 (1973).

[20] *See* United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971); Dailey, *supra* note 9, at 1009. *But see* Note, *The Antiskyjack System: A Matter of Search—or Seizure*, 48 NOTRE DAME LAW. 1261, 1265 n.35 (1973).

tuted under which airline employees, such as ticket agents, applied the profile to passengers entering the airport. Those passengers fitting the profile were designated "selectees" by the employees, and this information was forwarded to airline personnel at the boarding gate, usually by distinctive markings upon the selectee's ticket or boarding pass. Upon the selectee's arrival at the boarding gate, he was required to pass through a metal detector with his carry-on baggage.[21] If the metal detector indicated the selectee was carrying an amount of metal equal to the mass of a small handgun, the airline employee on duty at the gate stopped him and requested identification. If satisfactory identification was not presented, a United States Marshal was summoned, and identification was requested again.[22] If the selectee still refused or was unable to present satisfactory identification, he was requested to pass through the metal detector a second time. A second indication of metal on the person or in the baggage of the selectee provoked a request for submission to a voluntary "pat-down frisk."[23] The selectee's carry-on baggage was also searched.[24] If at any point in this procedure the selectee passed a particular test, further investigation was foregone and he was allowed to board the airplane.[25]

Initially the use of this screening procedure was voluntary; as a

[21] This apparently was not a separate requirement for selectees. All boarding passengers passed through the metal detector where the security system was used, but the detector's reaction was monitored only for selectees. Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 400 (1973).

[22] From this point on, the security procedures were carried out by the United States Marshal. Thus, except for the initial designation of the passenger as a selectee, the United States Marshal conducted each step of the admittedly redundant procedure at least once.

[23] *See* United States v. Lopez, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971).

[24] *See* United States v. Mitchell, 352 F. Supp. 38, 40 (E.D.N.Y. 1972), *aff'd mem.*, 486 F.2d 1397 (2d Cir. 1973).

[25] It is obvious that the profile screening system had redundant elements in the duplicated requests for identification and metal detector walk-through. It might also be questioned what relevance satisfactory identification, or lack of identification, would have to a person's intent on airplane hijacking. The task force studies found that hijackers as a group were not resourceful or determined persons, and that the imposition of a number of relatively minor obstacles in the screening system would stop the hijacker at the gate. Further, it was believed that the implementation of the system, along with publicity about it, would deter potential hijackers from making an attempt. Deterrence was the primary objective of the profile screening system. *See, e.g.*, McGinley & Downs, *supra* note 1, at 304; Dailey, *supra* note 9, at 1008; U.S. v. Lopez, 328 F. Supp. at 1082-83.

result, it was not used by all airlines. Moreover, the system was not even used on all flights by those airlines which had adopted it. However, in September, 1970, President Nixon directed the Department of Transportation (DOT) to "have American flag carriers extend the use of . . . surveillance . . . to all gateway airports and other appropriate airports in the United States."[26] The DOT continued to rely on voluntary cooperation by the airlines in carrying out the President's directive until September, 1971,[27] when the FAA concluded that such voluntary cooperation "ha[d] not satisfactorily provided . . . needed protection in many instances."[28] Consequently, the FAA proposed a new rule which would require each air carrier to submit for FAA approval its security program "showing the procedures, facilities, or screening system, or a combination thereof, that it uses or intends to use" for prevention or deterrence of hijackings or in-flight bomb explosions.[29]

On February 1, 1972, the FAA adopted a part of the previously proposed rule, and required airlines to implement within seventy-two hours a "screening system acceptable to the Administrator" on all reservation flights.[30] Although the requirements for the air-

[26] *See* United States v. Davis, 482 F.2d 893, 899 n.17 (9th Cir. 1973), citing *1970 Public Papers of the Presidents of the United States: Richard Nixon* 742-43 (G.P.O. 1971).

[27] *See* United States v. Davis, 482 F.2d at 899 n.17, citing *Hearings on Aircraft Hijacking Before the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 101 (1970) (testimony of Under Secretary of Transportation James A. Beggs).

[28] 36 Fed. Reg. 19,173-74 (1971) (proposing a new rule to be codified in 14 C.F.R. § 121.538).

[29] *Id.* at 19,174. Concurrently the FAA proposed a new rule 14 C.F.R. § 107 requiring operators of airports regularly serving scheduled air carriers to submit their security programs for approval. 36 Fed. Reg. 19,172-73 (1971). It should be noted that both proposed new rules provided that the Administrator could amend any approved security program upon his own initiative. *See* proposed rule 14 C.F.R. § 107.5(a)(2), 36 Fed. Reg. 19,173 (1971), and proposed rule 14 C.F.R. § 121.538(f), 36 Fed. Reg. 19,174 (1971).

[30] 37 Fed. Reg. 2,500-01 (1972) (adopting a new rule to be codified in 14 C.F.R. § 121.538). This rule included only a part of the new rule 14 C.F.R. § 121.538 proposed in September, 1971. *See* note 27, *supra*. It was found that an emergency existed which required that the new rule be effective immediately without waiting for the rulemaking proceeding to take its course. The FAA noted that the profile procedure originally proposed for voluntary implementation had been "highly effective," and expressed the opinion that most recent hijackings "would have been prevented had the system been used to the fullest extent possible." *See* preamble to new rule 14 C.F.R. § 121.538, 37 Fed. Reg. 2,501 (1972). This new rule was amended on March 6, 1972, giving the Administrator the power to amend any approved screening system "upon his own initiative." 37

lines' security systems were not spelled out in the new rule, the FAA apparently informed the airlines by informal means that application of the profile screening system to all passengers would be acceptable, and that the system was in fact required.[31] Thus, as of February 6, 1972, all passengers on all reservation flights in the United States were subjected to the profile screening system.[32]

Although the implementation of surveillance was first instituted with regard to certain airports in 1970 by Presidential directive, metal detector screening and baggage searches without discrimination among passengers were first explicitly required for certain flights in July, 1972, when President Nixon ordered the search of all carry-on baggage and the monitored metal detector screening of all passengers for all non-reservation shuttle flights.[33] On January 5, 1973, this requirement was extended to include all passenger flights.[34] As can be seen from the preceding discussion, after

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Fed. Reg. 4,904-05 (1972), *amending* rule 14 C.F.R. § 121.538. This amendment became effective April 6, 1972. A further amendment was issued on April 4, effective April 11, 1972,"to supply language inadvertently omitted from the [March 6] amendment." *See* 37 Fed. Reg. 7,150-51 (1972), *amending* 14 C.F.R. § 121.538. The effect of this second amendment was to include intrastate air carriers within the requirements of the rule.

On March 16, 1972, the FAA issued a new rule 14 C.F.R. § 107, adopting with minor changes the rule proposed for airport operators in September, 1971 (*see* note 28, *supra*). Again, the "emergency" situation required that the new rule be effective immediately. *See* 37 Fed. Reg. 5,689-91 (1972).

[31] *See* United States v. Davis, 482 F.2d at 900-01 nn.20 & 22, citing FAA Press Release No. 72-26 (Feb. 6, 1972).

[32] On August 1, 1972, the FAA exercised its power to amend the approved security programs by eliminating the multiple requests for identification. Airlines were forbidden to allow any person identified as a selectee to board without first searching his baggage and clearing him through a metal detector. If no metal detector was available, the selectee could not board without submitting to a "consent" search. *See* United States v. Davis, 482 F.2d at 901 n.24, citing FAA telegram of August 1, 1972, and DOT Press Release No. 72-72 (August 1, 1972).

[33] *See* United States v. Davis, 482 F.2d at 901-02 n.23, citing FAA telegram of July 18, 1972. Because tickets may be purchased for shuttle flights after boarding and take-off, and because shuttle flights are used primarily for one-day business trips for which there is no need to check baggage, such flights are not suited to effective use of the profile for selection of persons to be screened.

[34] *See* United States v. Davis, 482 F.2d at 901-02 n.25, citing DOT Press Release 103-72 (Dec. 5, 1972). Concurrent with this requirement the FAA issued emergency regulations amending 14 C.F.R. § 107 to require that each airport operator submit an amendment to its master security plan. The amendment to each plan was to "set forth facilities and procedures" which would insure that each operator would provide at least one armed law enforcement officer at each screening checkpoint for each flight. *See* 37 Fed. Reg. 25,934-35 (1972), *amending* 14 C.F.R. § 107. The amended regulations were to go into effect immediately,

security systems were first introduced on a voluntary basis in 1968, they were extended over time to cover more flights. Gradually the procedures were made more rigorous until early 1973, when the current system was adopted. Today, all passengers on all flights in the United States are required to submit to metal detector screening and baggage search before being allowed to board the airplane.

CASE LAW ON THE PROFILE SCREENING SYSTEM AND OTHER EARLY SECURITY SYSTEMS

The first federal court to address the antihijacking procedures outlined above was the Federal District Court for the Eastern District of New York in *United States v. Lopez*.[35] In this case, as in many which followed,[36] the defendant was arrested for possession of illegal drugs discovered as the result of a frisk initiated as a part of the screening system. In a memorandum opinion, Judge Weinstein discussed at great length the profile screening system[37] and found the procedure justifiable under the holding of *Terry v. Ohio*[38] when correctly applied. The court addressed the question of the constitutionality of the frisk subsequent to other elements

but litigation delayed their effectiveness until February 16, 1973. *See* Airport Operators Council Int'l v. Shaffer, 354 F. Supp. 79 (D.D.C.), *aff'd mem.* (D.C. Cir. 1973).

With these requirements, the current procedures were substantially in effect. One further amendment deserves mention, however. On April 15, 1976, an additional amendment to 14 C.F.R. § 121.538 became effective. This amendment required a "screening system, acceptable to the Administrator," for "explosive[s] or incendiary device[s] in checked baggage." 41 Fed. Reg. 10,911 (1976). Thus today all baggage, and not just carry-on baggage, is subject to screening.

In addition to the procedures outlined above, the President ordered the implementation of the "sky marshal" program in the early 1970s. Under this program, armed plainclothes federal marshals were passengers on selected flights to stop attempted hijackings. This program was terminated when it proved to be ineffective. *See* McGinley & Downs, *supra* note 1, at 298.

[35] 328 F. Supp. 1077 (E.D.N.Y. 1971).

[36] *See, e.g.*, United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Moreno, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Scott, 406 F. Supp. 443 (E.D. Mich. 1976); United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972); and People v. Hyde, 12 Cal. 3d 160, 524 P.2d 830, 115 Cal. Rptr. 358 (1974).

[37] *See* notes 19-25, *supra*, and accompanying text.

[38] 392 U.S. 1 (1968). For a brief discussion of this case, *see* note 4, *supra*.

of the procedure, and found that use of the profile, metal detector, and identification requests could produce the "specific and articulable facts" necessary for a "*Terry*-type search.[39] In balancing the governmental interest asserted against the citizen's fourth amendment interests, the court noted that six percent of those frisked were found to have weapons, and noted the acknowledged danger hijackings pose. As a result of this balancing of interests, the frisk was found to be reasonable and justified when the profile screening procedures were followed strictly and completely.[40] Judge Weinstein refused to find consent to the search, despite the presence at boarding areas of signs alerting passengers to the fact they and their baggage were subject to search. The government had not proved that any consent defendant may have given had been voluntary. Notwithstanding its approval of the profile screening system, the court found the search in this particular instance to be unreasonable because the FAA profile had been altered without authorization by an airline official. The court found the airline employees to be governmental agents in their designation of profile selectees,[41] and therefore the search which was the "fruit" of this designation was held impermissible.[42] Because of this ultimate hold-

[39] Judge Weinstein concluded that the six percent probability of finding a weapon during a frisk, as indicated by statistical studies, warranted the reasonable suspicion which justifies a "*Terry*-type" search. 328 F. Supp. at 1097. The California Supreme Court has expressed "grave doubt" as to the validity of this conclusion. People v. Hyde, 12 Cal. 3d 160, 164, 524 P.2d 830, 115 Cal. Rptr. 358 (1974).

