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#MeToo at 35,000 Feet: Reducing the Risk of In-Flight Sexual Assaults.

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#METOO AT 35,000 FEET: REDUCING THE RISK OF IN-FLIGHT SEXUAL ASSAULTS

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ABSTRACT

According to the U.S. Federal Bureau of Investigation (FBI), reports of minors and women sexually assaulted on flights have risen dramatically in the last few years. It remains unclear whether this is the result of more assaults or an increase in victims' courage to report as inspired by the #MeToo movement. In any case, America has been given notice of a truly horrifying problem and a lack of any real hope for victims. This Comment suggests that passenger safety can be improved by creating an Offender No-Fly List for those who have been convicted of in-flight sexual assaults.

A flight's path through several state jurisdictions means that a victim's rights to criminal and civil remedies change depending on the flight's departure location, destination, and path through the air. Additionally, although federal law criminalizes in-flight assaults, prosecutors often charge offenders with lesser state-law actions that provide offenders with the opportunity to repeatedly offend. Thus, repeat offenders sometimes walk away with seemingly few consequences.

Those seeking or enticed by crimes of opportunity will certainly find them in a flight's unique environment. Falling asleep in a dimly lit cabin only a few inches from a complete stranger will always have inherent risk. However, society can make flights safer by enforcing uniform federal penalties that will deter possi-

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ble offenders and prohibit convicted offenders from flying for a predetermined time.

This Comment addresses various ways that the United States has handled other threats to passenger safety and suggests a similar, but tailored approach to deterring in-flight sexual assaults. For example, the government's use of the Terrorist No-Fly List, though arguably effective, raises serious constitutional issues as it seems to penalize innocent citizens in violation of procedural, if not substantive, due process.

Unlike the Terrorist No-Fly List, the Offender No-Fly List's travel limitations are not subject to the same due process challenges. This solution punishes offenders, protects possible victims, and reduces recidivism by: (1) preventing offenders from flying for a set time; (2) motivating offenders to seek treatment; and (3) creating a unified database that enhances punishment for repeat offenders.

The United States has an opportunity to respond to the cries of these victims. It has the chance to recognize the complexity of the problem and do more than study it. Right now, Congress can make flights safer for everyone without violating the constitutional rights of anyone by implementing the Offender No-Fly List. Years from now, if sexual assaults repeatedly plague minors and women on flights across this country, it will only be because we failed to act now.

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I. INTRODUCTION

IN 1999, BETH[1] boarded a flight from Detroit to Chicago.[2] While trying to sleep, she felt the man behind her touch her breast three separate times.[3] She reported the man, and he pleaded guilty to "battery for knowingly making unlawful physical contact" in the Circuit Court of Cook County in Illinois. [4] In 2002, Caroline was flying from San Jose and, while laying down to rest, was assaulted when the man in the seat behind her grabbed her breast.[5] As he reached forward to grab her breast, Caroline "clamped down on his arm with her elbow," but the man decided this meant that she "wanted [it]." [6] The suspect confessed to the FBI that he was "excited" and sexually aroused at the time, and he eventually pleaded guilty in federal court to "abusive sexual contact for knowingly engaging in sexual contact with [Caroline] without her permission."[7]

Likewise, in 2011, Susan boarded a Southwest flight after returning from a trip to Las Vegas with her husband in celebration of their thirty-fourth wedding anniversary.[8] Since Southwest has open seating, she and her husband chose their seats.[9] Susan's husband is blind in his right eye, so he sat in the aisle seat on her left so that he could see the flight attendants for in-flight service.[10] Susan, feeling ill, chose to sit in the window seat hoping to lean against the window and get rest.[11] A man, unknown to the couple, sat between them.[12] She went to sleep on the flight and, on several different occasions, felt something pressing against her upper thigh.[13] At one point in the flight, Susan noticed that the man had turned his legs toward her, and think-

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[1] The names Caroline and Beth are not the real names of these victims. They are used to preserve the anonymity found in the district court's opinion and to correspond to the court's use of Victims C and B, respectively. *See* United States v. Erramilli, No. 11 CR 0778, 2013 U.S. Dist. LEXIS 49318, at *7–9 (N.D. Ill. Apr. 4, 2013) (mem. op.).

[2] *Id.* at *8.

[3] *Id.* at *8, *26.

[4] *Id.* at *8.

[5] *Id.* at *8, *26.

[6] United States v. Erramilli, 788 F.3d 723, 727 (7th Cir. 2015).

[7] *Erramilli*, 2013 U.S. Dist. LEXIS 49318, at *8–9.

[8] *Erramilli*, 788 F.3d at 725.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

ing that was odd, she acted as if she had gone back to sleep.[14] Upon opening her eyes, she found the man had "reached his left hand across his body and, while concealing it with a newspaper, slid his hand up her shorts and squeezed her inner thigh."[15] Susan immediately began to fight back.[16] Her husband had to prevent the man from leaving the plane after landing, and the police took the man into custody.[17] The most tragic part of these three stories is that they were all committed by the same man—Srinivasa Erramilli.[18]

In the wake of the #MeToo movement, the FBI has seen a 66% increase from 2014 to 2017 in the number of midair sexual assaults investigated.[19] In 2017, 63 cases of sexual assault were reported, and while that number may not seem massive, the number of reported cases has been growing from "57 in 2016, 40 in 2015[,] and 38 in 2014."[20] The 2017 result is the highest number of incidents ever reported, and the FBI remains confident that many cases are never reported.[21] A recent flight attendant survey conducted by the Association of Flight Attendants found that of the 1,929 flight attendants responding, one-in-five flight attendants "has experienced a report of passenger on passenger sexual assault while working on a flight."[22] These numbers point to either a growing problem or a growing awareness of an existing one.

II. ROADMAP

This Comment will discuss the nature of the problem as it currently exists. Then it will analyze the state of the law and argue why it is currently insufficient to address the problem at

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[14] *Id.* at 726.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at 727.

[19] Javier De Diego et al., *FBI: Sexual Assaults on Flights Increasing 'At an Alarming Rate,'* CNN (June 20, 2018), https://www.cnn.com/2018/06/20/politics/fbi-airplane-sexual-assault/index.html [https://perma.cc/ES8W-CF27] (last visited Aug. 14, 2019).

[20] *Id.*

[21] *Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime*, FED. BUREAU INVESTIGATION (Apr. 26, 2018), https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618 [https://perma.cc/A6PV-GJY6] (last visited Feb. 5, 2019).

[22] *#MeToo in the Air*, ASS'N OF FLIGHT ATTENDANTS-CWA, https://www.afacwa.org/metoo#a1 [https://perma.cc/CHj7-EZBK] (last visited Aug. 14, 2019).

hand. Both tortious and criminal claims will be scrutinized, and the inadequacies of both systems will be revealed. Having explained a need for deterrence and preventative measures, a brief history of preventative measures in the airline industry will be examined, and then an understanding of how the current terrorist No-Fly List functions as a preventative measure will be offered.

This Comment will next outline a proposed Offender No-Fly List (ONFL). The argument for this list will take two forms. First, having just explained the workings of the terrorist No-Fly List, similarities and differences will be highlighted. Second, common objections of substantive and procedural due process violations will be examined and refuted based on the proposed ONFL's inherent strengths when compared to the terrorist No-Fly List. After this, a brief conclusion will be offered.

III. THE STATE OF THE PROBLEM

Flying on an airplane poses risks uncommon to other areas of our daily lives. The FBI notes that passengers may perceive the cabin of the airplane as "a bubble of safety," but "particularly on overnight flights, where people may consume alcohol or take sleeping pills, and a dark cabin and close-quarter seating can give the perception of privacy and intimacy, offenders are tempted by the opportunity."[23]

Passengers flying alone are virtually assured of sitting next to a stranger for the duration of the flight. They have no way of making an informed decision about the person they will be sitting next to, and even if they decided before takeoff that they would prefer not to sit next to a person due to offensive behavior or language, often flights are full, leaving the passenger with the choice of abandoning his or her flight or enduring the ordeal. Additionally, assaults sometimes take place during takeoff or landing, when passengers are forbidden from leaving their seats, making escape more problematic.[24] As the area of passengers' seats has continued to shrink, the problem is only exacerbated.[25]

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[23] *Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime*, *supra* note 21.

[24] *See* United States v. Erramilli, 788 F.3d 723, 726 (7th Cir. 2015) (explaining that Susan was assaulted the last time during descent when she could not freely move around the plane and this made her particularly vulnerable).

[25] Kari Paul, *FAA Declines to Put a Stop to the 'Incredible Shrinking Airline Seat,'* MARKETWATCH (July 9, 2018), https://www.marketwatch.com/story/faa-declines-

While passengers can be reasonably certain the person next to them will not be armed, potential offenders can also be reasonably certain that potential victims—for instance, a young woman who might have mace while jogging in the park—will also be completely unarmed during the flight.

Finally, the flightcrew may dim the lights even on short flights, giving opportunities for weary travelers to rest before arriving at their destination. Few places other than flights involve strangers sleeping in a dimly lit area only inches from complete strangers, and many of the cases involving sexual assault involve women asleep during flights, taken advantage of by other passengers—sometimes even while spouses, friends, or other passengers sit nearby.

Courts have found these characteristics of air travel to increase the risk of sexual assault.[26] The U.S. Court of Appeals for the Second Circuit held that the "characteristics of air travel," including cramped economy class seating, dim lighting, and seating among unknown men, had increased a victim's vulnerability to an in-flight sexual assault.[27]

While every passenger has some risk in these situations, the FBI notes that women and unaccompanied minors often suffer these offenses.[28] On June 15, 2016, an unaccompanied female child flew on a domestic flight from Dallas, Texas, to Portland, Oregon.[29] She was assigned a window seat, and a man unknown to her was assigned the middle seat next to her.[30] The man exhibited no peculiar actions during boarding or takeoff, other than needing to be reminded to put away his personal items and secure his tray table.[31] Shortly after the in-flight service of snacks, and despite instructions that flight attendants should "pay extra attention to the [unaccompanied minors] and 'ensure their well being and safe travel,'" a flight attendant discovered the male passenger with his hand in the minor's "groin" or

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to-put-a-stop-to-the-incredible-shrinking-airline-seat-2018-07-09 [https://perma.cc/YJ4Y-HUUU].

