ARIZONA
LAW REVIEW

VOLUME 16 1974 NUMBER 4

SCREENING TRAVELERS AT THE AIRPORT TO PREVENT HIJACKING: A NEW CHALLENGE FOR THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

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The author wishes to acknowledge his indebtedness to his colleague, Barry Nakell, for his critical reading of early drafts, to David G. Waters, J.D. 1973, University of North Carolina, and Robert S. Payne, J.D. 1974, University of North Carolina, for their research assistance, and to Susan Cocklereece for her editorial assistance.

INTRODUCTION

Any person who has traveled from an airport in the United States since January 5, 1973, has been stopped at a checkpoint before reaching the boarding area. There, security personnel, under the watchful eye of an armed law enforcement officer, screen all boarding passengers before allowing any to proceed to the boarding gate. Their purpose is to prevent aircraft hijacking[1] by deterring or detecting any attempts to carry weapons or explosives aboard aircraft.

1. The term "hijack" had its origins in either 19th-century rural England or America, where it may have been customary for traveling hobos to salute one another with, "Hi, Jack." As the holdup of some hobos by others became common, this greeting may have taken on a more sinister meaning as the signal that a holdup was about to begin. Or, the term may have been extrapolated from another common way of initiating such holdups, "Stick' em up high, Jack!"

Screening[2] at most airports now involves a thorough manual inspection of the traveler's carry-on baggage,[3] although at some airports this baggage is first passed through a low-level x-ray weapon detector and only those bags in which a weapon-shaped object is detected are manually inspected.[4] At the same time, the traveler must walk through a metal detecting device that is set to register when a predetermined aggregate mass of metal, usually equal to that of a small handgun, is detected.[5] Anyone who activates this general metal detector is usually

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While through these uses the term hijack may have become synonymous with any holdup, the original dynamic of holding up a victim whose status made him unable or unlikely to seek official protection is probably what led to use of the term to signify the holdup of trucks carrying bootleg liquor during the Prohibition Era. The fact that these trucks were often taken over and driven away by their hijackers may have suggested the original application of the term hijacking to similar incidents involving aircraft. *See* E. PATRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 288 (1958); Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004 (1973); *Notes and Queries No. 100*, AM. MERCURY, June 1926, at 241-42.

Given this etymology, hijacking is not an entirely satisfactory term to identify the type of aircraft-related incidents to which it is now commonly applied. Few of these incidents involve robbery of the craft's passengers or theft of its cargo, and many have an extortion motive not present in earlier hijackings. Nevertheless, commandeering of the vehicle is common both to the Prohibition Era and to the aircraft-related incidents. Moreover, hijacking has been used so frequently in the past decade to refer to aircraft-related incidents that its primary connotation for the modern American is undoubtedly an incident involving aircraft.

Hijacking is a better term for these incidents than air piracy, since the term piracy in its nautical origin referred exclusively to attacks on one ship by another ship and did not include attacks from within the ship itself. *See* Samuels, *The Legal Problems: An Introduction*, 37 J. AIR L. & COM. 163, 164 (1971). The term air piracy is used in international circles, due perhaps to the inclusion of aircraft in the definition of piracy in the Geneva Convention of 1958. *See id.* This term, however, has had much less domestic usage than hijacking. On the other hand, the term skyjacking, which was coined by the media in 1971 and has had considerable popular currency, still seems too slangish for serious use. *See* Dailey, *supra*.

2. Screening is a process by which the traveler passes through a particular system made up of one or more discrete procedures. The process consists of any dynamic movement or passage of the traveler through the series of procedures that make up a given system. The procedures are each of those discrete screening steps or activities which are undertaken in the course of the process. A system is any particular selection and grouping of discrete procedures to carry out the process at a given time and place.

3. This Article's descriptions of screening as carried out since January 1973 are based on personal observations by the author, on the observations of other travelers, media accounts, and on a letter from A.C. Butler, Chief, Air Operations Security Division, Office of Air Transportation Security, Federal Aviation Administration to the author, June 1, 1973, on file in the *Arizona Law Review* office [hereinafter cited as Butler letter], as well as on other sources specifically cited.

4. N.Y. Times, Apr. 8, 1973, § 5, at 25, col. 6; Butler letter, *supra* note 3; *cf.* United States v. Moreno, 475 F.2d 44, 49 n.6 (5th Cir. 1973).

5. *See* Butler letter, *supra* note 3. The general metal detectors in current use are: the "Metor," manufactured by Outokumpu Oy, Research Laboratory, of Tapiola, Finland; the SMD-1000 Weapons Detector, manufactured by the Sperry Rand Corp., Sensor Group, of Gainesville, Fla.; and, the WD-5 Weapon Detector, manufactured by the Westinghouse Electric Corp., Electronic Protection Systems, of Baltimore, Md. None of these devices is the "magnetometer," so commonly described in the cases and literature dealing with pre-1973 screening. *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077, 1085-86 (E.D.N.Y. 1971); McGinley & Downs, *Airport Searches and Seizures, A Reasonable Approach*, 41 FORDHAM L. REV. 293, 303 (1972); Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 400-01 (1973). Rather, they sense all metal, ferrous and nonferrous, on a so-called "active element" principle. Butler letter, *supra* note 3. The term "weapons detector" seems both too narrow and too broad for these devices, since they detect the presence of any metal but do not discover what the metal is. *Id.*

checked by a hand-held wand which, when passed over the body, locates metal items. If the wand is activated, the traveler must remove the metal and be rechecked. Anyone who fails to clear on recheck is frisked, and if the frisk discloses anything that feels like a weapon, a search is made for that item. At those airports where a metal detector has not yet been installed, all travelers may be frisked.[6]

Screening of air travelers to prevent hijacking did not begin in 1973. Since 1968 the Federal Aviation Administration [FAA] and the airlines had been experimenting with a more selective system that employed a behaviorally-oriented Hijacker Personality Profile to identify potential hijackers.[7] Generally, under this system only those travelers who matched the Profile, activated a magnetometer,[8] and failed to produce identification[9] had their baggage manually inspected or were subjected to a frisk.[10] However, even by late 1972, implementation of this system was not universal. There were airports which had no screening and others where screening was sporadic.[11] Where screening was done, it was not always uniform. In some instances, merely matching the Profile may have led to a frisk or baggage inspection, with or without a magnetometer or identification check.[12] Al-

6. The directive implementing the 1973 system requires a frisk or consent search of every passenger when no metal detector is available. Telegram from J.H. Shaffer, Administrator, Federal Aviation Administration, to "All FAA Regional Directors," Dec. 5, 1972, on file in the *Arizona Law Review* office. *See* United States v. Davis, 482 F.2d 893, 902 n.25 (9th Cir. 1973).

A more detailed mandate for a screening system similar to the 1973 Federal Aviation Administration [FAA] system is contained in the Air Transportation Security Act of 1974, Pub. L. No. 93-366, tit. II (Aug. 5, 1974). Also, a search of both the person and the belongings of all air travelers is required as a condition to air travel in at least two states. *See* ILL. ANN. STAT. ch. 38, § 84-3 (Smith-Hurd 1971); IND. ANN. STAT. § 10-4763 (Burns Cum. Supp. 1974).

7. The Profile is described in more detail in text accompanying notes 299-314 *infra.*

8. This device was the precursor of the general metal detector. It worked on a passive element principle, sensing only deflections in the earth's own magnetic field and thus detecting only objects made of ferrous metals. United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077, 1085 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 5, at 303. Like the general metal detectors, most magnetometers aggregated all the metal sensed on the person and were activated when the aggregate equaled that of a small handgun. United States v. Slocum, *supra* at 1182; United States v. Bell, 335 F. Supp. 797, 801 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, *supra* at 1086.

9. Almost all cases involve an identification check. *See generally* Comment, *supra* note 5, at 388. Some requests for identification required retrieval of baggage already placed in the hold of the plane. *See* United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *petition for cert. dismissed*, 415 U.S. 902 (1974).

10. *See* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1040 (1971); Comment, *supra* note 5, at 387-88.

11. United States v. Moreno, 475 F.2d 44, 49 n.6 (5th Cir. 1973); Fenello, *Individual Rights v. Skyjack Deterrence: An Airline Man's View*, 18 VILL. L. REV. 996, 998 (1973); Comment, *supra* note 5, at 392, 415. *See generally* Davis, *The Government's Response to Hijacking*, 18 VILL. L. REV. 1012, 1014-15 (1973); Note, *supra* note 10, at 1040.

12. *See, e.g.*, United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *petition for*

though baggage inspection was routinely preceded by a frisk,[13] the frisk may or may not have been preceded by a wand check or the traveler's removal of metal.[14] Even the Profile was not always used, and screening sometimes was very similar to the 1973 system.[15] Thus, the adoption of the 1973 system regularized screening and, by bringing all travelers into contact not only with screening but with procedures other than the Profile and general metal detector, made it nonselective in its application.

Air traveler screening has produced a torrent of lower court cases[16] and legal commentary[17] that have been concerned with whether

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cert. dismissed, 415 U.S. 902 (1974); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Miller, 480 F.2d 1008 (5th Cir.), *cert. denied*, 414 U.S. 1041 (1973); United States v. Riggs, 347 F. Supp. 1098 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); People v. Botos, 27 Cal. App. 3d 774, 104 Cal. Rptr. 193 (Ct. App. 1972); McGinley & Downs, *supra* note 5, at 303.

13. *See, e.g.*, United States v. Crain, 485 F.2d 297 (9th Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); People v. Lee, — Cal. App. 3d —, 108 Cal. Rptr. 555 (Ct. App. 1973).

14. *See, e.g.*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972), *noted in* "Airport Searches of Carry-On Luggage," 15 ARIZ. L. REV. 595, 720 (1973); People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (Ct. App. 1973); Comment, *supra* note 5, at 387-88. At other times the traveler's removal of metal was required before any request for identification. People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (Ct. App. 1973).

15. *See, e.g.*, United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); People v. Lee, — Cal. App. 3d —, 108 Cal. Rptr. 555 (Ct. App. 1973); People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (Ct. App. 1973); People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (Ct. App. 1973); People v. De Strulle, 28 Cal. App. 3d 477, 104 Cal. Rptr. 639 (Ct. App. 1972). *See also* Note, *supra* note 10, at 1040.

16. United States Courts of Appeals cases (ordered numerically by circuit) include: United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Margraf, 483 F.2d 708 (3d Cir.), *vacated*, 414 U.S. 1106 (1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *petition for cert. dismissed*, 415 U.S. 902 (1974); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); United States v. Miller, 480 F.2d 1008 (5th Cir.), *cert. denied*, 414 U.S. 1041 (1973); United States v. Legato, 480 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973); United States v. Moreno, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973); United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974); United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Echols, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); United States v. Burton, 475 F.2d 469 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); United States v. Crain, 485 F.2d 297 (9th Cir. 1973); United States v. Miner, 484 F.2d 1075 (9th Cir. 1973); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973); United States v. Doran, 482 F.2d 929 (9th Cir. 1973); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973).

United States District Court cases (ordered alphabetically by jurisdiction) include: United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States v. Winstanley, 359 F. Supp. 146

screening violates the fourth amendment "right of the people to be secure in their persons . . . papers and effects against unreasonable searches and seizures."[18] The Supreme Court has not yet heard a screening case, nor has any consistent or wholly satisfactory approach to the fourth amendment problems presented by screening emerged from either lower court decisions or scholarly commentary.