[40] 328 F. Supp. at 1084.

[41] *Id.* at 1101. *Compare* United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd mem.*, 486 F.2d 1397 (2d Cir. 1973). In *Mitchell* Judge Dooling found that an airport search did not invoke fourth amendment standards:

> The context is not basically a citizen-to-government context, and invocation of the Fourth Amendment appears as an almost gratuitous consequence of the presence in the background of governmental air safety regulation and of the governmental provision at the airports of peace officers to apprehend people found actually committing or attempting crimes. . . . The persons interested in the flight, carriers, crew, and passengers, are not seeking to detect crime or to prevent crime in the public interest. Their interest, absolute and unqualified, is in safe flight. *Id.* at 42-43.

The fourth amendment does not prohibit unreasonable searches by private individuals. Burdeau v. McDowell, 256 U.S. 465 (1921). Thus, if the airline employees using the profile screening system in *Lopez* had been held to be acting in a private capacity, the alteration of the profile would not have been fatal to the subsequent search.

[42] Without valid "specific and articulable facts," there could be no *Terry* justification for the frisk. Since each step of the procedure depended upon all the

ing in the case, most of the discussion approving the profile screening system was dictum. Nevertheless, Judge Weinstein's analysis of the need for the profile system and its effectiveness has been relied upon in many cases.[43]

The Second Circuit Court of Appeals upheld a "*Terry*-type" frisk and baggage search in a series of cases where defendants were subject to the entire screening process.[44] The court's decision in *United States v. Bell*[45] indicated, however, that there was disagreement on the circuit bench as to the true justification for the search. Chief Judge Friendly in his concurring opinion stated that "the danger *alone* meets the test of reasonableness" (emphasis in original) in a good faith antihijacking search of reasonable scope where the passenger had notice that he was subject to search.[46] He reasoned that the passenger could avoid the search simply by choosing another means of travel. Judge Mansfield filed a concurring opinion, however, specifically taking issue with Chief Judge Friendly on this point, fearful that such a holding would result in abuse of the screening process.[47]

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preceding steps to provide such facts and justification, when the initial justification developed by governmental agents was lacking, all the subsequent steps were unjustified and illegal under the "fruits of the poisonous tree" doctrine. Under that doctrine, any information or evidence obtained as the result of an unlawful search not only may not be used in court, but also may not be used to obtain other information or evidence in a lawful manner. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

[43] *See, e.g.*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1973); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); People v. Lee, 32 Cal. App. 3d 907, 108 Cal. Rptr. 555 (1973).

[44] *See, e.g.*, United States v. Clark, 498 F.2d 535 (2d Cir. 1974); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972).

[45] 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

[46] *Id.* at 675 (Friendly, C.J., concurring). Judge Friendly was unwilling to assume that the fact that no flight where the profile had been properly applied had been hijacked proved that the profile's use was preventing the hijackings. *Id.* n.1.

[47] *Id.* at 675-76 (Mansfield, J., concurring). Judge Mansfield was not alone in this feeling, nor was it wholly unjustified. As of November, 1972, less than 20% of arrests resulting from all airport searches, a majority of which presumably stemmed from the profile screening system, were for weapons. More than 33% were for drug offenses. United States v. Davis, 482 F.2d at 909 n.43, citing N.Y. Times, November 26, 1972, at 1, col. 2. The remaining arrests were for other violations, such as illegal immigration. *Id.* This raises a question whether the profile was a predictor of hijackings, or merely an indicator of lawless tendencies or activities. *See also* United States v. Albarado, 495 F.2d 799, 805 (2d Cir. 1974); United States v. Legato, 480 F.2d 408, 414 (5th Cir.), (Goldberg, J.,

Absent a true "*Terry*-type" situation, and despite Chief Judge Friendly's concurrence, however, the Second Circuit refused to uphold any airport searches based upon this form of implied consent in a situation where the entire screening program was not used but could have been.[48] Thus, the following rule developed in the Second Circuit: in a situation where use of the profile screening system was proper, only the implementation of the entire procedure in sequence could justify a frisk under the *Terry* doctrine.[49]

The Third and Fourth Circuits did not require such strict adherence to the elements of the screening procedure. In *United States v. Epperson*,[50] the Fourth Circuit Court of Appeals held that the use of a metal detector, apparently without profile screening, was reasonable in light of the threat of hijacking. The court did not even discuss the profile system in its opinion. In *United States v. Slocum*,[51] the Court of Appeals for the Third Circuit, citing *Epper-*

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concurring), *cert. denied*, 414 U.S. 979 (1973). Judge Goldberg's *Legato* concurrence is discussed in note 58, *infra*.

[48] *See, e.g.*, United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974). In *Ruiz-Estrella* the court held that Judge Friendly's theory was inapplicable, assuming arguendo that it was correct, because defendant had not been informed of his right to refuse the search by not boarding the airplane. Warning signs could not be assumed to have apprised him of this right. 481 F.2d at 728-29. In *Albarado*, the court stated that the universal use of metal detectors without the use of the profile was not unreasonable, but that any further searches subsequent to activation of the metal detector must start with the least intrusive, for example, a request for removal of metal objects along with a second walk through the metal detector. The court stated the rule as follows: "*the frisk* in the typical boarding situation . . . *is to be used only in the last instance*." (emphasis in original). 495 F.2d at 808-09. The court found the use of a metal detector to be a search. *Id.* at 803. It also found that conditioning air travel upon waiver of fourth amendment rights was not based upon consent grounds, but upon reasonableness. *Id.* at 805-07. *See also* notes 131-33, *infra*, and accompanying text.

[49] *See* notes 40 & 48, *supra*, and accompanying text.

[50] 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

[51] 464 F.2d 1180 (3d Cir. 1972). In this case none of the intermediate steps involving airline employees were used. It appears that under *Albarado* the Second Circuit would have found the subsequent frisk unreasonable.

The Third Circuit had addressed an airport search in one earlier case, *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972). This case did not, however, address the profile screening system. There was testimony that "possibly the ticket agent used a so-called Behavior Pattern Profile to determine whether defendant fit the mold of prior highjackers." However, the court found no need to reach issues concerning profile usage "because the justifiable bases for the search were largely independent of the Profile." *Id.* at 704. The court found exigent circumstances justifying the search in the "enormous consequences" which might result from a hijacking and the limited time

son, specifically held that the use of a metal detector was per se reasonable and thus constitutional, independent of the profile. While the profile was useful in focusing attention on potential hijackers for metal detector monitoring, the court did not believe its use was required by the fourth amendment.[52] Thus, in both these circuits indiscriminate and universal use of the metal detector, has been authorized from the outset and the changes in the security program requirements mandated during 1972 and 1973 had no real effect.

The Fifth Circuit took a different tack in applying the *Terry* doctrine to airport searches. In *United States v. Moreno*,[53] the Fifth Circuit Court of Appeals focused exclusively on the language in *Terry* concerning danger to others to uphold the search of defendant as reasonable.[54] In its discussion the court stated that an airport, like a border crossing, was a "critical zone" because of the gravity of the hijacking problem, and therefore "mere suspicion" could justify a search.[55] In two later appeals decided the same day by different panels, the "critical zone" language of *Moreno* was adopted and applied to justify not the manner or scope of the searches, as had been the case in *Moreno*, but rather the searches themselves.[56] *United States v. Legato*[57] upheld a search occurring after a bomb threat had been received. Although argu-

available for action by the United States Marshal. The court consequently lowered the suspicion necessary for a justifiable search from that required in *Terry*. *Id.* at 703.

[52] 464 F.2d at 1183.

[53] 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

[54] At least one commentator has taken issue with this reading of *Terry*. All courts justifying the airport search under *Terry* have based their deciison in part on the "protection of others" language in *Terry*. However, a close reading of the *Terry* opinion indicates that the others to be protected are bystanders at the scene of the frisk, and not the ultimate intended victims of any suspected criminal plan. The danger of violence to both the searching officer and the "others" arises from the confrontation between the officer and the person searched. *See* Note, *Applying Constitutional Standards to Airport Security Searches*, 5 LOY. CHI. L. J. 186, 200 (1974). *See also* People v. Hyde, 12 Cal. 3d 160, 163-65, 524 P.2d 830, 115 Cal. Rptr. 358 (1974). *But see Moreno*, 475 F.2d at 47-48 n.2.

[55] 475 F.2d at 51. "Mere suspicion" is sufficient to justify a border search. *See Moreno, id.* n.8. The *Moreno* court explicitly stated, however, that its decision rested on *Terry*, and refused to adopt the border search analogy to justify the search.

[56] United States v. Legato, 480 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

[57] 480 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

ably the search could have been upheld as reasonable under *Terry* without the critical zone designation, the court found the search justified on the basis of the border search analogy and defendant's implied consent.[58] Again based upon this *Moreno* critical zone approach the court in *United States v. Skipwith*[59] held that even "mere or unsupported suspicion" justified a search of passengers actually presenting themselves for boarding of an airplane.[60] The court expressly declined to follow a district court decision in the Ninth Circuit to the contrary,[61] and held that once a passenger had presented himself for boarding, he had no right to leave the boarding gate in order to avoid the search.[62] It is interesting to note that *Skipwith* was the first Fifth Circuit case to involve scrutiny of any element of the profile screening procedure, but although defendant fit the profile, he was not subjected to a metal detector scan prior to being frisked.

[58] Judge Goldberg concurred only in the result, elegantly expressing concern over the fact that most airport searches had revealed drugs rather than weapons. His concurrence, in its entirety, stated:

> Under the commands of *Moreno* I concur only in the result. The exigencies of skyjacking and bombing, however real and dire, should not leave the airport and its environs an enclave where the Fourth Amendment has taken its leave. 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 the bombs from exploding. Seeking to prevent or deter crime, standing alone, has never justified eroding the right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.

480 F.2d at 414. Both *Moreno* and *Legato* involved drugs found during airport searches.

[59] 482 F.2d 1272 (5th Cir. 1973).

[60] *Id.* at 1276. It was fortunate for the government's case that the suspicion could be unsupported rather than reasonable. The United States Marshal testified that he was "inclined to believe" that a three-inch by two-inch bulge, approximately the size of a business card, was a gun. There are very few guns available which are this small. Because of this claimed "belief," the Marshal ordered the defendant to remove the "gun" (which proved to be drugs) from his pocket. *Id.* at 1274.

[61] United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972). *See* note 80, *infra*, and accompanying text.

[62] 482 F.2d at 1277. The court reasoned that to hold otherwise would allow a hijacker to try to board flights until he was successful. *Id.* at 1281 (Aldrich, J., dissenting). The majority expressly adopted this part of Judge Aldrich's dissent. *Id.* at 1277.

The court added much dictum questioning the continued utility of the exclusionary rule but, having held the search valid, found no error in admitting the drugs found in the weapons search. *See id.* at 1277-79. For a brief explanation of the exclusionary rule, *see* note 5, *supra*.

Fourth amendment rights at the airport continued to be diluted in the Fifth Circuit with the court's decision two weeks later in *United States v. Miller*.[63] In a *per curiam* opinion, the court held with practically no discussion that preflight security searches need not be limited to a search for weapons.[64] A literal reading of the decision seems to indicate that an airport security search may be made for anything. However, since the basis for upholding the search in *Miller* was consent, this decision is distinguishable from the preceding fifth Circuit decisions, and it is possible that the court oversimplified and perhaps misstated its holding.