[26] Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000).

[27] *Id.*

[28] *Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime*, *supra* note 21.

[29] R.M. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1206 (D. Or. 2018).

[30] *Id.*

[31] *Id.* at 1206–07 (citations omitted).

"crotch" area.[32] According to the family, the child suffers a fear of men and of flying to this day.[33]

These assaults are normally inflicted by strangers and occur seemingly without warning. They may have lasting consequences—restricting victims' ability to travel by air.[34] While passengers could not reasonably expect to know enough details about the people around them to make informed decisions regarding their safety, they should be able to rely upon the law for foreseeable remedies and preventative actions. Unfortunately, that is often not the case.

IV. CURRENT LAW: UNKNOWN REMEDIES AND TEPID PENALTIES

The current state of the law allows restricted tort remedies and weak criminal prosecutions for victims of sexual assault. The law has failed to address actual prevention or deterrence in many of these cases.

Passengers that find themselves victims of sexual assault while on flights have two main options: they can file criminal actions against the offender, or they can file civil charges against both the offender and the airline. Many passengers—victims and offenders alike—are likely unaware of what criminal and tort laws apply during their particular flight, and this becomes especially true when addressing issues on international flights. Often passengers might not understand how the law characterizes flights as either domestic or international and how this affects the passengers' legal rights.

A. Tort Recovery: Unknown Remedies

While many consider a chief aim of torts to be deterrence,[35] deterrence requires foreseeability of consequences. Victims can certainly sue the offenders in tort, but this would likely bring in a small recovery and little deterrence. Passengers' chances of recovery against the airline turn not merely on the facts but perhaps even more so on what law will be applicable. These factors are not foreseeable for passengers and change with every case.

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[32] *Id.*

[33] *Id.* at 1207–08.

[34] *See id.*

[35] *See* Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 183 (2012).

Given this unpredictability, how could this serve as a deterrent for the airline or a source of comfort for the passenger?

Tort recovery drastically changes depending on whether the flight is characterized as international or domestic. Rather, it is the *passenger* that is actually characterized as international or domestic.[36] The international or domestic characterization of a passenger depends on the individual passenger's ticket.[37] An international passenger is one whose ticket "shows either (1) an origin in one country and a destination in another country or (2) an origin and destination in one country but a planned intermediate stop in a different country."[38] A domestic passenger, in contrast, is one in which the passenger's ticket lists an arrival and departure within the same country and has no *planned* stops in any other country.[39] Making an *unplanned* stop in another country would not change the passenger's characterization.[40] A passenger on a direct flight from Dallas, Texas, to Anchorage, Alaska, would be a domestic passenger even if she flew over Canada, since her flight never planned to stop in an area outside of the United States.[41]

These characterizations are often not so simple. Different passengers may be international or domestic though physically aboard the same plane.[42] For instance, if Julie is flying from Dallas to London with a stop in New York City, then Julie is an international passenger.[43] But Karen, on the same plane, is flying from Dallas to New York City, and therefore is a domestic passenger.[44] If both women were assaulted on this same flight while flying over Texas airspace, Karen's tort recovery would be likely be determined by the forum court's choice of law rules[45] while Julie's tort recovery would be largely, if not entirely, controlled by the "Warsaw Convention as amended by the Montreal Agree-

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[36] *See* J. SCOTT HAMILTON, PRACTICAL AVIATION LAW 173 (5th ed. 2011).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See id.*

[42] *Id.* at 185.

[43] *See id.*

[44] *See id.* at 185–86.

[45] *See id.* at 186; R.M. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1210–13 (D. Or. 2018) (finding that the Oregon choice of law rules apply since it was the forum state, but that those rules require using Texas law—the airspace where the assault occurred).

ment."[46] The recoveries possible for each woman could be dramatically different from both each other and from each woman's expectation.[47]

For domestic in-flight assault victims, the choice of law issues may drastically change their recovery.[48] In the case of the aforementioned unaccompanied minor who was assaulted while flying from Dallas to Oregon, the victim's family brought suit against the airline.[49] The case involved a dispute between the parties over what law should apply. Under Oregon law, the airline had a duty "to protect against risk of foreseeable harms 'including the risk of harm from third-party criminal acts.'"[50] However, under Texas law, the airline presumptively had no duty to protect the victim from "criminal acts of third parties unless the criminal act [was] foreseeable."[51] Oregon made foreseeability a question for the jury, while Texas made the question of duty a matter of law.[52] Given these differences, the burden of surviving the airline's motion for summary judgment would depend heavily upon what law was chosen.

The court found that Oregon's "statutory choice of law methodology" should be applied, since the case was brought in a federal court in Oregon and federal courts "look to the forum state's choice of law rules to determine the controlling substantive law."[53] Using this methodology, the court found that Texas's tort law should apply because the victim and the airline were domiciled in different states, the injury occurred over Texas airspace, the airline was domiciled in Texas, and the injury continued across many states, as the minor continued to suffer trauma until the plane landed in Oregon.[54] Under Texas law, a common carrier would only have a duty and could be liable where "a criminal's conduct is a foreseeable result of the prior negligence of a party."[55] The court held that under Texas law, this assault

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[46] HAMILTON, *supra* note 36, at 186.

[47] *See id.*

[48] *See R.M.*, 388 F. Supp. 3d at 1210–13.

[49] *Id.* at 1208.

[50] *Id.* at 1211 (quoting Piazza v. Kellim, 377 P.3d 492, 501 (Or. 2016)).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1210.

[54] *Id.* at 1211–13.

[55] *Id.* at 1213 (quoting Barton v. Whataburger, Inc., 276 S.W.3d 456, 462 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)).

was not foreseeable and granted the defendant's motion for summary judgment.[56]

As this case shows, even where plaintiffs are domestic passengers, their options for tort recovery might be limited by the exact moment of the assault, the duration and geographic location of their continued suffering as they speed through the air, and the domicile of their airline of choice.[57] Domestic passengers cannot know when purchasing a ticket what set of laws will govern nor their chances of tort recovery should they be assaulted on a flight.

International passengers are subject to treaties such as the Warsaw Convention—an international treaty that more uniformly addresses tort recovery than the panoply of domestic choice of law rules but also limits passengers' recovery in ways many likely do not understand.[58] A complete review of the full scope of the Warsaw and Montreal Conventions is beyond the scope of this Comment. This Comment will only address a brief summary of issues necessary to understand the applicability to international passengers who are also victims of in-flight sexual assault.[59]

The Warsaw Convention "had two goals: to establish uniform rules for international air travel and to limit potential carrier liability for passenger injuries so as not to frighten away potential investors from the fledgling air industry."[60] The 1999 Montreal Convention was an attempt to update the then seventy-year-old Warsaw Convention.[61]

Courts have found case law surrounding the Warsaw Convention has "at least some persuasive value in interpreting parallel

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[56] *Id.* at 1215, 1217.

[57] *Id.* at 1211–13.

[58] Jennifer McKay, *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, 34 CASE W. RES. J. INT'L L. 73, 99 (2002).

[59] For a detailed discussion regarding sexual assault and assault claims under the Warsaw Convention, see generally Judith R. Karp, *Mile High Assaults: Air Carrier Liability Under the Warsaw Convention*, 66 J. AIR L. & COM. 1551 (2001). *See also* Davis L. Wright, *Flying the Overly Friendly Skies: Expanding the Definition of an "Accident" Under the Warsaw Convention to Include Co-Passenger Sexual Assaults*, 46 VILL. L. REV. 453 (2001).

[60] Wallace v. Korean Air, 214 F.3d 293, 296 (2d Cir. 2000) (citations omitted).

[61] HAMILTON, *supra* note 36, at 186–87 (discussing the "Modernization of the 'Warsaw System'" and noting it "should be recognized as a tweaking, a fine-tuning of the Warsaw Convention, rather than a rejection and replacement of that system.").

provisions of the Montreal Convention."[62] Both the Warsaw and Montreal Conventions "provide[ ] international air passengers' exclusive remed[ies] for claims governed by [either] treaty."[63]

The U.S. Court of Appeals for the Sixth Circuit explained the interplay between the two conventions:

> The Warsaw Convention continues to govern disputes involving parties from countries that are signatories to the Warsaw Convention but not signatories to the Montreal Convention. Russia, for example, is a party to the Warsaw Convention and did not ratify the Montreal Convention until 2017, so the Warsaw Convention would govern claims against Russian airlines arising from incidents that occurred prior to Russia's ratification of the Montreal Convention.[64]

Both the Warsaw Convention and Montreal Convention subject airlines to strict liability for personal injury; however, under the Montreal Convention, the airline may avoid liability if it proves it was not a proximate cause of the injury.[65] Additionally, both treaties affect what recovery is available to international passengers.[66] Originally, the Warsaw Convention capped the airlines' liability to each passenger at $8,300. [67] This was later amended by the Montreal Agreement—not to be confused with the Montreal Convention—raising the cap to $75,000 per international passenger.[68] Under the Montreal Convention, damages for international passengers are capped at 100,000 units each, known as Special Drawing Rights (SDRs), meant to simplify international use and valued at $155,000 in 2011[69] and around $137,542 in July of 2019.[70] The International Monetary Fund

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[62] Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 411 (6th Cir. 2017) (citing *In re* Air Crash at Lexington, Ky., 501 F. Supp. 2d 902, 907–08 (E.D. Ky. 2007) (highlighting the vital importance of the Warsaw Convention's jurisprudential history to understanding the Montreal Convention)).

[63] *Id.* at 412 (citing El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168–69 (1999) (holding that plaintiff could not state a claim for remedy unless plaintiff could under the Warsaw Convention)).

[64] *Id.* at 411 n.4.

[65] HAMILTON, *supra* note 36, at 187, 189.

[66] *See id.* at 167.