In some cases, a particular frisk or search of carry-on baggage has been approved on the ground that the facts known at its initiation were sufficient to make it reasonable under the stop and frisk rationale of *Terry v. Ohio*.[19] Occasionally, such facts have consisted of no more than the positive results of screening, usually a profile match, magnetometer activation, and failure to produce identification.[20] In other cases, the facts came from a wider variety of sources, including tips, surveillance of travelers in the general airport area, and observation of

(E.D. La. 1973); United States v. Kroll, 351 F. Supp. 148 (W.D. Mo.), *aff'd*, 481 F.2d 884 (8th Cir. 1973); United States v. Echols, 348 F. Supp. 745 (E.D. Mo. 1972), *aff'd*, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); United States v. Burton, 341 F. Supp. 302 (W.D. Mo. 1972), *aff'd*, 475 F.2d 469 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973); United States v. Edwards, 359 F. Supp. 764 (E.D.N.Y. 1973), *aff'd*, 498 F.2d 496 (2d Cir. 1974); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); United States v. Riggs, 347 F. Supp. 1098 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); United States v. Margraf, 347 F. Supp. 230 (E.D. Pa. 1972), *aff'd*, 483 F.2d 708 (3d Cir.), *vacated*, 414 U.S. 1106 (1973).

State court cases include: State v. Miller, 110 Ariz. 491, 520 P.2d 1115 (1974); State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972); People v. Hyde, — Cal. App. 3d —, 108 Cal. Rptr. 785 (Ct. App. 1973), *vacated*, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974); People v. Bleile, — Cal. App. 3d —, 108 Cal. Rptr. 682 (Ct. App. 1973); People v. Lee, — Cal. App. 3d —, 108 Cal. Rptr. 555 (Ct. App. 1973); People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (Ct. App. 1973); People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (Ct. App. 1973); People v. De Strulle, 28 Cal. App. 3d 477, 104 Cal. Rptr. 639 (Ct. App. 1972); People v. Sotos, 27 Cal. App. 3d 774, 104 Cal. Rptr. 193 (Ct. App. 1972); State v. Sigeison, 282 So. 2d 649 (Fla. Ct. App. 1973); State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974); State v. Adams, 125 N.J. Super. 587, 312 A.2d 642 (App. Div. 1974); People v. Boyles, 73 Misc. 2d 576, 341 N.Y.S.2d 967 (Sup. Ct. 1973); People v. Lopez, 73 Misc. 2d 878, 342 N.Y.S.2d 420 (Sup. Ct. 1973); People v. Erdman, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972); People v. Sortino, 68 Misc. 2d 151, 325 N.Y.S.2d 472 (Sup. Ct. 1971).

17. *See* Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFFALO L. REV. 123 (1972); McGinley & Downs, *supra* note 5; Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security With the Fourth Amendment*, 9 CRIM. L. BULL. 491 (1973); *Symposium—Skyjacking: Problems and Potential Solutions*, 18 VILL. L. REV. 985 (1973) [hereinafter cited as *Symposium—Skyjacking*]; Note, *supra* note 10; Comment, *Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356 (1972) [hereinafter cited as Comment, *Constitutional Problems*]; Note, *The Constitutionality of Airport Searches*, 72 MICH L. REV. 128 (1973) [hereinafter cited as Note, *Constitutionality*]; Note, *The Antiskyjack System: A Matter of Search—or Seizure*, 48 NOTRE DAME LAW. 1261 (1973); Comment, *Airport Anti-Hijack Searches After Schneckloth: A Question of Consent or Coercion*, 34 OHIO ST. L.J. 879 (1973); Comment, *supra* note 5; 23 CATHOLIC U.L. REV. 157 (1973); 39 TENN. L. REV. 354 (1972); 20 WAYNE L. REV. 209 (1973).

18. U.S. CONST. amend. IV.

19. 392 U.S. 1 (1968).

20. *See, e.g.*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

their conduct in the boarding line, as well as screening results.[21] Some courts have been unwilling to hold that screening results alone could constitute reasonable suspicion under *Terry* and yet have found screening reasonable under the fourth amendment on grounds sufficiently broad[22] to include a nonselective system. Several of these courts have looked to administrative search cases to find support for requiring all who travel by air to submit to screening.[23] Others have found such support by analogy to the border search[24] or have concluded that the evils of hijacking outweigh the traveler's interests in being free from screening and have found screening reasonable on that basis alone.[25] Such a broad rationale is necessary to justify screening under the 1973 system since all travelers are subjected to screening, and no particularized facts are relied on for its initiation.

21. *See, e.g.*, United States v. Fern, 484 F.2d 666 (7th Cir. 1973) (suspicious behavior in waiting lounge and positive profile results led to stop; failure of identification, misstatements about origin of trip, and "numerous mannerisms" led to frisk of outside of flight bag); United States v. Legato, 480 F.2d 408 (1th Cir.), *cert. denied*, 414 U.S. 979 (1973) (anonymous tip that a man carrying a bright orange shopping bag and armed with a bomb would board one of several flights, followed by the appearance of defendant carrying such a bag and checking onto one such flight led to surveillance in lounge; separation from companion and return to parking lot with bag on announcement of a bomb scare led to investigative stop in parking lot; defendant's denial of facts observed during surveillance plus inconsistent identification led to a search of the bag); United States v. Moreno, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973) (suspicious behavior on deplaning from one flight led to surveillance upon departure from airport; on return 2 hours later, switching lines, nervousness on seeing officer, gestures of protecting or covering something with coat, and ducking into men's room led to investigative stop; unsolicited account of activity in town inconsistent with surveillance led to request for identification; hesitations in bringing out wallet and movement signifying intent to flee led to pat-down frisk); United States v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973) (two incidents of unnecessary chartering of a small plane to fly with a heavy footlocker from border town, which was serviced by a direct commercial flight to Chicago, to an interior town to make connection with flight to Chicago; large gratuity given to baggage handler, combined with the strong odor of moth balls exuding from locker as well as disclaimer of ownership of the locker led to threat to use force to open locker); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (positive profile and magnetometer result and failure to produce identification, plus defendant volunteering that he had just been released from the Tombs detention center on bail for murder and narcotics charges led to frisk); United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972) (late arrival at airport, saving seat for nonexistent companion, nervousness and perspiration while waiting in lounge led to stop before screening began; then, discrepancy between identification and ticket and visible bulge in coat pocket led to pat-down of outer coat area); United States v. Riggs, 347 F. Supp. 1098 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973) (substantial surveillance and development of information concerning supposed criminal record prior to arrival at airport, plus positive profile results, led to investigative stop). *But see* United States v. Moore, 483 F.2d 1361 (9th Cir. 1973) (nervous behavior at check-in counter and inability to state from memory information shown on items of identification led to denial of boarding; but agitation, sweating, stumbling, slurring speech, hurried departure from airport, and ignoring shouts that redeemable ticket had been dropped were held insufficient to justify search of suitcase taped shut with masking tape); People v. Erdman, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972) (observation of bulge in pocket held to justify stop but not frisk).

22. *E.g.*, United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

23. *Id.*; People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (1973).

24. United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

25. United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Bell, 464 F.2d 667, 674 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972); United States v. Kroll, 351 F. Supp. 148 (W.D. Mo.) (dictum), *aff'd*, 481 F.2d 884 (8th Cir. 1973).

A consent rationale would be sufficiently comprehensive, if valid, to subsume all of the theories relied on by the courts. A search or seizure is reasonable under the fourth amendment, even in the absence of probable cause or reasonable suspicion, if it is based on consent.[26] The procedures under the 1973 system are referred to as consent searches,[27] and each is carried out with the traveler's cooperation. The traveler's consent to screening may be implied in entering the airport, purchasing a ticket, or stepping in line,[28] or it may be more clearly implied in handing over baggage, walking through the metal detector, or submitting to a wand check or frisk.[29] As long as a traveler is free to avoid screening by abandoning the effort to board a plane, consent remains the fact upon which a nonselective system relies for its reasonableness.

The courts which have approved nonselective screening disagree as to when consent becomes irrevocable. The Ninth Circuit has held that the option to avoid screening by leaving the airport must remain available up until the moment screening begins,[30] while the Fifth Circuit has held that this option is lost when one steps in line at the screening checkpoint.[31] All courts, however, recognize that up to some point a traveler is free to leave and that screening ultimately rests on the consent manifested by a choice to continue beyond that point.

The result of these decisions is that air travel is being conditioned on consent to screening.[32] Under any of the screening systems, a

26. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

27. Butler letter, *supra* note 3. *See* United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974) (Oakes, J., concurring). References to and reliance on consent permeate all descriptions and discussions of completely nonselective systems.

28. *See, e.g.*, United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973); United States v. Bell, 464 F.2d 667, 675 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972).

29. *See, e.g.*, People v. Lee, — Cal. App. 3d —, —, 108 Cal. Rptr. 555, 560 (Ct. App. 1973); People v. De Strulle, 28 Cal. App. 3d 477, 482, 104 Cal. Rptr. 639, 642 (Ct. App. 1972); People v. Botos, 27 Cal. App. 3d 774, 779, 104 Cal. Rptr. 193, 196 (Ct. App. 1972).

30. United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973); *accord*, United States v. Clark, 475 F.2d 240 (2d Cir. 1973) (dictum).

31. United States v. Skipwith, 482 F.2d 1272, 1277 (5th Cir. 1973).

32. Cases which recognize that screening procedures condition air travel on consent include: United States v. Fern, 484 F.2d 666, 669 (7th Cir. 1973); United States v. Doran, 482 F.2d 929, 931-32 (9th Cir. 1973); United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973); United States v. Bell, 464 F.2d 667, 675 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972); United States v. Meulener, 351 F. Supp. 1284, 1287-90 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971); People v. Lee, — Cal. App. 3d —, —, 108 Cal. Rptr. 555, 559 (Ct. App. 1973). See, however, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974), in which the court stated:

> [T]he legality of the search does not rest on a "consent" theory, but rather on the reasonableness of the total circumstances, *the fact* that a passenger may withdraw at any time plus the general knowledge that one is subject to a search if one flies is sufficient in light of the otherwise minimized invasion of the passengers' privacy.

traveler who does not consent will not be allowed to board an airplane. Thus, consent is given in the face of, and in most instances in direct response to, the threat to withhold air travel. Even when the traveler is free to leave without consenting to the procedure, he or she is not free to board the plane without so doing. Conditioning air travel on consent to screening raises questions as to the validity of the consent. Some courts have condemned this as a form of coercion which destroys the voluntariness necessary for the consent to impart fourth amendment reasonableness to the screening.[33] On the other hand, the courts that have approved nonselective screening tacitly have approved such conditioning. No court, however, has thoroughly analyzed air traveler screening as a conditioned-benefit problem.

Regardless of whether the screening condition is viewed as coercive, or is otherwise condemned or accepted, the identification of screening as a condition on air travel provides a necessary and sufficient focus for evaluating the constitutionality of any screening system. If it is permissible to condition air travel on screening, then a consent given in compliance with that condition would make the ensuing screening reasonable under the fourth amendment. Conversely, if the condition is not permissible, consent given solely in compliance with it would be ineffective.[34] Moreover, the factors rendering the condition impermissible would preclude finding the screening reasonable on some ground other than consent.

In coping with problems presented by the government's conditioning of other benefits on the surrender of constitutional rights, the Supreme Court has developed an enormous body of precedent dating back to the 1850's.[35] This case law, together with a sizable body of scholarly commentary, is the source of the unconstitutional conditions doctrine.[36] In the 1950's and 1960's, the modern version of this doc-

Id. at 808. The "total circumstances" referred to constitutes a consent theory; the court ultimately judges air traveler screening under a process of analysis very similar to the unconstitutional conditions analysis suggested by a consent theory.

33. *See* United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973), *aff'g* 351 F. Supp. 148, 151 (W.D. Mo. 1973); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971).

