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“Fly The Friendly Skies”: How Implementing a Private Security System Can Improve the Safety of the Nation and an Industry

Courtney Luster
Southern Methodist University

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**“FLY THE FRIENDLY SKIES”¹: HOW IMPLEMENTING A
PRIVATE SECURITY SYSTEM CAN IMPROVE THE
SAFETY OF THE NATION AND AN INDUSTRY**

COURTNEY LUSTER*

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* Jane L. Levere, *Old Slogan Returns as United Asserts It is Customer-Focused*, N.Y. TIMES (Sept. 20, 2013), <http://www.nytimes.com/2013/09/20/business/media/old-slogan-returns-as-united-asserts-it-is-customer-focused.html> [https://perma.cc/WM9T-QAN5] (announcing United Airlines’ return to their vintage slogan “Fly the friendly skies”); *see also* FriendlySKy, *Come Fly Our Friendly Skies of United*, YOUTUBE (Dec. 13, 2015), <https://www.youtube.com/watch?v=5pA5rk9qktM> [https://perma.cc/N8GD-7LWG].

¹ International Aviation Women’s Association Scholarship 2017 Comment. J.D. Candidate, SMU Dedman School of Law, May 2018; B.A., The University of Texas at Austin, May 2012. The author would like to thank her parents, Clifford and Kari Luster, as well as her aunts, Donna Bearer and Katherine Chiles, for their constant love, motivation, support, and time.

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I. “IT’S TIME TO FLY”²: INTRODUCTION

“SPIRIT AIRLINES PASSENGERS battered . . . ,”³ “Lawsuit: American Airlines Failed to Protect Girl,”⁴ “JetBlue [] passenger . . . interfering with flight safety . . . ,”⁵ “\$10 million [passenger assault] lawsuit filed against [a]irlines”⁶ These

² *United Airlines Deepens Commitment to ‘It’s Time to Fly’ Ad Campaign, Selects Barrie D’Rozario Murphy as New Advertising Agency*, PR NEWSWIRE (Apr. 4, 2007, 1:00 PM), <http://www.prnewswire.com/news-releases/united-airlines-deepens-commitment-to-its-time-to-fly-ad-campaign-selects-barrie-drozario-murphy-as-new-advertising-agency-57853677.html> [https://perma.cc/7KHQ-BW4A] (discussing focus of United’s slogan “It’s Time to Fly”).

³ Nancy Dilon, *Spirit Airlines Passengers File Suit after In-Flight Fight*, DAILY NEWS (Apr. 7, 2016, 6:05 PM), <http://www.nydailynews.com/news/national/spirit-airlines-passengers-file-suit-in-flight-fight-article-1.2592341> [https://perma.cc/6KM5-CF6J].

⁴ Mary Beth Quirk, *Lawsuit: American Airlines Failed to Protect Girl from Passenger Accused of Touching Her Inappropriately*, CONSUMERIST (Sept. 8, 2015), <https://consumerist.com/2015/09/08/lawsuit-american-airlines-failed-to-protect-girl-from-passenger-accused-of-touching-her-inappropriately/> [https://perma.cc/64A4-LQGP].

⁵ *Parver v. Jet Blue Airlines Corp.*, 649 F. App’x 539, 541 (9th Cir. 2016).

⁶ Francesca Fontana, *\$10 Million Lawsuit Filed Against American Airlines, Man Accused of Groping 13-Year-Old on Portland Flight*, THE OREGONIAN/OREGONLIVE (July 6, 2016, 11:42 AM), http://www.oregonlive.com/portland/index.ssf/2016/07/10_million_lawsuit_filed_again.html [https://perma.cc/GHX7-88LS].

are the types of headlines splattered over the front of newspapers and internet homepages. Despite the Transportation Security Administration (TSA) being the forefront of aviation security and safety, the typical TSA litigation tends to center around employment issues, corporate compliance, or petitioners' attempts to have their names removed from a "No-Fly" List.⁷ However, airline carriers are constantly defending themselves and bearing the brunt of safety litigation. In an attempt to mitigate safety concerns, flight attendants are no longer trained for just service in the sky. Today, stewards and stewardesses are trained in the fundamentals of aviation, security procedures, self-defense maneuvers, emergency protocol, and so much more.⁸ Sadly, it simply is not enough. In the past few years, the Federal Bureau of Investigation (FBI), who asserts jurisdiction in-flight, has logged around 170 crimes per year during flights.⁹ Airlines need to take more proactive steps to ensure safer skies for their passengers and their companies.

This comment proposes a new security program which should be implemented by airlines individually. Previous legal works have discussed the past aviation security systems, which were under private security companies; however, since the September 11, 2001 (9/11) terrorist attacks, the federal government has implemented a government controlled security system for air travel. So, current legal scholars discuss the constitutionality and legality of the current government safety procedures. Thus, for context, Part II seeks to discuss past and current security measures by TSA and airlines alike. Part III recommends the security protocol that should be adopted by the individual airlines; this is proposed as being an additional level of security which works in

⁷ Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 916 (2015) (hearing a suit from an air marshal after TSA fired him for talking to a reporter); Ardila Olivares v. Transp. Sec. Admin., 819 F.3d 454, 458 (D.C. Cir. 2016) (hearing a suit against TSA for the denial of an applicant to a Federal Aviation Administration certified flight school); Coleman v. Sec'y U.S. Dep't Homeland Sec., 649 F. App'x. 128, 129 (3rd Cir. 2016) (addressing a transportation security officer's suit for harassment under the ADA); Ibrahim v. U.S. Dep't Homeland Sec., 835 F.3d 1048 (9th Cir. 2016) (regarding a woman challenging placement on No Fly List and attorney's fees).

⁸ *Customized Compliance Training*, DELTA AIR LINES, http://www.delta.com/content/www/en_US/about-delta/business-programs/training-and-consulting-services/flight-attendant-training/customized-compliance-training.html [https://perma.cc/24VQ-LJNR] (last visited July 8, 2017).

⁹ Corinne Purtil, *Unfriendly Skies: The Disturbing Reality of Sexual Assault on Airplanes*, QUARTZ (Oct. 27, 2015), <https://qz.com/533256/the-disturbing-reality-of-sexual-assault-on-airplanes/> [https://perma.cc/5ESF-JMVW].

conjunction with the existing government security scheme. Part IV discusses the feasibility of the program in regard to finances, public opinion, and effectiveness. Finally, Part V analyzes potential legal issues, addressing how the program is not bound by the Constitution due to lack of state action and the aviation industry's additional protection for safety-related decisions under certain statutes.

II. THE "WINGS OF MAN": HISTORICAL BACKGROUND OF PAST AND CURRENT SAFETY PROGRAMS¹⁰

A. "ONE MISSION. YOURS."¹¹: THE CAPPS I PROGRAM

The first American airplane to be hijacked was over fifty-five years ago.¹² And, as the federal government has continued to improve aviation security through the years, terrorists and criminals continue to work to evade the system and find kinks in its armor. In 1998, with the sweeping advances in technology, the United States created the Computer Assisted Passenger Pre-Screening System (CAPPS I).¹³

Being the first of its kind, this program was not without its flaws. The CAPPS I terrorism prevention program was used and funded independently by each airline.¹⁴ Despite being a mandatory program, many felt that leaving the system to the discretion of the individual airlines created fundamental flaws in the system, such as cutting into profit incentives and airlines not having uniform security thresholds.¹⁵ However, the main identifiers of suspicious behaviors stemmed from passengers' conduct in the airport, their travel history, their home address, travel companions, date and method of ticket purchase, their destination, whether the tickets were round trip, as well as many other

¹⁰ *The Wings of Man*, WRITE NOW & THEN (June 30, 2015), <https://write-now-and-then.com/2015/06/30/the-wings-of-man/> [<https://perma.cc/9BZ5-JHZ9>] (discussing Eastern Airline's "Wings of Man" slogan campaign).

¹¹ Trevor Jensen, *TWA at Your Service in New DMB&B Ads*, ADWEEK: BRAND MARKETING (Sept. 20, 1999), <http://www.adweek.com/brand-marketing/twa-yo-ur-service-new-dm-bb-ads-33622/> [<https://perma.cc/MU7P-BADD>] (explaining Trans World Airline's advertising history including their slogan "One mission. Yours.").

¹² Ian David Fiske, *Failing to Secure the Skies: Why America has Struggled to Protect Itself and How it Can Change*, 15 VA. J.L. & TECH. 173, 176 (2010).

¹³ *Id.* at 180.

¹⁴ *Id.* at 180–81.

¹⁵ *Id.*

factors.¹⁶ However, less than one year after implementation, the CAPPs I program was limited only to screening checked luggage out of the public's fear for its civil liberties.¹⁷ Thus, with CAPPs I not being employed to screen passengers and carry-on luggage, nineteen men walked onto four planes with box cutters and nefarious plans on September 11, 2001.¹⁸

B. "WE REALLY MOVE OUR TAILS FOR YOU"¹⁹: QUICK, COMPREHENSIVE, CAPPs II

While eleven of the nineteen terrorists responsible for 9/11 were identified as high-risk by the CAPPs I program, none were stopped or questioned because the terrorists did not check any baggage as required under the restricted system.²⁰ After this attack shook the nation, Congress created a more assertive system through the passing of the Aviation and Transportation Security Act.²¹ This Act officially created the aviation security agency known as TSA and amplified the current CAPPs I program through several modifications, creating CAPPs II.²²

The CAPPs II program differed from CAPPs I in that it not only monitored flight purchasing and travel patterns, but it also used data from commercial and government databases to confirm passengers' true identities and compare the identity against criminal wanted lists (both domestic and international), terrorist threat lists, and "No-Fly" and potential no fly lists.²³ Based on

¹⁶ *Id.* at 180; Leigh A. Kite, Note, *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPs II System Meet the Constitutional Challenge?*, 61 WASH. & LEE L. REV. 1385, 1394 (2004).

¹⁷ Michael J. DeGrave, Note, *Airline Passenger Profiling and the Fourth Amendment: Will CAPPs II be Cleared for Takeoff?*, 10 B.U. J. SCI. & TECH. L. 125, 130–31 (2004); Fiske, *supra* note 12, at 182 n.70 (citing DeGrave, *supra*, at 130).

¹⁸ Katie Cristina, Comment, *The TSA's New Precheck Is Beginning to Look a Lot Like CAPPs II: The Privacy Implications of Reviving the Tenets of the Failed Predecessor*, 78 J. AIR L. & COM. 617, 623–24 (2013).

¹⁹ *A History of Flight Attendants*, FEMININITY IN FLIGHT, <http://femininityinflight.com/laborhistory.html> [<https://perma.cc/G89P-KX6Z>] (last visited July 8, 2017) (explaining how Continental Airline's well thought out slogan, "We really move our tails for you," was poorly received by many stewardesses).