In *United States v. Cyzewski*[65] the Fifth Circuit extended the scope of the antihijacking search to include checked baggage already on the airplane in those cases where the passenger fit the profile, refused to produce identification, and stated that his identification was in his checked luggage. The defendants here were not subjected to a metal detector until after they had produced identification, which they had on their persons despite their claims that it was in their luggage. As a result of the metal detector scans it was clear that if defendants had any large metal objects, they were in the checked baggage which had been retrieved from the airplane.[66] Nevertheless, the court held that the security search could reasonably include the checked baggage that would not be available to the passenger. The court stated that continued search would be reasonable until the officer conducting it was satisfied that no harm could come from the passenger's boarding the airplane, and until it became unreasonable to further doubt the passenger's innocence.[67] *Cyzewski* was limited, however, in *United States v. Palazzo*,[68] which disapproved retrieval and search of de-

[63] 480 F.2d 1008 (5th Cir.), *cert. denied*, 414 U.S. 1041 (1973).

[64] *Id.* at 1010. The court's exact language was: "Appellant's assertion that an airport search must be limited to search for weapons is without merit." *Id.*

[65] 484 F.2d 509 (5th Cir. 1973), *petition for cert. dismissed*, 415 U.S. 902 (1974).

[66] Focusing on the deterrent effect of antihijacking programs, the court had no problem with the fact that no search was made until after the luggage, which supposedly contained identification and later was suspected of containing weapons, was made accessible to the passenger. The court found the deterrent effect of the officers' calling defendant's bluff justified a search for weapons which obviously could not be used in a hijacking. *Id.* at 514.

[67] *Id.* at 513-14.

[68] 488 F.2d 942 (5th Cir. 1974).

fendant's checked baggage since the defendant had not fit the profile, had produced satisfactory and correct identification, and had no metal revealed by metal detector scan and frisk. In both *Cyzewski* and *Palazzo* the passengers had presented themselves for boarding.

In view of the Fifth Circuit cases discussed above, it appears that the following rule developed for that circuit: any person attempting to board an airplane is subject to a complete search for anything accessible to him, and he cannot refuse to submit to such a search. Further, so long as it is not completely unreasonable for the security officer to doubt the passenger's innocence, he may allow his whimsy free rein and extend the search to anything which might be contained in the passenger's checked baggage. Since this rule allowed very broad discretion for airline security officers in the Fifth Circuit, implementation of the univeral and indiscriminate search procedures in 1972 and 1973[69] obviously had little real impact in the Fifth Circuit.

The Seventh Circuit Court of Appeals, in its decision in *United States v. Fern*,[70] cited with approval the Fifth Circuit *Moreno*[71] and *Legato*[72] decisions. It held that profile fit without a metal detector search justified a stop and search, although the facts of the case could have provided more justification for a frisk and baggage search along the lines of *Terry* than this holding indicates on its face.[73] Nevertheless, so long as the profile screening system was in use, it appears that profile fit alone would justify a personal search in the Seventh Circuit.

United States v. Kroll[74] was the first case in which the Court of Appeals for the Eighth Circuit faced the airport security system.[75]

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[69] *See* notes 32-34, *supra*, and accompanying text.

[70] 484 F.2d 666 (7th Cir. 1973).

[71] *See* notes 53-56, *supra*, and accompanying text.

[72] *See* note 57, *supra*, and accompanying text.

[73] Defendant's actions aroused the United States Marshal's suspicions enough that he checked with the agent who sold defendant his ticket. Further information obtained from the ticket agent led the Marshal to conclude that defendant fit the profile. Defendant's actions during the identification interview and subsequent frisk fully justified a reasonable suspicion that he was carrying a weapon in his carry-on baggage. 484 F.2d at 667.

[74] 481 F.2d 884 (8th Cir. 1973).

[75] The profile had played a part in three previous decisions by the Eighth Circuit Court of Appeals involving airline search of checked baggage after the

The court held that the mere posting of signs stating that passengers were subject to search did not establish free and voluntary consent to the search, since refusal to consent "would have meant foregoing the constitutional right to travel."[76] Here the passenger apparently had fit the profile,[77] but had presented identification upon request. Nevertheless, he was subjected to a metal detector search.[78] The metal detector indicated defendant was carrying metal, his briefcase was searched, and drugs were found. The court held that even under these circumstances the scope of the search for weapons and explosives had to be reasonable, and found that here the scope had gone beyond the bounds of reason.[79]

The leading case in the Ninth Circuit on airport searches was

passenger at least partially fit the profile. However, in each case the facts were such that the court found the search involved to be a private search conducted by the airline for its own purposes, and not as a part of the antihijacking security procedures. *See* United States v. Wilkerson, 478 F.2d 813 (8th Cir. 1973); United States v. Echols, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); United States v. Burton, 475 F.2d 469 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973). Because they were conducted by airlines personnel in a private capacity, the searches involved in these cases were not subject to the fourth amendment. *See* Burdeau v. McDowell, 256 U.S. 465 (1921), and note 41, *supra*. In a similar fact situation today, however, it seems unlikely that these decisions would be followed. The 1976 amendment to 14 C.F.R. § 121.538, requiring screening of all checked baggage, has probably imbued such searches with sufficient regulatory character to require a different holding. *See* note 34, *supra*. *See also* United States v. Fannon, 556 F.2d 961 (9th Cir. 1977).

[76] 481 F.2d at 886. The right to travel has been recognized since 1823. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). The Supreme Court recognized it as fundamental over 100 years ago. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43-44 (1867). The Court has continued to uphold this right to the present day. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969); United States v. Guest, 383 U.S. 745, 757 (1966).

[77] "The ticket seller, through some process which was not fully described, determined that the defendant was a possible hijacker." 481 F.2d at 895. The ticket agent requested the passenger's driver's license, which was produced. He then marked the ticket to indicate the passenger met the profile. *Id.*

[78] If the profile screening procedure had been followed strictly, producing adequate identification would have cleared the passenger, and he would have been subjected to no further screening. *See* note 25, *supra*, and accompanying text.

[79] The United States Marshal testified that he believed a very small bulge ("approximately ¼ inch thick and 2 inches across") in one corner of a business envelope in the briefcase might contain explosives. 481 F.2d at 885, 887. The court found this belief unreasonable, and in fact questioned whether the Marshal seriously held such a belief. There being no reasonable belief or suspicion that the envelope contained explosives, its search was unreasonable. The court explicitly limited its holding, as to the reasonableness of a belief that such a small bulge might be caused by concealed explosives, by the state of the art in miniaturizing explosives. *Id.* at 887 n.4.

the district court decision in *United States v. Meulener.*[80] In *Meulener*, which involved a motion to suppress illegal drugs found during an airport search,[81] the court held that the search of the passenger's suitcase violated the fourth amendment since he was not told before the search that he could refuse to be searched by not boarding the airplane. Government interest in preventing hijackings would not be present if the passenger decided not to board.[82] In such a case the passenger's fourth amendment rights would be coextensive with those of non-passengers present in the airport who were not subject to forcible search.[83] Signs had been posted in the boarding area to warn that passengers and their baggage were subject to search. The court, however, found these signs were insufficient to prove implied consent, and held that the government could not condition the exercise of the constitutional right to travel upon the waiver of fourth amendment rights.[84] In addition, the screening procedure was not followed completely nor in sequence, resulting in a search insufficiently limited in scope and an independent basis for the court's holding.[85]

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[80] 351 F. Supp. 1284 (C.D. Cal. 1972).

[81] Of the cases discussed so far, only four involved the discovery of weapons. *See also* note 36, *supra*, and accompanying text. Of 49 cases surveyed by one commentator in 1974, only five involved weapons-related offenses. *See* Andrews, *supra* note 1, at 726 n.382.

Two earlier cases in the Ninth Circuit had involved searches at airports which resulted in the discovery of drugs. In United States v. Schafer, 461 F.2d 856 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972), an "administrative search" (*see* note 87, *infra*) by a United States Department of Agriculture official in connection with an agricultural quarantine of Hawaii was upheld, based on the Supreme Court decision in Camara v. Municipal Court, 387 U.S. 523 (1967), discussed at notes 184-89, *infra*, and accompanying text. After finding a "compelling urgency," the court held that a warrant was not required because time delays would " 'frustrate' the purpose of these inspections" and "effectively cripple any meaningful quarantine." 461 F.2d at 858. In United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972), the district court disapproved a search of previously checked baggage after defendant fit the profile, failed to produce satisfactory identification, and produced a "slightly positive reaction" on the metal detector. No contraband or weapons were found when defendant was frisked. The court specifically held that profile fit and inadequate identification did not justify a warrantless search. Airport searches must be based on consent, and the passenger must be aware of his option to avoid the search by not boarding the airplane. *Id.*

[82] 351 F. Supp. at 1289.

[83] *Id.* at 1290.

[84] *Id.* at 1288, *quoting* United States v. Lopez, 328 F. Supp. at 1092-93, discussed at notes 35-43, *supra*, and accompanying text.

[85] 351 F. Supp. at 1291.

The Ninth Circuit Court of Appeals adopted parts of *Meulener* in its decision about six months later in *United States v. Davis.*[86] The court held it reasonable for the government to condition flying upon a reasonable "administrative search"[87] of passengers, provided they were given the option to avoid the search by choosing not to fly.[88] In *United States v. Miner,*[89] the court clarified this right to avoid an airport search in a situation in which the defendant fit the profile but had not activated the metal detector. The court held that although consent to a search would be implied where the passenger knew of the requirement and still attempted to board, his consent could be withdrawn.[90] Once his consent was withdrawn, the passenger could be refused boarding. He could not, however, be forced or coerced into submission to further search. Continued requests by airline employees to search carry-on baggage were found to be coercive if the passenger did not know he could avoid the search by leaving the boarding area.[91]

The Ninth Circuit made it very clear in *United States v. Moore*[92] that it did not consider airports "critical zones" as characterized by the Fifth Circuit.[93] After the defendant in Moore was unable

[86] 482 F.2d 893 (9th Cir. 1973). The court examined the history of hijacking regulation in great detail. *See* notes 26-34, *supra*, and accompanying text.

[87] The rationale of the administrative search is that with respect to certain regulated activities, consent to the search is implied from the fact that the person subject to the search has engaged in the activity. The search, if reasonable in method and scope, is not prohibited by the fourth amendment despite the absence of a warrant, so long as the person makes no objection to the search. *See* Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), discussed at notes 184-89, *infra.*

[88] 482 F.2d at 913. Although the court did find that consent could be implied from the passenger's knowledgeable choice to board, and thereby to subject himself to search, it is important to note that this does not mean that the passenger must waive his fourth amendment rights in order to exercise his constitutional right to travel. "The Constitution does not forbid searches and seizures; it forbids only those that are unreasonable." United States v. Epperson, 454 F.2d at 771 (discussed at note 50, *supra*, and accompanying text), *citing* Elkins v. United States, 364 U.S. 206, 222 (1960). By retaining the requirement of reasonableness, the Ninth Circuit does not require waiver by the passenger. It therefore avoids some of the constitutional difficulties which may arise in the Fifth Circuit under its "critical zone" holdings, discussed at notes 53-68, *supra*, and accompanying text.

[89] 484 F.2d 1075 (9th Cir. 1973).

[90] *Id.* at 1076.

[91] *Id.*

[92] 483 F.2d 1361 (9th Cir. 1973).

[93] *See* text and notes 53-68, *supra.*

to produce satisfactory identification, he was denied boarding. His previously checked baggage was returned to him, and he then attempted to leave the airport. He was subsequently stopped, however, and a search of his baggage revealed drugs. The court found this was not an administrative search under the screening system, and also that it was not a valid "*Terry*-type" search, since the baggage was locked. Any weapons in locked luggage would not be readily available to the defendant during the stop.[94]

As shown by the cases discussed above, three major justifications for the airport search developed in relation to the profile screening system. In the Second[95] and Seventh[96] Circuits, the search was looked upon as a true "*Terry*-type" protective search, although the persons to be protected were not the officials carrying out the search, but rather the passengers on the specific flight. In the Fifth Circuit the airport was viewed as a "critical zone." As a result, at the boarding gate at least, any search was justified.[97] Ninth Circuit decisions viewed the search as administrative, requiring implied consent by the passenger for its justification. Conditioning the passenger's right to board the airplane on such a search was reasonable only if the passenger knew he could refuse to be searched, or could stop the search at any time, by not boarding the airplane.[98] The Eighth Circuit rule is less clear, but with its emphasis on reasonableness[99] it seems to be nearest the administrative search rule of the Ninth Circuit. It is unclear at this time whether the Third and Fourth Circuits[100] will ultimately follow the direction taken by the Fifth Circuit, or that taken by the Ninth Circuit.[101]

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[94] 483 F.2d at 1363.