34. For cases which illustrate the relationship between the voluntariness of condition-induced consent and the validity of the condition itself in a fifth amendment context, see Lefkowitz v. Turley, 414 U.S. 70 (1973); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Spevak v. Klein, 385 U.S. 511 (1967); Cohen v. Hurley, 366 U.S. 117 (1961); Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). *See also* Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 162-63 (1968).

35. *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) (a state may extend to a foreign corporation the privilege of doing business in a state on "such conditions as [it] may think fit . . . provided they are not repugnant to the Constitution . . . of the United States").

36. The case law is discussed at text & notes 37-69 *infra*. Early articulations of the unconstitutional conditions doctrine are epitomized by Hale, *Unconstitutional Condi-*

trine received its primary development and refinement in dealing with conditions requiring the surrender of first or fifth amendment rights. Given the nature of screening as a condition on air travel, the unconstitutional conditions doctrine provides a framework within which the relevant constitutional considerations can best be reconciled. It is thus the most appropriate tool for assessing the constitutionality of screening.

The purpose of this Article is to establish that the 1973 screening system, or any other nonselective screening system, when viewed in light of the unconstitutional conditions doctrine, reflects a misperception of the dangers of hijacking, an insensitivity to the threat which screening poses to fourth amendment values, and, most important, a lack of diligence in seeking the least drastic means for achieving the purposes of screening. The experimental selective systems used before 1973 show that it is feasible to develop a less drastic alternative to the 1973 screening system. Such an alternative model would use a larger series of procedures, gradually increasing in intrusiveness from the mere use of the Profile to a frisk or a manual baggage inspection. Consent to each procedure would be required from a decreasing number of travelers, selected on the basis of facts developed by earlier procedures. The vast majority of travelers would be freed from any screening beyond use of the Profile or a general metal detector. This model would be as effective in preventing hijacking as the nonselective system. Under the unconstitutional conditions doctrine, the availability of such a model requires condemnation of any less selective system.

I. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. *How the Doctrine Works*

The unconstitutional conditions doctrine is essentially a three-part balancing test[37] used to determine the constitutionality of governmen-

tions and Constitutional Rights, 35 COLUM. L. REV. 321 (1935). More recent scholarly treatments of the doctrine include: French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751 (1969) [hereinafter cited as Van Alstyne, *Public Employees*]; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne, *Demise*]; Willcox, *Invasions of the First Amendment through Conditioned Public Spending*, 41 CORNELL L.Q. 12 (1955); Note, *The First Amendment and Public Employees—An Emerging Constitutional Right to Be a Policeman?*, 37 GEO. WASH L. REV. 409 (1968) [hereinafter cited as Note, *Unconstitutional Conditions*]; Comment, *supra* note 34.

37. Commentators have clearly perceived the essential balancing nature of the Court's discussion and application of the unconstitutional conditions doctrine. *See, e.g.*, French, *supra* note 36, at 246-48; O'Neil, *supra* note 36, at 463-77; Van Alstyne, *Demise, supra* note 36, at 1449-50; Note, *First Amendment, supra* note 36, at 424; Note, *Unconstitutional Conditions, supra* note 36, at 1609; Comment, *supra* note 34, at 145,

tally-imposed conditions that require the surrender of a constitutional right in order to obtain some benefit. The court weighs the nature and degree of the condition's relevance to the benefit against the nature and extent of the condition's impact on the constitutional right with a view toward determining whether there exists a less drastic means to achieve the government's purpose.[38] If the condition is sufficiently relevant and has a minimal effect on the right and if it is not possible adequately to protect the benefit by less drastic means, the condition may survive constitutional testing despite its adverse impact.[39] However, if the condition has insufficient relevance, if it has a sufficient impact on a right, or if a less drastic alternative would adequately protect the benefit, the condition will be held unconstitutional.

By its nature as a balancing test, the unconstitutional conditions doctrine rejects two absolute approaches to the conditioned-benefit problem, each of which might have initial appeal in the air traveler

151, 156. Although the court may have been less open in acknowledging this balancing, it has in fact judged many conditions under tests which can only be called balancing. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969); United States v. Robel, 389 U.S. 258, 266-68 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 597-604 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18-19 (1966); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); Konigsberg v. State Bar (II), 366 U.S. 36, 49-56 (1961); Shelton v. Tucker, 364 U.S. 479, 487-90 (1960); Flemming v. Nestor, 363 U.S. 603, 611-12 (1960); Speiser v. Randall, 357 U.S. 513, 527-29 (1958); American Communications Ass'n v. Douds, 339 U.S. 382, 400-02, 406 (1950); United Pub. Workers v. Mitchell, 330 U.S. 75, 102-03 (1947).

38. The weighing of these three factors is the basis of the Court's decisions in: United States v. Robel, 389 U.S. 258, 266-68 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 597-602, 609 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 505-19 (1964); Sherbert v. Verner, 374 U.S. 398, 403-08 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See generally* Van Alstyne, *Demise, supra* note 36, at 1451. See O'Neil, *supra* note 36, at 460-77, for identification of a larger number of factors, although all can be subsumed within the three-factor test.

39. The following cases have upheld conditions in the face of an express acknowledgment that the conduct affected by the condition was protected from direct governmental infringement by the first amendment: United Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973); *In re* Anastaplo, 366 U.S. 82, 88-90 (1961); Konigsberg v. State Bar (II), 366 U.S. 36, 52-53 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 406-12 (1950); United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947); *cf.* Beilan v. Board of Pub. Educ., 357 U.S. 399, 407 (1958). In numerous other cases the Court has upheld a condition, but only upon the tacit or express assumption that the conduct affected by the condition was *not* protected. *See* Cole v. Richardson, 405 U.S. 676 (1972) (oath construed as promising only to eschew unprotected conduct held not inconsistent with first amendment); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) (disclosure of memberships not themselves protected from direct infringement); Flemming v. Nestor, 363 U.S. 603 (1960) (loss of social security benefits due to deportation occasioned by membership not protected from direct infringement); Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (disclosure of memberships in subversive organizations not protected from direct infringement); Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (membership in subversive organization accompanied by sufficient scienter to permit direct infringement); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (knowing membership in organization engaged in attempt to overthrow government by force or violence); *In re* Summers, 325 U.S. 561 (1945) (conscientious objection to military service by candidate for bar examination); Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934) (conscientious objection to compulsory ROTC membership by state university student).

screening context. On the one hand, the doctrine rejects the absolute view that if the government may withhold a benefit entirely it may extend that benefit on any terms, however unreasonable.[40] At the same time, the doctrine also rejects the absolute view that because the government may not do indirectly what it cannot do directly, a condition found to have any effect on a constitutional right must automatically fail.[41]

With reference to air traveler screening, the first absolute can be expressed by a restatement of two well-known epigrams: an air traveler may have a constitutional right to be free from unreasonable searches and seizures, but he has no right to travel by air;[42] and air travelers may board airplanes upon the reasonable terms laid down by the government. If they do not choose to board on such terms, they are at liberty to retain their rights of privacy and travel by other means.[43] However, in a line of cases which now number at least 13,[44] "the theory that [a benefit] which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[45] Even if the benefit may be characterized as a privilege, the government's conditioning power is not absolute. In the words of the Supreme Court's latest summary:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for

40. See cases cited notes 44-45 *infra*.

41. See discussion note 39 *supra* and note 49 *infra*. Some commentators have used the phrase "unconstitutional conditions doctrine" exclusively to refer to the more absolute view that any impact on a right is enough to render the condition invalid. *See* Van Alstyne, *Demise, supra* note 36, at 1444-48; Comment, *supra* note 34, at 144. They have no term for the less absolute process by which the Court has actually judged the validity of such conditions. In this Article, the phrase "unconstitutional conditions doctrine" is used to denote the balancing test which is used to determine whether a condition is unconstitutional and not the more absolute view.

42. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (Holmes, J.). The original phrase was: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

43. Adler v. Board of Educ., 342 U.S. 485, 492 (1952) (Minton, J.). The original phrase was: "[Persons] may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." Similar language is found in some discussions of air traveler screening. *See* Abramovsky, *supra* note 17, at 141-42. No such bold statements indicating that the government's power to deny a benefit altogether includes the power to offer it on any condition have appeared in any Supreme Court opinion since 1952.

44. Perry v. Sindermann, 408 U.S. 593 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Epperson v. Arkansas, 393 U.S. 97 (1968); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Sherbert v. Verner, 374 U.S. 398 (1963); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Speiser v. Randall, 357 U.S. 513 (1958); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

45. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

> any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not demand directly". . . . Such interference with constitutional rights is impermissible.[46]

Although this summary sounds of the second absolute position, the Court's decisions in many conditioned-privilege cases[47] and its articulation of the unconstitutional conditions doctrine in other cases[48] reject both absolute interpretations.[49] There are very few cases in which the Court has invalidated a condition solely on the basis that it would affect a constitutional right without assessing at least one of the factors—relevance, extent of impact, or least drastic means.[50] The Court's reaffirmation of the constitutionality of the Hatch Act,[51] which conditions all government employment on the surrender of a broad range of activi-

46. Perry v. Sindermann, 408 U.S. 593, 597 (1973) (citations omitted). This part of the opinion was joined by all the current members of the Court except Mr. Justice Powell, who did not participate.

In determining what *process* is due before a benefit may be denied or terminated, the distinction between rights and privileges may have lingering importance. *See, e.g.*, Perry v. Sindermann, *supra*; Board of Regents v. Roth, 408 U.S. 564 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bell v. Burson, 402 U.S. 535 (1971); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961); Greene v. McElroy, 360 U.S. 474 (1959).

47. See cases cited note 39 *supra*.

48. *E.g.*, Pickering v. Board of Educ., 391 U.S. 563, 570-75 (1968); United States v. Robel, 389 U.S. 258, 265-68 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 605-10 (1967); Elfbrandt v. Russell, 384 U.S. 11, 16-19 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 507-08 (1964); Baggett v. Bullitt, 377 U.S. 360, 373-74 (1964); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

49. The logic of the proposition that the government's power to absolutely deny a benefit includes the power to grant it subject to any condition was first attacked by Thomas Reed Powell in *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916), and further criticized in French, *supra* note 36. The argument that the government may not do indirectly that which it could not do directly also has been vigorously criticized. *See, e.g.*, French, *supra* note 36, at 242-43; Hale, *supra* note 36, at 349; Van Alstyne, *Demise, supra* note 36, at 1445-49; Note, *First Amendment, supra* note 36, at 424.

The three-factor balancing test of the unconstitutional conditions doctrine is similar to the compelling state interest test used by the Court when a benefit, which itself may be a fundamental right, is offered not on a condition requiring the surrender of another right but on terms alleged to violate the equal protection clause of the fourteenth amendment. *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969). Both tests place central emphasis on the less drastic means criterion and employ the factor of relevance. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972). *Compare* Rosario v. Rockefeller, 410 U.S. 752 (1973), *with* Kusper v. Pontikes, 414 U.S. 51, 55-66 (1973).

50. *See* Healy v. James, 408 U.S. 164 (1972); Whitehill v. Elkins, 389 U.S. 54 (1967); Torcaso v. Watkins, 367 U.S. 488 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952). In addition, Baird v. State Bar, 401 U.S. 1 (1971), and *In re* Stollar, 401 U.S. 23 (1971), contain no more than allusions to balancing considerations.

51. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

ties otherwise protected by the first amendment,[52] was a recent demonstration that conditioned-privilege cases are not decided through the application of absolutes.[53]

To be constitutional, any condition must first meet the test of relevance; it must bear at least some rational relationship to the benefit to which it is attached.[54] A condition may ensure that the benefit is used for its intended purposes, thus protecting its effectiveness, or it may keep the benefit from persons whose capacity for social harm would be enhanced by obtaining it.[55] Even when no right is affected by a condition, the Court requires some minimal relevance, although it will not hold such a condition unconstitutional unless it is "utterly lacking in rational justification."[56] Where the Court finds or assumes that a condition does affect a right, it may hold the condition unconstitutional solely on the ground that it is irrelevant,[57] but without articulating such a strict test of irrelevance. In either case, the lack of relevance will render a condition unconstitutional at the outset.[58] When some

52. "An employee in an Executive Agency . . . may not . . . take an active part in political management or political campaigns." 5 U.S.C. § 7324(A)(2) (1970).

53. The Court's clearest rejection of both the "any condition" and the "no condition" absolutes is found in Pickering v. Board of Educ., 391 U.S. 563 (1968), where the Court juxtaposed the state's argument that employment as a teacher could be offered on any terms with the teacher's argument that he could not be discharged unless he made statements which were punishable criminally, and proceeded to analyze the teacher's statements on a basis which excluded both extremes. *Id.* at 568-73.

54. *See*, O'Neil, *supra* note 36, at 454-67; Van Alstyne, *Demise, supra* note 36, at 1461; Willcox, *supra* note 36, at 14-15; Note, *Unconstitutional Conditions, supra* note 36, at 1596; Comment, *supra* note 34, at 149.

55. Note, *Unconstitutional Conditions, supra* note 36, at 1600. *Cf.* French, *supra* note 36, at 247; O'Neil, *supra* note 36, at 467.

56. Flemming v. Nestor, 363 U.S. 603, 611 (1960). In *Flemming*, the Court assumed that a condition requiring termination of accrued social security benefits upon deportation of the beneficiary did not affect first amendment rights despite the fact that the ground for deportation was membership in the Communist Party at a time when mere Party membership was not a crime. The rational connection between deportation and loss of benefits was found in a possible congressional desire to limit benefits to those whose later expenditures would strengthen the domestic economy and to conserve the benefit pool for more deserving beneficiaries. Other cases in which the Court upheld a condition on a finding of minimal relevance after finding or assuming no right was affected by the condition include: Barsky v. Board of Regents, 347 U.S. 442 (1954) (conviction of even nonturpitudinous crime has some bearing on fitness to practice medicine); *In re* Summers, 325 U.S. 561 (1945) (willingness to bear arms has some bearing on fitness to practice law). *See generally*, O'Neil, *supra* note 36, at 468; Van Alstyne, *Demise, supra* note 36, at 1447.

57. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958), *as interpreted in* Shelton v. Tucker, 364 U.S. 479, 484-85 (1960) (requirement that foreign corporation disclose names and addresses of all in-state members as a condition to being qualified to do business in state bears no rational relationship to the state's interest in regulating the benefit of doing business within the state); Bates v. City of Little Rock, 361 U.S. 516 (1960) (to the same effect); Konigsberg v. State Bar (I), 353 U.S. 252 (1957) (presumably innocent membership in Communist Party, terminated before application for admission to bar, bears no rational relationship to applicant's fitness to practice law); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (to the same effect); *cf.* Baird v. State Bar, 401 U.S. 1 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). *See generally* Hale, *supra* note 36, at 349-51, 353-57.

58. See cases cited note 57 *supra*. There are also several cases in which the Court's concern about the irrelevance of a condition may have been a significant factor in its

minimal relevance is found, however, the analysis proceeds to an assessment of the extent of the condition's effect, if any, on constitutional rights and the availability of less drastic means to protect the benefit.[59]

In weighing the extent of a condition's impact on constitutional rights, some importance may once have attached to a distinction between conditions that directly and those that only indirectly affect rights.[60] Recently, however, that distinction has lost most of its significance. Many indirect-effect conditions have been held unconstitutional,[61] while, in the Hatch Act case, a direct-effect condition on fed-

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holding a condition unconstitutional although the reason stated by the Court was the condition's effect on a right. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Speiser v. Randall, 357 U.S. 513 (1958), *as interpreted in* Konigsberg v. State Bar (II), 366 U.S. 36 (1961), *and* Comment, *supra* note 34, at 152, 154-55; Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

Considerations of irrelevance also may have colored the Court's approach to the oath cases which have been decided in the last two decades. The oaths required foreswearing many forms of past, present, or future associations or speech. The Court invalidated those oaths that either expressly or because of vagueness and potential overbreadth required avoidance of protected as well as unprotected activities. Connell v. Rigginbotham, 403 U.S. 207 (1971); Whitehill v. Elkins, 389 U.S. 54 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Weiman v. Updegraff, 344 U.S. 183 (1952). However, the Court upheld those oaths that reached only unprotected activity. *See* Cole v. Richardson, 405 U.S. 676 (1972); Garner v. Board of Pub. Works, 341 U.S. 716 (1951). The vagueness rationale for finding oaths constitutionally infirm was introduced in *Cramp*, reached its peak in *Whitehill*, and began to recede in *Cole*. Yet behind the articulated basis for invalidating many of these oaths, the Court may have had doubts about the efficacy of an oath as a means of protecting any public benefit against a person truly bent upon subverting it, together with an awareness that oaths may bear most heavily on those with conscientious scruples. *See* O'Neil, *supra* note 36, at 455-56.

59. Cases in which the Court's finding of some relevance in the condition was a prelude to its further consideration of other factors include: Pickering v. Board of Educ., 391 U.S. 563 (1968); United States v. Robel, 389 U.S. 259 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Sherbert v. Verner, 374 U.S. 398 (1963); *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar (II), 366 U.S. 36 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958); American Communications Ass'n v. Douds, 339 U.S. 482 (1950); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). *See also* Willcox, *supra* note 36, at 28-29; Note, *First Amendment*, *supra* note 36, at 422; Note, *Unconstitutional Conditions*, *supra* note 36, at 1601.

60. *See* Garner v. Board of Pub. Works, 341 U.S. 716, 721-24 (1951). The effect of all conditions is less direct than that of penal sanctions, in that conditions do no more than induce surrender of rights by those seeking the benefit so conditioned. The further distinction among conditions in terms of directness turns on how that inducement works. A condition has a direct effect when it specifically requires the surrender of constitutionally protected activity in order to obtain or retain the benefit. A condition has an indirect effect when the need to comply with it would induce an individual to surrender protected activity, even though the condition itself does not require that surrender.

61. *In re* Stolar, 401 U.S. 23 (1971) (condition requiring disclosure of protected memberships, without making such membership itself a basis for denial or termination of benefit); Baird v. State Bar, 401 U.S. 1 (1971) (similar condition); Shelton v. Tucker, 364 U.S. 479 (1960) (similar condition); Speiser v. Randall, 357 U.S. 513 (1958) (condition requiring that the individual seeking a benefit carry the burden of establishing that his beliefs or memberships are not of a specified, illegal nature); NAACP v. Alabama, 357 U.S. 449 (1958) (condition requiring disclosure of protected memberships, without making such memberships themselves a basis for denial or termination of benefit); Konigsberg v. State Bar (I), 353 U.S. 252 (1957) (similar condition). The rationale behind these decisions is that the need to disclose or to meet the evidentiary burden may induce persons seeking a benefit to avoid joining protected but

eral and state employment was held constitutional.[62] The test has been reduced to one of ascertaining whether there is any impact, in which case the analysis will turn on the condition's relevance and the availability of less drastic alternatives. However, the possibility of casting the directness or extent of the infringement into the balance has not been eliminated.[63]

Most decisive under the unconstitutional conditions doctrine is the requirement that a condition that infringes on a right be held unconstitutional if there is a less drastic means to achieve the same purpose.[64] One condition may be less drastic than another, either by affecting the rights of fewer beneficiaries[65] or by having a lesser impact on the rights of those whom it does affect.[66] On at least six occasions, the Court has used the less drastic means test to hold conditions unconstitutional.[67] Although it has yet to uphold a condition on the basis of an express finding that there is no less drastic means to accomplish the government's purpose, the assumption that a condition might be upheld on such grounds is implicit in the Court's discussions of this criterion.[68]

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unpopular organizations. Vaguely worded conditions also may induce individuals to avoid protected activity. *See* Whitehill v. Elkins, 389 U.S. 54, 60-64 (1967); *cf.* Sherbert v. Verner, 374 U.S. 398 (1963).

62. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

63. *See In re* Anastoplo, 366 U.S. 82 (1961); Konigsberg v. State Bar (II), 366 U.S. 36 (1961). These cases which, although undercut, have not been overruled, sustain the conditioning of bar membership on responding to inquiries concerning potentially protected affiliations, at least as a preliminary to inquiring into the nature of the memberships. In Law Student Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971), the preliminary broad inquiry and the subsequent specific inquiry were two subparts of the same question.

64. The least drastic means requirement was recognized and applied in the following cases: Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); United States v. Jackson, 390 U.S. 570, 582 (1968); United States v. Robel, 389 U.S. 258, 268 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 602, 609 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Sherbert v. Verner, 374 U.S. 398, 407 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* O'Neil, *supra* note 36, at 469-70; Van Alstyne, *Demise, supra* note 36, at 1451; *cf.* Comment, *supra* note 34, at 156-57.

65. For instance, the Court has suggested limiting the application of those conditions which require broad disclosure of associational memberships to persons in highly sensitive government positions, rather than having such conditions attach to all positions. *See* United States v. Robel, 389 U.S. 258, 267 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 607 (1967).

66. *See* Pickering v. Board of Educ., 391 U.S. 563, 569-70 (1968).

67. See cases cited note 64 *supra.*

68. See cases cited note 64 *supra.* In some of these cases the court has discussed less drastic alternatives. *See* Pickering v. Board of Educ., 391 U.S. 563, 570 n.3 (1968) (forbidding certain public criticism of superiors where relationship between superior and subordinate is of such a nature that effectiveness would be undermined by such criticism); United States v. Robel, 389 U.S. 258, 265-68 (1967) (establishing a more precise system of regulations to protect sensitive positions from those who would use them for subversion); Keyishian v. Board of Regents, 385 U.S. 589, 605-08 (1967) (to the same effect); Aptheker v. Secretary of State, 378 U.S. 500, 513 (1964) (establishing a program under which membership in the Communist Party is not considered conclusive but is one factor to be weighed); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (asking certain teachers about all organizational ties or asking all teachers how many organizations they belong to). In other cases the Court has imposed the less drastic means requirement without any mention of what a less drastic means might be. *See* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

The alternatives that have been mentioned by the Court suggest its willingness at least to consider conditions which have some effect on rights if they are the least drastic way effectively to accomplish the government's purpose.[69] In addition, the Court's continuing reference to alternatives which serve the government's "basic purpose" indicates that the less drastic means test does not require the adoption of ineffective alternatives. A condition may be retained if it is the only effective means to achieve an important benefit-protecting purpose, even if it does affect rights to some extent.

B. *Applicability of the Doctrine to the Screening Problem*

None of the cases from which the unconstitutional conditions doctrine is derived have involved air traveler screening. These cases and the screening situation, however, have the common theme of the government's conditioning a benefit on the recipient's surrender of a constitutional right. Admittedly, there are some differences between the screening cases and previously decided unconstitutional condition cases. In the screening context, the right that is surrendered is the fourth amendment right to be secure from unreasonable searches and seizures, while past conditioned-benefit cases have dealt with first or fifth amendment rights, or in earlier times, an economic right founded on notions of substantive due process. Also, in screening, air travel may itself be a right, while in other cases the conditioned benefits have not had the status of rights. Further, the government does not directly offer the benefit of air travel but rather conditions a benefit offered by private airlines; in most other cases, the benefit has flowed directly from the government. In spite of these differences, air traveler screening is an appropriate subject for unconstitutional conditions analysis.