²⁰ DeGrave, *supra* note 17, at 148 (stating eleven of the nineteen September 11 attackers were identified through data patterns).

²¹ Aviation and Transportation Security Act, 49 U.S.C. § 44903(j)(2) (2006); Cristina, *supra* note 18, at 624.

²² Fiske, *supra* note 12, at 182.

²³ Cristina, *supra* note 18, at 625 (quoting Deborah von Rochow-Leuschner, *CAPPs II and the Fourth Amendment: Does It Fly?*, 69 J. AIR L. & COM. 139, 147 (2004)) (stating commercial and government databases would be used to consider certain factors of each traveler such as "race, religion, political affiliations,

the data compiled, all travelers were then to be coded into one of three risk categories.²⁴ A passenger's category then determined the amount of security screening they were subjected to before boarding, if they were even allowed to fly at all.²⁵ Finally, this program was to be completely in the control of and financed by the federal government, rather than by each airline individually as before.²⁶

Opposite the public's fear for national security and personal safety was the looming worry of Big Brother. The public's outcry over the intrusiveness of the government's reach in the name of security was deafening.²⁷ Constitutional fears of the government encroaching on American's Fourth,²⁸ Fifth,²⁹ and Fourteenth³⁰ Amendment liberties, as well as concerns in regard to the Privacy Act, caused Congress to halt the CAPPs II implementation until the potential issues had an identifiable solution.³¹ Due to these gaps in the program, and the failure to remedy them, CAPPs II never came to fruition.³²

credit history, employment, spending habits, charitable donations, unusual books purchased or checked out, and visits to certain websites.' But, . . . the TSA expressed . . . precise sources relied on were confidential."); Fiske, *supra* note 12, at 183.

²⁴ Cristina, *supra* note 18, at 624–25; Fiske, *supra* note 12, at 182–83.

²⁵ Cristina, *supra* note 18, at 624–25; Fiske, *supra* note 12, at 182–83.

²⁶ Fiske, *supra* note 12, at 183.

²⁷ *CAPPs II: Government Surveillance via Passenger Profiling*, ELECTRONIC FRONTIER FOUNDATION, <https://w2.eff.org/Privacy/cappsii/background.php> [<https://perma.cc/W2FU-DA3M>] (last visited July 8, 2017) (“CAPPs II would *force you* to surrender more of your privacy in order to travel . . . How much of your private life should the government be allowed to examine . . . CAPPs II could come to serve as an all-purpose dragnet . . . All of this “mission creep” has taken place before . . .”) (emphasis added).

²⁸ U.S. CONST. AMEND. IV (“The right of the people to be secure in their persons, . . . and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . .”).

²⁹ U.S. CONST. AMEND. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

³⁰ U.S. CONST. AMEND. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

³¹ Cristina, *supra* note 18, at 626 (referencing U.S. Gov't Accounting Office, GAO-04-385, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges* 4–5 (2004) (citing concerns such as data accuracy, inadequacy of appeal process, data security protocol, absence of policies for operation and use of the system, privacy concerns, and other).

³² *Id.*

C. THE SECURE FLIGHT PROGRAM: “YOU ARE NOW FREE TO MOVE ABOUT THE COUNTRY”³³

After the failure of the CAPPs programs, TSA was tasked with creating a new program which did not employ commercial data.³⁴ Specifically, the government wanted a program which identified terrorists only, rather than screening any potential passenger who might pose a risk.³⁵ Thus, Secure Flight was born. The program’s inspection process is limited to cross-referencing names with the “No-Fly” list,³⁶ “Selectee” databases³⁷ (which are a step below no-fly status), and the Center for Disease Control and Prevention (CDC) “Do Not Board List” only; this program does not cross-check any name with criminal lists or commercial databanks.³⁸ Secure Flight is even touted by TSA as “pro-

³³ Bernadette, *Southwest Airlines “Ding!” Commercial*, YouTube (July 5, 2010), <https://www.youtube.com/watch?v=dohsnU7c7X0> [<https://perma.cc/2B6C-P2PY>] (showcasing Southwest’s “Ding! You’re now free to move about the country” tagline).

³⁴ *Privacy Impact Assessment for the Secure Flight Program*, U.S. DEP’T HOMELAND SEC. 1, 5 (Aug. 9, 2007), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf [<https://perma.cc/2PQF-9724>] (“Secure Flight does not utilize commercial data verify identities, nor does it use algorithms to assign risk scores to individuals.”); see also *Security Screening*, TRANS. SEC. ADMIN., http://www.tsa.dhs.gov/what_we_do/layers/secureflight/index.shtm [<https://perma.cc/BME5-7DGT>] (last visited July 8, 2017) (“Secure Flight does NOT assign a score to individuals, use commercial data, or predict behavior.”); *Secure Flight Q & A*, THE TSA BLOG (June 2, 2009), <http://blog.tsa.gov/2009/06/secure-flight-q.html> [<https://perma.cc/F4HS-QFD9>] (“TSA does not collect or use commercial data to conduct Secure Flight watch list matching.”).

³⁵ Cristina, *supra* note 18, at 627–28; *Privacy Impact Assessment for the Secure Flight Program*, *supra* note 34; see also *Security Screening*, *supra* note 34; *Secure Flight Q & A*, *supra* note 34.

³⁶ *Ibrahim v. U.S. Dep’t Homeland Sec.*, 538 F.3d 1250, 1255 (9th Cir. 2008) (“... an agency called the Terrorist Screening Center ‘actually compiles the list of names ultimately placed on the No-Fly List.’ And the Terrorist Screening Center isn’t part of the Transportation Security Administration or any other agency named in section 46110; it is part of the Federal Bureau of Investigation.”); *Green v. Trans. Sec. Admin.*, 351 F. Supp. 2d 1119, 1121 (W.D. Wash. 2005) (“[Those], identified on a “No-Fly List,” consist[] of individuals who are prohibited from flying altogether. [Those], identified on a “Selectee List,” consist[] of individuals who must be ‘selected’ by air carriers for additional screening before they are permitted to fly.”).

³⁷ *Ibrahim*, 835 F.3d at 1255; *Green*, 351 F. Supp. 2d at 1121 (“[Those], identified on a “Selectee List,” consist[] of individuals who must be ‘selected’ by air carriers for additional screening before they are permitted to fly.”).

³⁸ Fiske, *supra* note 12, at 186–87; Michael Isaac, Note, *Privatizing Surveillance: The Use of Data Mining in Federal Law Enforcement*, 58 RUTGERS L. REV. 1057, 1069 (2006) (“... Congress barred the Secure Flight Program from accessing commercial databases . . .”).

tect[ing] privacy . . . [by] collect[ing] the minimum amount of personal information . . . necessary”³⁹ Despite the fact Secure Flight matches passengers on all flights entering, exiting, and flying over the United States,⁴⁰ some still have concerns about this program’s ability to detect threats using such a limited pool of information.⁴¹

D. GLOBAL ENTRY AND TSA PRE-CHECK VOLUNTARY PROGRAMS: “A WHOLE DIFFERENT ANIMAL”⁴²

The United States Customs and Border Protection (CBP) and TSA have recently created two voluntary screening programs to aid them and passengers, Global Entry and Pre-Check.⁴³ Global Entry is CBP’s expedited clearance program for travelers entering the United States who have been pre-approved and determined to be low-risk.⁴⁴ In order to be approved for Global Entry, applicants must provide correct and complete information, be a citizen of certain countries, and be free of any criminal convictions or pending criminal charges.⁴⁵ Applicants must also verify

³⁹ *Security Screening: Secure Flight*, TRANSP. SEC. ADMIN., www.TSA.gov/travel/security-screening (click the plus sign beside the “Secure Flight” title to drop-down information regarding this program) [<https://perma.cc/R9TB-KJGW>] (last visited July 8, 2017).

⁴⁰ Steve Sadler, *TSA Secure Flight Program*, TRANSP. SEC. ADMIN.: MEDIA: PRESS (Sept. 18, 2014), tsa.gov/news/testimony/2014/09/18/tsa-secure-flight-program.

⁴¹ *Security Screening*, *supra* note 39.

⁴² *Frontier’s ‘A Whole Different Animal’ Livery Has a Heartbeat*, AIRPIGZ (May 14, 2010, 10:10 PM), <http://airpigz.com/blog/2010/5/14/frontiers-a-whole-different-animal-livery-has-a-heartbeat.html> [<https://perma.cc/PVM6-KM6K>] (explaining how Frontier implemented its slogan, “Frontier. A Whole Different Animal,” in an innovative way).

⁴³ *Trusted Traveler Programs: Global Entry*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/trusted-traveler-programs/global-entry> [<https://perma.cc/VES6-TVVV>] (last visited July 8, 2017); *TSA Pre✓®*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/precheck> [<https://perma.cc/9MJW-425U>] (last visited July 8, 2017).

⁴⁴ Elizabeth Stern, *Ins and Outs of US Trusted Traveler Programs*, LAW 360 (Nov. 23, 2015), <https://www.law360.com/articles/730929/ins-and-outs-of-us-trusted-traveler-programs> [<https://perma.cc/4AA8-6HKN>].

⁴⁵ *Id.*; *Trusted Traveler Programs: Global Entry: Eligibility for Global Entry*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/trusted-traveler-programs/global-entry/eligibility> [<https://perma.cc/3C3K-K2KT>] (last visited July 8, 2017) [hereinafter *Eligibility for Global Entry*] (allowing U.S. citizens, U.S. lawful permanent residents, and citizens of Colombia, the United Kingdom, Germany, the Netherlands, Panama, Singapore, South Korea, and Mexican nationals to apply for Global Entry, but there may be additional requirements of individuals depending on their country of citizenship).

they have never been sentenced for a customs, immigration, or agriculture regulation violation, and they are not currently being investigated by any federal, state, or local law enforcement agency.⁴⁶ After completing the required forms, an applicant must then schedule an interview and biometrics scan at a pre-selected location.⁴⁷ With Global entry approval, members also receive TSA Pre-Check benefits.⁴⁸ The processing time for Global Entry may vary, but on average the CBP says it takes on average about “[fifteen] business days to be conditionally approved for the program,” and once approved “membership will be valid for [five] years unless [] revoked”⁴⁹ The Global Entry security system reduces the time it takes passengers to navigate the airport by about seventy percent because it provides more surety for the airlines and their passengers.⁵⁰

Pre-Check is a TSA program which allows for accelerated movement through airport security.⁵¹ At available airports, TSA Pre-Checked travelers do not need to remove their shoes, belts, or coats or remove laptops and liquids from their bag.⁵² Pre-Check members also stroll through a standard metal detector rather than the now typical x-ray body scanners or pat downs.⁵³ The program also requires an online application, an interview, and fingerprinting.⁵⁴ According to TSA’s Former Administrator, Pre-Check strengthens security because the TSA’s ability to “find the proverbial needle in the haystack is improved every time [it is] able to reduce the size of the haystack.”⁵⁵ While some individuals still express constitutional and privacy concerns, these are

⁴⁶ Stern, *supra* note 44; *Eligibility for Global Entry*, *supra* note 45.