[67] Wallace v. Korean Air, 214 F.3d 293, 296 (2d Cir. 2000).

[68] *Id.* at 297.

[69] *See* HAMILTON, *supra* note 36, at 187.

[70] For exact determinations of SDR value, two websites were consulted: *The Currency Converter*, COINMILL, https://coinmill.com/SDR_calculator.html#SDR=100000 [https://perma.cc/BUV9-76KV] (last visited July 31, 2019); and *SDR Valuation*, INT'L MONETARY FUND, https://www.imf.org/external/np/fin/data/rms_sdrv.aspx [https://perma.cc/R9JS-3TRW] (last visited July 31, 2019).

(IMF) calculates the value of the SDR through a complex formula using five international currencies, and this continuous variable adds further difficulty for passengers attempting to understand their recovery rights.[71] Furthermore, both the Warsaw and Montreal Conventions bar international passengers from recovering against the airline for pure mental anguish[72] or punitive damages.[73] Both conventions permit the use of domestic law to determine how damages are calculated.[74]

In other words, Julie, from the earlier hypothetical, if assaulted on February 3, 2019, an international passenger flying within Texas airspace and limited by the Montreal Convention—the most generous of the treaties—would be unable to recover for purely mental anguish or for punitive damage claims.[75] Any claims that she could bring against the airline would then "pass-through" the treaty to the relevant domestic law, likely chosen in another dizzying set of choice of law rules set by the forum.[76] Domestic law would then determine what compensatory damages would be allowed.[77] Whatever damages are allowed would then be capped by the Montreal Convention at $137,542.[78]

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[71] The IMF calculates the value of the SDR based on a basket of five currencies, including the U.S. dollar, at specified ratios. While the ratios are set for five-year terms, the value of the various currencies changes the value of the SDR on a daily basis. This makes it even less likely that an international passenger could reasonably know the exact limits on recovery prior to a lawsuit. For more information, see *Special Drawing Right (SDR) Factsheet*, INT'L MONETARY FUND (Mar. 8, 2019), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR [https://perma.cc/PB6V-9QLK] (last visited July 31, 2019).

[72] CHARLES F. KRAUSE & KENT C. KRAUSE, 1 AVIATION TORT & REGULATORY LAW 1514 (2d ed. 2017–2018) (citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991)).

[73] *Id.* at 1582.

[74] Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 434–36 (6th Cir. 2017) (holding that the Montreal Convention allows the use of domestic law to calculate damages) (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224–26 (1996) (holding that Article 24 in the Warsaw Convention reserves domestic law the power to calculate damages)).

[75] *See* Doe v. United Airlines, Inc., 73 Cal. Rptr. 3d 541, 546, 551 (Cal. App. Dep't Super. Ct. 2008) (explaining that, under the Warsaw Convention, a minor victim could not recover for PTSD caused by sexual assault without a showing of bodily injury).

[76] Andrew J. Harakas & Jeff Ellis, *Aviation Liability United States*, *in* 1 AVIATION LIABILITY 2019 (Andrew J. Harakas et al. eds., 2018), question 36.

[77] *Id.*

[78] *See* HAMILTON, *supra* note 36, at 187; *The Currency Converter*, *supra* note 70; *SDR Valuation*, *supra* note 70.

B. Criminal Claims: Tepid Penalties

Prosecutors may charge perpetrators of in-flight sexual assaults under state law or under federal law.[79] For the sake of brevity, this Comment will focus primarily on the applicable federal laws under which a suspected offender might be charged.

The United States has broadly defined its jurisdiction in maritime and aviation issues. Assaults on flights are brought under this special maritime statute, 49 U.S.C. § 46506.[80] Even international flights not flying over any state, "belonging in whole or in part to . . . any citizen [of the United States], or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof," are within the special maritime and territorial jurisdiction of the United States.[81] Furthermore, if an offense is committed either "by or against a national of the United States" aboard "any foreign vessel during a voyage having a scheduled departure from or arrival in the United States," it is also considered within the "special maritime and territorial jurisdiction of the United States."[82]

Under 18 U.S.C. § 113, offenders can be punished for an assault occurring "within the special maritime and territorial jurisdiction of the United States."[83] Prosecutors may prosecute offenders for abusive sexual contact under 18 U.S.C. § 2244.[84] When offenses involve young children, some of the maximum imprisonment limits can be doubled.[85] Subsection (a) of § 2244 offers much higher sentences than subsection (b) (ten years to life for some offenses); however those larger penalties are reserved for sexual assaults based on force, threat, or rendering the person unconscious, drugged, or intoxicated.[86] Quite often, in-flight sexual assaults occur after women or minors voluntarily fall asleep, so these larger penalties are out of reach.[87] Prosecutors can obtain three-year sentences under § 2244(a)(2) for

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[79] *See, e.g.*, United States v. Erramilli, No. 11 CR 0778, 2013 U.S. Dist. LEXIS 49318, at *29 (N.D. Ill. Apr. 4, 2013) (mem. op.).

[80] *See* 49 U.S.C. § 46506 (2012).

[81] 18 U.S.C. § 7(5) (2012).

[82] *Id.* § 7(8).

[83] *Id.* § 113.

[84] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (to be codified at 18 U.S.C. § 113); 18 U.S.C. §§ 2242, 2244 (2012).

[85] *See* § 2244(c).

[86] *Id.* § 2241(a)–(b), pursuant to a claim under § 2244(a)(1).

[87] *See Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime*, *supra* note 21.

sleeping victims by showing that assaults are based on sexual acts taken while the victim was "incapable of appraising the nature of the conduct" or "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."[88] Though § 2244(a), with its more stringent penalties, would seem an ideal fit to protect sleeping victims, prosecutors can find it difficult to prove sexual actions took place when the testifying witness was asleep,[89] or defendants may plead down to § 2244(b)'s lesser penalties.[90]

In the case involving the third victim of Erramilli, who was flying home from Las Vegas with her husband only to awaken with Erramilli's hand under her shorts, prosecutors ended up dropping the more serious indictment under § 2244(a) for the lesser charge under § 2244(b).[91] Prosecutors chose this route because the victim could readily testify to the offender's actions, including the location of his hand, after she awoke.[92] The onus of testifying about acts occurring while the victim is asleep leads to lower maximum sentences—in this case, reducing the possibility from three years to two.[93] In the end, Erramilli, now on his third conviction for touching women's breasts or thighs on airplanes, "was sentenced to nine months' imprisonment and one year of supervised release."[94]

Given the relatively low sentences for actions taken while a victim is asleep and the difficulty of showing exactly what actions were taken while the victim was asleep, criminal convictions may frequently result in less than two-year convictions for sexual assaults on an airplane. This provides little deterrence or prevention when a person convicted of three in-flight offenses might board another airplane beside a sleeping woman later that year.

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[88] 18 U.S.C. §§ 2244(a)(2), 2242(2)(A)–(B).

[89] United States v. Erramilli, 788 F.3d 723, 726 (7th Cir. 2015) (noting that the government had voluntarily dismissed the more severely punishable indictment under § 2244(a)(2) due to "insufficient evidence that Erramilli made contact with [the victim]'s inner thigh (or any other area listed in the statute) while she was asleep").

[90] *See* Wallace v. Korean Air, 214 F.3d 293, 295 (2d Cir. 2000) (noting that the offender had pled to § 2244(b)).

[91] *Erramilli*, 788 F.3d at 726.

[92] *Id.*

[93] *Compare* § 2244(a)(2) (listing the maximum imprisonment as "not more than three years"), *with* § 2244(b) (listing the maximum imprisonment as "not more than two years").

[94] *Erramilli*, 788 F.3d at 725, 727.

The current state of the law, allowing for the possibility of civil recovery and criminal convictions, does not do enough to prevent or deter future in-flight assaults. Since the laws are intended as remedies post-offense, they may result in few consequences for airlines and offenders, and because passengers are unaware of their protections and penalties, it is doubtful that these measures serve as any meaningful deterrent to these crimes.

In the past, when passengers' safety has been threatened by other passengers, society has not relied simply on remedies and punishment. Instead, the government has implemented preventative measures to screen for weapons and to prevent known offenders from gaining access to these particularly vulnerable environments. In the case of terrorists, the law not only created enhanced screening, but it also created watchlists designed to prevent and deter future terrorist acts.[95] Additionally, where individuals have been convicted as sex offenders, society has chosen to implement measures to prevent and deter future offenses. Society already limits sex offenders' freedom of movement and other freedoms, and the Supreme Court has upheld such restrictions as constitutional.[96]

This Comment will suggest that, just as the law prevents suspected terrorists' access to flights to prevent violence against passengers and restricts sexual offenders' access to other vulnerable groups to prevent sexual assaults, the law should restrict access of those convicted of in-flight sexual assaults by creating the Offender No-Fly List (ONFL). First, it is important to note the history of these kind of watchlists and how the terrorist No-Fly List (the No-Fly List) functions.

V. A HISTORY OF PREVENTION

America developed protective screening at airports in response to the skyjackings of the 1960s.[97] "The first hijacking of an American commercial aircraft occurred in 1961."[98] In re-

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[95] *See* Eric Hedlund, Comment, *Good Intentions, Bad Results, and Ineffective Redress: The Story of the No Fly and Selectee Lists and a Suggestion for Change*, 79 J. AIR L. & COM. 597, 601 (2014).

[96] *E.g.*, Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (holding that a Kansas law legalizing the civil commitment of previously convicted pedophiles did not violate due process).

[97] *See* Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 7–8 (2013).