Reliance on the unconstitutional conditions doctrine as evolved outside the fourth amendment context is necessitated by the scarcity of Supreme Court cases dealing with benefits conditioned on surrender of fourth amendment rights. The Court has decided only four cases which appear to have involved a situation in which a benefit was conditioned on consent to search,[70] and in none of these has it squarely con-

69. Each articulation of the less drastic means test includes some reference suggesting that the alternative means must have some effectiveness in accomplishing the government's purpose. Thus, *Shelton* refers to means "for achieving the *same* basic purpose," 364 U.S. at 488 (emphasis added); *Sherbert* refers to an alternative to "combat such abuses," 374 U.S. at 407; *Aptheker* refers to means "of achieving the Congressional objective," 378 U.S. at 513-14; and *Robel* refers to means by which "Congress must achieve its goal," 389 U.S. at 268.

70. *See* United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Zap v. United States, 328 U.S. 624 (1946), *vacated*, 330 U.S. 799 (1947).

fronted the conditioned-benefit aspects of the problem.[71] Yet the result in these cases and cases in the related area of border searches is fully consistent with a deliberate application of the unconstitutional conditions doctrine, although the doctrine has never been articulated as such.

1. *The Fitness of the Subject*

a. *The Nature of the Rights Affected.* Fourth amendment rights are as important and as flexible as the first amendment rights under which the unconstitutional conditions doctrine was primarily developed. Both amendments reflect a basic commitment to the worth of the individual and a belief in the importance of securing the utmost opportunity for individual self-fulfillment. Further, both amendments establish a priori limits on what the state can expect from the individual in terms of either conformity or disclosure of thought, belief and expression, or conduct.[72] Unlike the fifth and sixth amendments, which are primarily designed to secure procedural rights, the first and fourth amendments protect substantive individual liberties against governmental intrusion.[73] If this protection has an ulterior purpose, it is to secure for all the free interchange of ideas essential to a democratic society.[74]

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71. See text & notes 110-47 *infra.*

72. Two basic implications of the theory underlying our system of freedom of expression need to be emphasized. The first is that it is not a general measure of the individual's right to freedom of expression that any particular exercise of that right may be thought to promote or retard other goals of the society. The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in good society.

T. EMERSON, THE SYSTEM OF EXPRESSION 8 (1970).

Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . ."

Ker v. California, 374 U.S. 23, 32 (1963), *quoting* Gouled v. United States, 255 U.S. 298, 304 (1921).

73. The substantive, nonprocedural nature of fourth amendment rights was stressed by the Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in concluding that a waiver of fourth amendment rights does not need to be knowing and intelligent to the same degree as a waiver of those fifth and sixth amendment rights which are the safeguards of a fair criminal trial. *Id.* at 235-46. *See also* Linkletter v. Walker, 381 U.S. 618, 636-40 (1965).

74. *See* Keyishian v. Board of Regents, 385 U.S. 589, 602-03 (1967). As the Court stated in Stanford v. Texas, 379 U.S. 476 (1965):

"[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new." "This history was of course part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted search and seizure could also be an instrument for stifling liberty of expression." As Mr. Justice Douglas has put it, "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of Entrick v. Carrington. These three amendments are indeed closely related, safeguarding not only

Both amendments are flexible, however, permitting the government to invade the interests they protect, even outside the conditioned-benefit context. Despite three decades of vigorous dissent,[75] a majority of the Court still applies a balancing test to the first amendment. As a result, some forms of expression, such as obscenity,[76] malicious libel,[77] fighting words,[78] and direct incitement to immediate criminal action,[79] may be proscribed, and even expressions whose content is clearly within the protection of the amendment may be forbidden in certain manners[80] or at certain times and places.[81] Under the fourth amendment, privacy can be invaded when there is probable cause and the invasion is authorized by a warrant.[82] Moreover, some searches and seizures may be reasonable even without these limitations.[83] Thus, even outside the conditioned-benefit context, the fourth amendment permits a balancing of interests,[84] as does the first.

b. *The Nature of the Benefit Conditioned.* Under the unconstitutional conditions doctrine, it makes no difference whether travel by air is classified as a privilege or as a right. The government gains no leeway in attaching conditions to a benefit simply because the citizen may not have an independent right to the benefit.[85] However, the suspicion remains that it may be more difficult to sustain a condition if the benefit to which it is attached qualifies as a fundamental right. This theory is strengthened by language in some opinions of the Court which indicate that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."[86]

The right to travel, both within the United States and outside the

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privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'"
Id. at 484-85 (citations omitted).

75. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449-57 (1969) (Douglas, J., concurring).
76. Miller v. California, 413 U.S. 15, 30-35 (1973).
77. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
78. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-74 (1942).
79. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
80. Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949).
81. Grayned v. City of Rockford, 408 U.S. 104, 114-21 (1972); Adderley v. Florida, 385 U.S. 39, 46-47 (1966).
82. U.S. CONST. amend. IV.
83. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 439-42 (1973); Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967).
84. *See generally* Greenberg, *The Balance of Interests Theory and the Fourth Amendment*, 61 CALIF. L. REV. 1011 (1973).
85. Perry v. Sindermann, 408 U.S. 593, 597 (1972).
86. Simmons v. United States, 390 U.S. 377, 394 (1968). The rights in conflict in *Simmons* were fourth and fifth amendment rights. To establish the standing necessary to obtain the benefit of the fourth amendment exclusionary rule, the defendant had to give incriminating testimony which then was introduced in evidence at the guilt phase of the trial. To avoid this mutual conditioning of rights, the Court held the testimony inadmissible at trial. *Id.* The tension between the rights also could have been alleviated by making an exception to the standing requirement. *See* Jones v. United States, 362 U.S. 257 (1960).

country,[87] has been recognized as a fundamental right for over 100 years.[88] In *Shapiro v. Thompson*,[89] the Supreme Court stated that: "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[90] Air traveler screening affects the right to travel, even though it directly affects only travel by air, leaving all other travel options open to those who wish to avoid screening.[91] The need to take a slower and perhaps less convenient form of travel would seem to be a burden on the right to travel and, in many instances, tantamount to a complete denial of that right.[92]

Travel's status as a fundamental right does not, however, require an absolute standard in judging the constitutionality of screening as a condition; the three-factor test of the unconstitutional conditions doctrine still applies. In *Aptheker v. Secretary of State*,[93] a condition which required avoidance of constitutionally-protected memberships in the Communist Party in order to travel outside the Western Hemisphere was held unconstitutional on the grounds that it did not require active or purposeful membership or distinguish among various travel purposes.[94] The Court suggested, however, that a more narrowly

87. Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (travel within the United States); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (travel within the United States); United States v. Guest, 383 U.S. 745, 757 (1966) (travel within the United States); Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (travel overseas); Kent v. Dulles, 357 U.S. 116, 125-27 (1958) (travel overseas); Edwards v. California, 314 U.S. 160, 177-86 (1941) (travel within the United States); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1867) (travel within United States).

88. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). The fundamental nature of the right to travel within the United States stems in part from the fact that free interstate travel may be necessary to the exercise of political liberties. *Id.* at 44. The right to travel overseas seems to be recognized simply as part of a citizen's fundamental liberty. Kent v. Dulles, 357 U.S. 116, 125-27 (1958). *See also* Edwards v. California, 314 U.S. 160, 177-86 (1941).

89. 394 U.S. 618 (1969).

90. *Id.* at 629.

91. *See* United States v. Edwards, 498 F.2d 496, 504 (2d Cir. 1974) (Oakes, J., concurring). *But see* Abramovsky, *supra* note 17, at 130; *Symposium—Skyjacking, supra* note 17, at 1065.

92. *See* McGinley & Downs, *supra* note 5, at 322. *But see* Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 714 (1972) (in which the Court sustained a passenger fee for airport use on the basis that it was *not* a burden in the constitutional sense). The Court in *Delta Airlines* noted that the fee was "limited . . . to travelers asked to bear a fair share of the costs of providing public facilities that further travel." *Id.* at 712. It would not seem possible to sustain passenger screening on a similar "no burden" basis. Being screened is not a way of bearing a fair share of the economic cost of air safety, nor does surrendering a dollar involve surrender of a constitutional right as does submitting to screening. *But see* Comment, *supra* note 5, at 409-10.

93. 378 U.S. 500 (1964).

94. *Id.* at 514. At issue was a statute making it unlawful for any member of a Communist organization who knew that the organization was subject to a final order to register with the Subversive Activities Control Board to apply for, use, or attempt to use a passport. At that time, a passport was a prerequisite to lawful travel outside the Western Hemisphere. *Id.* at 501-02, 507.

drawn passport condition, more relevant to the government's interest in preventing travel from being used for socially harmful purposes and less drastic in its impact on first amendment rights, might well pass constitutional muster despite some remaining impact on the right to travel.[95]

A series of equal protection cases further indicates that the fundamental nature of the right to travel does not necessarily mean that it can never be burdened, even by conditions that also affect rights other than travel. Although the Court has used the compelling state interest test to strike down 1-year[96] and 3-month[97] residence requirements for obtaining welfare benefits[98] and for voting in state[99] and local[100] elections, in each case the Court acknowledged that the right to travel could be burdened,[101] provided the burden was necessary to promote a sufficiently compelling state interest.[102] Eventually, it recognized that a state's interest in preparing adequate voter records and protecting its electoral processes from fraud was sufficient to justify denying the right to vote to anyone who exercised his right to travel within 50 days of

95. *Id.* at 512-14 (discussing, without disapproval, a program that would still allow membership to be considered as one factor in determining whether an individual could travel abroad).

96. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

97. Dunn v. Blumstein, 405 U.S. 330 (1972).

98. Shapiro v. Thompson, 394 U.S. 618 (1969).

99. Dunn v. Blumstein, 405 U.S. 330 (1972).

100. Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971), *aff'd mem.*, 405 U.S. 1034 (1972).

101. In none of these equal protection cases was travel the benefit being conditioned as it was in *Aptheker* and in the air traveler screening context. Welfare and voting were the benefits; travel was the right affected by the condition on those benefits. Nor are these cases strictly conditioned-privilege cases, since there was nothing which the individuals could gain from the states in question by waiving their right to travel and staying where they were. Also, when the individuals did travel, the states to which they moved did not withdraw anything which was already being provided to them. The states merely refused to initiate welfare benefits or voting rights for a time after the right to travel was exercised. However, these refusals were treated by the Court as penalties on the exercise of the right to travel. In the Court's equal protection analysis, it was highly important that the benefit of welfare or voting was offered on terms which discriminated against those who had recently exercised travel rights. This discrimination was the penalty or burden on the right to travel that invoked the compelling state interest test.

102. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court easily disposed of the state interests said to justify the penalty on travel, finding that the state "did not use or have reason to use the one year requirement for the governmental purposes suggested." *Id.* at 638. In short, the burden was irrelevant. In Dunn v. Blumstein, 405 U.S. 330 (1972), despite the involvement of two constitutional rights, the importance of the governmental interests involved led the Court into a considerably more protracted analysis, *id.* at 343-60, before it could conclude: "[W]e cannot say that durational residence requirements are necessary to further a compelling state interest." *Id.* at 360. In Sosna v. Iowa, 95 S. Ct. 553 (1975), the Court retreated from the use of the compelling state interest test in circumstances where the burden did not result in an irretrievable foreclosure of a necessity or right. In upholding a state's 1-year durational residence requirement for filing of divorce actions, the Court also noted that a state interest in requiring that those who seek a divorce be genuinely attached to the state and that the desire to insulate divorce decrees from collateral attack were stronger than the budgetary or administrative interests advanced in *Shapiro* and *Dunn*.

the election in question.[103]

From these cases, it appears that conditions attached to the exercise of the right to travel must be judged by the same constitutional standards as conditions attached to benefits that do not qualify as fundamental rights. Whether or not air travel is a fundamental right, the constitutionality of the screening condition will depend on its relevance to the government's interest in protecting air travel, the impact of the condition on fourth amendment rights, and the availability of less drastic means to prevent hijacking.[104]

c. *The Source of the Benefit.* The fact that the benefit of air travel is extended by private airlines rather than the government does not make the unconstitutional conditions doctrine less relevant. Since *Truax v. Raich*,[105] it has been recognized that a government regulation that requires a private party to offer a benefit in such a way as to interfere with the rights of the recipient is subject to close constitutional scrutiny. Further, the recipient has standing to attack the regulation even though its terms do not apply to him or her but only to the party offering the benefit.[106] Indeed, because of the impact which a condition may have on the private offeror's own economic and other interests in addition to its impact on the recipient's interests,[107] one commentator has suggested that conditions the government places on privately-offered benefits ought to be judged more strictly than conditions on direct benefits. This suggestion may have special significance for air traveler screening, since many airlines evidently believe that they have an economic and public relations interest in returning to a selective screening system.[108] This Article proceeds on the assumption that the criteria developed in assessing conditions on governmental benefits apply at least as strictly in judging conditions placed on the privately offered benefit of air travel.[109]

103. Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973).

104. For analyses which proceed somewhat along these lines although reaching conclusions different from those of this Article, see United States v. Davis, 482 F.2d 893, 912-13 (9th Cir. 1973); Note, *Constitutionality, supra* note 17, at 133-34; Comment, *supra* note 5, at 412. *See also* Abramovsky, *supra* note 17, at 127-30.

105. 239 U.S. 33 (1915).

106. *Id.* at 40-43. In *Truax*, an Arizona law made it a misdemeanor for a private employer to employ fewer than 80 percent citizens. In an action brought by an alien employee, the Court held that the statute denied him equal protection. *See also* NAACP v. Alabama, 357 U.S. 449, 460-66 (1958); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947).

107. Linde, *supra* note 36, 27 n.236, 32, 37, 43 & n.304; *accord*, Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Van Alstyne, *Demise, supra* note 36.

108. *See Hearings on H.R. 3858 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., ser. 93-9, at 416 (1973) (statement of Jack R. Shields, Manager for Operational Safety, Eastern Airlines) [hereinafter cited as *House Hearings*].

109. Implementation of any screening procedure pursuant to statute, FAA regulations, or an FAA directive would be governmental action subject to constitutional review, regardless of whether the person implementing the procedure was a FAA em-

2. *Relevant Fourth Amendment Cases Analyzed Under the Doctrine*

a. *Conditioned-Benefit Cases.* In *Zap v. United States*,[110] a navy contractor was required to consent to inspections of his records as a condition of obtaining a government contract.[111] During such an inspection, government agents discovered and seized a check indicating that Zap had defrauded the government. The government's seizure of the check was upheld on the ground that it was discovered in the course of a lawful search. The Court made it clear that the lawfulness of the search stemmed from the consent embodied in the contractor's acceptance of the conditions of his contract. "[W]hen the petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy he might otherwise have had as respects business documents related to those contracts."[112] The unarticulated major premise of this reasoning was that the award of the contract could validly be conditioned on agreeing to the inspection. The Court, however, gave no reasons for adopting that premise.

More than two decades passed before the Court confronted another fourth amendment conditioned-benefit case. Then, in *Colonnade Catering Corp. v. United States*[113] and *United States v. Biswell*,[114] the Court was presented with situations in which the licenses of a liquor dealer and a firearms dealer were conditioned on consent to periodic, unannounced inspections by government agents of their business premises, stock in trade, and records.[115] In *Colonnade*, the dealer re-

ployee, a local law enforcement officer, the employee of a private detective agency hired by the airline, or an airline employee. United States v. Davis, 482 F.2d 893, 897-904 (9th Cir. 1973); People v. Kluga, 32 Cal. App. 3d 409, 413-15, 108 Cal. Rptr. 160, 164 (Ct. App. 1973). *See also* Note, *supra* note 10, at 1041-47; Note, *Constitutionality, supra* note 17, at 135-37. For cases holding that an inspection of checked baggage by an airline employee not required by any governmental regulations or instigated or participated in by any law enforcement officer was not government action subject to the fourth amendment, see United States v. Ogden, 485 F.2d 536, 538 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); United States v. Wilkerson, 478 F.2d 813, 815 (8th Cir. 1973); United States v. Echols, 477 F.2d 37, 39 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); United States v. Burton, 475 F.2d 469, 471 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973).

110. 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 799 (1947).

111. A federal statute required that the books and records of a Navy contractor be "subject to inspection and audit" at "all times," and the contracts signed by the defendant reiterated this condition. To obtain the contract, the contractor had no choice but to agree to the inspections. 328 U.S. at 625.

112. *Id.* at 628.

113. 397 U.S. 72 (1970).

114. 406 U.S. 311 (1972).

115. In both cases, federal statutes authorized entry onto the premises of any licensed dealer for the purpose of examining his records or examining any liquor or firearms kept or sold by him. *Id.*; 397 U.S. at 74. These conditions apparently were not placed in the licenses themselves, but their acceptance was implicit in acceptance of the license. While a subsequent refusal to permit such an inspection was not specifically made grounds for revocation of the license, it was a criminal act punishable by fine or imprisonment. Thus, a dealer's consent to the inspection was obtained by the dual threat,

fused to permit an inspection of his liquor storeroom, and Internal Revenue Service agents broke into it; in *Biswell*, the dealer permitted an inspection only after asking whether the Treasury agent had a warrant and being told that the licensing statute permitted inspections without warrants. In both cases, the Court stated that an inspection which the dealer acquiesced to would be reasonable, and, in *Biswell*, it held that the seizure of weapons during such an inspection "was not unreasonable."[116] While the *Biswell* Court stated that "the legality of the search depends not on consent but on the authority of a valid statute,"[117] a majority of the Court's current members have subsequently taken the view that consent was the basis for the legality of the *Biswell* search. In *Almeida-Sanchez v. United States*,[118] the majority explained *Biswell* by saying that, "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him."[119] This interpretation is consistent with that part of the Court's rationale in *Biswell* that found the inspection reasonable on the ground that, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[120]

The Court did not, in *Colonnade, Biswell*, or the interpretive language of *Almeida-Sanchez*, articulate its major premise that the government may validly condition the issuance of liquor and firearms licenses on the licensees' agreeing to permit periodic inspections of their premises. But these cases are consistent with the proposition that the lawfulness of an inspection is dependent on the lawfulness of conditioning the license on consent to such inspection. Only by such an analysis do the observations that, "businessmen . . . accept the burdens . . . of their trade," and "the dealer . . . does so with the knowledge that his . . . records . . . will be subject to inspection" lead to the conclusion that such inspections are reasonable under the fourth amendment.

Approval of the *Zap, Colonnade*, and *Biswell* searches is consistent with a deliberate application of the unconstitutional conditions doc-

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first, of not receiving a license if he interposed any objection to the search condition before the license was issued and, second, of being jailed if he refused to permit an inspection when it was requested.

116. 406 U.S. at 314-17. In *Colonnade*, the Court found that the forcible entry constituted an unreasonable search on the ground that Congress had made a fine or imprisonment for refusing to permit an inspection the exclusive sanction, and forcible entry thus was not authorized by the statute. 397 U.S. at 76-79.

117. 406 U.S. at 315.

118. 413 U.S. 266 (1973).

119. *Id.* at 271.

120. 406 U.S. at 316.

trine. Unannounced, warrantless inspections of the storeroom or business records of a government contractor or licensee are a relevant way to protect the benefit involved—the contract or license—from misuse by the beneficiary. In *Biswell*, the Court expressly noted that, "close scrutiny of [interstate traffic in firearms] is undeniably of central importance to federal efforts to prevent violent crime and to assist the states in regulating the firearms traffic within their borders . . . and inspection is a crucial part of the regulatory scheme . . . ."[121]

Arguably, the impact of these inspections on fourth amendment rights was small, because they were limited in scope to the location where the benefit was enjoyed and to related papers and effects. Moreover, the inspections involved only the premises, records, and inventory involved in the businesses. While the Court generally has refused to distinguish between fourth amendment rights of people in the conduct of their business and in the conduct of their private lives,[122] the Court's statement in *Biswell* that the inspections "posed only limited threats to the dealer's justifiable expectations of privacy"[123] may reflect the view that business premises and records are more susceptible to being viewed by outsiders than are personal effects.[124]

The least drastic alternative criterion provides the strongest basis for approving the inspections in these cases. The *Biswell* Court relied heavily on the absence of a less drastic and equally effective alternative, observing:

> [I]f the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable. . . . If inspection is to be effective and to serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible.[125]

On the facts of *Zap, Colonnade,* and *Biswell,* uannounced inspections seem to be the only effective way to protect the benefits in question

121. *Id.* at 315.
122. *See* See v. City of Seattle, 387 U.S. 541 (1967). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.* at 543.
123. 406 U.S. at 316.
124. *Accord,* Davis v. United States, 328 U.S. 582 (1946), *as interpreted in* Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973). In *Davis,* the public character of the property seized and the fact that the demand was made during business hours at the place where the property was required to be kept were relied upon to support the conclusion that the government agents' "persuasive" conduct did not amount to such duress as to render involuntary the defendant's actual cooperation in producing the property seized.
125. 406 U.S. at 316.

from abuse. These inspections may be made in the absence of probable cause or reasonable suspicion, but only because there seems to be no practical and less drastic means to gather adequate facts to support either of these traditional standards with respect to any particular contractor or dealer.[126]

Wyman v. James[127] was the fourth of the Court's conditioned-privilege cases. There, a welfare recipient was required to consent to periodic home visits by caseworkers as a condition to continued receipt of welfare benefits. After receiving benefits for about 2 years, the recipient refused to permit a home visit and the benefits were terminated. In an action brought to have the home visitation condition declared invalid, the Court upheld the termination of benefits on the ground that the home visit, if a search at all,[128] was not an unreasonable search.[129]

Although the procedural context made the case ripe for unconstitutional conditions analysis,[130] the Court avoided any direct reference to the doctrine. As in the other cases, however, its conclusion that the search was reasonable rested on the premise, here somewhat less inarticulate, that welfare benefits could validly be conditioned on consent to home visits. Thus, it said: "If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search. . . ."[131] So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers and nothing of constitutional magnitude is involved."[132]

Although this language has overtones of the absolute view that the government can impose any condition on a benefit,[133] any inference

126. The alternative of infiltrating informers into the organizations of contractors and licensees would be absurdly expensive. Moreover, even if these informers' activities would not amount to searches under United States v. Hoffa, 385 U.S. 293 (1966), such infiltration could pose an even more serious threat to the values protected by the fourth and also the fifth amendment than the warrantless inspections approved in these cases. On the other hand, the alternative of waiting for probable cause would leave virtually no effective means to ensure that the benefits derived from the contract or license were not abused. The fact that a condition is being placed on a benefit provides a toehold for inspection procedures which, although useful to law enforcement outside a conditioned-benefit context, would clearly be precluded by the fourth amendment. To avoid overextension of this exception, strict adherence to the relevance requirement may be necessary.

127. 400 U.S. 309 (1971).

128. *See* text & notes 284-87 *infra.*

129. 400 U.S. at 318.