[95] *See* notes 35-48, *supra*, and accompanying text.

[96] *See* notes 70-73, *supra*, and accompanying text.

[97] *See* notes 53-68, *supra*, and accompanying text.

[98] *See* notes 80-94, *supra*, and accompanying text.

[99] *See* notes 74-79, *supra*, and accompanying text. With the passage of the Air Transportation Security Act of 1974 (ATSA), § 315, authorizing the FAA to require passenger screening, it is submitted that the Ninth Circuit implied consent-administrative search rationale has become more attractive and may be explicitly adopted by the Eight Circuit in an appropriate case. For a discussion of the ATSA, *see* notes 108-10, *infra*, and accompanying text.

[100] *See* notes 50-52, *supra*, and accompanying text.

[101] The decisions in those circuits are reconcilable with the reasoning of either the Fifth Circuit or the Ninth Circuit. However, as stated with respect to the

JUSTIFICATION FOR UNIVERSAL SEARCH

As has been stated, the current antihijacking system requires that all passengers be searched before they are allowed to board. This includes—in the ordinary situation—a walk through a metal detector and either a hand search of carry-on baggage or an X-ray examination of the baggage.[102] The use of the profile on a regular basis has been discontinued.[103] The change from the multi-step profile screening system to a system of universal searches represented a basic philosophical change in the purpose of the security procedures. The profile screening system was intended as a deterrent, effective as much through publicity and its psychological impact as through its ability actually to apprehend the hijacker in his attempt.[104] The current system is intended primarily to prevent hijackings, not only by deterring the individual bent on such action, but also by making access to an airplane impossible for anyone with the tools of the hijacker's trade. Although the justification for the change at the time was questionable,[105] the noticeable change in

Eighth Circuit (*see* note 99, *supra*), the passage of the ATSA should make the Ninth Circuit position more attractive to the Third and Fourth Circuits. The implied consent-administrative search rationale of the Ninth Circuit avoids the new exception to the fourth amendment created by the Fifth Circuit, and it is no longer questionable on statutory grounds. *See* text and notes 108-10, *infra*.

[102] By far the great majority of carry-on baggage searches are carried out by the use of X-ray equipment. The hand search is still in use today, however, for some flights at some airports. On April 1, 1978, carry-on baggage for a Texas International flight to Houston, Texas, was searched by hand at Dallas-Fort Worth International Airport, one of the largest and most modern airports in the world.

[103] *See* United States v. Edwards, 498 F.2d 496, 497 (2d Cir. 1974).

[104] Dailey, *supra* note 9, at 1011. *See also* Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 387 (1973).

[105] The change in procedures was claimed to be necessary because an "emergency" existed with respect to the threat of hijacking. The preamble to the December 6, 1972, amendment to 14 C.F.R. § 107 (*see* note 34, *supra*) is instructive. The FAA justified its new requirements by referring to the hijacking incidents of October 29, 1972, and November 30, 1972. It should be noted that in the first incident four armed men shot their way onto the airplane. *See* Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 391 n.71. It is submitted that in such a situation, when there are several armed attackers who begin their assault before passing through the screening point, universal search and one armed guard's presence at the checkpoint are not likely to present an insuperable obstacle to the hijackers. The procedures required in December, 1972, simply would have been ineffective here. The November incident involved three men armed with guns and grenades, two wanted for rape and one an escapee from jail. *See id.* and Andrews, *supra* note 1, at 762 app. It is at least open to question whether one armed guard could have stopped them. In addition, it is not at all unreasonable to assume that a pitched battle

the kind of hijacker threatening the traveling public today possibly provides retrospective justification for today's more stringent and more intrusive procedures.[106]

This practical justification, however, ignores the questionable statutory basis for the FAA's authority to require passengers to submit to the current security procedures at the time they were adopted. Although the requirements were issued in the form of regulations covering airports, airlines, and their security procedures,[107] in fact the intent and effect was to regulate what passengers were allowed to carry on board airplanes. By delegating the inspection activities to airline and airport personnel, a semblance of authority was maintained. Congress recognized the fictional basis for the regulations with its passage of the Air Transportation Security Act of 1974 (ATSA).[108] Section 315 of that act required the Administrator to "prescribe or *continue in effect*" regulations "requiring . . . all passengers [and carry-on baggage] be screened by weapon-detecting procedures or facilities . . . prior to boarding."[109] The Administrator was authorized to amend the regulations "only to the extent necessary," and only by submitting

between police and hijackers at the boarding gate would have resulted in much greater injury and loss of life.

The existence of an "emergency" at the time of the Orders of December, 1972, is also open to question. There were only three hijackings, including the two described above, between August 1, 1972, when adequate identification no longer allowed a selectee to board (*see* note 32, *supra*), and the issuance of the regulations in December. This was the lowest number of hijackings for a comparable period since 1967. Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. at 391; Andrews, *supra* note 1, 747-63 app. This does not appear to be the situation of "escalating threats of hijacking, extortion, sabotage and terrorism" described in the announcement of December 6. 37 Fed. Reg. 25,934 (1972). It is not unreasonable to assume that the reduced incidence of hijackings was a direct result of the universal application of the profile screening system, where appropriate, along with the August 1, 1972, elimination of the questionable procedure of clearing by identification.

[106] Although hijacking has decreased as a problem in this country, largely because of the tightened security procedures, other countries have not seen such a dramatic decrease. The problems of hijackings by political terrorists continue to plague foreign countries, particularly in connection with the unrest in the Middle East.

[107] *See* notes 26-34, *supra*, and accompanying text. The question of the FAA's authority was in fact raised in comments on the proposed new rule 14 C.F.R. § 107, proposed in September, 1971. *See* preamble to new rule 14 C.F.R. § 107 as adopted, 37 Fed. Reg. 5,690 (1972).

[108] Pub. L. No. 93-366, 88 Stat. 415 (codified at 49 U.S.C. §§ 1356, 1357, 1371, 1372, 1472, 1516 (Supp. V 1975)).

[109] 49 U.S.C. § 1356(a) (Supp. V 1975).

the amendments to Congress thirty days prior to their effective dates, absent an emergency.[110]

The profile system was designed as, and proved to be, a deterrent because hijackers as a group were "neither very resourceful nor very determined."[111] This characteristic can hardly be used to describe the typical revolutionary terrorist of today, who has been willing in some instances to participate in obvious suicide missions, and to continue on a destructive course long after his position has become hopeless from all vantage points.[112] Since the elements of the hijacker profile were understandably kept confidential,[113] it is unknown whether they would apply to today's terrorist. However, it might be a valid assumption that this new kind of hijacker, apparently of a different psychological nature, would exhibit significantly different behavior patterns from that of the "ordinary" hijacker of 1968 and earlier years.[114] It is, therefore, questionable whether the profile as originally developed could be used effectively to identify the most dangerous of today's potential hijackers. Although the profile could be updated[115] to include elements which would identify the terrorist prior to his attempt to board, it is arguable that such identification would serve only to move the

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[110] *Id.* The requirement of submission of regulations to Congress, absent the Administrator's determination that an emergency exists, would have had no effect on any of the procedures required by the FAA prior to the passage of this Act. In addition, the only substantive change in the regulations since December, 1972, was also adopted without notice and public procedure because of the danger posed. *See* 41 Fed. Reg. 10,911 (1976), *amending* 14 C.F.R. § 121.538 to require screening of checked baggage, note 34, *supra.*

[111] Dailey, *supra* note 9, at 1008.

[112] Examples of suicide missions are numerous in connection with the unrest in the Middle East. A recent example is the raid in March, 1978, when Palestinian commandos seized a bus and drove toward Tel Aviv, Israel. Most of the commandos were killed or captured. *See* N.Y. Times, March 12, 1978, at 1, col. 6. For other examples, *see* N.Y. Times, November 19, 1974, at 1, col. 4 (three Arab guerillas killed at Beisan, Israel); N.Y. Times, May 31, 1972, at 1, col. 8 (Japanese Red Army members attacked passengers at Lod Airport outside Tel Aviv; two attackers killed and one captured). An example of terrorists continuing in the face of a hopeless situation is the battle between the Symbionese Liberation Army (SLA) and the Los Angeles Police Department, in which five members of the SLA died. *See* N.Y. Times, May 18, 1974, at 1, col. 1.

[113] *See* note 19, *supra.*

[114] As has been stated, the profile was developed by the task force by studying all known previous hijackers.

[115] The original profile was intended to be, and possibly was, modified as new hijacker types made their appearance. *See* Dailey, *supra* note 9, at 1010.

terrorist activity from the inside of the airplane to the inside of the airport concourse. Even this is not likely to be the endpoint of the terrorist activity, as will be seen. A return to a profile screening system, therefore, would be unlikely to provide adequate protection from the most immediate and greatest dangers posed by the possibility of hijacking.

A hypothetical scenario is instructive. Having carefully planned its raid, a team of terrorists arrives at an airport. Although designated by the ticket agent as selectees under an updated profile procedure,[116] the group is permitted to proceed to the security checkpoint. There they pull automatic weapons and grenades and take hostages, including the security officers who are armed only with pistols. These security officers are quite understandably unwilling to confront the terrorists, who have superior arms. Such a confrontation would be suicidal, and would likely result in a massacre of the persons in the immediate area. By moving quickly, the terrorists are able to reach a selected boarding gate before an alarm can be raised and they can be isolated. This boarding gate would have been selected by the terrorists for its proximity to the security checkpoint and its serving a flight with most passengers already on board. If they are unable to reach the gate before the area is sealed off, they simply take a large number of hostages and barricade themselves in the most secure area of the airport available.[117] As has been illustrated, the existence of a profile has neither deterred nor prevented this assault. Unfortunately, this fictional scenario with its serious repercussions is even more possible under the current system, since without the use of a profile there is not the possibility of the ticket agent's warning the security checkpoint personnel.[118]

[116] Whether this would occur in fact is highly questionable. It is easy to purchase a ticket from a travel agent, who is unlikely to be privy to a confidential profile, assuming that the profile would be usable when the ticket was purchased at a time and place removed from the intended scene of the hijacking attempt. In addition, it is possible through the use of credit cards to purchase airline tickets by mail, and thus never to confront a ticket agent.

[117] In early 1975, three Arab terrorists held 10 persons hostage in a washroom at Orly Airport in Paris after an unsuccessful attempt to attack an Israeli airliner. N.Y. Times, January 21, 1975, at 1, col. 1.

[118] In fact a very similar incident has occurred already under current procedures. On February 23, 1974, a hijacker killed the security officer at a screening checkpoint and boarded an airplane waiting for take-off. Andrews, *supra* note 1, at 764 app. n.440.