[98] United States v. Davis, 482 F.2d 893, 897 (9th Cir. 1973).

sponse, Congress passed a statute making hijacking an airplane a federal crime.[99] Under this statute, an airline could refuse to transport a passenger or her property if "in the opinion of the air carrier, such transportation would or might be inimical to safety of flight."[100] One American flight was skyjacked each year on average from 1961 to 1968.[101] In 1968, eighteen aircraft were hijacked, and in 1969, thirty-three United States planes were hijacked in forty attempts.[102] In 1968, a taskforce under the Federal Aviation Administration (FAA), working with other government departments and air carriers, created a system to prevent hijackings including a "profile" of potential hijackers, use of magnetometers for detecting metal on passengers, and "weapons search[es] of the carry-on luggage and/or person of anyone who activated the magnetometer."[103]

"By September 1970, approximately 400 United States deputy marshals were assigned to surveillance and search activities at airport boarding gates."[104] Around this time, President Nixon unveiled "A Program to Deal with Airplane Hijacking," instructing the Department of Transportation to further these procedures by having "airlines extend the use of surveillance equipment and techniques to all appropriate airports in the United States."[105] At the same time, the President committed the federal government to supplying officers to operate the equipment, search passengers, and make arrests.[106] By January 5, 1973, the FAA required that all passengers be screened by magnetometer and all carry-on baggage be searched.[107] The government made few major changes to these laws until 2001.

Prior to September 11, 2001 (9/11), the FAA still oversaw aviation security in the United States.[108] At this time, the FAA focused its efforts primarily on preventing sabotage, since it

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[99] Harawa, *supra* note 97, at 8 (citing Act of Jan. 3, 1961, Pub. L. No. 87-197, 75 Stat. 466, 466–68).

[100] *Davis*, 482 F.2d at 897–98 (quoting Pub. L. No. 87-191, § 4, 75 Stat. 466, 467–68) (codified at 49 U.S.C. § 1511)).

[101] Harawa, *supra* note 97, at 8.

[102] *Davis*, 482 F.2d at 898.

[103] *Id.*

[104] *Id.* at 899.

[105] *Id.*

[106] *Id.* at 899–900.

[107] *Id.* at 901–02.

[108] Hedlund, *supra* note 95, at 601 (citing NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 82 (2004) [hereinafter 9/11 COMM'N REPORT]).

perceived hijacking to be a lesser threat.[109] Despite implementing a multi-layered defense of various screening measures, these layers were "seriously flawed."[110] At the time, the FAA had a "no-fly" list that contained the name of twelve suspected terrorists, despite the fact that the Gore Commission had recommended the FBI and the Central Intelligence Agency (CIA) provide their lists of thousands of "known and suspected terrorists" to the FAA to improve screening.[111] On the day of the 9/11 attacks, the metal detectors were "calibrated to detect items with at least the metal content of a .22-caliber handgun."[112] The metal detectors and X-ray devices often failed to detect FAA test items during this era.[113] Additionally, knives with blades under four inches were not prohibited under FAA rules.[114] In perhaps the most chilling statement of the 9/11 Commission Report, the investigators concluded:

> The 19 men were aboard four transcontinental flights. They were planning to hijack these planes and turn them into large guided missiles, loaded with up to 11,400 gallons of jet fuel. By 8:00 A.M. on the morning of Tuesday, September 11, 2001, they had defeated all the security layers that America's civil aviation security system then had in place to prevent a hijacking.[115]

After 9/11, the government drafted a multi-pronged approach to enhance the nation's civil aviation security system. Congress passed the Aviation and Transportation Security Act (ATSA), under which aviation security now fell under the Transportation Security Administration (TSA)—a new organization under the Department of Transportation.[116] Congress mandated that the transfer of power occur within three months of passing the ATSA.[117] In order to prevent future hijacking of cockpits, the ATSA required changes to flight-deck door and cockpit procedures.[118] The ATSA also necessitated passenger and crew manifests including the full name, date of birth, citi-

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[109] 9/11 COMM'N REPORT, *supra* note 108, at 82.

[110] *Id.* at 83.

[111] *Id.*

[112] *Id.* at 2.

[113] *Id.* at 84.

[114] *Id.*

[115] *Id.* at 4 (footnotes omitted).

[116] Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597–98 (2001) (codified as amended at 49 U.S.C. § 114).

[117] *Id.* § 101(g)(1), 115 Stat. at 603.

[118] *Id.* § 104(a), 115 Stat. at 605–06.

zenship, and gender of travelers.[119] Additionally, TSA was empowered to "provide for deployment of Federal air marshals on every passenger flight of air carriers in air transportation or intrastate air transportation."[120] Passenger fees added after 9/11 provided funding for the air marshals,[121] and the Act required the airlines to provide a seat to them at no charge.[122]

In addition to these changes, "interagency sharing of watch list information became a larger focus."[123] The 9/11 Commission Report recommended the increased use of watchlists,[124] and the "Intelligence Reform and Terrorism Prevention Act . . . of 2004 codified this recommendation into law."[125] Today, much of this authority comes from 49 U.S.C. § 114(f) and (h).[126] The Terrorist Screening Center (TSC), administered by the FBI[127] and instituted in response to President George W. Bush's Presidential Directive 6, "created[ ] and maintains[ ] the consolidated terrorist watchlist called the Terrorist Screening Database (TSDB)."[128] The No-Fly List is a "subset" of the TSDB,[129] as is the Selectee List.[130] Both were created in response to the 9/11 attacks and the 9/11 Commission Report.

VI. ALTERNATIVE PREVENTATIVE MEASURSES

Given the many different preventative measures used to respond to the 9/11 attacks, many would favor alternative solutions to preventing in-flight sexual assaults. Those alternative

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[119] *Id.* § 115, 115 Stat. at 623 (codified as amended at 49 U.S.C. § 44909 (c)(2)).

[120] *Id.* § 105(a), 115 Stat. at 607 (codified as amended at 49 U.S.C. § 44917 (a)(1)).

[121] *Id.* § 118(a), 115 Stat. at 625 (codified as amended at 49 U.S.C. § 44940 (a)(1)(D)).

[122] *Id.* § 105(a), 115 Stat. at 607 (codified as amended at 49 U.S.C. § 44917 (a)(4)).

[123] Hedlund, *supra* note 95, at 601.

[124] 9/11 COMM'N REPORT, *supra* note 108, at 393.

[125] Dan Lowe, Note, *The Flap with No Fly—Does the No Fly List Violate Privacy and Due Process Constitutional Protections?*, 92 U. DET. MERCY L. REV. 157, 165 (2015).

[126] 49 U.S.C. § 114(f), (h) (2012); *see also* TRANSP. SEC. ADMIN., DHS/TSA/PIA-018(h), PRIVACY IMPACT ASSESSMENT UPDATE FOR SECURE FLIGHT 3 (2017) [hereinafter PRIVACY IMPACT ASSESSMENT].

[127] Latif v. Holder, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014).

[128] Hedlund, *supra* note 95, at 602.

[129] Mohamed v. Holder, 266 F. Supp. 3d 868, 873 (E.D. Va. 2017).

[130] Lowe, *supra* note 125, at 160.

solutions do not actually deter or prevent future assaults.[131] For instance, it is virtually undisputed that flight attendants need training on how to handle in-flight sexual assault situations.[132] Flight attendants largely have not been trained to handle these situations. Both Congress and flight attendants agree that training should be provided, and the recently passed omnibus spending bill of March 23, 2018, moves for better training, reporting, and record-keeping measures by the airlines in regard to sexual assaults.[133] While better training for flight attendants will help suffering victims and possibly garner better evidence for cases, it focuses on how to respond to sexual assaults and does little to prevent or deter them. It is a much-needed improvement, but without other action, it is an insufficient response.

Neither would the use of air marshals on flights solve the problem. Federal air marshals, already provided for by provisions implemented after 9/11, seem to be an obvious solution to deter in-flight sexual assaults. As previously noted, air marshals are funded through security fees,[134] though the airline must provide the seat at no cost, regardless of whether or not the flight is full.[135] Currently, air marshals are used on international and domestic flights deemed high-risk by intelligence agencies.[136] While TSA may provide for air marshals on every flight, it must only do so when the flight is "determined by the Administrator to present high security risks."[137] Air marshals largely do not identify themselves to other passengers, and they attempt to surreptitiously monitor situations, only intervening when necessary.[138] They intervene during in-flight assaults only if the "flight

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131 *See, e.g.*, Marisa Garcia, *Inflight Sexual Harassment Incidents Demand Better Response*, RUNWAY GIRL NETWORK (Jan. 15, 2019), https://runwaygirlnetwork.com/2019/01/15/inflight-sexual-harassment-incidents-highlight-need-for-better-response/ [https://perma.cc/XW9H-943D].

132 *See, e.g.*, De Diego et al., *supra* note 19; Nathan Wilson, *Unsafe Skies: Sexual Assaults on Airliners a Growing Problem*, KOMONEWS (Sept. 18, 2017), https://komonews.com/news/local/mid-flight-sexual-assaults-a-growing-problem [https://perma.cc/Z22X-GSJZ] (last visited on Aug. 14, 2019).

133 *#MeToo in the Air*, *supra* note 22.

134 49 U.S.C. § 44940(a)(1)(D) (2012).

135 *Id.* § 44917(a)(4).

136 *Id.* § 44917(a)(1)–(2); DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., OIG-09-64, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 35 (2009), https://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf [https://perma.cc/B8ZQ-45HS].

137 49 U.S.C. § 44917(a)(1)–(2).

138 *See* Everett Potter, *Five Myths About Air Marshals*, USA TODAY (Aug. 7, 2014), https://www.usatoday.com/story/travel/flights/2014/08/07/5-myths-about-air-

crew has exhausted its ability to handle a situation."[139] These officers remain hidden because they are intended as the "last line of defense for U.S.-flagged aircraft" in the event of a hijacking.[140]

Given this clandestine approach, air marshals do not serve as the deterrent that a uniformed officer would. Air marshals would only respond to situations already addressed by flight attendants and would only prevent the escape of an accused offender or further assault.[141] None of this would deter an assault, since the passengers would not know the air marshal was aboard the flight. Changing the furtive approach currently used by air marshals would inevitably hinder their ability to prevent terrorist hijackings, so the safety of passengers is not best served through such a change.[142]

Furthermore, air marshals guard an extremely small percentage of flights—estimated by one former air marshal as one half of one percent of U.S. flights.[143] Their numbers would need to be increased exponentially to supply the over 75,000 air marshals needed to cover all the flights across the United States, and considering the air marshal budget is already decreasing, that does not seem likely.[144]

Nor does it seem likely that the airlines could provide 75,000 security guards aboard flights that could properly address this issue.[145] Having visible security officers on flights might provide a factor of deterrence, but the challenges created might negate any factor. Airlines will certainly not want the added liability of attempting to screen hazardous situations from innocuous ones.[146] Distinguishing nefarious acts from ordinary acts of loving relationships opens up enormous difficulty for anyone attempting to accomplish such a task. The chance of false

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marshals/13724331/ [https://perma.cc/N8DG-H575] (last visited Aug. 13, 2019).