⁴⁷ *Trusted Traveler Programs: Global Entry*, *supra* note 43.

⁴⁸ Seth Kugel, *Global Entry and Company: Worth the Price?*, N.Y. TIMES (Apr. 24, 2014), https://www.nytimes.com/2014/04/24/travel/global-entry-and-company-worth-the-price.html?_r=0 [<https://perma.cc/X3UJ-TZGR>] (stating over “1.3 million people have” applied for Global Entry and about “3,200 people [] sign [] up [for TSA PreCheck] each day”); Stern, *supra* note 44.

⁴⁹ *Applying for Global Entry: How Do I Apply for Global Entry?*, U.S. CUSTOMS & BORDER PROT., https://help.cbp.gov/app/answers/detail/a_id/1671/~/applying-for-global-entry [<https://perma.cc/4PPM-YVUZ>] (last visited July 8, 2017).

⁵⁰ Kugel, *supra* note 48.

⁵¹ *Id.*

⁵² *TSA Pre✓®*, *supra* note 43.

⁵³ *Id.*

⁵⁴ *TSA Pre✓®: Applying for TSA Pre✓®*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/precheck/faq> [<https://perma.cc/VSG2-SC53>] (click the plus sign beside the question “How do I apply for TSA Pre✓®?” for information regarding the application process).

⁵⁵ John S. Pistole, *Addressing Counterterrorism, Risk-Based Security, and TSA’s Vision for the Future of Aviation Security*, TRANSP. SEC. ADMIN.: MEDIA: PRESS (Mar. 5,

minimal, if not nonexistent, due to the program's voluntary nature and the fact that benefits are conferred on passengers approved as "low-risk," but the ability to fly is not taken away if a passenger is not approved.⁵⁶ However, while airport security has made leaps and bounds since the 9/11 attacks, the skies are still not safe enough to protect the airline industry from litigation.

III. "YOU'RE GOING TO LIKE US."⁵⁷: THE PROPOSED SECURITY MEASURES

Not only do airlines struggle with the constant fear of another terrorist attack, which would be a crippling economic hit,⁵⁸ but airlines also combat unruly passengers daily, which cost them substantial amounts of money.⁵⁹ From 2007 to 2015, there have been over 49,084 cases reported of unruly passengers during flight.⁶⁰ Examples of what is considered unruly passenger behav-

2012), <https://www.tsa.gov/news/speeches/counterterrorism-risk-based-security-and-tsa's-vision-future-aviation-security-0> [<https://perma.cc/ZXR9-Y2XM>].

⁵⁶ Jay Stanley, *TSA Once Again Considering Using Commercial Data to Profile Passengers*, ACLU: FREE FUTURE (Jan. 11, 2013, 11:09 AM), <https://www.aclu.org/blog/tsa-once-again-considering-using-commercial-data-profile-passengers> [<https://perma.cc/MPL4-KLPM>].

⁵⁷ jlt30, *1983 TWA Commercial*, YOUTUBE (Dec. 31, 2008), <https://www.youtube.com/watch?v=OMVi8H1gNjg&feature=youtu.be> [<https://perma.cc/V3ZC-HGVF>] (posting a previously aired Trans World Airline commercial with the written and sung slogan "You're going to like us.").

⁵⁸ Christ Kjelgaard, *New Terror Attack Could Be Costly for Airlines*, NBC NEWS (Aug. 30, 2007), http://www.nbcnews.com/id/20515498/ns/business-us_business/t/new-terror-attack-could-be-costly-airlines/ [<https://perma.cc/WFK9-TZQX>] (estimating another aviation attack would cost the airline industry "anywhere from \$214 billion to \$420 billion"); Matthew Phillips, *Why Do Airlines Always Lose Money? Hint: It's Not Due to Taxes or Fuel Costs*, FREAKONOMICS BLOG (June 24, 2011, 12:01 PM), <http://freakonomics.com/2011/06/24/why-do-airlines-always-lose-money-hint-its-not-due-to-taxes-or-fuel-costs/> [<https://perma.cc/C2TT-VMMV>] (discussing the huge economic hit after the September 11 terrorist attacks which caused a low demand for air travel while the airlines refused to raise flight prices to close the gap).

⁵⁹ Alex Davies, *Unruly Passengers Are Becoming A Serious Problem For Airlines*, BUSINESS INSIDER (Dec. 18, 2013, 11:31 AM), <http://www.businessinsider.com/unruly-passengers-airlines-flight-rising-expensive-2013-12> [<https://perma.cc/JJ3U-79QW>] (citing the Int'l Air Transp. Ass'n quoting the cost of defusing an unruly passenger between \$10,000 and \$200,000); *Fact Sheet: Unruly Passengers*, INT'L AIR TRANSP. ASS'N, https://www.iata.org/pressroom/facts_figures/fact_sheets/Documents/fact-sheet-unruly-passengers.pdf [<https://perma.cc/8LN3-AFQQ>] ("Unruly passenger incidents . . . lead to significant operation disruption and costs for airlines."); *Unruly Passengers: The Issue*, INT'L AIR TRANSP. ASS'N, <http://www.iata.org/policy/safety-security/pages/unruly-passengers.aspx> [<https://perma.cc/HG7A-T9GN>].

⁶⁰ *Id.*

ior include illegal consumption of narcotics, verbal and physical confrontations with crew members or passengers, making threats, sexual abuse or harassment, riotous behavior, and the list goes on.⁶¹ The majority of these unruly incidents are related to the passenger's consumption of alcohol.⁶² These incidents are unique in that cabin crew cannot call the authorities in-flight for immediate assistance; this is one of the many reasons crew members and airlines must put themselves in the best position to prevent or mitigate these situations. Crew members are alone in the air, and they are the sole authority. While airlines train crews to deal with the situation in the air, it would be more beneficial to them and their passengers if crew were never put in that situation. A spokesperson for the House Transportation Committee commented on the use of private contractors in aviation security, stating "They exceed[] or provide[] the same level of security as TSA screeners."⁶³ A dual program utilizing advanced data screening and an in-airport system implemented by individual airlines could provide crew and passengers such a safe guard.

A. DATA "IS READY WHEN YOU ARE"⁶⁴: RECOMMENDED USE OF DATA

These days, companies now use big data to produce big results: hotels use it to identify bad weather and stranded travelers, and then send targeted emails; pizza companies also detect bad weather and power outage areas; and some retailers even use it to determine when a shopper is likely pregnant.⁶⁵ With such amazing capabilities, how can airlines not use it for the safety of their passengers and the protection of their companies? Big

⁶¹ INT'L AIR TRANSP. ASS'N, GUIDANCE ON UNRULY PASSENGER PREVENTION AND MANAGEMENT 13 (2d ed. 2015), available at <https://www.iata.org/policy/Documents/2015-Guidance-on-Unruly-Passenger-Prevention-and-Management.pdf> [<https://perma.cc/5AVN-2YBZ>].

⁶² *Id.* at 18.

⁶³ Ron Nixon, *New Law Clears the Way for Airports to Drop T.S.A. Screeners*, N.Y. TIMES (Mar. 15, 2012), <http://www.nytimes.com/2012/03/16/us/airports-with-new-law-are-freer-to-split-from-tsa.html> [<https://perma.cc/2QXG-ABRV>].

⁶⁴ *Trademarks & Slogans*, DELTA AIR LINES, INC., http://www.delta.com/content/www/en_US/about-delta/corporate-information/trademarks-slogans.html [<https://perma.cc/3BMU-SKJP>] (last visited July 8, 2017) (providing a list of Delta's slogans through their company's history).

⁶⁵ Chuck Schaeffer, *5 Retail Big Data Examples with Big Paybacks*, CUSTOMER RELATIONSHIP MGMT. SOFTWARE SOLUTIONS, <http://www.ctmsearch.com/retail-big-data.php> [<https://perma.cc/QJA5-E3WN>] (last visited July 8, 2017).

data is “[e]xtremely large data sets that may be [analyzed] computationally to reveal patterns, trends, and associations, especially relating to human [behavior] and interactions.”⁶⁶ When people or companies mention big data use, images of dystopian societies and dehumanizing effects flash in people’s minds. However, big data is not near as perverse as people imagine; rather, it is the most effective solution for an ideal means of travel.

Through commercial databases, airline carriers can cross-reference names, dates of birth, addresses, phone numbers, and more to confirm a traveler’s identity,⁶⁷ as well as identify potential security risks. Commercial data can then be used to inform airlines of possible suspicious activity through alerts of suspicious websites recently visited, unusual books purchased, erratic spending habits (such as gun purchases, large quantities of ammunition, unusual chemicals, etc.), length of residence, whether a residence is owned or rented, key words from emails, occupation, and so much more. For instance, data could have flagged the recent Fort Lauderdale Airport shooter, who had begun selling all his belongings, including big items like his car.⁶⁸ Airlines can even take into account whether a passenger has gone through and been cleared by a trusted traveler program or Pre-Check. With this information, airlines can do their own security scans of checked bags, or perhaps code a person’s boarding pass to alert gate agents to double check this passenger’s person and carry-on. However, it is important to note this

⁶⁶ *Big data*, ENGLISH OXFORD LIVING DICTIONARY, https://en.oxforddictionaries.com/definition/big_data [<https://perma.cc/7DET-D8PE>] (last visited July 8, 2017).

⁶⁷ Cristina, *supra* note 18, at 624; John Yoo, *NSA Surveillance: Issues of Security, Privacy and Civil Liberty: Article: The Legality of the National Security Agency’s Bulk Data Surveillance Programs*, 10 I/S: J.L. & POL’Y FOR INFO. SOC’Y 301, 308 (2014) (“The 9/11 hijackers themselves provide an example . . . commercially available data might have turned up ties between every single one of the al Qaeda plotters . . . two hijackers [were] known to the CIA in the summer of 2001 to have been in the country . . . [Two] had rented apartments in their own name[s] and were listed in the San Diego phone book . . . Both [], the leader of the 9/11 al Qaeda cell, and [another hijacker], who piloted one of the planes into the World Trade Center, had lived there with them . . . [several] used the same frequent flier number . . . five hijackers used the same phone number [] when booking their flights; the remaining hijackers shared addresses or phone numbers with one of [the] hijackers [] who was in the United States in violation of his visa at the time.”).