The possibility of a terrorist attack resulting only in the taking of hostages and barricading within a portion of the building exists for any building in which large numbers of people are present.[119] The dangers of great injury or loss of life are as large in other public buildings as in the airport terminal. Since this danger, unlike the danger of airplane seizures, is not specific to air commerce, there is no justification for singling out airports for more rigorous security measures, based on this danger, than those instituted at the more vulnerable public buildings dedicated to other purposes, such as courthouses and other governmental buildings.[120]

There is less likelihood under current security systems as generally implemented, however, that a hijacker would be able to gain access to an airplane. Under current procedures at larger and busier airports, where all passengers, and more importantly all carry-on baggage,[121] are screened or searched, security checkpoints have been moved away from the boarding gate, and therefore from the airplane.[122] By reducing the likelihood of a potential hijacker's

[119] It may be argued that the airport is a more attractive target for a takeover because of an asserted greater likelihood of escape by airplane. While this may be true for the lone hijacker, it is not necessarily true for an organized band of terrorists, the hijackers who present the greatest danger today. Such a group would be quite capable of protecting themselves by limiting their exposure during a transfer to an airplane, whether from a courthouse or a concourse. The deciding factor with respect to their access to an airplane would be resolute refusal by the authorities in negotiations to allow such access, whether by bus to the airport or by walking down a concourse to the airplane. In addition, terrorist groups tend to pick their targets for relevance to their cause as much as the potential for escape. A final argument is that recent history in this country simply does not support the greater attractiveness of the airport. *See, e.g.*, N.Y. Times, March 10, 1977, at 1, col. 6 (Hanafi Moslems take over three buildings in Washington, D.C., holding almost 150 persons hostage).

[120] For a discussion of courthouse security systems, *see* Jesmore, *The Courthouse Search*, 21 U.C.L.A. L. REV. 797 (1974).

[121] A terrorist's automatic weapons are more easily concealed in baggage than on his person.

[122] It is unknown whether this has been done for security reasons or financial ones, but it serves both. The primary security reason is obvious from the proposed scenario—to increase the opportunity for isolating anyone trying to defeat the system by assault. A further possible security reason is deterrence. Central location of obvious screening checkpoints near ticket desks and airport entrances conceivably would discourage the "ordinary" hijacker from any attempt simply by the checkpoints' presence and obvious permanence. The boarding gate checkpoint would not be apparent until the hijacker had at least begun his attempt.

The direct financial reasons are the lower capital investment and labor costs required by a few central locations for the metal detector and X-ray units. An indirect financial reason could be reduced passenger irritation in a less congested screening situation, resulting in greater customer satisfaction and repeat business.

access to an airplane, the purposes of the security system are served. In contrast, the profile screening system as generally implemented did not subject the passenger to any search until his arrival at the loading gate.

As shown by the scenario and discussion above and in terms of current risks associated with hijacking, there is a significant governmental interest in a security system which is more effective as a preventive, rather than merely deterrent, measure against hijacking than the profile system previously used.[123] Arrayed against this significant governmental interest is the passenger's constitutional interest in privacy. Although on balance some type of universal and indiscriminate screening procedure is probably justified, it is submitted that there are less intrusive methods currently available or possible, and that these less intrusive procedures should be used in place of those procedures currently in use. Because of the constitutional dimensions of indiscriminate and universal screening, some of the case law generated by current universal search procedures will be reviewed before examining proposals for altering those procedures.[124]

CASE LAW ON NON-SELECTIVE SEARCH PROCEDURES

Initially, it is obvious that only one of the rules developed by the various circuits in early holdings would be changed by subjecting all passengers to search—the "*Terry*-type" justification adopted by the Second and Seventh Circuits.[125] Under the Fifth Circuit holdings, any search was justified at the point where the

[123] No reason has been shown to expect this particular scenario. However, at least some current thought suggests that terrorist hijackings may move to the United States. *See, e.g.*, Hadley, *Terrorists Might Abandon Europe for Friendly United States*, Dallas Times Herald, January 1, 1978, § F, at 1, col. 1. Mr. Hadley postulates that the absence of a response capability similar to that exhibited by the Israeli military at Entebbe, Uganda, in July, 1976, (*see* N.Y. Times, July 4, 1976, at 1, col. 6) and by the West German military in November, 1977, at Mogadishu, Somalia (*see* N.Y. Times, November 19, 1974, at 1, col. 4), makes the United States particularly vulnerable to terrorist activities involving hijacking.

[124] There is much less reported case law from the federal court system considering the reasonableness of security systems under the current procedures. It is possible that this is a result of the changed procedures, substituting local law enforcement for United States Marshals. *See* 14 C.F.R. § 170 (1977). However, the federal case law which considers indiscriminate airport searches, along with a number of state court decisions, is sufficient for some conclusions to be drawn.

[125] *See* notes 35-48, 70-73, & 95-96, *supra*, and accompanying text.

passenger attempted to board.[126] Under the administrative search holdings in other circuits, a reasonable search was acceptable. Of course, an indispensable part of reasonableness was notice to the passenger that he would avoid the search by choosing not to board the airplane.[127] Under the "*Terry*-type" protective frisk, however, there must be "specific and articulable facts" raising a reasonable suspicion that the person frisked is armed and dangerous to the security officer or others.[128] Even if the use of a metal detector were viewed as a frisk, and not as a more complete search,[129] no circumstances would support suspicion of each individual passenger attempting to board an airplane. In addition, the manual or X-ray search of baggage could not possibly be viewed as a "*Terry*-type" pat-down frisk, since the frisk was limited to feeling the outer clothing for objects which might be weapons, and did not permit the search of the contents of the clothing.[130] Similarly, a thorough search of the contents of baggage, whether by hand or by X-ray instruments, is more extensive than that authorized under the holding of *Terry*. Thus, it would be impossible to justify this search under a "*Terry*-type" rationale without facts to raise the suspicion for every boarding passenger.

The Court of Appeals for the Second Circuit first addressed the question of universal searches—eliminating the profile—in *United States v. Albarado*.[131] Since the flight involved here was an international one, the profile system was not in use, and all passengers were routinely subjected to the metal detector. Defendant activated the metal detector, and counterfeit money was discovered as a result of the subsequent frisk. Although the court ultimately held that the evidence should be suppressed,[132] it stated in dictum

[126] *See* notes 53-68 & 97, *supra*, and accompanying text.

[127] *See* notes 80-93 & 98, *supra*, and accompanying text. *See also* note 99, *supra*, and accompanying text.

[128] *See* note 4, *supra*.

[129] Metal detector use has generally been held to be a search, rather than a frisk. *See, e.g.*, United States v. Epperson, 454 F.2d at 769, *supra* note 50; United States v. Albarado, 495 F.2d 799, 803 (2d Cir. 1974), discussed at text and notes 131-33, *infra*.

[130] *See* United States v. Thompson, 405 F. Supp. 1104 (S.D.N.Y. 1975).

[131] 495 F.2d 799 (2d Cir. 1974).

[132] The court held that frisking the defendant without requesting him to remove all metal objects and walk through the metal detector again was unreasonable. It stated the rule as this: "*the frisk* in the typical boarding situation . . . *is to be used only in the last instance*." (emphasis in original). *Id.* at 808-09.

that the use of a metal detector on all passengers constituted a reasonable search in the airport context, and therefore was constitutional.[133]

In *United States v. Edwards*,[134] the Second Circuit was faced squarely with the question of indiscriminate, universal search of carry-on baggage without the use of the profile. Although the facts of the case might have justified the baggage search under the *Terry* rationale applied in other cases,[135] the court held that indiscriminate manual searches of carry-on baggage were reasonable.[136] Relying on the *Edwards* holding, the court in *United States v. Williams*[137] found "there was implied consent to search the carry-on luggage by virtue of the fact that baggage which one does not want to have searched may be consigned to the baggage compartment."[138]

As indicated by the quoted language from *Williams*, the court based its conclusions as to the permissibility of non-selective airport searches in *Albarado, Edwards,* and *Williams* on a finding of implied consent in conjunction with the pertinent regulations in effect.[139] Thus, the Second Circuit has adopted a position similar to the administrative search rule formulated by the Ninth Cir-

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[133] *Id.* at 806.

[134] 498 F.2d 496 (2d Cir. 1974).

[135] Defendant activated the metal detector when she walked through it carrying her baggage. However, there is no indication she was required to walk through again without the baggage, which would probably have been required under *Albarado*. "[T]he case [also] present[ed] no . . . questions concerning a search of her person." *Id.* at 500. Therefore, the decision must rest squarely on the constitutionality of the regulations in effect at the time requiring search of all carry-on luggage. *See id.* at 499.

[136] *Id.* at 500. The opinion was written by Chief Judge Friendly, who paralleled his concurrence in *United States v. Bell*, discussed at text and notes 45-47, *supra*.

[137] 516 F.2d 11 (2d Cir. 1975).

[138] *Id.* at 12.

[139] This appears to be the trend now in the Second Circuit, as recognized in *Edwards*, 498 F.2d at 501, and *Williams*, 516 F.2d at 12. However, the *Albarado* court expressly rejected implied consent as a justification for the airport search, stating that forcing the passenger to choose between his constitutional right to travel and the constitutional privilege to be free from unreasonable searches was coercive. Because of this coercion, any consent would be invalid because not given freely and voluntarily. Because *Albarado* cannot be reconciled with *Edwards* and *Williams* on this issue, the rule in the Second Circuit regarding implied consent is not so clear as it seems from *Williams*. *See also Edwards*, 498 F.2d at 501 n.1 (Oakes, J., concurring).

cuit.[140] It is still unclear, however, whether the Second Circuit will follow the Ninth Circuit by holding that a passenger may stop the search at any point by deciding not to board.

Although there have been no Third Circuit decisions examining the constitutionality of airport searches since the current requirements went into effect,[141] two decisions in that circuit do have relevance to the question of the reasonableness of current procedures. In *United States v. Wilkinson*,[142] a Third Circuit district court held that the defendant had "attempt[ed] to board an aircraft," for the purposes of the statute prohibiting such an attempt while carrying a concealed weapon.[143] Defendant had purchased a ticket and had proceeded from the ticket counter with her carry-on luggage toward the departure gate, passing through a security checkpoint located a distance from the departure gate. X-ray examination of her carry-on luggage revealed a gun. Although the decision does not address the search question, it implicitly approves the relocation of the security checkpoint away from the boarding gate.[144] Such a decision arguably is more consistent with the Ninth Circuit's administrative search rationale than the Fifth Circuit "critical zone" rule, which addressed itself specifically to the boarding gate.

[140] *See Edwards*, 498 F.2d at 498 n.5. This appears to be the trend despite language in *Albarado* declining to find airport searches to fit "within any of the traditional exceptions to the warrant requirement" and specifically rejecting the administrative search rationale. 495 F.2d at 803-04 & n.9.

A subsequent Second Circuit case, *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976), used the strongest possible language regarding airport luggage searches. The *Bronstein* court stated in dictum that "[t]here can be *no* reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impediments." *Id.* at 462 (emphasis added). In *Bronstein*, dogs had been used to sniff checked baggage suspected of containing marijuana. The quoted statement was pure dictum, however, since the use of dogs was held not to be a search for fourth amendment purposes, and a subsequent search was consented to by the defendants. It is hoped that this dictum will not become the basis for any future decisions, since it is broad enough to cover any luggage, and would permit search of unlimited scope of any baggage for any reason, or for no reason at all.

[141] As has been stated, decisions under the profile security system were sufficiently broad to permit universal and indiscriminate search. *See* note 51, *supra*, and accompanying text.

[142] 389 F. Supp. 465 (W.D. Pa.), *aff'd mem.*, 521 F.2d 1400 (3d Cir. 1975).

[143] 49 U.S.C. § 1472(1) (1970). *See* note 15, *supra*.

[144] *See also* State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974), discussed and notes 173-74, *infra*, and accompanying text.

In another district court decision, *United States v. Bily*,[145] it was held that consent to search could be withdrawn during the search, and that the search could not continue after defendant indicated that he had revoked his consent. The *Wilkinson* decision may indicate that the Third Circuit will eventually adopt the administrative search rationale, and if so, the *Bily* decision seems to indicate that this adoption will include the entire rule, including the passenger's right to withdraw his implied consent at any point in the screening procedure.