130. The dissenters chose to analyze the case in terms of unconstitutional conditions. Both dissenting opinions took the position that requiring the home visit was an unconstitutional condition on the government's offer of welfare benefits. *See id.* at 327-29 (Douglas, J., dissenting); *Id.* at 344-45 (Marshall, J., dissenting).

131. *Id.* at 317-18.

132. *Id.* at 324.

133. *See* text & notes 41, 43-44 *supra.*

that the Court is returning to such a view is belied by the rest of the Court's opinion. The Court reaches its reasonableness conclusion through a self-conscious weighing of factors which would have been equally significant under an unconstitutional conditions analysis. Indeed, the difference between the majority and the dissenters stems only from different weight given to the factors bearing on the relevance and intrusiveness of the home visit and on the availability of less drastic means, and not from any articulated difference as to whether welfare may be offered on any condition, however unreasonable.

If the primary aim of the home visit were to protect the welfare benefit from exploitation or misuse, the criterion of minimal relevance would be satisfied, since the visit was at least rationally related to that purpose. In the view of the majority, however, the home visit was only secondarily related to protection of the benefit. The government's primary interest, it said, was "protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent*."[134] The emphasis was on "restoring the aid recipient 'to a condition of self support,' . . . upon the relief of his distress . . . . upon 'assistance and rehabilitation,' upon maintaining and strengthening family life, and upon 'maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . .' "[135] While the Court acknowledged that the home visit also could have a benefit protecting effect since evidence that the benefit was being fraudulently received or improperly used might be discovered, it characterized that effect as a by-product which "does not impress upon the visit itself a dominant criminal investigative aspect."[136] The dissenters took a dimmer view of the rehabilitative and assistance aspects of the visit and were more concerned with its investigative and evidence gathering nature.[137] At this stage, however, the disagreement was not over the importance of the visit's relevance, but over the nature of that relevance.

The majority's position that the visit lacked a dominant criminal investigative purpose,[138] which is an important factor in determining the extent to which fourth amendment interests are invaded,[139] supports the conclusion that the home visit had a limited impact on fourth amendment rights. The visit's impact was further limited, in the ma-

134. 400 U.S. at 318.
135. *Id.* at 319.
136. *Id.* at 323.
137. *Id.* at 331-32 (Douglas, J., dissenting); *Id.* at 339-44 (Marshall, J., dissenting).
138. *Id.* at 323.
139. *Compare* Camara v. Municipal Court, 387 U.S. 523 (1967), *with* Cady v. Dombrowski, 413 U.S. 433 (1973).

jority's view, by its scope; it was characterized as a "gentle means."[140] Although acknowledging that the visit involved "one of the most precious aspects . . . of personal security in the home,"[141] the Court emphasized the fact that it was preceded by advance warning,[142] that it was carried out by a trained caseworker and not by police or uniformed authority,[143] without forcible entry, during work hours, that the beneficiary was relied on as the primary source of information, and that privacy was emphasized.[144]

As in the government contract and license cases, however, the less drastic means criterion furnished the strongest basis for upholding the condition in *Wyman*. Although Ms. James suggested several alternative means of obtaining relevant information about herself and her child, the Court was not persuaded that the rehabilitative and educative, much less the protective, purposes of the home visit could be as effectively fulfilled by any of those means.[145] On the other hand, the belief that the suggested alternatives were equally effective and less drastic than the home visit was significant to the dissenters,[146] as well as decisive to the lower court which had rejected the condition.[147] Regardless of the merits of these positions with respect to the welfare home visit, they illustrate the importance of the less drastic means criterion.

b. *Area Search Cases.* The Supreme Court's cases dealing with "area searches" have been relied on by lower courts to support nonselective screening.[148] While no benefit is conditioned in these cases, a regular inspection, affecting all persons inhabiting or entering a particular area, is a feature which area searches share with screening.[149]

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140. 400 U.S. at 319.
141. *Id.* at 316.
142. *Id.* at 320-21.
143. *Id.* at 322.
144. *Id.* at 321.
145. *Id.* at 322.
146. *Id.* at 342-43 (Marshall, J., dissenting).
147. James v. Goldberg, 303 F. Supp. 935, 943-44 (S.D.N.Y. 1969), *rev'd sub nom.*, Wyman v. James, 400 U.S. 309 (1971).
148. *See* United States v. Davis, 482 F.2d 893, 908-09 (9th Cir. 1973).
149. It is significant that in both the Court's opinion and Mr. Justice Powell's concurrence in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), these cases were discussed, together with *Colonnade* and *Biswell*, as "administrative inspection cases" although the conditioned-benefit aspect of the latter two cases was seen as a "central difference." 413 U.S. at 271, 281. Since they do not involve conditioned benefits, the area searches are carried out either by force, as in *Almeida-Sanchez*, or by threat of penal sanction for refusal to admit the inspector. The Court in Wyman v. James, 400 U.S. 309 (1971), found the use of penal sanctions to be a relevant feature distinguishing the area inspection, for which a warrant is required, from the welfare home visit, which it held to be reasonable without a warrant or probable cause. *Id.* at 325. The dissenters thought that the difference between a suspended $100 fine and withdrawal of all means of livelihood made the home visit a stronger case for the warrant and probable cause requirement. *Id.* at 328.

In *Camara v. Municipal Court*[150] and *See v. City of Seattle*,[151] the Court held that a warrant was required for area searches. However, the Court indicated that such warrants could be issued upon facts amounting to considerably less than probable cause to believe that fire, health, or building code violations existed in any particular premises inspected. In *Almeida-Sanchez v. United States*,[152] a majority of the Court appeared willing to extend the area search concept to permit the search, under a warrant, of all vehicles traveling on highways within 25 and perhaps as far as 100 miles[153] from any external boundary of the United States for the purpose of finding illegal aliens. The Court held the search illegal on the basis that no warrant had been obtained, but Mr. Justice Powell, who cast the deciding vote, expressed the view that some area searches of vehicles by roving border patrols could be authorized by an area warrant based on considerably less than probable cause with respect to any particular vehicle actually searched.[154] The four dissenters agreed with Justice Powell.[155]

These cases also are consistent with the unconstitutional conditions doctrine. In *Camara*, the criterion of relevance was met by the Court's finding that housing and building inspections have a mix of rehabilitative and investigative purposes similar to that which later was found significant in the welfare home visit. While the detection and ultimate prosecution of municipal code violations may have been a principal objective in the area inspection, the Court nevertheless found that the primary purpose of the inspection was simply to detect unsafe conditions, whether intended or unintended, and to assist property owners in correcting them.[156] Although the vehicle search was not designed to aid drivers in an analogous fashion, it was at least rationally related to protecting entry into the country from those not entitled to do so.[157]

In *Camara* and *Almeida-Sanchez*, there were also suggestions that the inspections in question had a limited impact on fourth amendment rights. Housing and building inspections were said to involve "a relatively limited invasion of the urban citizen's privacy."[158] This may have been partly because a typical building inspection, although more exten-

150. 387 U.S. 523 (1967), *overruling* Frank v. Maryland, 359 U.S. 360 (1959).
151. 387 U.S. 541 (1967).
152. 413 U.S. 266 (1973).
153. The vehicle involved in this case was only 25 miles north of the border when it was stopped, but regulations issued pursuant to the Immigration and Nationality Act authorized such searches up to 100 miles from any external boundary of the United States. *Id.* at 268.
154. *Id.* at 277-79, 283-84 (Powell, J., concurring).
155. *Id.* at 288-89 (White, J., dissenting).
156. 387 U.S. at 535.
157. Almeida-Sanchez v. United States, 413 U.S. 266, 275-84 (1973) (Powell, J., concurring).
158. 387 U.S. at 537.

sive than a welfare home visit, may still be less extensive than a full search for criminal evidence. It is at least, in the Court's words, "a less hostile intrusion" because it is "neither personal in nature nor aimed at the discovery of evidence."[159] These characterizations make the impact of the building inspection on fourth amendment values appear limited in the same respects which later were found significant in the welfare home visit situation. Similarly, in *Almeida-Sanchez*, Mr. Justice Powell found it important that the case involved only the search of an automobile, which he said is "far less intrusive on the rights protected by the fourth amendment than the searches of one's person or of a building."[160] He also found it significant that the government's usual response on discovering an illegal alien was simply deportation and not criminal prosecution,[161] evidently viewing the former as the milder response.

Again, a least drastic means criterion proved decisive in these cases. The Court's analysis in *Camara*, and Mr. Justice Powell's opinion in *Almeida-Sanchez*, reflect a conscious choice between alternate ways of achieving the government's purpose; both would compel resort to the less drastic alternative of a warrant as opposed to a warrantless procedure. Admittedly, the alternative still did not measure up to the traditional standards of the fourth amendment since it would be based on less than probable cause.[162] Nevertheless, it was upheld on the basis that the still less intrusive alternatives proposed by the defendants would not have been effective. In *Camara*, the Court said: "There is unanimous agreement among those familiar with this field that the only *effective* way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures."[163] Mr. Justice Powell echoed this in

159. *Id.* at 530, 537.

160. 413 U.S. at 279 (Powell, J., concurring).

Cady v. Dombrowski, 413 U.S. 433 (1973), was decided the same day as *Almeida-Sanchez*, with Mr. Justice Powell becoming the swing man by voting for the search in *Cady* and against it in *Almeida-Sanchez*. This case also develops the notion that an automobile is not, in the nature of things, a very private place in modern society. *Id.* at 441-42. *See also* Cardwell v. Lewis, 417 U.S. 583, 590-91 (1974).

161. 413 U.S. at 278-79 (Powell, J., concurring).

162. In *Camara*, the Court suggested that warrants might issue on the basis of the nature of the building and the condition of the entire area. 387 U.S. at 538. Mr. Justice Powell's standard for area searches in *Almeida-Sanchez* was more demanding, requiring facts about the frequency with which illegal aliens are known to be transported within a particular area, the proximity of the area to the border, the size and geographic characteristics of the area including the location of roads and the extent of their use, and the probable degree of interference with the rights of innocent persons. 413 U.S. at 283-84. However, the possibility that area warrants might issue on facts so general as to reduce the warrant procedure to a sham raises the question of whether the area warrant is a less drastic alternative. *See* See v. City of Seattle, 387 U.S. 541, 553-55 (1967) (Clark, J., dissenting). In *Camara*, the Court thought that placing the ultimate decision in the hands of a judicial rather than an executive officer made this alternative significantly less drastic. 387 U.S. at 532-33.

163. 387 U.S. at 535-36 (emphasis added).

Almeida-Sanchez when he noted that, "no alternative solution is reasonably possible."[164]

c. *Border Search Cases.* The border search cases are also relevant to air traveler screening and have been relied on to support nonselective screening.[165] Moreover, the border search can be viewed as another condition upon the right to travel, although one which is limited to travel outside the United States rather than travel by one type of conveyance.

Since at least the time of the first Congress, customs officials have been authorized to stop and search any "vehicle, beast or person" in which or on whom they suspect there is dutiable merchandise or contraband.[166] Immigration officials are authorized to conduct border searches for illegally entering aliens.[167] These searches are routinely made even though there may be no factual basis to believe that the person or thing searched is carrying seizable articles.[168] Moreover, the searches are extensive and intrusive, commonly involving a thorough inspection of all luggage, perhaps a frisk of the person, and, in some instances, an exploration of body cavities.[169] Some courts have stated that mere entry into the country constitutes probable cause for search,[170] and others have concluded that the border search is reasonable even in the absence of probable cause or reasonable suspicion.[171]

164. 413 U.S. at 278.