⁶⁸ *Fort Lauderdale Airport Shooter Charged, Could Face Death Penalty*, KTLA 5 (Jan. 7, 2017, 9:04 AM), <http://ktla.com/2017/01/07/fort-lauderdale-airport-shooter-came-here-specifically-to-attack-fbi-says/> [<https://perma.cc/MC8J-982M>].

function and added safety measure is not meant to replace the TSA with private airlines' own version of security, nor is TSA meant to rely on the airlines to alert them to potential dangerous passengers through their data. TSA should still continue their normal performance of security, including their "random screening, regardless of whether an alarm is triggered" by the airlines.⁶⁹ Private airline's ability to screen all passengers against commercial databases merely provides the industry an extra layer of safety.

While TSA screens terrorist watch lists, it does not utilize criminal records of local, state, and federal law enforcement agencies; this is a disservice to airline security.⁷⁰ While some of the trusted traveler programs use it, the vast majority of people who travel via airlines are not checked.⁷¹ Airlines checking their passenger list against even basic police reports could be immensely beneficial. Crimes such as public intoxication, disorderly conduct, sexual assault, indecent exposure, and battery could alert the airlines enough to help them take small preventative measures against potential problems. For instance, if a cross-check alerts the airline to a sex offender, and the offender's seat is slotted beside an unaccompanied minor or such, the airline could reassign them to window seat or an emergency exit aisle with the single seats. If a passenger has numerous instances of public intoxications or disorderly conduct, a note could be made on the steward's manifests to be wary of passenger's alcohol intake and mannerisms, so they may offer water and food consumption to delay serving more alcohol. If air marshals are on a particular flight, airlines could strategically seat them amongst potential problem individuals. The use of public

⁶⁹ *Airport Screening Procedures*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/airport-screening-procedures> [<https://perma.cc/5D8H-CVLG>].

⁷⁰ *Improving Pre-Screening of Aviation Passengers Against Terrorist and Other Watch Lists: Hearing Before the Subcomm. on Econ. Sec., Infrastructure Prot., and Cybersecurity of the Comm. on Homeland Sec. House of Representatives*, 109th Cong. 78, 29 (2005) [hereinafter *Watch Lists Hearings*]; Cristina, *supra* note 18, at 637–38 (“...CBP uses commercial and law enforcement data, which domestic flights, through Secure Flight, expressly do not have congressional authority to use.”).

⁷¹ This parallels nicely with the Federal Rules of Evidence. Under Rule 404(b), a defendant's past crimes, wrongs, or other acts can be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Under Rules 413 and 414, past sexual assault or child molestation charges can be brought in to show propensity. Finally, under Rule 609, an individual's prior convictions may be introduced in court in order to impeach their credibility. FED. R. EVID. 404(b), 413, 414, 609.

records and other data could be extremely helpful in mitigating potential safety issues in-flight or possible greater threats; with data, airlines can “know why you fly.”⁷²

B. “MUCH MORE THAN FLYING”⁷³: PROPOSED IN-AIRPORT RESPONSE SYSTEM

While this is in no way intended to supplant TSA security measures, added security measures could complement and aid the government in their goal of a safer America. Many argue that intelligence based screening is not as effective as physical security measures and that data security alone is not sufficient.⁷⁴ However, any singular system compounded with other security measures could prove far more effective. Thus, a dual system utilizing both data intelligence and physical security agents could have impressive capabilities.

Upon arrival at Birmingham-Shuttlesworth International Airport, a series of stanchions and ropes for crowd control were set up in front of each airline’s check in counters. At the queue’s entrance two podiums manned by security agents. As two queues formed behind each podium, people would hand the security guard their passport and be subjected to a series of questions: “What are you traveling for today? . . . What was your business in our country? . . . Oh, you studied abroad, what class did you take? . . . Who was your professor?” Before a traveler could even check-in for their flight, check their luggage, and obtain a boarding pass, the traveler had to get past the first round of security questions.⁷⁵ This is not the only airport to implement this type of security measure.⁷⁶ Israeli airline, El Al, and highly targeted Tel Aviv’s Ben Gurion Airport, are world re-

⁷² ERAUPRCWA, *American Airlines-Home*, YOUTUBE (Mar. 21, 2009), https://www.youtube.com/watch?v=_rtpszbxaoE [<https://perma.cc/MHG2-SQAB>] (featuring the advertisement with American Airline’s “We know why you fly” slogan).

⁷³ aomd88, *Iberia “Mucho más que volar” (1994)*, YOUTUBE (June 10, 2014), <https://www.youtube.com/watch?v=6iKF4UxIcX4> [<https://perma.cc/YFD9-9C7T>] (playing an original 1994 Iberia Airlines commercial with their tagline “Much more than flying”) (translated for effect).

⁷⁴ Fiske, *supra* note 12, at 175, 179.

⁷⁵ While being blessed with the opportunity to study abroad, the author experienced this layered security system. It struck the author as surprisingly effective even at the time.

⁷⁶ Daniel Wagner, *What Israeli Airport Security Can Teach the World*, HUFFINGTON POST (May 17, 2014 8:19 AM), http://www.huffingtonpost.com/daniel-wagner/what-israeli-airport-secu_b_4978149.html [<https://perma.cc/DAE2-YBA8>].

nowned for their aviation security.⁷⁷ While some advanced technology is used, such as the use of pressure chambers to trigger any possible explosive within checked baggage, ordinary metal detectors are the standard practice for checking persons.⁷⁸ Accordingly, the key to Israeli security does not lie solely in technology, but rather in the in-airport security guards. Highly trained personnel focus on travelers' behavioral cues, eye contact, tone of voice, pace of speech, and other signals while asking specific inquiries.⁷⁹ Israeli security is actually working on creating a similar procedure through kiosks.⁸⁰ These machines would assess factors such as traveler's body temperature, hearth rate, and blood pressure while the traveler checks in.⁸¹ At some point during the process, certain statements or questions would be presented which would provoke a response from a guilty party.⁸² That traveler could then be subject to a personal one-on-one screening by an agent. There are some administrators though who do not want to go this route, for they feel the key component that makes Israeli security so infallible is the human element.⁸³

In a 2010 interview with the Cable News Network (CNN), the former head of security for El Al, Isaac Yeffet, stated the key to security is to “[s]top relying on technology.”⁸⁴ He went on to clarify that “[t]echnology can help the qualified, well-trained human being but cannot replace him.”⁸⁵ El Al relies on a unique, and quite controversial, method of passenger monitoring: profiling.⁸⁶ However, this is not the ugly, hate-based method people assume.⁸⁷ Rather, El Al's profiling is a comprehensive,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Brian Palmer, *What's So Great About Israeli Security?*, SLATE (Jan. 3, 2011 3:38 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/01/whats_so_great_about_israeli_security.html [<https://perma.cc/7VR8-HV8R>].

⁸¹ *Id.*

⁸² *Id.*

⁸³ Wagner, *supra* note 76.

⁸⁴ *How the Israelis Do Airport Security*, CNN (Jan. 11, 2010 5:06 PM), <http://www.cnn.com/2010/OPINION/01/11/yeffet.air.security.israel/> [<https://perma.cc/8E3B-A3BU>] [hereinafter *Yeffet Interview*].

⁸⁵ *Id.*

⁸⁶ Ralph Goodman, *Guest Post: Why Israeli Airport Security is so Effective*, ANNE'S OPINIONS (Mar. 26, 2016), <https://anneinpt.wordpress.com/2016/03/26/guest-post-why-israeli-airport-security-is-so-effective/> [<https://perma.cc/6XQ8-2974>] (last visited July 8, 2017); Palmer, *supra* note 80; Wagner, *supra* note 76.

⁸⁷ Goodman, *supra* note 86.

algorithmic process more in the realm of methods like *Criminal Minds* and *Lie to Me*.⁸⁸ Israel's aviation security agents are exceptionally trained and profile with an eye more neutral and impartial than the average citizen.⁸⁹ Yeffet demonstrated with the 2002 shoe bomber, "[He] got a British passport in Belgium, not [] England . . . he bought a one-way ticket from Paris to Florida. He paid cash. He came to the airport with no luggage. What else do I need to know that this passenger is suspicious?"⁹⁰ While hindsight is twenty-twenty, this type of profiling awareness has proven successful for El Al in real time. This process is done through questioning *every* passenger by well-educated, multilingual, and highly trained agents.⁹¹ Before any preconceived notions form, agents objectively question passengers and perceive through their answers and actions whether more screening is necessary.⁹² El Al also constantly tests its security measures, and if a false risk gets past the security agent, they are fired immediately—for in this line of work, a failure is costly.⁹³ This type of screening, which gets more rigorous the closer you get to the plane, could also help airlines watch for overly intoxicated passengers who could cause problems once in the air.⁹⁴

But physical procedures do not just stop at questioning. As mentioned, pressure chambers ensure that checked baggage is free from pressurized explosives.⁹⁵ Some have recommended implementing canine teams into the screening process.⁹⁶ Dogs have been aiding and saving their best friends for decades. Law enforcement agencies have employed the help of canine units for over a century, and military forces benefited from their help

⁸⁸ *Id.*; *Criminal Minds: About Criminal Minds*, CBS, http://www.cbs.com/shows/criminal_minds/about/ [<https://perma.cc/J7Y9-474Y>] (last visited July 8, 2017); *Lie to Me*, Fox, 2009–2011 <http://www.imdb.com/title/tt1235099/> [<https://perma.cc/Y6FP-GSCB>] (last visited July 8, 2017).

⁸⁹ Goodman, *supra* note 86; Wagner, *supra* note 76.

⁹⁰ Yeffet Interview, *supra* note 84.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Palmer, *supra* note 80 ("Officials think of passengers as passing through a series of concentric circles, with increasing scrutiny as they get closer to boarding the plane."); Wagner, *supra* note 76 (citing official's belief of a circular security system with increasing intensity the closer a passenger gets to the plane).

⁹⁵ Wagner, *supra* note 76.

⁹⁶ Katherine A. Lowe, Comment, *Safety in the Sky: Will Reforming and Restructuring the TSA Improve Our Security or Merely Infringe On Our Rights?*, 81 J. AIR L. & COM. 291, 306–07 (2016).

in several wars.⁹⁷ Canine teams have proven to be a highly effective means for the detection of explosives and accelerants.⁹⁸

Airlines could also implement more stringent requirements for individuals who check firearms. When attending any Texas gun show, before entering the lobby to get tickets, individuals encounter a large pavilion with a tables where individuals check and secure all guns. Attendants ensure all firearms are unloaded and zip-tie the sliding mechanism, revolver chamber, or bolt action down to render the firearm inoperable.⁹⁹ Shows also require all ammunition be in sealed containers.¹⁰⁰ In the commercial aviation environment, this same process could be implemented before checked firearms get stored in cargo. Furthermore, checked items that are inherently dangerous in general could have a separate pick up location away from the main baggage claim areas. While airports still have large expanses of unsecured, public areas, a minor change such as this could prevent tragedies similar to the recent Fort Lauderdale incident.¹⁰¹ Further, security officers could be placed strategically in public areas to patrol and ensure safety.¹⁰² This could be as simple as inquiring with the local police department if any off-duty police officers want to pick up a part-time shift.¹⁰³ While some of these suggestions seem relatively simple, they could have a huge impact on aviation security as a whole.