No reported decisions from the Fourth, Fifth, Sixth, Seventh, or Eighth Circuits have been found which address the reasonableness of passenger or carry-on luggage screening under current procedures.[146] The Ninth Circuit has continued to view airport searches as administrative under the procedures requiring universal and indiscriminate screening of passengers, as evidenced by its holding in *United States v. Canada*.[147] The *Canada* court upheld the search procedure applied to defendant's carry-on luggage[148] based on implied consent, stating that "the alternatives presented to a potential passenger approaching the screening area are so self-evident that his election to attempt to board necessarily manifests acquiescence in the initiation of the screening process."[149] Defendant's implied consent covered the manual search of his baggage after the X-ray examination, since he had not withdrawn his consent.[150]

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[145] 406 F. Supp. 726 (E.D. Pa. 1975). *Bily* was not an airport search case, but rather involved the search of defendant's residence.

[146] Two Sixth Circuit decisions, *United States v. Dalpiaz*, 494 F.2d 374 (6th Cir. 1974), and *United States v. Scott*, 496 F. Supp. 443 (E.D. Mich. 1976), which resulted from airport security searches did not involve challenges of universal metal detector and baggage searches. The search in each was upheld because information developed in the early stages of the screening procedures justified the continued investigation which revealed weapons in *Dalpiaz* and drugs in *Scott*.

[147] 527 F.2d 1373 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975).

[148] The X-ray examination showed a large "indeterminate dark area." An airlines security guard told defendant that the bag would have to be opened and explained the reason. The security guard opened the bag when she received no objection, and found a large amount of cash—evidence suggested a total of $68,000. Information developed subsequently resulted in defendant's arrest for possession of narcotics. Since the subsequent developments were the "fruits" of these initial X-ray and manual searches, it was necessary for the procedure to be approved if defendant's conviction was to be upheld. *See* note 42, *supra*.

[149] 527 F.2d at 1378, *quoting from* United States v. Davis, 482 F.2d at 914.

[150] *See* note 148, *supra*.

United States v. Homburg[151] rejected the government's contention that consent to search was irrevocable once a passenger had entered the boarding area. The *Homburg* court stated that further search could not be justified by implied consent when defendant had expressed a desire to leave the boarding area rather than have his baggage manually searched.[152] In so holding, the Ninth Circuit again rejected the Fifth Circuit's "critical zone" rationale.[153]

The courts of California have addressed the antihijacking screening procedures in a number of cases.[154] Those dealing with the profile screening system generally did not rely on profile fit to justify metal detector searches,[155] but for the most part approved baggage searches or frisks on the basis of express or implied consent.[156] The California courts first explicitly adopted the administrative search rule in *People v. Kluga*.[157] In *Kluga* defendant challenged

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[151] 546 F.2d 1350 (9th Cir.), *cert. denied*, ___ U.S. ___, 97 S.Ct. 2654 (1977).

[152] Manual search of the luggage was upheld, however, under the *Terry* doctrine because of a telephoned bomb threat and defendant's highly suspicious actions.

[153] *See* text and notes 53-68 & 97, *supra*. *See also* United States v. Miner, 484 F.2d 1075, discussed at note 89, *supra*, and accompanying text.

[154] The first reported California case, *People v. Botos*, 27 Cal. App. 3d 774, 104 Cal. Rptr. 193 (1972), held profile fit and failure to produce satisfactory identification justified a request to search checked baggage. The court stated that the United States Marshal "could continue [his investigation] until his suspicions were, or should have been, allayed." 104 Cal. Rptr. at 195. Defendant had consented to the search upon request.

[155] *See, e.g.*, People v. Lee, 32 Cal. App. 3d 907, 108 Cal. Rptr. 555 (1973) (metal detector search "justified at its inception"); People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (1973) (no discussion of profile); People v. DeStrulle, 28 Cal. App. 3d 478, 104 Cal. Rptr. 639 (1972) (no discussion of profile). *Lee* specifically held that "a person who meets the profile *or* a person who gives a positive reading to the [metal detector]" may be stopped and requested to submit to personal and baggage searches. 108 Cal. Rptr. at 560 (emphasis added).

[156] *See, e.g.*, People v. Lacey, 105 Cal. Rptr. at 74 (consent to frisk after defendant activated metal detector); People v. DeStrulle, 104 Cal. Rptr. at 640 (consent to baggage search after it activated the metal detector). In *Lacey*, although the court relied upon *United States v. Epperson* (discussed at note 49, *supra*) to find the search reasonable, the facts set out in the court's discussion emphasize the notice given passengers that they and their baggage were subject to search. Therefore, *Lacey* is consistent with the implied consent-administrative search rule of the Ninth Circuit. This consistency is further supported by the fact that defendant was free to leave at any time until the frisk revealed what was reasonably thought to be a weapon, justifying the object's examination under *Terry*. 105 Cal. Rptr. at 75.

[157] 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (1973). Again there was no reference to defendant's fitting the profile. Since the flight was international, it is likely that universal and indiscriminate metal detector searches were in use. *See* text

the examination of a cigarette package and a bottle found in his boots when he was frisked after his activation of the metal detector. The court held that "[t]he genesis and basis for the extent of defendant's search . . . lay in an administrative regulation,"[158] and upheld the search.[159]

This administrative search rationale was subsequently adopted by the California Supreme Court in *People v. Hyde*.[160] The court found that any "undesirable consequences" which might flow from eliminating warrant requirements for airport would be mitigated by two main factors. First, the decision to search was not subject to the discretion of security officers, since all passengers were subject to screening. Second, the screening procedures had to be as limited in their intrusiveness as would be consistent with their purpose of deterring or preventing hijacking and the carrying of weapons or explosives on board airplanes. A further mitigating factor was the individual's ability to avoid the search altogether by electing not to board.[161] The California court's administrative search rationale differed somewhat from that of the Ninth Circuit, however, in that there was no reliance upon consent, express or implied.[162] The *Hyde* court had no reason to deal with consent, for the trial court had specifically found that the defendant had not consented to search.[163] In a footnote the supreme court stated that the consent theory was inappropriate in any event, since com-

following note 131, *supra*. Defendant challenged the search which followed metal detector activation, however, and not the metal detector use itself. The universality of metal detector monitoring in *Kluga* is not known.

[158] 32 Cal. App. 3d at 414, 108 Cal. Rptr. at 163. The regulations relied upon were those adopted in February and March, 1972. *See* notes 30-32, *supra*, and accompanying text.

[159] The court approved the search in light of modern technology's ability to miniaturize explosives. 32 Cal. App. 3d at 416 & n.7, 108 Cal. Rptr. at 165 & n.7.

[160] 12 Cal. 3d 160, 524 P.2d 830, 115 Cal. Rptr. 358 (1974). *Hyde* involved search of the defendant's carry-on baggage after he fit the profile. However, the court held that neither profile fit nor metal detector activation was required for further search in the airport screening context. This holding was not dictum, since defendant had challenged the trial court's severely limiting his ability to cross-examine on the profile. The court in a footnote found this limitation at trial irrelevant under its holding that profile fit was unnecessary. *Id.* at 168 n.5, 524 P.2d at 836 n.5, 115 Cal. Rptr. at 364 n.5.

[161] *Id.* at 169, 524 P.2d at 837, 115 Cal. Rptr. at 365.

[162] Thus, the California Supreme Court did not precisely follow the path suggested in *Lacey*, discussed in note 156, *supra*.

[163] 12 Cal. 3d at 162, 524 P.2d at 832, 115 Cal. Rptr. at 360.

pelling a passenger to choose between fourth amendment rights and his constitutional right to travel constituted coercion; for consent to be valid it had to be free and voluntary.[164] The court rejected any justification of airport searches under *Terry*, since all passengers were subjected to metal detector screening.[165] A further objection to the *Terry* rational was the fact that the persons other than the frisking officer to be protected from danger in *Terry* were bystanders to the frisk, and not intended victims of any planned crimes.[166]

The *Hyde* court's holding with regard to consent has resulted in the development of an administrative search rule in the California courts somewhat different from that of the Ninth Circuit. Lower court decisions following *Hyde* have held that once a passenger had subjected himself to the initial stages of screening, he could not stop further search by electing not to board. In *Morad v. Superior Court*[167] defendant had activated the metal detector three times, but did not consent to the frisk which followed.[168] The California Court of Appeals interpreted the California Supreme Court's language in *Hyde* to mean that the election not to board must be made prior to passing through any of the screening procedures.[169] The *Morad* court accepted the reasoning of some

[164] *Id.* n.2, 524 P.2d at 832 n.2, 115 Cal. Rptr. at 360 n.2.

[165] *Id.* at 164, 524 P.2d at 833, 115 Cal. Rptr. at 361. The court also expressed "grave doubt" whether reasonable suspicion was justified by the six percent probability that a person frisked would be armed. *Id.* This statement was in response to Judge Weinstein's finding in *Lopez* that this probability *did* justify a reasonable suspicion that the selectee was armed and dangerous. *See* discussion of *Lopez*, notes 35-43, *supra*, and accompanying text.

[166] 12 Cal. 3d at 164-65, 524 P.2d at 834, 115 Cal. Rptr. at 362.

[167] 44 Cal. App. 3d 436, 118 Cal. Rptr. 519 (1975); *Cf.* People v. Bleile, 44 Cal. App. 3d 280, 118 Cal. Rptr. 556 (1975). This part of the California rule is diametrically opposed to that of the Ninth Circuit. *See* United States v. Homburg, 546 F.2d 1350 (9th Cir.), *cert. denied*, ___ U.S. ___, 97 S.Ct. 2654 (1977), discussed at notes 151-53, *supra*, and accompanying text; United States v. Miner, 484 F.2d 1075 (9th Cir. 1973), discussed at note 89, *supra*, and accompanying text.

[168] Defendant in *Morad* had also fit the profile, but the California Supreme Court had held in *Hyde* that profile fit and metal detector activation could not justify further search by themselves. *See* note 160, *supra.*

[169] 44 Cal. App. 3d at 440-41, 118 Cal. Rptr. at 522-23. The court found the *Hyde* opinion's use of the word "attempting" in its discussion of the purpose of the screening procedure to be crucial. *Hyde* had stated that purpose to be "insur[ing] that dangerous weapons will not be carried onto an airplane and . . . deter[ring] potential hijackers from *attempting* to board." People v. Hyde, 12 Cal. 3d at 166, 524 P.2d at 834, 115 Cal. Rptr. at 362 (emphasis added).

earlier federal court decisions that to hold otherwise would allow a potential hijacker to try to board different flights until he found one where he could successfully pass through the security screen.[170] As evidenced by these cases, under the California rule the airport search is valid as an administrative search, but the rule differs in some respects from that of the Ninth Circuit.

Other state courts have also considered airport security systems. In *State v. White*[171] the Arizona Court of Appeals approved the universal screening procedures under the implied consent-administrative search rationale. The court held that a passenger must have the right to avoid the search by electing not to board, and that the search must be as limited as would be consistent with its purpose.[172] A Georgia Court of Appeals upheld the metal detector search of a non-passenger who passed through the security checkpoint in *State v. David*.[173] The *David* court upheld the universal search of all persons entering the concourse as reasonable.[174]

[170] 44 Cal. App. 3d at 441 & n.2, 118 Cal. Rptr. at 523 & n.2. The *Morad* court explicitly accepted the holding of the Fifth Circuit Court of Appeals in *United States v. Skipwith*, 482 F.2d at 1277, on this point. *See* note 62, *supra*. *See also* discussion of Chief Judge Friendly's concurrence in United States v. Bell, at note 46, *supra*, and accompanying text. It is submitted that this reasoning was invalid for the search in *Morad*. At the time of the *Morad* search, the FAA regulations requiring profile screening or universal search for all flights were in effect. *See* notes 30-33, *supra*, and accompanying text. Thus, defendant could not have been successful in his search for a flight without security procedures. There can be little question of the invalidity of this reasoning for today's procedures, since all passengers on all flights are now subjected to metal detector and baggage searches. *See* note 34, *supra*, and accompanying text.

[171] 110 Ariz. App. 505, 549 P.2d 600 (1976). *White* involved manual search of defendant's carry-on baggage after X-ray examination showed an "indeterminate shape" within the bag. Although the court found it "logical to conclude" that defendant withdrew his implied consent when he declined to open the package within the baggage, it held that the information available to the security officer at the time constituted probable cause to search for illegal drugs.