139 *Id.*

140 *Id.*

141 *Id.*

142 *See* Clay W. Biles, *How 9/11 Changed the Federal Air Marshal System*, BUS. INSIDER (Dec. 16, 2013), https://www.businessinsider.com/5-ways-federal-air-marshals-have-changed-since-911-2013-12 [https://perma.cc/N47E-QDJH].

143 Potter, *supra* note 138.

144 *See id.*

145 *See, e.g.*, Elliott Hester, *Keeping Passengers Safe from Aircraft Predators*, L.A. TIMES (Feb. 4, 2018), https://www.latimes.com/travel/la-tr-fly-guy-20180204-story.html [https://perma.cc/DMJ5-NFMJ].

146 *Cf.* Karp, *supra* note 59, at 1561–64.

positives for intervention seems enormous. Should security wake up passengers who appear to be sleeping if a man has his arm around a woman? What if they are sharing a blanket? Should security intervene anytime a person touches a sleeping passenger? These issues raise a tremendous possibility for security to act on stereotypes and prejudices.[147] Security may become timid after false accusations, so their real assistance would be *after* an in-flight assault. That is certainly a benefit, but it still does little to prevent or deter future in-flight assaults.

The government's use of the No-Fly List to provide comprehensive protection supplemented by air marshals speaks to the List's ability to protect passengers. Accordingly, analyzing the functioning of the current No-Fly List is important to understand how the ONFL could protect passengers, even if supplemented by other solutions.

VII. THE NO-FLY LIST: HOW IT WORKS

The No-Fly List and the Selectee List function differently. "Individuals on the No-Fly List are prohibited from traveling on commercial aircraft. Individuals on the Selectee List are permitted to fly but receive secondary screening at airport security checkpoints."[148] Because the No-Fly List bears a closer resemblance to the proposed ONFL, and because the Selectee List purportedly raises fewer due process issues,[149] this Comment will focus on the function of the No-Fly List from here on.

According to TSA:

> Individuals may be nominated to a TSA Watch List based on intelligence or law enforcement information specific to the individual, or their involvement in a security incident that indicates they may pose, or are suspected of posing, (1) a threat to transportation or national security, (2) a threat of air piracy or terrorism,

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147 *See* Jerald Monahan & Sheila Polk, *The Effect of Cultural Bias on the Investigation and Prosecution of Sexual Assault*, POLICE CHIEF MAG., https://www.policechiefmagazine.org/the-effect-of-cultural-bias-on-the-investigation/ [https://perma.cc/J7AU-TGQT] (last visited Aug. 16, 2019).

148 Scherfen v. U.S. Dep't of Homeland Sec., No. 3:CV-08-1554, 2010 U.S. Dist. LEXIS 8336, at *7–8 (M.D. Pa. 2010) (citing a Department of Homeland Security letter sent to the plaintiff).

149 *See* Mohamed v. Holder, 266 F. Supp. 3d 868, 879 & n.13 (E.D. Va. 2017) (distinguishing Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1128–30 (W.D. Wash. 2005) from the case at bar because the Selectee List does not serve as a complete ban on international flights as the No-Fly List does).

> (3) a threat to airline or passenger safety or (4) a threat to civil aviation security.[150]

The TSC "generally accepts those nominations on a showing of 'reasonable suspicion' that the individuals are known or suspected terrorists based on the totality of the information."[151] A reasonable suspicion has been met if the "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual 'is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.'"[152] TSA has indicated that no one may be added to the No-Fly List "based solely" on "real or perceived race, color, religion, national origin, ethnicity, gender, age, sexual orientation, gender identity[,] or disability," but it concedes that such things "may be considered under the totality-of-the-circumstances . . . where it is both relevant and based on specific intelligence or threat information."[153]

If an individual has been denied boarding, the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP) "is the mechanism available . . . to seek redress for any travel-related screening issues."[154] Travelers may send an email, complete an online form, or use conventional mail to begin an administrative review, and if there is a misidentification with someone on the No-Fly List, then the TSC begins corrective steps.[155] Whether the report uncovers a mistake or an accurate restriction largely remains a mystery after the review, since DHS sends a determination letter that "neither confirms nor denies" whether the traveler is in the TSDB or on the No-Fly List.[156] From here, the traveler can either begin an administrative appeal or seek judicial review.[157] In the end, the No-Fly List operates on secret nominations and occasionally hinders the transportation of some people who arguably have no reason to be on the list.[158]

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[150] PRIVACY IMPACT ASSESSMENT, *supra* note 126, at 4.

[151] Latif v. Holder, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014).

[152] *Id.*

[153] PRIVACY IMPACT ASSESSMENT, *supra* note 126, at 4.

[154] *Latif*, 28 F. Supp. 3d at 1141.

[155] *Id.*

[156] *See id.* at 1142.

[157] *Id.*

[158] *See* Gregory Krieg, *No-Fly Nightmares: The Program's Most Embarrassing Mistakes*, CNN (Dec. 7, 2015), https://www.cnn.com/2015/12/07/politics/no-fly-mistakes-cat-stevens-ted-kennedy-john-lewis/index.html [https://perma.cc/

VIII. A PREVENTATIVE SOLUTION TO IN-FLIGHT SEXUAL ASSUALT: THE OFFENDER NO-FLY LIST

The ONFL would retain the strengths of the No-Fly List and avoid many of its pitfalls. It would provide actual deterrence without erroneously restricting the freedoms of the innocent, as the No-Fly List is apt to.[159] The requirements for being added to the list would be clear and easily avoidable. To be on the list, a person must be convicted of an in-flight sexual assault in a criminal proceeding under any one of the offenses in 18 U.S.C. §§ 2241–2244.[160] Not everyone convicted of a sexual assault would be on this list—only those who had committed the offense on a flight. The scope of the ONFL is intentionally narrow to protect the safety of airline passengers who are often in a uniquely vulnerable position—restricted to assigned seats, in dark cabins, next to strangers, often while falling asleep. This narrow application reduces the risk of errors and due process issues.[161]

Offenders would only be on the list for a set period of time.[162] Much like supervised release, one offense would not lead to a lifetime ban. Judges could be provided a guideline range, like they have when committing an offender to supervised release, ensuring some uniformity while also allowing judicial discretion in sentencing. Offenders could always appeal admission to the ONFL or the duration of their inclusion on it through normal appellate procedures. Should offenders desire to be released from the list earlier, they could complete programs designed to

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P6FC-DG7J] (last visited Apr. 26, 2019) (reporting about journalists and children possibly being placed on the No-Fly list).

159 *See Drastic Drop in Number of Unruly Passengers After Introduction of No-Fly List: Report*, MONEYCONTROL NEWS (June 28, 2018), https://www.moneycontrol.com/news/trends/current-affairs-trends/drastic-drop-in-number-of-unruly-passengers-after-introduction-of-no-fly-list-report-2644481.html [https://perma.cc/337S-3YY3] (explaining how a similar No-Fly List implemented in India has successfully deterred incidents).

160 *See* 18 U.S.C. §§ 2241–2244 (2012).

161 *Cf.* William Mann, Comment, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. & COM. 857, 878 (2000) (stating that banning passengers from flying without a hearing or when they do not have criminal convictions would violate due process).

162 *See In First Case After Govt's 'No-Fly List', Woman Escorted Off Indigo Flight*, ECON. TIMES (Sept. 13, 2017), https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/in-first-case-after-govts-no-fly-list-woman-escorted-off-indigo-flight/articleshow/60493218.cms [https://perma.cc/DR3X-44E3] (explaining how India's version of a similar offender No-Fly List only bans passengers for a limited period of time).

reform sex offenders to stress the importance of consent instead of assuming a woman wants sexual contact.[163] Should offenders recidivate, their future admissions to the ONFL would be calculated on a substantially higher range and capped with a permanent ban.[164]

The ONFL would be a list operated by TSA separate from the No-Fly-List. When individuals are convicted of one of the offenses, they would be added to this list by the judiciary. TSA is the appropriate entity to keep this list because, under 49 U.S.C. § 114(h)(2), TSA is tasked with notifying appropriate authorities of those that pose a risk to passenger safety.[165] Certainly those who have recently been convicted of in-flight passenger assault and have been deemed too dangerous to be permitted to board at this time also pose a risk to passenger safety.[166] Additionally, TSA will need the list should an offender attempt to violate the ONFL and board a plane. Since none of the classified information from the terror No-Fly List would be attached, TSA could readily remind a person denied boarding that he or she is on this list.

If the ONFL were implemented, it would provide greater deterrence against those who might commit these offenses. Examining the effectiveness of the No-Fly List is difficult, but there are two sources demonstrating its effectiveness, and these give an indication of the effectiveness of the ONFL.

First, various groups across the government have seen the No-Fly List as an effective preventative measure. A DHS Office of the Inspector General report from 2009 found that the No-Fly List and Selectee List were effectively identifying those who threatened aviation security.[167] Public document reports give few details explaining these conclusions; however, Congress, a body made up of those who are privy to the full information, has shown a desire to expand the use of these lists. Recently, Democratic members of the House have moved to create a No-Fly, No

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[163] On two separate occasions of sexual assault, Erramilli claimed to believe the women liked what he was doing. *See* United States v. Erramilli, 788 F.3d 723, 727 (7th Cir. 2015); United States v. Erramilli, No. 11 CR 0778, 2013 U.S. Dist. LEXIS 49318, at *6 (N.D. Ill. Apr. 4, 2013).