⁹⁷ *Police Canines in History*, DOGS FOR LAW ENFORCEMENT (2013), <http://www.dogsforlawenforcement.org/police-canines-in-history.html> [https://perma.cc/35RN-R58W] (last visited July 8, 2017).

⁹⁸ *Id.*; see also Lowe, *supra* note 96, at 306–07.

⁹⁹ *Show Rules*, PREMIER GUN SHOWS, LLC 1 (Apr. 22, 2014), <http://premiergunshows.com/wp-content/uploads/Exhibitor-Rules.pdf> [https://perma.cc/WNX6-F5H2].

¹⁰⁰ *Id.*

¹⁰¹ Catherine E. Shoichet et al., *Fort Lauderdale Airport Suspect ‘Came Here Specifically’ to Attack, FBI Says*, CNN (Jan. 7, 2017, 1:01 pm), <http://www.cnn.com/2017/01/06/US/fort-lauderdale-airport-incident/> [https://perma.cc/DC3X-MA4U].

¹⁰² Palmer, *supra* note 80; Wagner, *supra* note 76 (“Armed security personnel patrol the terminal.”).

¹⁰³ The author’s father was a police officer for over thirty-five years, and he worked a part time job through the department as security for a movie theater on Friday and Saturday nights.

IV. “DEFY OBSTACLES”¹⁰⁴: THE FEASIBILITY OF THE PROPOSED SECURITY SYSTEM

While the best laid plans sound fantastic in theory, the practicality of a strategy always needs to be assessed with a skeptical and realistic view. Three chief concerns arise with the implementation of such a program: cost, coverage, and constitutionality. However, these concerns are manageable when structuring this program through the correct scope.

From the airline’s perspectives, the first natural worry is potential efficiency scarifies in implementing and screening all passengers without delay. One of the core focuses of major airlines is what is classified as “D0.”¹⁰⁵ D0 is the goal of a plane’s estimated departure being exactly on time.¹⁰⁶ An airline’s mission is to be exactly within their projected departure and arrival times, for every minute is money.¹⁰⁷ In 2015, the cost of a U.S. airline delay was \$65.43 per minute.¹⁰⁸ So, when it comes to extensive security measures, it is natural for airlines to be uneasy about the possibility of delays due to the number of passengers they transport. A common misconception is that only small airlines can implement such extensive security, which is why El Al is so successful.¹⁰⁹ This paints an incorrect image in people’s minds of El Al being a tiny airline, yet the Israeli airline transported nearly five million passengers in 2015.¹¹⁰ In forty years, El Al has

¹⁰⁴ Rick Seaney, *If Presidential Candidates Adopted Airline Slogans*, ABC NEWS (Oct. 12, 2012), <http://abcnews.go.com/Travel/presidential-candidates-adopted-airline-slogans/story?id=17452000> [https://perma.cc/JZ8U-AYLE] (using Air Canada’s “Defy Obstacles” slogan as an example).

¹⁰⁵ Terry Maxon, *American Airlines Group to Pay Employee Bonuses if American, US Airways Outdo Operations of Rivals*, DALLAS MORNING NEWS (Jan. 2014), <http://www.dallasnews.com/business/airlines/2014/01/23/american-airlines-group-to-pay-employee-bonuses-if-american-us-airways-outdo-operations-of-rivals> [https://perma.cc/4GX8-KAGF].

¹⁰⁶ Roseflyer, *Airlines Definition of On-time in Various Places?*, AIRLINERS.NET (2012), <http://www.airliners.net/forum/viewtopic.php?t=535365#p7282059> [https://perma.cc/9DX6-72WG].

¹⁰⁷ *U.S. Passenger Carrier Delay Costs*, AIRLINES FOR AMERICA (2015), <http://airlines.org/dataset/per-minute-cost-of-delays-to-u-s-airlines/> [https://perma.cc/Z9XZ-R8TH] (last visited July 8, 2017).

¹⁰⁸ *Id.*

¹⁰⁹ von Rochow-Leuschner, *supra* note 23, at 141 (arguing “. . . American flag carriers transport more people in two days than El Al does in a year.”).

¹¹⁰ *El Al Israel Airlines Rebounds in \$106 Million 2015 Net Profit*, TRAVEL WORLD ONLINE (Mar. 26, 2016, 3:45 PM), [http://www.travelworldonline.in/Airlines-news-detail.aspx?news=EL-Al-Israel-Airlines-rebounds-in-\\$106-million-2015-net-profit](http://www.travelworldonline.in/Airlines-news-detail.aspx?news=EL-Al-Israel-Airlines-rebounds-in-$106-million-2015-net-profit) [https://perma.cc/9G56-PWQD].

not had one aviation tragedy nor any significant delays.¹¹¹ Yeffet even confirmed that if a passenger is not a threat, it will not take trained personnel long to determine that—usually with just a few questions.¹¹² When flying out of England, while passengers might be asked questions by several security agents, the process only takes about five minutes. With most airlines recommending passengers show up to the airport up to two hours before take-off, passengers have plenty of time to answer a few questions and still get to their gate with plenty of time to spare.¹¹³

The next fear, no doubt, would be the monetary aspect. While airlines are profit-driven businesses, the misguided argument that they have a “strong incentive to provide the most minimal security possible”¹¹⁴ ignores the toll that security attacks and unruly passengers take on airlines’ profit. After the 9/11 attacks, in the first week alone, U.S. airlines were estimated to have lost between one and two billion dollars in revenue.¹¹⁵ When considering the potential liabilities, \$18,000 to fund a canine team does not seem as excessive.¹¹⁶ The safety and security of passengers has a direct effect on airline’s prosperity. U.S. carriers should do all they can to aid TSA for the safety of the nation and the security of their industry.¹¹⁷ As Yeffet stated so eloquently, “It costs money, but once you save lives, it’s worth all the money”¹¹⁸

¹¹¹ *Yeffet Interview*, *supra* note 84.

¹¹² *Id.*

¹¹³ *Check-in and Arrival Times*, AMERICAN AIRLINES, <https://www.aa.com/i18n/travel-info/arrival-times.jsp> [<https://perma.cc/X5YM-C37B>] (last visited July 8, 2017) (asking passengers arrive “as early as possible” but at least two hours before, “especially if [their] checking bags”); *Check-In Requirements*, DELTA AIR LINES, INC., http://www.delta.com/content/www/en_US/traveling-with-us/check-in/requirements.html [<https://perma.cc/CQH5-JXNU>] (last visited July 8, 2017) (stating “The early bird catches the plane” but states under the “Overall Requirements” section travelers should arrive “at the airport [two] hours prior to departure when traveling within the United States”); *Check-in and Airport Processing Times*, UNITED AIRLINES, INC., <https://www.united.com/web/en-US/content/travel/airport/process/default.aspx> [<https://perma.cc/4Q39-HHWA>] (last visited July 8, 2017) (providing travelers with a chart recommending arrival time based on where their destination is).

¹¹⁴ Fiske, *supra* note 12, at 181.

¹¹⁵ Naveen Kumar et al., *The Economic Impact of September 11, 2001 on the Aviation Industry*, GLOBAL TRADE, TRANSP., & LOGISTICS 1, 2 (Jul. 13, 2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.203.1445&rep=rep1&type=pdf>.

¹¹⁶ Lowe, *supra* note 96, at 307.

¹¹⁷ *Id.* at 315.

¹¹⁸ *Yeffet Interview*, *supra* note 84.

V. “A SYMBOL OF FREEDOM”¹¹⁹: THE LEGALITY OF THE RECOMMENDED SCHEME

But under this proposed system, might airlines open themselves up to the ultimate lawsuit, violating the laws of this great nation? Airlines already fight numerous safety-related lawsuits,¹²⁰ and some are even still struggling with litigation arising from the 9/11 attacks.¹²¹ As with the CAPPS programs, it seems the most pressing concerns would be the plan’s legality under privacy laws and its constitutionality under certain amendments. Yet, this proposed system does not involve the government, so it will not be subject to the Constitution’s privacy constraints.¹²² However, even if some governmental connection was found, these security procedures are still constitutional and protect individual liberties due to the system’s lack of deprivation without process and the aviation industry’s authority under legislative statute.

A. “FLY THE AMERICAN WAY”¹²³: CONSTITUTIONALITY REQUIRES STATE ACTION

When an American is deprived of any form of life, liberty, or property, the rallying cry always tends to be, “This is unconstitutional!” However, in order to invoke the Constitution, the viola-

¹¹⁹ Video Archeology, *1999 - Commercial - Southwest Airlines - A Symbol of Freedom - 1-800-IFLY-SWA*, YOUTUBE (Apr. 20, 2014), <https://www.youtube.com/watch?v=YKIUpV7LX6U> [<https://perma.cc/63XC-L5BR>] (ending the video with Southwest Airline’s slogan at the time “A Symbol of Freedom”).

¹²⁰ *Unruly Passengers*, *supra* note 59.

¹²¹ Justin Bachman, *Why Two Airlines Are Still Fighting 9/11 Lawsuits*, BLOOMBERG (July 19, 2013, 3:16 PM), <https://www.bloomberg.com/news/articles/2013-07-19/why-two-airlines-are-still-fighting-9-11-lawsuits> [<https://perma.cc/U3K9-M4K4>].

¹²² Since this program does not trigger constitutional requirements, because of lack of government involvement, the individual analysis of this program under the Fourth, Fifth, and Fourteenth Amendments are extraneous and beyond the scope of this article.