[172] 549 P.2d at 606. The court relied in part on the earlier decision of the Arizona Supreme Court in State v. Miller, 110 Ariz. 491, 520 P.2d 1115 (1974). *Miller* had disapproved the search of carry-on baggage which was placed in a locker after defendant was refused boarding. Defendant refused to consent to search of the bag, and his boarding pass was pulled. Defendant then placed the bag in a locker and was taken to an office within the airport. Three hours later, and still without consent, the locker was opened and the bag was searched because of claimed suspicion of a bomb. The court questioned whether there was in fact such suspicion about a bag which had been left in the locker for three hours. The search of the bag revealed drugs. Defendant had fit the profile, but there is no indication in the opinion that he activated the metal detector.

[173] 130 Ga. App. 872, 204 S.E.2d 773 (1974).

[174] 204 S.E.2d at 775. The court relied on *United States v. Epperson*, 454 F.2d

An Oregon Court of Appeals, in *State v. Chipley*,[175] held that the scope of the airport search must be strictly limited to seeking discovery of weapons or explosives. The court disapproved the search in question as too broad in scope, and thus had no occasion to rule on the permissibility of, or justification for, airport searches in general.[176]

In a decision involving a search not in fact conducted under the airport screening procedures, a Missouri Court of Appeals adopted language from many of the earlier decisions on screening systems. *State v. Johnson*[177] involved a search of carry-on luggage after a bomb threat against the airline had been received. Defendant subsequently aroused the suspicions of airline personnel by his actions while purchasing his ticket. In a wide-ranging opinion, the court appeared to rely on the Fifth Circuit's "critical zone" language, the *Terry* rationale, and express consent to uphold the search. Although the case did not involve routine screening, it could be predictive of Missouri court reasoning in future airport search cases.

There appears to be a trend in the cases discussed toward the administrative search rationale, although the trend may not always be clear. Even some courts which had previously rejected this rationale appear to have adopted it now.[178] Passage of the ATSA makes this rationale for airport searches more attractive because

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769 (discussed at note 50, *supra*), and *United States v. Slocum*, 464 F.2d 1180 (discussed at note 51, *supra*), without further discussion of the theories adopted by various courts.

[175] 29 Or. App. 691, 564 P.2d 1096 (1977).

[176] The court stated that "the only consensus which has emerged from [the] cases" considering airport security searches is that their scope must be limited. 564 P.2d at 1097.

[177] 529 S.W.2d 658 (Mo. App. 1975).

[178] *See* notes 139-40, *supra*, and accompanying text. Only the Fifth Circuit has taken a position totally inconsistent with the administrative search rationale, and that circuit has not addressed the new screening procedures. The procedures which became effective in January, 1973 (*see* note 34, *supra*), when taken in conjunction with the ATSA, § 201 (49 U.S.C. § 1356 (Supp. V 1975), *see* text and notes 108-10, *supra*), may make the administrative search rationale more attractive to the Fifth Circuit today. Its "critical zone" rationale could be abandoned simply by finding that the hijacking "emergency" of 1973 is past. However, it is not thought that such an abrupt change in Fifth Circuit reasoning is likely without Supreme Court examination of airport security searches.

of its authorization for the FAA to require this kind of regulation of passengers rather than airlines.[179]

A PROPOSAL

There can be little doubt that the present system of airport security screening to prevent hijackings is effective against all but the most determined of hijackers. There can also be little doubt that the most determined hijackers would be able to defeat the system.[180] In addition, the innovative hijacker who is able to disguise his weapon sufficiently (or bluff others into thinking something innocuous is a weapon) will not be stopped by the metal detector and X-ray searches carried out today.[181] Finally, there would be little point in questioning the constitutionality of subjecting all passengers to metal detector and baggage search, given the fact that holdings in all jurisdictions would support the procedure.[182]

Acceptance of the necessity and reasonableness of some form of indiscriminate search of passengers and baggage does not necessarily mean that the particular procedures adopted in 1972 should be continued through today and into the indefinite future. While the procedures may have been reasonable in the context of the danger of hijacking in 1972[183] and of technology existing at the time, changes in the threat and improvements in weapons detecting technology change the context of the search. Each individual search must be reasonable in its particular context. This can be seen from the reasonableness test applied to administrative searches.

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[179] 49 U.S.C. § 1356 (Supp. V 1975). *See* notes 108-10, *supra*, and accompanying text.

[180] *See* notes 116-18, *supra*, and accompanying text.

[181] The first successful United States hijacking after the 1973 procedures went into effect involved just such a bluff. On September 10, 1976, a group of Croatian nationalists hijacked a Trans World Airlines flight en route from New York to Chicago. The explosives they claimed to have turned out to be putty. *See* N.Y. Times, September 11, 1976, at 1, col. 5; September 13, 1976, at 18, col. 1. More recently, a hijacker kept a number of passengers hostage for several hours at Atlanta, Georgia, in an unsuccessful hijacking attempt. His weapons were a toy pistol and a transistor radio which he claimed was a bomb. *See* N.Y. Times, December 26, 1977, at 16, col. 1. In both instances the hijackers had passed through routine screening procedures.

[182] The Seventh Circuit is a possible exception, since its justification under the profile was based on *Terry* and it ha snot addressed the current procedures. *See* notes 70, 96, & 125, *supra*, and accompanying text.

[183] *But see* note 105, *supra*.

The current law concerning warrantless administrative searches derives from *Camara v. Municipal Court*[184] and *See v. City of Seattle*.[185] Both cases involved area inspections to determine compliance with local fire and housing codes.[186] The area inspection programs were upheld as reasonable under a test, announced in *Camara*, which involved "balancing the need to search against the invasion the search entails."[187] Public interest demanded that the purpose of the search be achieved, and it was "*doubtful* that *any other technique would achieve acceptable results*."[188] Another factor the Court found persuasive was the fact that the inspections involved were "neither personal in nature nor aimed at discovery of evidence of crime, . . . [and thus] involve[d] a relatively limited invasion of the citizen's privacy."[189] Because of these considerations, a program of area inspections, not carried out by force, for enforcement of the codes was reasonable, and searches under the program were also reasonable when the person whose building was searched acquiesced in the search.

Colonnade Catering Corp. v. United States[190] relied on *Camara* and *See* and held that forcible entry without a warrant was not authorized under statutes regulating the liquor industry and authorizing inspections.[191] However, the Court stated that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand."[192] Because of the history of regulation, licensing, and inspection, this Congressional power included "broad authority to fashion standards

[184] 387 U.S. 523 (1967).

[185] 387 U.S. 541 (1967).

[186] In both *Camara* and *See* the Court held that warrants were required because access to the areas to be searched was refused. *Camara*, 387 U.S. at 540; *See*, 387 U.S. at 545. However, the holdings themselves are limited to the proposition that the inspections could not be performed by force without a warrant. Where entry is refused, the existence of an area inspection program for the geographic area in which the particular building is located, together with satisfaction of the program's "reasonable legislative or administrative standards," would provide probable cause for issuance of a warrant covering the particular building. *Camara*, 387 U.S. at 538.

[187] *Camara*, 387 U.S. at 536-37.

[188] *Id.* at 537 (emphasis added).

[189] *Id.*

[190] 397 U.S. 72 (1970).

[191] *See* 26 U.S.C. §§ 5146, 7342, 7606 (1970).

[192] 397 U.S. at 76.

of reasonableness for searches and seizures."[193] The forcible warrantless search in *Colonnade* was disapproved because Congress had "selected a standard that does not include forcible entries without a warrant."[194] Rather, Congress chose to make a licensee's refusal to allow an inspection a violation of the law punishable by a fine.[195]

The Supreme Court again addressed the question of administrative searches in *United States v. Biswell.*[196] Biswell, a licensed dealer under the Gun Control Act of 1968,[197] acquiesced in the warrantless search of his locked storeroom after being shown that the search was authorized by the Gun Control Act.[198] The Court found the statutory authority to be analagous to authority under a search warrant, and upheld the search as reasonable.[199] Considerations which the Court relied on included the fact that "[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme."[200] Upholding the warrantless search as reasonable was necessary "if the law is to be properly enforced and inspection made effective."[201] The Court found that the inspection was intended to serve a deterrent effect, which required "unannounced, even frequent inspections."[202] Requiring a warrant would likely frustrate this purpose. "[O]nly limited threats to . . . justifiable expectations of privacy" were posed because "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[203] The Court held that "where . . . regulatory inspections further urgent federal interest, and the possibility of abuse and threat to privacy are not of impressive dimensions, the

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[193] *Id.* at 77.
[194] *Id.*
[195] *Id.*
[196] 406 U.S. 311 (1972).
[197] 18 U.S.C. §§ 921 *et seq.* (1976).
[198] *See* 18 U.S.C. § 923(g) (1976).
[199] 406 U.S. at 315.
[200] *Id.*
[201] *Id.* at 316.
[202] *Id.*
[203] *Id.*

inspection may proceed without a warrant where specifically authorized by a statute."[204]

As these Supreme Court cases show, for a warrantless administrative search to be reasonable, there must be an important governmental interest outweighing the citizen's privacy interest. The search must be authorized by statute, and it must be unlikely that the purpose of the search can be achieved in a less intrusive manner. Privacy expectations are reduced by the fact that the citizen engaged in the regulated activity with knowledge that this subjected him to search.

For a question of reasonableness to arise, the person subject to the search must have a "reasonable expectation of privacy" with respect to the area to be searched.[205] Although in subjective terms it may not be reasonable to expect privacy with respect to one's person or luggage in an airport today,[206] in the constitutional sense such an expectation may in fact be reasonable. The fact that the government has required metal detector and baggage searches for the past five years cannot by itself justify such searches as reasonable.[207]

Given that an administrative search of some type is justified, to survive constitutional scrutiny it must involve as little intrusion as possible.[208] Those cases upholding the reasonableness of metal

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[204] *Id.* at 317.

[205] *See* Katz v. United States, 387 U.S. 347, 361 (1967), (Harlan, J., concurring).

[206] It cannot be doubted that anyone who has traveled by air since 1973 knows at least the initial stages of the search procedures—the walk through the metal detector and the baggage X-ray. In addition, notice of the procedures is afforded both by signs posted in the airport and by the visibility of the metal detector and X-ray devices. Thus, an individual could not realistically expect his baggage to escape these search procedures. *Cf.* United States v. Bronstein, 521 F.2d at 462, discussed in note 140, *supra.*

[207] *Cf.* United States v. Albarado, 495 F.2d at 806, discussed at notes 126-28, *supra*, and accompanying text. *See also* United States v. Chadwick, ___ U.S. ___, 97 S.Ct. 2476 (1977).

[208] "[I]t is . . . *a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.*" United States v. Albarado, 495 F.2d at 806 (emphasis in original). The *Camara* opinion strongly supports this requirement. As has been stated (*see* text and notes 188-89, *supra*, and accompanying text), that opinion found that no techniques other than the inspection employed would achieve the purpose of the inspection, and that the searches involved a limited invasion of privacy since they were not personal in nature. Where the searches are personal in nature, as are both the metal detector search and the baggage search, a fortiori the least in-

detector searches did so on the basis of the "absolutely minimal invasion in all respects of a passenger's privacy,"[209] weighed against governmental interest in preventing hijackings. It follows, therefore, that where methods of search which are available, or which become available, intrude upon the privacy of the individual to a lesser degree but are still able to accomplish the purposes of the search, they should be constitutionally mandated.