[164] *See Drastic Drop in Number of Unruly Passengers After Introduction of No-Fly List: Report*, *supra* note 159 (comparing India's ban, which provides for increased limits for recidivists and possibly a permanent ban).

[165] 49 U.S.C. § 114(h)(2) (2012).

[166] *See* Karp, *supra* note 59, at 1552–54.

[167] ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION, *supra* note 136, at 26.

Buy law.[168] Essentially, the law would either prevent those on the lists from purchasing a gun, or at least require notification to the FBI if someone attempted to do so.[169] The legislation has been mirrored in the Senate.[170] In proposing such legislation, it seems that at least some on both sides of the aisle and in both chambers have found these terrorist watch lists an effective preventative measure.[171]

Second, brief glimpses of the No-Fly List in action show that it is effective. National security considerations undoubtedly make it difficult for the average citizen to know of the No-Fly List's moments of successful prevention. However, in one of the rare exceptions, in 2010, Faisal Shahzad planted a bomb at Times Square and then attempted to flee to Dubai, but he was apprehended on the plane by the FBI.[172] The FBI added Shahzad to the No-Fly List that day and notified the airlines to check the updated list within three minutes of adding him.[173] While the airline failed to heed the warning before Shahzad boarded the plane, it submitted the final passenger list prior to takeoff, and Customs and Border Protection agents had him arrested immediately.[174]

Though this story was reported as a near failure, the system put in place after 9/11 allowed the suspect to be added to the list and airlines notified within minutes.[175] This is a drastic improvement compared to the porous and fragmented system described in the 9/11 Commission Report and easily evaded by the terrorists that day.[176] The message was clear, even if terrorists somehow made it through security by human error, they were

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168 Eric Lichtblau, *After Orlando, Questions Over Effectiveness of Terrorism Watch Lists*, N.Y. TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/us/politics/after-orlando-questions-over-terrorism-watch-lists.html [https://perma.cc/HSA7-LNTS] (last visited Aug. 13, 2019); *see also* David M. Herszenhorn, *Bipartisan Senate Group Proposes 'No Fly, No Buy' Gun Measure*, N.Y. TIMES (June 21, 2016), https://www.nytimes.com/2016/06/22/us/politics/senate-gun-control-no-fly-list-terrorism.html [https://perma.cc/2j35-BP9B] (last visited Aug. 13, 2019).

169 *See* Lichtblau, *supra* note 168.

170 *See* Herszenhorn, *supra* note 168.

171 *See id.*

172 Scott Shane, *Lapses Allowed Suspect to Board Plane*, N.Y. TIMES (May 4, 2010), https://www.nytimes.com/2010/05/05/nyregion/05plane.html [https://perma.cc/5XQQ-9ZG2] (last visited Feb. 22, 2019).

173 *Id.*

174 *Id.*

175 *See id.*

176 *See* 9/11 COMM'N REPORT, *supra* note 108, at 4.

still not free. The No-Fly List's continued updates and checks by screeners create continuously active layers of protection against those on the list.[177] The No-Fly List was effective—it prevented Shahzad, a terrorist, from escaping, and it sent a message to others who planned to cause harm and quickly escape through the air.[178]

Given the No-Fly List's broad support by DHS and Congress's bipartisan support to use the No-Fly List in other areas, the value of using the ONFL as a preventative measure here should not be doubted. Just as with the No-Fly List, the ONFL would not be a one-time chance at preventing harm. It too would provide continued screening of passengers by allowing airlines to repeatedly check their passenger manifests against the ONFL. This makes the chance of an offender violating this list and getting caught substantially higher than if he only had to make it through security—an already daunting task.

In addition to providing new deterrence, the ONFL would enhance current federal penalties. Even when the lesser penalty of 18 U.S.C. § 2244(b) was used due to difficulty proving that the victim was asleep,[179] the ONFL would enhance the penalty from what might have been only a few months of incarceration to an added number of years without the ability to fly.[180] Additionally, this penalty would likely motivate prosecutors to convict under the federal statutes instead of the state statutes, giving the FBI more accurate numbers of actual offenses. Bringing the convictions more uniformly under the federal statutes and preventing offender boarding would provide more comfort to victims and other passengers. Victims would know at least some of the penalties that would be handed down for these offenses, and they would know that future flights would be safer. Repeat offenders currently suffer no greater penalties for continuing to perpetuate in-flight assaults, but under the ONFL, Erramilli would likely have never been on the flight to commit his third offense.[181] Airports would become sterile environments not only from suspected terrorists but also from offenders of in-flight sexual as-

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[177] *See* ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION, *supra* note 136, at 5.

[178] *See* Shane, *supra* note 172.

[179] United States v. Erramilli, 788 F.3d 723, 726 (7th Cir. 2015).

[180] *See* 18 U.S.C. § 2244(b) (2012).

[181] *See Erramilli*, 788 F.3d at 728.

saults.[182] Despite all of these benefits, the ONFL's similarity to the No-Fly List will certainly raise objections similar to those regarding the No-Fly List.

IX. PRESERVING DUE PROCESS AND DETERRING OFFENSES

A number of objections have been made against terrorist watchlists, and many of these take the form of procedural and substantive due process claims.[183] This Comment will look at the various constitutional challenges to the terrorist No-Fly List, and then explain why the argument would either prove less problematic for or not apply to the proposed in-flight sexual offender no-fly list.

A. Substantive Due Process Challenges

Substantive due process challenges facing the No-Fly List center around a deprivation of the right to travel. Unlike procedural due process, this is about protecting freedoms from government infringement "regardless of the fairness of the procedures used."[184] Domestic travel among states has been held to be a fundamental right—one subject to strict scrutiny.[185] This standard "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[186]

In *Saenz v. Roe*, a class action suit was brought challenging a California statute that would normally restrict welfare claims of those who had resided in-state less than twelve months to a lower welfare benefit.[187] The Supreme Court held that the right to travel includes "at least three different components."[188]

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather

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[182] *See* Privacy Impact Assessment, *supra* note 126, at 1, 4–5 (defining a "sterile area" as a TSA-controlled "portion of an airport" that provides "access to boarding aircraft").

[183] *See* Lowe, *supra* note 125, at 170–72; Hedlund, *supra* note 95, at 618–21.

[184] Mohamed v. Holder, 266 F. Supp. 3d 868, 876 (E.D. Va. 2017).

[185] Jeffery D. Kahn, Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists 59 (2013).

[186] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[187] Saenz v. Roe, 526 U.S. 489, 492, 496 (1999).

[188] *Id.* at 500.

> than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[189]

Despite the incredibly high bar against restricting a person's fundamental right to domestic travel, a person does not enjoy a fundamental right to domestic flight. "[B]urdens on a single mode of transportation do not implicate the right to interstate travel."[190] Consequently, in *Gilmore v. Gonzales*, where a man refused to show identification as required to board a domestic flight, denying him entry to the flight did not violate his constitutional rights.[191]

International travel has historically been afforded less protection than domestic travel.[192] The Supreme Court has demonstrated that international travel is a freedom and not a fundamental right. The "*freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States."[193] While interstate travel remains a "virtually unqualified" constitutional right, international travel is merely "an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment."[194]

Consequently, substantive due process challenges to international travel are not subject to the exacting standard of strict scrutiny but rather the much lower rational basis standard.[195] This is a very low bar. Under this standard, the government only needs to demonstrate that the legislation is "reasonably related" to the stated purpose.[196]

The ONFL is intended to promote public safety by protecting potential victims of sexual assault on a plane from those con-

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189 *Id.*

190 Gilmore v. Gonzales, 435 F.3d 1125, 1137 (9th Cir. 2006) (citing Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999)).

191 *Id.* at 1129–30.

192 *See* KAHN, *supra* note 185, at 73 (discussing how "the Supreme Court's analytical approach to domestic travel weakened its appreciation for the right to foreign travel.").

193 Haig v. Agee, 453 U.S. 280, 306 (1981).

194 *Id.* at 307; *see also* Kent v. Dulles, 357 U.S. 116, 125 (1958) (holding "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

195 Mohamed v. Holder, 266 F. Supp. 3d 868, 879 (E.D. Va. 2017); *see also* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (stating that only fundamental rights allow the use of any standard other than rational basis).

196 *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

victed of in-flight sexual assault offenses. This legislation is at least rationally related to the task of promoting public safety—its proposed intent. Therefore, it should survive any substantive due process challenge involving either domestic or international flights.[197]

In *Mohamed v. Holder*, a U.S. district court chose to apply strict scrutiny to the terrorist No-Fly List after stating that individuals have a fundamental right to fly.[198] That court distinguished *Gilmore v. Gonzales*, where the man would not show identification, based on the fact the prohibition on flying, was not complete, since he could have alternatively submitted to enhanced screening procedures.[199] This overlooks the *Gilmore* court's explicit explanation for its reasoning: "We reject Gilmore's right to travel argument because the Constitution does not guarantee the right to travel by any particular form of transportation."[200]

Furthermore, the *Mohamed* court's distinction of the No-Fly List's complete ban and the requirement to show identification in *Gilmore* seems to revolve around choice.[201] Those with no identification still have a choice to fly, but those placed on the No-Fly List are powerless to affect any other possibility—it is a complete ban. In this case, the ONFL is not a complete ban. As a part of the U.S. Code, every person would have notice that committing a sexual assault on a plane would subject a person to criminal prosecution and, if convicted, to a complete ban on flights for a period of time. This affords passengers a choice just as effectively, as was the case in *Gilmore*.[202]

If flying domestically was still found to be a fundamental right, subjecting the ONFL to strict scrutiny, it should still survive the challenge. To meet this standard, the government would need to show that the ONFL's infringement on the right to travel "is narrowly tailored to serve a compelling [government] interest."[203]

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197 *See id.*; *Mohamed*, 266 F. Supp. 3d at 883.

198 *Mohamed*, 266 F. Supp. at 879–80, 879 n.13 (distinguishing precedent indicating that a ban on domestic flying did not infringe on a fundamental right because the case did not address "a *complete ban*" as implicated by the No-Fly List).