¹²³ *Fly the American Way*, AMERICAN AIRLINES, https://www.aa.com/i18n/plan-travel/destinations/fly-the-american-way.jsp?locale=EN_AU&anchorLocation=undefined&reportedTitle=offering%20more%20across%20the%20Pacific&reportedPosition=0&url=undefined&_locale=&repositoryName=undefined&repositoryId=undefined [<https://perma.cc/QC6N-6VBT>] (last visited July 8, 2017); *see also* The Brar’s, *American Airlines-Fly The American Way Commercial*, YOUTUBE (July 4, 2012), <https://www.youtube.com/watch?v=cb7qEuJcYrk> [<https://perma.cc/PPU2-V5WW>] (showcasing American Airline’s past slogan “Fly the American Way”); ntsfdsdsvkm, *Fly the American Way!*, YOUTUBE (Mar. 17, 2013), <https://www.youtube.com/watch?v=x7ySq3QoBvQ> [<https://perma.cc/Z9XK-JCC5>].

tion needs to be committed by either the government itself or a private company acting as an extension of the government, also known as “state action.”¹²⁴ In this proposed system, the airline carriers on their face are private entities that cannot violate the Constitution, for the document does not reach to private acts of discrimination.¹²⁵ The U.S. Supreme Court has carved out two exceptions where private entities are liable for acting under the power of the government, the public function exception and the significant state involvement exception.¹²⁶

1. “*Going Beyond Expectations*”:¹²⁷ The Public Function Exception

In the first exception, the Court held that where a private entity takes on all the accoutrements of the state and undertakes a public function, the entity is deemed to be an extension of the government and is susceptible to constitutional liability.¹²⁸ However, this does not mean businesses that are open for public benefit are automatically liable. Rather, corporations are accountable when they adopt functions which are “traditionally exclusively reserved to the State.”¹²⁹ Not only has the government never run an air carrier business, the public function exception has been effectively rendered dead, and courts regularly avoid applying it.¹³⁰ So this exception would not pose a prob-

¹²⁴ The Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

¹²⁵ *Id.*

¹²⁶ See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

¹²⁷ S. Jayasankaran, *Malaysian Airline Launches Campaign as Firm Recovers*, WALL ST. J. (Dec. 4, 2002, 12:01 AM), <https://www.wsj.com/articles/SB1038944049385669033> [<https://perma.cc/YNA2-G4YZ>].

¹²⁸ *Marsh*, 326 U.S. at 506 (holding when private “facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.”).

¹²⁹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

¹³⁰ *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (holding that “a State’s mere acquiescence in a private action” does not convert that into state action); *Hudgens v. Nat’l Labor Relations Bd.*, 424 U.S. 507, 517 (1976) (holding a private shopping mall was not subject to the Constitution because it did not fit the public function test); *Jackson*, 419 U.S. at 350 (holding the mere fact a “business is subject to extensive state regulation does not by itself convert its action into that of the state for purposes of [The Constitution].”); *González-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 248 (1st Cir. 2012) (“Governments often do provide healthcare . . . but the public function exception applies to ‘traditionally exclusively’ public functions. Thus, running a utility company, or running a

lem, for courts would be unlikely to apply it in any situation, including this system.

2. “Fly with Friends”¹³¹: Significant State Involvement Exception

The second possible exception that triggers constitutional liability is the significant state involvement doctrine.¹³² Where a private entity is using the state in order to enforce their discriminatory action, the court can find that private company liable.¹³³ Yet, this comment’s proposed security system does not rely on any action by the state or government enforcement. Additionally, even extensive regulation, such as the Federal Aviation Administration’s (FAA) directives to the airline industry, does not impart state action on a private entity.¹³⁴ Thus, due to there being no “state action,” airline carriers would not be bound by the Constitution.

3. “Something Special in the Air”¹³⁵: Not TSA’s Private Program Offering

As stated previously, this program is not supposed to replace or work under the discretion of TSA. TSA does currently have a government allowance titled the “Screening Partnership Program.”¹³⁶ Under this program, an airport can elect, with the approval of TSA, to privatize their security screening.¹³⁷ However,

school, do not qualify. Neither does operating a [health management organization].”).

¹³¹ *This is My Favorite Brand!*, BRAND HISTORY, <https://brand-history.com/austrian-airlines-osterreichische-luftverkehrs-ag/austrian-airlines/austrian-air-lines-omileicht-fluge-buchen-auf-www-austrian-com-schneller-einfacher-am-gunstigsten-buchen-auf-austrian-com-austrian-fly> [<https://perma.cc/TLE9-L8PW>] (last visited July 8, 2017).

¹³² *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

¹³³ *Barrows v. Jackson*, 346 U.S. 249, 259–60 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹³⁴ *Jackson*, 419 U.S. at 350–51.

¹³⁵ GloopTrekker, *American Airlines Commercial - 1990*, YOUTUBE (Mar. 29, 2010), https://www.youtube.com/watch?v=JG_1psnyxB4 [<https://perma.cc/YVC2-M9JQ>] (featuring American Airlines’ slogan “Something special in the air.”); see also 80stvthemes, *American Airlines Something Special in the Air 1984 Commercial*, YOUTUBE (May 4, 2012), <https://www.youtube.com/watch?v=afy4RuOmDG0> [<https://perma.cc/Z9Q3-RYTZ>].

¹³⁶ *Screening Partnership Program*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/for-industry/screening-partnerships> [<https://perma.cc/8ET6-WUB2>] (last visited July 8, 2017).

¹³⁷ *Id.*; *Airports Who Opt Out of TSA Screening are Still Regulated by TSA*, TSA BLOG (Nov. 19, 2010), <http://blog.tsa.gov/2010/11/airports-who-opt-out-of-tsa-screening.html> [<https://perma.cc/Z3JV-YVSQ>].

despite the security checkpoints being managed by a private security company, the procedures and techniques are still regulated and controlled by TSA, all the way down to the technology.¹³⁸

Under this program, TSA still controls the system in its entirety; the only delegation is the daily passenger screening.¹³⁹ TSA does not allow an airport to just privatize portions of the security system; it is an all or nothing approach.¹⁴⁰ Additionally, TSA has only approved certain private security vendors for airports to use and will not approve an airport's choice of security firm unless it "determines that there is a need to add additional vendors to the current . . . [p]rogram"¹⁴¹ These private security companies' employees are also trained at the TSA Academy in Glynco, Georgia, before receiving employment at an airport for aviation security,¹⁴² and they are to earn similar wages and benefits as a normal TSA agent.¹⁴³ The worst feature of this government controlled program is airports cannot increase number of screeners or staff to make the security process more efficient or quicker because TSA controls the amount of agents in the contract with the security firm.¹⁴⁴

Regrettably, TSA has also been criticized for making the shift to private screeners arduous on airports, resulting from a lengthy application process, lack of the airport's control in the contract development, absence of information about the transition process, and regular denial of applications.¹⁴⁵ Since TSA itself reviews the applications, the agency only approves an air-

¹³⁸ *Screening Partnership Program*, *supra* note 136; *Airports Who Opt out of TSA Screening are Still Regulated by TSA*, *supra* note 137.

¹³⁹ *Screening Partnership Program*, *supra* note 136.

¹⁴⁰ *Id.* (under "Can an airport authority apply to use contract screeners at some airport security checkpoints but not all; a partial opt-out?" question heading) ("TSA will not accept applications to privatize a portion of an airport's security screening operations . . . [for it does] not provid[e] a successful environment . . .").

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Justin Bachman, *More Airports May Ditch the TSA and Use Private Security Instead*, SKIFT (May 27, 2016, 1:00 PM), <https://skift.com/2016/05/27/more-airports-may-ditch-the-tsa-and-use-private-security-instead/> [<https://perma.cc/ZC89-3XW5>]; *see also* Justin Bachman, *How Airports Can Get Rid of TSA Screeners*, BLOOMBERG (May 27, 2016, 6:00 AM), <https://www.bloomberg.com/news/articles/2016-05-27/how-airports-can-get-rid-of-tsa-screeners> [<https://perma.cc/85VV-2QPT>].

¹⁴⁴ Bachman, *Airports May Ditch TSA*, *supra* note 143.

¹⁴⁵ *Id.*

port's request for privately controlled security when "a clear and substantial advantage to [switch private screeners for government agents] emerges."¹⁴⁶ Thus, under this system, airport security, even privatized, is clearly state action and not truly under the control of the airports or airlines. The proposed system is in addition to and separate from government regulation in order to give airlines better control over the safety of their planes and passengers.

4. *"To fly. To Serve."¹⁴⁷: Even if Courts Found State Action, The Program is Still Constitutional*

However, even if state action could be found, or TSA is somehow involved, this program would still not run afoul of the constitution for several reasons. First, while the U.S. Supreme Court has found the right to travel fundamental,¹⁴⁸ it has not found the right to a specific mode of transportation.¹⁴⁹ Thus, to avoid the system, travelers merely choose a different method of traveling. Additionally, while one issue with CAPPs was the deprivation of traveler's rights due to banning them from all flights without redress, this system does not infringe the liberty interest of international flights or the property interest from contracting to fly with the air carrier.¹⁵⁰ This proposed system does not arbitrarily ban a passenger based on data alone; rather, data's role simply alerts the airlines to potential for additional screening, a possible seat change, or a monitoring of alcohol intake. If upon in-airport questioning the airline realizes a passenger is belligerently drunk or is concerned about a safety issue, the carrier can bump the passenger to the next flight while they sober up, or cut off alcohol intake. If safety is a concern, airlines have a special authority under law to deny travelers passage.¹⁵¹

¹⁴⁶ Brian Finch & David Inserra, *Airports are Fed Up with the TSA. Here's Why it will be Hard to Break Up with Them*, FOX NEWS (May 19, 2016), <http://www.foxnews.com/opinion/2016/05/19/airports-are-fed-up-with-tsa-heres-why-it-will-be-hard-to-break-up-with-them.html> [<https://perma.cc/SA97-TNBZ>].

¹⁴⁷ British Airways, *Aviators, British Airways to Fly to Serve*, YOUTUBE (Sept. 22, 2016), <https://www.youtube.com/watch?v=A4JdQi60an0> [<https://perma.cc/S2UR-6R2A>] (promoting British Airways' slogan "To Fly. To Serve.").

¹⁴⁸ *United States v. Guest*, 383 U.S. 745, 760 (1966); *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Crandall v. Nevada*, 73 U.S. 35 (1868).

¹⁴⁹ *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006); *Miller v. Reed*, 176 F.3d 1202, 1204 (9th Cir. 1999).

¹⁵⁰ Kite, *supra* note 16, at 1414, 1417–18.

¹⁵¹ 49 U.S.C. § 44902 (allowing airlines to refuse service to travelers who "is or might be inimical to safety") (emphasis added).

Under this system, airlines are not conducting searches at the behest of the government or in conjunction with authorities.¹⁵² And, while investigating and interrogating potential sources of peril is typically a function of government enforcement agencies, courts have held that corporation jobs that investigate the possibility of crime are not transformed automatically into government actors.¹⁵³ Similar to how courts found a college campus, a bank, a racetrack, and an amusement park security system not to be state action, the airline's security measures would also be advancing the interest of the private companies rather than the government's interest.¹⁵⁴ Moreover, courts have found private individuals acting to protect their "*financial interest* and not to vindicate the interest of the state" are assuredly not government actors subject to the Constitution.¹⁵⁵ It is when the government takes an active role, establishing control over an entity and taking responsibility for them, that protection under the Constitution is warranted.¹⁵⁶ This security system is not a joint action with the government or its agents. Rather these are private enti-

¹⁵² DeGrave, *supra* note 17, at 137 ("Administrative searches conducted by the airlines are considered state action because they are done at the request of the government. Unlike police searches, administrative searches do not result from a suspicion of criminal activity, past or present.")