Since minimally intrusive methods of search are mandated, current screening procedures involving the use of metal detectors should be changed. Under current procedures the passenger is required to pass through a metal detector to reach the boarding area. If he activates the metal detector, he is requested to remove any metal items from his pockets and to walk through the metal detector again. If this still produces a reaction, the passenger may be subjected to a personal frisk. The presence of metal on the passenger's person at this point cannot justify the reasonable suspicion that he is armed, as required under *Terry*. Therefore, the frisk must be justified as a continuation of administrative search procedures.[210] If a less intrusive method of locating the offending metal is available, it must be used before the passenger is subjected to a frisk. From the advent of wide scale usage of the metal detector, small hand-held metal detectors have been available. In fact, these were used in some airports until walk-through detectors were installed. Since the privacy intrusion of this device is less than that involved in a physical frisk, this or a comparable device should constitute the next step in the search procedure.[211] There is an additional

trusive procedure which will stop preventable hijackings should be used. *See also* Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 409-10 (1973); Note, *Applying Constitutional Standards to Airport Security Systems*, 5 LOY. (CHI.) U. L. J. 186, 204 (1974); Downing v. Kunzig, 454 F.2d 1230, 1232 (6th Cir. 1972); United States v. Schafer, 461 F.2d 856, 859 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972), discussed in note 81, *supra*.

[209] United States v. Albarado, 495 F.2d at 806, discussed at notes 131-33, *supra*, and accompanying text.

[210] Even assuming that the metal detectors in use today are not activated as easily as those used in the original screening procedures, they will be activated by many people who are not armed. Assuming that metal detectors today are 50 times more selective than those in use at the time of the *Lopez* search, one percent of all passengers will still activate them. This is from 100 to 250 times the percentage of passengers denied boarding in the studies cited in *Lopez*. *See* United States v. Lopez, 328 F. Supp. at 1084. It is submitted that one chance in 100 to 250 is not a reasonable basis for suspicion.

[211] An example of a change to a less intrusive method of search is the current

advantage to the use of such a device at this stage of the procedure. Because it pinpoints the location of the offending metal, it reduces the possibility for abuse of the airport search procedure.[212] By the use of the hand-held metal detector, the purposes of the screening system—prevention of hijackings and the carriage of weapons on airplanes—would be adequately served. At the same time, where the use of this device precedes any physical frisk, privacy intrusions would be reduced.

It may be argued, however, that the sole use of such a device would not locate nonmetallic explosives passengers might be carrying. Many of the search cases involving discovery of drugs relied heavily on the possibility that a hijacker might use explosives in his attempt.[213] This argument, however, ignores the fact that the initial walk-through metal detector will not reveal nonmetallic explosives either.[214] Thus, to apprehend the hijacker with explosives on his person, security officers must depend upon the chance that he will also be carrying a sufficient amount of metal to activate the metal detector and justify a physical frisk. Absent statistical evidence that passengers with explosives are also likely to be carrying sufficient metal to activate the metal detector, this argument is irrelevant to a frisk under current procedures. Thus, the explosives argument cannot support current procedures over the use of hand-held metal detectors.[215]

Furthermore, it may be possible to use instruments which would

use of X-ray equipment for searching carry-on baggage, which has generally supplanted the earlier manual search. A second example is the change from hand-held metal detectors to the walk-through type as these became available in the early days of the indiscriminate screening procedures.

[212] For example, such a device would not be triggered by a nonmetallic container of illegal drugs. Therefore the airport security procedure would be less readily adaptable to the general search without probable cause.

[213] For the most extreme example of an attempt to justify a drug search by the possibility of explosives, *see* United States v. Kroll, 481 F.2d 884 (8th Cir. 1973), discussed at notes 74-79, *supra*, and accompanying text.

[214] After the September, 1976, hijacking by Croatian nationalists (*see* note 181, *supra*), a TWA security spokesman was quoted as saying that the weapons detectors currently in use would be incapable of detecting plastic explosives. N.Y. Times, September 12, 1976, at 23, col. 1.

[215] It is significant that no screening procedure publicly proposed or adopted for airports has found sufficient danger of explosives to require that passengers submit to a search adequate to reveal explosives possession. It is also significant that in none of the cases surveyed did any screening system result in the discovery of explosives. *See also* note 220, *infra*.

detect non-metallic explosives on the passenger's person, and thus eliminate the danger without depending upon the chance of metal detector activation. The United States Customs Bureau is currently testing vapor detectors capable of indicating the presence of illegal narcotics being smuggled into the country.[216] It is quite possible that this device could be adapted to detect vapors from non-metallic explosives, with little further intrusion into the passengers' privacy. Furthermore, if properly calibrated it would prevent the carriage of explosives on board airpanes without also producing the opportunity for abuse which the physical frisk is subject to.

Unfortunately, in view of holdings in the various jurisdictions examined, it appears unlikely that current procedures will be changed as suggested here. Incorporating the use of hand-held metal detectors, combined with the use of vapor detectors, does, however, reduce the intrusiveness of the screening searches. Therefore, a strong case for this requirement can be made on the basis of the constitutional considerations discussed above.

These considerations would also support changes in the procedures for screening carry-on baggage. The 1976 amendment to the aircraft security regulations requiring that all checked baggage be screened for explosives and incendiary devices would bolster this recommendation for change.[217] Prior to this amendment, a passenger was able to protect his privacy interests by checking luggage he did not want routinely screened.[218]

Changes in technology since the original imposition of indiscriminate baggage search have been reflected in the devlopment of carry-on baggage screening procedures since 1973. Whereas originally carry-on baggage was searched by hand, X-ray machinery was put into use when it became available.[219] The change from manual searches to the use of x-ray machines has certainly resulted in less intrusion upon the passenger's privacy. It is obvious that the projection of dense object outlines on a television screen

[216] *See* Dallas Times Herald, April 20, 1978, § A, at 17, col. 1.

[217] *See* 41 Fed. Reg. 10,911 (1976), *amending* 14 C.F.R. § 121.538(b).

[218] In fact, this option was held to be the basis for implied consent to the search of carry-on baggage in United States v. Williams, 516 F.2d at 12, discussed at text and notes 137-39, *supra.*

[219] Refinements have apparently been made in the X-ray equipment, for there is much less likelihood that photographic film in baggage searched by X-ray will be fogged by the search today.

visible to a limited number of persons is less intrusive than a security officer's opening the bag and rummaging among the contents in full view of all persons at or near the checkpoint.[220]

Despite this reduction in the intrusiveness of the baggage search, however, it is submitted that there is still significant intrusion involved in the display by outline of much of the contents of one's baggage. One reason, albeit not the only one, for carrying objects in one's baggage is to hide them from public view. The desire to hide contraband is no more likely than the desire to prevent public view of legitimate possessions. In any event, a person's exercise of his constitutional right to privacy cannot raise a presumption of illegality. Because of the significance of the continued intrusion involved in the baggage searches, less intrusive procedures should be adopted as technological advances are made which will accomplish the legitimate purposes of the search. A metal detector which can localize metallic objects contained in baggage with enough precision to ignore the metal frame would be one possibility. Such a development may be possible, as evidenced by walk-through metal detectors which indicate the general area of a passenger's body where metal is located. Even if this is not technologically feasible at this time, metal detectors currently available should be used. By calibrating the instrument to react to the mass of metal in a handgun, the purpose of current X-ray search procedures would be satisfied. The contents of baggage containing little or no metal would not be revealed to strangers, and thus the passenger's privacy rights would be pro-

[220] This change in procedure also shows that the danger of explosives has not in fact been considered to be particularly great. The X-ray devices currently used generally show the outlines only of metallic objects or others of similar density within the baggage examined. It is quite possible to obtain explosives which are not sufficiently dense to project a suspicious image on the television screen. *See* note 214, *supra*, and N.Y. Times, September 12, 1976, at 23, col. 1. A manual search of carry-on baggage would be much more likely to disclose such explosives. *Cf.* Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (approving the conditioning of access to federal buildings on consent to search for bombs). Nevertheless, the governmental interest in preventing the carriage of such explosives was not found to be sufficient to require the continuation of the manual search. *See* notes 213-15, *supra*, and accompanying text. In the only reported case which involved explosives, United States v. Illingworth, 489 F.2d 264 (10th Cir. 1973), the defendant flew from Pocatello, Idaho, to Denver, Colorado, changing airplanes en route, without discovery of dynamite in his carry-on baggage. Defendant was not arrested until after he told ticket agents in Denver about the dynamite.

tected to the fullest possible extent. Any baggage activating the metal detector could then be subjected to X-ray examination. This X-ray examination would be fully justified as the least possible intrusion at this step consistent with the prevention of hijacking and weapons carriage.

As with the personal frisk, the possibility of explosives cannot justify more intrusive procedures than those proposed. Plastic explosives in amounts sufficient for the hijacker's purposes would not be detected by X-ray examination.[221] If this danger is deemed great enough to warrant effective screening, vapor detectors could be incorporated into the procedures proposed above with little increase in their intrusiveness, and with greatly decreased potential for abuse compared to current procedures. The primary advantage of the proposed procedures would be the "absolutely minimal invasion" necessary to accomplish the purposes of the antihijacking searches. Because the constitutional requirement is minimum intrusion consistent with the purposes of the search, present procedures with respect to carry-on baggage screening should be amended to incorporate changed technology which would reduce the intrusion and the potential for abuse.

CONCLUSION

The great public interest in the prevention of hijacking admittedly justifies some level of screening and search of all air passengers today. It also must be conceded that current procedures result in relatively small intrusion upon the privacy of those passengers. However, for the procedures to be strictly constitutional, they must incorporate the means which result in the least intrusion consistent with the goal of preventing hijacking. Although current procedures may have been reasonable as the least intrusive available at the times they were adopted, they do not necessarily continue to be reasonable, even assuming that the dangers of hijacking have not diminished. Rather, as soon as new, less intrusive techniques become available, they are constitutionally required if equally effective.

No reasonable system of security screening or search will be absolute in preventing hijacking. For various reasons a certain

[221] *See* note 214, *supra.*

level of risk will always be accepted. To the extent that a particular danger is considered too remote to justify more stringent procedures of general application, this acceptance should be expressly recognized with respect to all routine screening procedures. Of course, where a particular passenger is selected for more thorough search because of "specific and articulable facts," the more stringent procedures may be applied so long as they are reasonable within the particular factual context.

Although the public interest has been seen since the adoption of current procedures as warranting effective search for metallic weapons—generally guns and knives—it has never resulted in the adoption of general searches of air travelers comprehensive enough to reveal non-metallic explosives. It is recognized that there will be specific instances when the facts available to the security personnel justify a reasonable fear of explosives. This fear should be tested under *Terry*, requiring "specific and articulable facts" to raise such a fear.[222] Courts should not approve a search revealing contraband merely because the searching officers claimed they thought there might be explosives in the passenger's luggage or on his person. Since current procedures are totally inadequate for the discovery of explosives, and since there has never been any sustained use of a procedure adequate to that purpose, the obvious implication is that this particular risk has been deemed acceptable. Therefore, courts should be hesitant to accept a claim of fear or suspicion to justify a more intrusive search which does not in fact reveal explosives.

Because of technological advances which will effectively further the purposes of airport security screening with less intrusion, the search methods in use today may be unreasonable despite their reasonableness when first adopted. It is submitted that any arguments based on the danger of explosives in favor of current procedures are without substance, both because of the procedures' ineffectiveness in discovering explosives and because of the apparently negligible and accepted danger of hijacking presented by explosives. Therefore, the equipment and methods used should be, and indeed are constitutionally required to be, updated today, and updated periodically in the future as less intrusive but equally

[222] *See* Terry v. Ohio, 392 U.S. 1 (1968), discussed in note 4, *supra*.

effective search techniques become available. Specifically, the use of hand-held metal detectors should precede any physical frisk of passengers activating the walk-through metal detector. In addition, metal detector screening of carry-on luggage should precede X-ray examination of the luggage. Both these changes in current procedures are constitutionally required as the least intrusive means consistent with the purposes of the airport security screening system. Furthermore, any perceived increase in the danger of explosives should be guarded against, not by continuation of current procedures, but by the use of vapor detectors and similar devices which could effectively prevent explosives carriage without the great potential for abuse which current procedures present.