199 *See id.* at 879 n.13.

200 Gilmore v. Gonzales, 435 F.3d 1125, 1136 (9th Cir. 2006).

201 *See Mohamed*, 266 F. Supp. 3d at 879 n.13.

202 *Gilmore*, 435 F.3d at 1135–36.

203 *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

In *Mohamed*, despite subjecting the No-Fly List to strict scrutiny, the court found that it met this standard and did not violate due process.[204] The court noted the deference afforded to the No-Fly List due to the national security concerns implicated.[205] The ONFL's public safety purpose is compelling, but since national security is the most compelling interest possible,[206] it will be less compelling than in the *Mohamed* analysis. While this is undoubtedly true, the ONFL is so narrowly tailored as to still pass strict scrutiny analysis. It would affect only the class of subjects who have committed an in-flight sexual assault through their free actions and who have been convicted in a criminal proceeding beyond a reasonable doubt. Furthermore, it is not a permanent ban but a temporary restraint subject to argument at sentencing and appeal.

Society already restricts felons' ability to purchase firearms—a fundamental right under the Second Amendment—for public safety reasons.[207] Congress has proposed restricting this same Second Amendment fundamental right for those on the No-Fly List, where individuals on that list would have no convictions and inclusion on that list may be permanent.[208] The ONFL seems easily permissible by comparison. Given this, the ONFL should not violate substantive due process under whichever standard of review is used.

B. Procedural Due Process Challenges

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[209] The Supreme Court stated that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[210] The Court allows administrative flexibility in satisfying due process, and it analyzes rules by weighing the gov-

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[204] *Mohamed*, 266 F. Supp. 3d at 883.

[205] *Id.* at 882.

[206] *See id.*; Haig v. Agee, 453 U.S. 280, 307 (1981).

[207] *See* Andrew Chung, *U.S. Top Court Deals Setback to Gun Control Advocates on Felon Ban*, Reuters (June 26, 2017), https://www.reuters.com/article/us-usa-court-guns-felons/u-s-top-court-deals-setback-to-gun-control-advocates-on-felon-ban-idUSKBN19H1KZ [https://perma.cc/7J3L-8FQT].

[208] *See* Herszenhorn, *supra* note 168.

[209] Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (emphasis omitted).

[210] *Id.* at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

ernment and private interests, as found in three factors.[211] In deciding whether procedural due process has been violated, courts apply the test from *Mathews v. Eldridge*, balancing:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[212]

While most every challenge to the No-Fly List on due process grounds has been rejected,[213] in *Latif v. Holder*, the U.S. District Court for the District of Oregon held that the plaintiffs' inclusion on the No-Fly List violated the "Plaintiffs' rights to procedural due process."[214] Since so few cases have prevailed against the No-Fly List, this Comment will thoroughly analyze the *Latif* case and apply the reasoning to the proposed ONFL.[215] This Comment will show that, given the ONFL's compliance with the case's requirements, it would not violate the procedural due process of any individual on the list.

In *Latif*, thirteen U.S. citizens, the plaintiffs, "were denied boarding on flights over United States airspace."[216] Due to this act, and because some had been told so by airline or government officials, the plaintiffs believed they were on the No-Fly List.[217] Each had attempted to follow the recommended administrative review procedures by filing DHS TRIP complaints, but DHS responded with letters that in each case did "not confirm or deny any Plaintiff's name is on any terrorist watch list nor provide a reason for any Plaintiff to be included in the TSDB or on the No-Fly List."[218] Plaintiffs therefore contended that their

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[211] *Id.* at 334–35.

[212] *Id.* at 335.

[213] Lowe, *supra* note 125, at 157.

[214] Latif v. Holder, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014).

[215] During the writing of this Comment, *Elhady v. Piehota* raised a procedural due process challenge in the Eastern District of Virginia against the Terrorist Screening Database (TSDB). Elhady v. Piehota, 303 F. Supp. 3d 453, 465, 468 (E.D. Va. 2017). The claims in that case are similar to the other cases discussed, and since the TSDB underlies the No-Fly List, these arguments will raise the same due process issues addressed in this section. This case would not likely change the ONFL's analysis, whatever the holding.

[216] *Latif*, 28 F. Supp. 3d at 1143.

[217] *Id.*

[218] *Id.*

Fifth Amendment right to procedural due process had been violated.[219] The court applied the aforementioned *Mathews* test to decide.[220]

The court first looked to see whether there was a "private interest . . . affected by the official action."[221] The court found that plaintiffs' liberty of travel and reputations had likely been infringed.[222] The court held that "inclusion on the No-Fly List constitute[d] a significant deprivation of [plaintiffs'] liberty interests in international travel."[223] In deciding this, the court first distinguished *Gilmore v. Gonzales* and *Green v. Transportation Security Administration.*[224]

In *Gilmore*, mentioned above, a man was denied boarding on a domestic flight after refusing to show identification, and the court held that this did not violate his constitutional rights. [225] Similarly, in *Green*, passengers were subjected to "enhanced security screening," and the court held there was no due process violation because the plaintiffs did "not have a right to travel without any impediments whatsoever."[226] The government cited both cases in *Latif* to illustrate the lack of a constitutional right to fly.[227] The court distinguished these cases from the case at bar because both *Gilmore* and *Green* dealt with interstate rather than international travel, and the burdens in both cases were less than the prohibition placed on the *Latif* plaintiffs via the No-Fly List.[228]

The court found that the interstate versus international flight distinction was important, since finding alternative transportation to a destination could be significantly more difficult when addressing a ban on international flights.[229] It stated:

> Although there are viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with Defendants' contention that international air travel is a mere convenience in light of the

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[219] *Id.* at 1147.

[220] *Id.*

[221] *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[222] *Id.* at 1151.

[223] *Id.* at 1150.

[224] *Id.* at 1148 (citing Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006); Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119 (W.D. Wash. 2005)).

[225] *Gilmore*, 435 F.3d at 1129–30.

[226] *Green*, 351 F. Supp. 2d at 1122, 1130.

[227] *Latif*, 28 F. Supp. 3d at 1148.

[228] *Id.* at 1148–49.

[229] *Id.* at 1148.

> realities of our modern world. Such an argument ignores the numerous reasons that an individual may have for wanting or needing to travel overseas quickly such as the birth of a child, the death of a loved one, a business opportunity, or a religious obligation.[230]

Here, the plaintiffs could not travel internationally by other means such as boat or by land because of the cost in time and money and the risk of being detained by other countries due to their association with the No-Fly List.[231] For some plaintiffs, health constraints made them unable to handle the physical demands of alternative modes of travel.[232] The modern importance of international travel, combined with the difficulty for these plaintiffs to find an alternative to flights, proved very important to the court.[233]

Further distinguishing the prior cases, the court stated that being added to the No-Fly List was a much greater burden than the "security-screening restrictions" in *Gilmore* and *Green* because the No-Fly List is a "complete and indefinite ban on boarding commercial flights."[234]

The court held that, when dealing with international travel, protected liberties can be infringed even if all modes of transportation are not prohibited.[235] Though this was not a ban on every mode of international transportation, it proved enough to infringe on the plaintiffs' "protected liberty interest[s] in international travel."[236]

Given the court's emphasis on international travel as a protected liberty interest, offenders challenging ONFL restrictions on international travel would have a substantially stronger case than equivalent challenges relating to domestic flights.[237] The ONFL would certainly disrupt the lives of offenders who could no longer travel internationally. Offenders might also face the same challenges using other modes of international travel as those on the terrorist watchlists.[238] Just as the *Latif* court found "long-term separation from spouses and children," losses of "em-

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230 *Id.*
231 *Id.* at 1143, 1149.
232 *Id.* at 1143.
233 *Id.* at 1149.
234 *Id.* at 1148.
235 *Id.* at 1149.
236 *Id.*
237 *See id.* at 1148.
238 *See id.* at 1143.

ployment opportunities," and the "inability to visit family" could be caused by the No-Fly List,[239] these same consequences could result from being placed on the ONFL.

However, unlike in *Latif*, the ONFL would not constitute a "significant deprivation"[240] of those liberty interests because, unlike the terrorist watchlists, the ONFL would not function as an indefinite ban. Those placed on the list would have a definite beginning and ending date ahead of time, and the process of appealing administratively and judicially can be known. These are measured consequences to an act that leaves its victims with lasting consequences, and the offenders, unlike the victims, will know exactly when the added burden will end.[241]

In *Latif*, the court also held that the plaintiffs were stigmatized by being placed on the No-Fly list under the "stigma-plus doctrine."[242] Under this doctrine, plaintiffs "must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law."[243] Where public disclosure was limited to "a relatively small group of individuals" who witnessed the denial of boarding or even an arrest, the court found this was a "more limited" disclosure than those normally challenged using this doctrine.[244] The court held that the plaintiffs satisfied the "plus" element because their legal status changed when they legally could and then legally could not fly.[245] Consequently, the court held the plaintiffs' interest in their reputations had been infringed upon.[246]

While this was sufficient to satisfy the stigma-plus test for the No-Fly List, this challenge would fail when applied to the ONFL. The first prong of the test requires that the accuracy of the disclosure be contested.[247] The *Latif* court found the accuracy of the disclosure questionable due to low evidentiary standards and

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[239] *Id.* at 1149.

[240] *See id.* at 1150.

[241] *See* R.M. v. Am. Airlines, Inc. 338 F. Supp. 3d 1203, 1207–08 (D. Or. 2018) (stating the minor victim was still suffering from the effects of the assault years later).

[242] *Latif*, 28 F. Supp. 3d at 1150.

[243] *Id.* (emphasis omitted) (quoting Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005)).

[244] *Id.* at 1151.

[245] *Id.* at 1150–51.

[246] *Id.* at 1151.

[247] *Id.* at 1150.

poor procedures regarding the watchlists.[248] Neither of these concerns will apply to the ONFL, as will be discussed under the second *Mathews* test factor. Further, because admission to the ONFL will only occur after a criminal conviction beyond a reasonable doubt, the accuracy of the ONFL could be challenged as a part of appealing a criminal conviction and not a separate due process challenge.