¹⁵³ *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (10th Cir. 1995) (a college campus' security measures were not deemed to be a state function); *United States v. Garlock*, 19 F.3d 441, 443–44 (8th Cir. 1994) (holding the banks' investigation of disappearance of money was not state action and thus was not subject to constitutional liability); *United States v. Francoeur*, 547 F.2d 891, 893–94 (5th Cir. 1977) (holding the amusement park security's search would have violated plaintiff's rights if it had been done by government actors, but the search does not violate constitutional rights here because it was a private search conducted for "purely private reasons"); *United States v. Maxwell*, 484 F.2d 1350, 1352 (5th Cir. 1973) (holding "the fourth amendment [sic] does not apply to searches and seizures conducted by private parties."); *Minnesota v. Buswell*, 460 N.W.2d 614, 619–20 (Minn. 1990) (holding when the government's involvement of racetrack security "amounts to no more than responding to requests for arrest" the constitution and the Fourth Amendment are not triggered).

¹⁵⁴ *Gallagher*, 49 F.3d at 1457; *Garlock*, 19 F.3d at 443–44; *Francoeur*, 547 F.2d at 893; *Buswell*, 460 N.W.2d at 619–20; *Maxwell*, 484 F.2d at 1352; Nicholas Poppe, *Discriminatory Deplaning: Aviation Security and The Constitution*, 79 J. AIR. L. & COM. 113, 133 (2014).

¹⁵⁵ *People v. Houle*, 91 Cal. Rptr. 874, 876 (Cal. Ct. App. 1970) (holding that a bondsman who seized and arrested the defendant, for being in possession of drugs, was lawful due to the bondsman protecting his own private interests) (emphasis added).

¹⁵⁶ *Gallagher*, 49 F.3d at 1457; *Garlock*, 19 F.3d at 443–44; *Francoeur*, 547 F.2d at 893; *Buswell*, 460 N.W.2d at 619–20; *Maxwell*, 484 F.2d at 1352; Poppe, *supra* note 154.

ties, the airlines, protecting their own private financial and safety interests, as well as their passengers' interest.¹⁵⁷

Significantly, immunity from the constitution due to being private actors holds true "even when the government requires [] certain security measures be taken."¹⁵⁸ So despite airlines being regulated by the FAA, and given certain security protocol by other government agencies, security agents would still have the ability to search passengers and their carry-ons without incurring constitutional liability. Equally distinguishable, the federal government provides statutory authority to all air carriers to refuse service to passengers, or their property, who "is, or *might be*, inimical to safety."¹⁵⁹ Thus, an airline not required to adopt security, exerting its statutory authority and not implicating the government in the process, is safe from the Fourth Amendment and constitutional liability.¹⁶⁰

5. "*Up[,] Up[,] and Away*"¹⁶¹: *Airline's Security Measures are Protected Under Statute*

Apart from the Constitution and the Fourteenth Amendment, there is still the fear of discrimination rearing its ugly head, especially in the light of America's current cultural tensions.¹⁶² Under 49 U.S.C. § 44902, can airlines refuse passengers under the justification that their race is deemed to be inimical to safety? Despite the wide latitude given to air carriers in regard to their power of refusal,¹⁶³ the same law still respects America's core values and protects individuals from discrimination.¹⁶⁴

¹⁵⁷ *Gallagher*, 49 F.3d at 1457; *Garlock*, 19 F.3d at 443–44; *Francoeur*, 547 F.2d at 893–94; *Maxwell*, 484 F.2d at 1352; *Buswell*, 460 N.W.2d at 619–20.

¹⁵⁸ *Garlock*, 19 F.3d at 444; *State v. Sanders*, 448 A.2d 481, 486 (N.J. Super. Ct. App. Div. 1982) (holding that while the government requires casinos to "establish detailed security procedures," casino security guards still have the ability to behave in a quasi-police manner without government liability.).

¹⁵⁹ 49 U.S.C. § 44902 (2012) (emphasis added).

¹⁶⁰ *Poppe*, *supra* note 154, at 134; *see also Ibrahim v. U.S. Dep't Homeland Sec.*, 538 F.3d 1250, 1257 (9th Cir. 2008).

¹⁶¹ RCA Corp., Photograph of Record Cover, *TWA (Trans World Airlines), Up Up and Away with Arthur Fiedler and the Boston Pops*, AVIATION MUSEUM & LIBR. COLLECTION <http://www.flysfo.com/museum/aviation-museum-library/collection/14110> [<https://perma.cc/FN36-VM45>] (last visited July 8, 2017).

¹⁶² Genevieve Wood, *Why Has America Become a Fractured Republic? Yuval Levin Explains.*, DAILY SIGNAL (June 21, 2016), <http://dailysignal.com/2016/06/21/why-has-america-become-a-fractured-republic-yuval-levin-explains/> [<https://perma.cc/JW8P-8TS2>].

¹⁶³ 49 U.S.C. § 44902 (2012).

¹⁶⁴ § 40127 ("Prohibitions on discrimination").

While the in-airport response system promotes objective assessments of each person, this calculation is based on a person's conduct, traveling methods, data flags, and more. This security judgment though is not based on race, national origin, or such factors. Airlines are *prohibited* from subjecting a passenger "to discrimination on the basis of race, color, national origin, religion, sex, or ancestry."¹⁶⁵ The statute does not give airlines carte blanche to discriminate; courts have clarified the protection that is provided under these statutes for the carriers and for the individuals. While § 44902 provides airlines with broad discretion on what they deem safety issues, this power is not absolute.¹⁶⁶ The airline's discretionary authority "under § 44902 is not 'a license to discriminate.'"¹⁶⁷ A decision to not transport a passenger due to safety concerns must be based on a rational belief and exercised in good faith,¹⁶⁸ and thus the decision is not a subjective one. Objectively, courts have held that airlines cannot be held liable for their decisions based on hindsight; the decision must be assessed as reasonable "in light of th[e] facts and circumstances" at the time the opinion was formed.¹⁶⁹ If the decision is found to have been "arbitrary and capricious," the airline is subject to liability,¹⁷⁰ and a multitude of courts hold actions motivated by race or religious animus are inherently arbitrary and capricious.¹⁷¹ Prejudice and discrimination can never be legitimate nor does it bear any relation to preserving safe skies.¹⁷²

¹⁶⁵ *Id.*

¹⁶⁶ *Dasrath v. Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431, 443 (D.N.J. 2006).

¹⁶⁷ *Adams v. U.S. Airways Group*, 978 F. Supp. 2d 485, 499 (E.D. Pa. 2013) (quoting *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002)); *see also Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004) (quoting *Bayaa*, 249 F. Supp. 2d at 1205).

¹⁶⁸ *Dasrath*, 467 F. Supp. 2d at 444.

¹⁶⁹ *Al-Watan v. Am. Airlines, Inc.*, 658 F. Supp. 2d 816, 824 (E.D. Mich. 2009); *Dasrath*, 467 F. Supp. 2d at 444; *Al-Qudhai'Een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841, 846 (S.D. Ohio 2003).

¹⁷⁰ *Adams*, 978 F. Supp. 2d at 495; *Al-Watan*, 658 F. Supp. 2d at 825; *Al-Tawan v. Am. Airlines, Inc.*, 570 F. Supp. 2d 925, 931 (E.D. Mich. 2008); *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 14 (1st Cir. 2008); *Dasrath*, 467 F. Supp. 2d at 434; *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397 (S.D.N.Y. 2004); *Alshrafi*, 321 F. Supp. 2d at 162; *Al-Qudhai'Een*, 267 F. Supp. 2d at 846.

¹⁷¹ *Adams*, 978 F. Supp. 2d at 495; *Al-Watan*, 658 F. Supp. 2d at 825; *Al-Tawan*, 570 F. Supp. 2d at 931; *Cerqueira*, 520 F.3d at 14; *Dasrath*, 467 F. Supp. 2d at 434; *Ruta*, 322 F. Supp. 2d at 397; *Alshrafi*, 321 F. Supp. 2d at 162; *Al-Qudhai'Een*, 267 F. Supp. 2d at 846.

¹⁷² *Alshrafi*, 321 F. Supp. 2d at 162.

B. “NEVER FORGET YOU HAVE A CHOICE”¹⁷³: THE PRIVACY OF A PERSON’S DATA

Big data is making its way into every field and industry, for it possesses a way for massive amounts of information to be analyzed, revealing certain trends and patterns about individuals. This is done through a process called data mining.¹⁷⁴ However, while big data seems to bring concerns of privacy and data accuracy, Americans tend to give their data away like candy for companies like LexisNexis, Oracle, or eBureau to scarf up and offer to businesses.¹⁷⁵ But, the question is still posed, if airlines use this same tactic but for security purposes, would it be violating individuals’ privacy?

While airlines are private and not held subject to the Constitution because there is no state action present, the document which is the foundation for this country is an excellent starting point for legal analysis. The Fourth Amendment protects individuals from unreasonable searches in matters where an individual has a subjective expectation of privacy which society would recognize as a legitimate expectation.¹⁷⁶ Courts have held further that the government cannot create or eliminate privacy expectations.¹⁷⁷ Airlines could not merely disclose what they are going to search in order to destroy a customer’s expectation of privacy.¹⁷⁸ However, courts have also held what a “person knowingly exposes to the public, even in his own home or office, is

¹⁷³ Traveling Sardar, *British Caledonian-We Never Forget You Have a Choice.*, YOUTUBE (Dec. 12, 2012), <https://www.youtube.com/watch?v=L32diN0xxO4> [<https://perma.cc/YDN7-SCMJ>] (advertising British Caledonian’s slogan “We never forget you have a choice”); *see also* Video Archeology6, *Commercial - British Caledonian Airlines - We Never Forget You Have a Choice. - Caledonian Girls!*, YOUTUBE (June 9, 2014), <https://www.youtube.com/watch?v=pzgEy9WPgrY> [<https://perma.cc/WSH8-R7F4>].

¹⁷⁴ *Data Mining Concepts*, ORACLE: HELP CENTER, https://docs.oracle.com/cd/B28359_01/datamine.111/b28129/process.htm#DMCON002 [<https://perma.cc/8PR7-C7Q9>] (last visited July 8, 2017); Anita Ramasastry, *Lost in Translation? Data Mining, National Security and the “Adverse Inference” Problem*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 757, 767 (2006).

¹⁷⁵ Isaac, *supra* note 38, at 1062; EBUREAU, <http://www.ebureau.com> [<https://perma.cc/7T5D-DJNA>] (last visited July 8, 2017); *Data Management*, LEXISNEXIS RISK SOLUTIONS, <http://www.lexisnexis.com/risk/data-management/> [<https://perma.cc/4SNN-8X9W>] (last visited July 8, 2017); *Data Mining Concepts*, *supra* note 175.

¹⁷⁶ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁷⁷ von Rochow-Leuschner, *supra* note 23, at 157.

¹⁷⁸ *Id.*

not [] subject [to] protection.”¹⁷⁹ Even when an individual gives a third party information “for a limited purpose and [in] confidence,” this information is no longer deemed private.¹⁸⁰ Paradoxically though, in order to function in today’s modern society, divulging personal information is practically mandatory.¹⁸¹

Amazon uses customer data to make recommendations, identify buyer preferences, and improve customer service.¹⁸² American Express and Capital One use data to predict consumer behavior and spending habits, to recognize identity theft, and to retain customers.¹⁸³ Netflix analyzes streaming habit of individuals to recommend programs and determine preferences of entire demographics and even countries.¹⁸⁴ Starbucks determines the success of a potential new store location by assessing traffic, demographics, and consumer data in that location.¹⁸⁵ But big

¹⁷⁹ *Katz*, 389 U.S. at 351; *see also* *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (holding “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,” and thus there is no expectation of privacy when dialing phone numbers because the number is automatically turned over to phone company for dialing and billing), *partly overruled by statute* 18 U.S.C. § 3121(a); *United States v. Miller*, 425 U.S. 435, 442 (1976) (“checks . . . contain only information voluntarily conveyed . . . in the ordinary course of business”), *subsequent statute fills in gaps of holding does not overrule*, *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008) (citing *United States v. Hernandez*, 313 F.3d 1206, 1209–10 (9th Cir. 2002) (“[A]s with the phone numbers they dial, individuals do not enjoy a reasonable expectation of privacy in what they write on the outside of an envelope.”); *United States v. Choate*, 576 F.2d 165, 182 (9th Cir. 1978) (“The information on the outside of envelopes and packages normally passes through so many hands, public and private, that a mail cover cannot be said to invade any constitutionally protected zone of privacy.”), *rev’d on other grounds*, 560 U.S. 746 (2010); *United States v. Springer*, 58 M.J. 164, 168 (C.A.A.F. 2003) (quoting *Ex Parte Jackson*, 96 U.S. 72, 733 (1877)) (“[N]o reasonable expectation of privacy exists in the information visible on the outside of an envelope. ‘Letters and sealed packages are as fully guarded from examination and inspection, *except as to their outward form and weight*, . . .’” (emphasis in original))).

¹⁸⁰ *Miller*, 425 U.S. at 443 (citing *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 745 n.15 (citing H.R. Rep. No. 95-1383, p. 34 (1978) (“the purpose of the statute is to fill the gap left by the ruling in *Miller* that a bank customer has ‘no standing under the Constitution to contest Government access to financial records.’”))).

¹⁸¹ Isaac, *supra* note 38, at 1083 (citing *Miller*, 425 U.S. at 451).

¹⁸² Ramasastry, *supra* note 175, at 768; Eleanor O’Neill, *10 Companies That Are Using Big Data*, CA TODAY (Sept. 23, 2016), <https://www.icas.com/ca-today-news/10-companies-using-big-data> [<https://perma.cc/XGH7-JZ2M>].

¹⁸³ Ramasastry, *supra* note 175, at 768; O’Neill, *supra* note 183.

¹⁸⁴ Ramasastry, *supra* note 175, at 768; O’Neill, *supra* note 183.

¹⁸⁵ Ramasastry, *supra* note 175, at 768; O’Neill, *supra* note 183; *5 Companies Using Big Data Management to Fuel Their Marketing*, REACHFORCE (Jan. 6, 2016),

data is not just for large corporations. Any website a person visits can pull detailed information about that individual.¹⁸⁶ Private companies have used data for years to exploit consumer impulse.¹⁸⁷ Instead of using data to just “maximize profit and [] improve consumer experience,”¹⁸⁸ airlines can use big data to monitor patterns, behaviors, and purchases to improve aviation safety. Individuals have already disclosed this information to a multitude of companies who are using it, so the information is no longer deemed private under United States law. Plus, airlines are in the unique position to collect their own information from citizens of many countries. A large issue with the CAPPs and TSA Pre-Check programs are other nation’s privacy laws.¹⁸⁹ For example, the European Union has stricter privacy laws than the United States.¹⁹⁰ But with loyalty programs, international credit cards services, and contracts with other travel arrangement companies, air carriers already have a large source of data that is structured around compliance with all other countries’ laws and with the passengers they transport.

Another fear is the accuracy of these data sets. Commercial data, input by humans, may contain errors, which would cause passengers to get flagged without concrete grounds.¹⁹¹ Some have warned even “‘law enforcement data should be used with caution . . . because data may be incomplete or inaccurate.’”¹⁹² However, unlike the government’s programs, the airlines’ security systems would not flag and code passengers as not allowed to fly.¹⁹³ Under the proposed system, a data irregularity simply means a few more questions at the airport and a double screen

<http://www.reachforce.com/blog/5-companies-using-big-data-management-to-fuel-their-marketing/> [<https://perma.cc/8NQ9-49ZT>].

¹⁸⁶ Isaac, *supra* note 38, at 1088–89; *see also* Yoo, *supra* note 67, at 325.

¹⁸⁷ Isaac, *supra* note 38, at 1057–58.

¹⁸⁸ Ramasastry, *supra* note 175, at 758.

¹⁸⁹ Cristina, *supra* note 18, at 628.

¹⁹⁰ *Id.*

¹⁹¹ Ramasastry, *supra* note 175, at 760.

¹⁹² James Fisher, Comment, *What Prices Does Society Have to Pay for Security? A Look at the Aviation Watch Lists*, 44 WILLAMETTE L. REV. 573, 578 (2008) (quoting Al Gore et al., White House Commission on Aviation Safety and Security Final Report to President Clinton 3.19 (Feb. 12, 1997), *available at* <https://fas.org/irp/threat/212fin~1.html> [<https://perma.cc/8BLT-M5TA>]).

¹⁹³ Kite, *supra* note 16, at 1398–99 (noting under the CAPPs II system, passengers who are “[r]ed-coded . . . will be barred from boarding the plane[, and a]dditionally, . . . TSA will hand the names of the red-coded passengers over to appropriate law enforcement officials, thus subjecting the passengers to police questioning and possible arrest.”).

of the passenger's bag. There is no data error under this system that could stop a passenger from traveling without further scrutiny. An additional concern based on faulty or triggering data is its ability to actually alert airlines of a safety concern. Several people have expressed concern that after frequent travelers or terrorists have experienced the system, they can trick the data to bypass and fail to flag them.¹⁹⁴ However, individuals' commercial data is constantly being updated through their own actions.¹⁹⁵ Furthermore, this fails to recognize that people cannot evade detection because the proposed system is two-part. *Every* passenger is subject to questions, dogs walk around *all* bags, and everyone's behavior is monitored and analyzed. Data is just a tool to aid the in-airport check and on board passenger management. Data checks are not a stand-alone, fail proof system but rather a tool in a symbiotic relationship. Moreover, unlike the federal system, which provides no real redress or ways to correct bad information, airlines can add to their own data sets when passengers clear their name. For instance, travelers who get pre-check approval, or have occupations that require rigorous background checks (such a military, law enforcement, teachers, bar admission, etc.), can share the extensive informational findings with airlines, allowing them to further clear the passengers in their security processes.

VI. "SINCERELY YOURS, . . ." ¹⁹⁶: CONCLUSION

Despite all the government does to protect this great nation and aid the airline industry, sadly, it is not enough. Airlines are hemorrhaging money out of safety litigation, disruptive passenger incidents, and terrorist occurrences.¹⁹⁷ The current, jet-

¹⁹⁴ Fisher, *supra* note 193, at 581; Ramasastry, *supra* note 175, at 771.

¹⁹⁵ Jaykishan Panchal, *Stay in the Know: How to Keep Up with Digital Marketing Trends*, BUSINESS.COM (Mar. 1, 2016), <http://www.business.com/online-marketing/how-to-keep-up-with-digital-marketing-trends/> [https://perma.cc/YKE8-QXAS] (noting due to individuals constantly updating and plugging into the digital world through the use of social media, Google connectivity, and more, big data can help businesses stay apprised and continually target customers in the best way possible).

¹⁹⁶ *Aeroflot New Slogan*, AEROFLOT RUSSIAN AIRLINES: NEWS (July 29, 2004), <https://www.aeroflot.ru/ru-en/new/1116> [https://perma.cc/B4GS-QVLG] (announcing Aeroflot's new slogan "Sincerely Yours, Aeroflot").

¹⁹⁷ *Parver v. Jet Blue Airlines Corp.*, 649 F. App'x 539, 541 (9th Cir. 2016).; Dillon, *supra* note 3; Quirk, *supra* note 4; Fontana, *supra* note 6; Bachman, *Still Fighting 9/11 Lawsuits*, *supra* note 121.

lagged security arrangement is not truly protecting anyone.¹⁹⁸ “Above all, [airlines] care,”¹⁹⁹ about their trade and about their passengers. Airlines need to “fly into tomorrow”²⁰⁰ by adopting their own private, data-aided, in-airport security system. “[P]rivatized security and federal screeners have performed as well or as badly as the other,”²⁰¹ but perhaps this is because the industry has adopted the either-or approach. The government and the airlines should adopt systems that work simultaneously for the same objectives, while also allowing separate goals to take priority as well. Let the Transportation Security Administration protect national security, and let airlines protect their industry. Then, in the end, everyone can “fly the friendly skies.”²⁰²

¹⁹⁸ *Parver*, 649 Fed. App’x 539; Dillion, *supra* note 3; Quirk, *supra* note 4; Fontana, *supra* note 6; Bachman, *Still Fighting 9/11 Lawsuits*, *supra* note 121.

¹⁹⁹ Lewis Machipisa, *ZIMBABWE-TRANSPORT: Airline Tries to Clean Up Its Act*, INTER PRESS SERVICE (Jan. 20, 1997), <http://www.ipsnews.net/1997/01/zimbabwe-transport-airline-tries-to-clean-up-its-act/> [<https://perma.cc/NQX8-8827>] (discussing consumer’s spoofs on old slogans of Air Zimbabwe, including their slogan “Above all We Care”).

²⁰⁰ João Marcos Massote, *Japan Airlines - Fly Into Tomorrow*, YOUTUBE (Aug. 9, 2016), <https://www.youtube.com/watch?v=U650zNeCu7s> [<https://perma.cc/A93U-T48L>] (advertising Japan Airlines’ updated fleet with their slogan “Fly Into Tomorrow”).

²⁰¹ Greg Fulton, *An Airport Screener’s Complaint*, TIME (Aug. 17, 2006), <http://content.time.com/time/nation/article/0,8599,1228247,00.html> [<https://perma.cc/4QZ6-ZMGP>].

²⁰² Levere, *supra* note 1; *see also* FriendlySKy, *supra* note 1.