When assessing the second factor in the *Mathews* test, courts look at: (1) the risk of "erroneous deprivation" of the right to travel and harm to reputation; and (2) the "probative value" of additional or alternative procedural safeguards that could be put in place.[249] In reasoning the first part of this factor, the risk of erroneous deprivation, courts consider both the "substantive standard that the government uses to make its decision as well as the procedural processes in place."[250]

In *Latif*, the substantive standard was found to be very low.[251] "[N]ominations to the TSDB are generally accepted based on a 'reasonable suspicion' that requires 'articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual' meets the substantive derogatory criteria."[252] While this threshold is not merely a "hunch," it is less than probable cause and far less than "preponderance of the evidence."[253]

Beyond merely a low standard, the *Latif* court found several procedural issues increased the risk of error.[254] Government reports indicated that the TSDB contained several mistakes and that the TSC had failed to appropriately remediate these errors when it needed to.[255] Further, because the government did not confirm whether the plaintiffs were on these lists or why they were on these lists, the procedures created a "one-sided and insufficient record at both the administrative and judicial level."[256] Plaintiffs could not even use this information to provide exculpatory evidence should they find errors.[257] Consequently, both

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[248] *See id.* at 1152–53.

[249] *See id.* at 1151 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[250] *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 761–64 (1982)).

[251] *See id.* at 1151–52.

[252] *Id.* at 1151.

[253] *Id.* at 1151–52.

[254] *Id.* at 1152–53.

[255] *Id.* at 1152 (referring to an instance where a person suffered repercussions over a period of nine years from briefly being added to the No-Fly List).

[256] *Id.*

[257] *Id.* at 1154.

the low standard and the flawed system created substantial risks of an individual having her liberty deprived erroneously.[258] The court also held that additional procedural safeguards after the plaintiffs were denied boarding were needed to reduce the risk of errors.[259]

Unlike in *Latif*, the ONFL would not suffer from similarly low substantive standards or procedural issues. First, the substantive standard would be the highest judicial standard. Offenders would only be added to the ONFL after having been convicted in a criminal proceeding involving sexual assault on an airplane. Criminal convictions require a defendant to be found guilty under the beyond a reasonable doubt standard.[260] Unlike the reasonable suspicion standard that is far below the preponderance of the evidence standard,[261] beyond a reasonable doubt is the highest standard in use. Therefore, the ONFL would have the lowest risk possible under the substantive standard factor.

Second, ONFL procedure exceeds the expectations and even the additional procedural safeguards in *Latif*.[262] Those on the ONFL will know they are on the list and know the factors that caused them to be added—being convicted for sexually assaulting someone on an airplane. Unlike in *Latif*, where the plaintiffs only *suspected* they had been added to a watchlist *after* having been denied boarding,[263] those on the ONFL would have a hearing *prior* to being added to the list and they would *know* whether they had been added. Since both notice and explanation would be given *before* being added to the ONFL, this exceeds even the supplemental procedures recommended by the *Latif* court, which were intended to give passengers explanation *after* having been denied boarding.[264] Additionally, since national security secrecy would not be a factor, should passengers believe they have been added to the ONFL list in error, the airline or a TSA agent could easily confirm whether they were on the list.[265] Finally, those on the list would still have administrative and judi-

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[258] *Id.* at 1152–53.

[259] *Id.* at 1153 (discussing the value of plaintiffs' requested additional safeguards to be added *after* a person was denied boarding: (1) post-deprivation notice of placement on the list; (2) explanation of reasons for inclusion on the list; and (3) post-deprivation hearings).

[260] *In re* Winship, 397 U.S. 358, 364 (1970).

[261] *See Latif*, 28 F. Supp. 3d at 1151–52.

[262] *See id.* at 1153.

[263] *Id.* at 1143.

[264] *See id.* at 1153.

[265] *See id.* at 1154.

cial remedies to appeal their inclusion on the list, further ensuring procedural safeguards and preventing errors. Given the incredibly high substantive standard and procedural safeguards exceeding even the supplemental safeguards sought by the *Latif* court, the second prong of the *Mathews* test comes out substantially in favor of the ONFL.

When applying the last prong of the *Mathews* test, courts weigh the public interest—"the administrative burden and other societal costs that would be associated with requiring" additional safeguards.[266] In *Mathews*, the Supreme Court weighed the government's fiscal and administrative resources against the addition of evidentiary cases when terminating a person's disability benefits.[267] In determining the balance, the Court stated that the "ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[268] The Court held that evidentiary hearings would be unnecessary in light of the "good-faith judgments" of those appointed by Congress to administer these programs.[269]

In *Latif*, as in similar cases involving the terrorist watchlists, the government's interest is preserving national security by "combating terrorism and protecting classified information."[270] The Supreme Court has declared "that no governmental interest is more compelling than the security of the Nation."[271] Consequently, the *Latif* court found that this interest weighed in the government's favor for the last prong.[272] Despite this enormous interest, the court held that due process still required the government to give those denied boarding privileges three things.[273] The government must provide plaintiffs: (1) notice of their status on the list; (2) sufficient explanations for their "placement on that List" so that those denied could reasonably submit evidence on their behalf; and (3) the opportunity to have that evidence included in their files and considered at every stage of review.[274]

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266 Mathews v. Eldridge, 424 U.S. 319, 347 (1976).
267 *Id.* at 347–48.
268 *Id.* at 348.
269 *Id.* at 348–49.
270 *Latif*, 28 F. Supp. 3d at 1154.
271 Haig v. Agee, 453 U.S. 280, 307 (1981).
272 *Latif*, 28 F. Supp. 3d at 1154.
273 *Id.* at 1162.
274 *Id.*

In the case of the ONFL, the public interest is the public safety of those who may suffer in-flight assaults. This is a significant interest; however, even this substantial interest is likely not as strong as the national security interest in preventing terrorist acts or securing classified information, as in *Latif*.[275] Even if an opponent of the ONFL were to espouse the dubious claim that this public safety interest is of the same weight as that of the fiscal and administrative cost savings in *Mathews*, this interest would still outweigh the benefits of any proposed supplemental procedures.[276] There, the Court's deference to the good-faith decisions of welfare agency administrators was enough for existing procedures to counterbalance the relatively low public interest.[277] As in *Mathews*, deference to the good-faith decisions of judges and juries weigh in favor of imposing no other procedures for the ONFL.

Even as a lesser interest, public safety is certainly still significant, and whatever procedural options are weighed against it will carry less weight. They carry less weight because, as previously mentioned, unlike the *Latif* court's assessment of the second prong of the *Mathews* test,[278] the ONFL gives no reason to fear erroneous deprivation of rights, and the ONFL has sufficient procedural safeguards to meet the supplemental procedures in that case.[279] The ONFL's safeguards meet all of the due process requirements imposed by the *Latif* court, since offenders will be given notice of list inclusion, a chance to see the prosecution's evidence and provide exculpatory evidence, and this evidence will remain in the record for all appellate or administrative reviews.[280] Furthermore, since the *Latif* court required this *after* boarding was denied, the ONFL exceeds this standard for all offenders by providing each element of procedure *before* any denial of boarding.[281]

Ultimately, the weight of the public interest, proper deference to criminal judicial proceedings, a standard of guilt beyond a reasonable doubt, and the substantial procedural safeguards already in place demonstrate that the ONFL would certainly

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[275] *See id.* at 1154.

[276] *See* Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976).

[277] *See id.*

[278] *See Latif*, 28 F. Supp. 3d at 1153–54.

[279] *See id.* at 1153 (explaining the supplemental safeguards against which the public interest will be weighed).

[280] *See id.* at 1162.

[281] *See id.*

meet the standards for procedural due process for the No-Fly List.

X. CONCLUSION

In-flight sexual assaults are either occurring more frequently, or we are only now beginning to understand a sliver of the problem, thanks to the courage of women and children empowered by the #MeToo movement. While the latest FAA Reauthorization Act created a task force to study this problem in an attempt to find the real numbers, it may be years before any action is taken.[282] The ONFL provides a first step to mitigate these dangers now. It is time to address this issue.

Detractors of any restrictions on air travel emphasize the negative impacts these restrictions have on people's ability to obtain meaningful employment, attend family gatherings, see graduations, or participate in important religious functions.[283] Opponents might suggest that such restrictions lead down a slippery slope, but the slope is slippery for both sides. If nothing is done to curtail the rise of in-flight sexual assaults, passengers will need to weigh the increasing likelihood of an assault with the need to travel. If air travel restrictions so negatively impact the lives of those restricted, then the fear of becoming a victim of in-flight sexual assault must just as negatively impact passengers who are too afraid to fly.[284] Neither better training for flight attendants nor the use of federal marshals (who will only intervene after all other possibilities have been exhausted) can provide assurance for the women and children most likely to be affected.

Society is left with a choice. It may choose to impose a measured restriction against the freedom of those proven to have committed an in-flight sexual assault, or it may choose to leave offenders' freedom to fly intact, thereby effectively limiting the freedom to fly of those who have done nothing wrong. Any action taken will restrict freedom. Even if the slope is slippery, the consequences are clear.

The ONFL provides a preventative measure to an area of the law that is riddled with unclear tort remedies and criminal pen-

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[282] *See* Press Release, Dep't of Transp., U.S. Department of Transportation Announces Aviation Consumer Protection Advisory Committee and National In-Flight Sexual Misconduct Task Force (Nov. 15, 2018), https://www.transportation.gov/briefing-room/dot7318 [https://perma.cc/UK83-EJ4J] (last visited Aug. 14, 2019).

[283] *See Latif*, 28 F. Supp. 3d at 1149.

[284] *See* R.M. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1207–08 (D. Or. 2018).

alties of miniscule deterrence or prevention. The ONFL would not violate due process, and it exceeds judicial requirements in every category. This is a manageable solution built on an existing framework, and if in five years, stories of offenders committing their third sexual assault still make headlines, it will only be because we failed to act now.