165. *See, e.g.*, United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); United States v. Doran, 482 F.2d 929, 931 n.1 (9th Cir. 1973); United States v. Moreno, 475 F.2d 44, 52 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). The argument is not that air passenger screening *is* a border search, but that the two situations are so similar that the recognition of an exception for one suggests the creation of an analogous exception for the other. Thus, superficial differences between the two situations, such as the fact that air travelers are screened only when they travel in or depart from the country while the border search applies only when the traveler enters the country, are irrelevant. *But see* McGinley & Downs, *supra* note 5, at 322-23; Note, *supra* note 10, at 1051; Note, *Constitutionality, supra* note 17, at 138-41.

166. Act of July 1, 1789, ch. 5, 1 Stat. 29, 43. The successors to this act are found in 19 U.S.C. §§ 482, 1581-1582 (1970).

167. 8 U.S.C. § 1357(a) (1970). The power of immigration officials to conduct warrantless searches of vehicles in areas adjacent to the country's borders was severely limited in Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

168. *See generally* United States v. Moreno, 475 F.2d 44, 51 n.8 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968). [hereinafter cited as Comment, *Border Searches*]. See, however, Comment, *supra* note 5, at 395, 405-06, suggesting that border searches require some fact-based suspicion. This suggestion is not borne out by the cases. *See* Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); McGinley & Downs, *supra* note 5, at 322.

169. *See generally*, Note, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966); Comment, *Border Searches, supra* note 168. Facts akin to probable cause may be necessary to support the most personally intrusive of these searches, *see* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) (inspection of vagina), but not mere baggage inspections and frisks.

170. *E.g.*, Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967); Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961).

171. *E.g.*, United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965). The suspicion upon which courts hold that a border search may be initiated is clearly not the reasonable suspicion contemplated

The absence of true probable cause or reasonable suspicion and the obvious search nature of standard border search procedures, however, make it more accurate simply to characterize the border search as an outright exception to the fourth amendment.[172]

The Supreme Court has never been faced with a clear-cut challenge to the border search exception, so that the existence and propriety of the exception have been assumed.[173] As a result, an extensive rationale for the exception has not been articulated by the Court. In *Boyd v. United States*,[174] it simply reasoned:

> As this Act [originally authorizing the border search] was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the Amendment.[175]

Beyond this historical argument, no court has synthesized a comprehensive rationale for the border search exception.[176] However, the reasons given by the lower courts and divined by the commentators add up to an unconstitutional conditions analysis of the exception.

Many courts, drawing perhaps on the view that the right to control the ingress of undesirable persons and merchandise is an indispensable concomitant of national sovereignty,[177] have simply relied on the importance of the government's interest in preventing the illegal entry of

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in Terry v. Ohio, 392 U.S. 1 (1968), since it requires no factual support other than what would be an "inarticulate hunch" in *Terry* terminology.

172. *See* Note, *Constitutionality, supra* note 17, at 138. *But see* Comment, *supra* note 5, at 395.

173. It is undoubtedly within the power of the Federal Government to exclude aliens from the country. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the Court stated in Carroll v. United States: "Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may lawfully be brought in."

Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (citations omitted).

174. 116 U.S. 616 (1886).

175. *Id.* at 623. *See also* United States v. Moreno, 475 F.2d 44, 51 n.8 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). A similar reliance on history, including a quote from the same language of *Boyd*, accompanied the Court's approval of the inspection of liquor dealer's storerooms and records in Colonnade Catering Corp. v. United States, 397 U.S. 72, 75-76 (1970). This historical argument has been challenged on the grounds that the legislators may have passed the 1789 customs statute without considering fully the applicability of the fourth amendment to border searches, that community standards of reasonableness change, and that changes in the underlying facts might render unreasonable a search which would have been reasonable by the same standards in 1789. Comment, *Border Searches, supra* note 168, at 1011.

176. Comment, *supra* note 5, at 395.

177. *See* Cross v. Harrison, 57 U.S. (16 How.) 164 (1853), *as interpreted in* Note, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV. 513, 518 (1967). Talking of the sovereign's right to do such things adds little to the fourth amendment analysis, since the sovereign has an equal right to prevent, detect, and prosecute crime within its borders.

aliens and smuggling of contraband and on the evident relevance of the border search to those interests.[178] Others have stressed what they viewed as the limited impact of the border search on fourth amendment values, noting the relative nonintrusiveness of the baggage search,[179] or stating that a person approaching the border is on notice that searches will be made and, therefore, his privacy is less invaded by such searches.[180] Also emphasized is the lack of criminal investigative purpose for the border search; the primordial purpose of the search is not "to apprehend persons, but to seize contraband."[181]

Again, however, the chief justification for the fourth amendment exception accorded to the nonselective and extensive border search lies in the lack of any less drastic alternative, either outside or within the search context. The practical problems inherent in policing a border are said to require that customs officials be exempt from probable cause; they must be free to react immediately based on suspicion.[182] The crimes with which the border search is concerned are not amenable to detection after the border has been crossed or to deterrence through the threat of apprehension and punishment. Moreover, the border search has not yet proved adaptable to a more selective preventive search system. Customs officials may develop an instinct for who is carrying contraband,[183] and their hunches may prove reasonably accurate in practice, but these intuitions do not approximate a scientific study. If a more sophisticated means of identifying potential smugglers could be developed, it would raise serious doubts as to the continuing validity of nonselective border searches.

The unconstitutional conditions analysis as applied to the fourth

178. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153-54 (1925); United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965); United States v. Marti, 321 F. Supp. 59, 62-64 (E.D.N.Y. 1970); Note, *Constitutionality*, *supra* note 17, at 139; Note, *supra* note 169, at 279; Comment, *Border Searches*, *supra* note 168, at 1011-12.

179. *See* Comment, *Border Searches*, *supra* note 168, at 1012, 1015; *cf.* Note, *supra* note 169. Both of these articles were concerned primarily with highly intrusive border searches of body cavities. From such a perspective, it is perhaps easier to view the rummaging of baggage or the frisking of the person as relatively nonintrusive.

180. *See, e.g.*, United States v. Stornini, 443 F.2d 833 (1st Cir.), *cert. denied*, 404 U.S. 861 (1971); United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970); United States v. Espinoza, 338 F. Supp. 1304 (S.D. Cal. 1972). The real connection between notice and the invasion of privacy is not drawn. It could amount to no more than a conclusion that the reasonableness of privacy expectations may be judged by the prevalence of police practices, or it simply could suggest that the adverse impact of the search can be mitigated by careful advance planning. *Compare* text accompanying notes 272-81 *infra*, *with* text accompanying notes 297-98 *infra*.

181. Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 362 U.S. 379 (1966); McGinley & Downs, *supra* note 5, at 323.

182. United States v. Warner, 441 F.2d 821, 832 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971); Landau v. United States Attorney, 82 F.2d 285, 287 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936); United States v. Marti, 321 F. Supp. 59, 62-63 (E.D.N.Y. 1970); Note, *supra* note 169, at 279. *See also* Note, *Constitutionality*, *supra* note 17, at 138-39.

183. *Cf.* Note, *supra* note 169, at 279.

amendment conditioned-benefit, area search, and border search cases has resulted in approval of the searches which have been involved. It by no means follows, however, that similar approval of nonselective air traveler screening is required. Each element of the doctrine must be carefully applied to screening before a judgment on that question can be made.

II. APPLICATION OF THE DOCTRINE TO AIR TRAVELER SCREENING

A. *Relevance*

1. *The Relevance and Effectiveness of Screening*

Air travel is an important benefit in modern society, which the government has a strong interest in protecting. Hijacking poses some threat to air travel safety, and it is accepted that air traveler screening is rationally related to protecting the benefit from this threat.[184] Moreover, it may be assumed that the government's interest in protecting air travel from hijacking is at least as strong as its interest in protecting its contracts or licenses from fraud or abuse, preventing the importation of contraband or unwanted aliens, assisting and rehabilitating welfare beneficiaries, or helping property owners to correct hazardous conditions on their property.

Air traveler screening is relevant, however, only as it protects the benefit and not in the beneficiary-assisting manner that distinguished the welfare home visit and building inspection cases. In the welfare or building inspection context, each visit or inspection was thought to aid the particular beneficiary being visited or inspected. The screening of a particular air traveler, however, does not aid that person in the same way. It does not teach the traveler how better to enjoy the benefit of air travel, nor does one traveler need to be screened to be assured that he poses no threat to his own safety. One traveler's safety is protected by the screening of the other travelers, not by his own screening, and vice versa.[185]

The fact that air traveler screening has a benefit-protecting relevance is a two-edged sword. The presence of this relevance reduces the likelihood that the benefit has been conditioned as a subterfuge for

184. Many courts have stressed the importance of the government's interest in preventing hijacking and the relevance of screening to that interest, even without doing so in a full scale unconstitutional conditions analysis. *See, e.g.*, United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973); United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973); United States v. Kroll, 351 F. Supp. 148, 151 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884 (8th Cir. 1973).

185. *But cf.* Note, *supra* note 10, at 1050.

achieving an independently desired invasion of rights.[186] On the other hand, this relevance creates a temptation to make the condition as broad as possible in order to achieve maximum protection, a temptation which may be less alluring when the primary purpose of the condition is to aid the beneficiary directly. This temptation suggests caution in weighing the relevance of screening. Any search is relevant to the government's interest in detecting and preventing crime. Nevertheless, the fourth amendment's probable cause and warrant requirements must be met before a nonconsent search may be found reasonable outside the conditioned-benefit context. The fact that screening is a relevant condition means only that its constitutionality will turn on the nature and extent of its invasion of fourth amendment interests and on the availability of less drastic means to protect air travel.

Despite the relevance of screening, there are limits on its effectiveness. It is most effective against hijackers who, carrying a concealed weapon or explosive, attempt to board a plane intending to take control of the aircraft, either for the simple purpose of being taken to a nonscheduled destination or for the additional purpose of using the craft and its passengers as hostages in order to extort some concession.[187] Screening is less effective against criminal behavior when the sole purpose is the destruction of the aircraft or the killing of passengers. While this purpose can be accomplished by a suicidal individual using a concealed weapon or explosive to shoot down or blow up a craft in the air, this modus operandi is extremely rare.[188] The result, whether suicidal or homicidal, can be accomplished more easily by planting an explosive in an unscreened bag or package carried in the hold of a plane. Screening is also ineffective against those highly dangerous incidents which begin on the ground, either with a kidnapping away from an airport, such as the incident at the 1972 Olympics in Munich,[189] or with a forcible storming of an airport gate.[190]

186. In this respect, screening is quite different from a condition which might require consent to the search of an individual's home in order to obtain air travel. Such a condition on a tax deduction or a government contract was termed outrageous by the dissenting justices in Wyman v. James. 400 U.S. 309, 330 (1971) (Douglas, J., dissenting); *Id.* at 343 (Marshall, J., dissenting). Such a condition would fail under the unconstitutional conditions doctrine as bearing no rational relationship to the benefit being conditioned. In contrast, air traveler screening, at the time and place the benefit of air travel is offered, meets this minimal test of relevance.

187. Many writers have sought to identify and assess the diverse motives which lead individuals to undertake hijackings. *See* Abramovsky, *supra* note 17, at 125-26; McGinley & Downs, *supra* note 5, at 297-301; Samuels, *supra* note 1, at 163; Comment, *supra* note 5, at 417. All of the motives, however, presume some plan to use control over the aircraft to accomplish an ulterior purpose instead of, or at least before, destruction of the craft and its passengers. *See* Rein, *A Government Perspective,* 37 J. AIR L. & COM. 183, 188, 191 (1971).

188. Since 1961, there has been only one domestic incident which may fit this category. *See* discussion note 440 *infra.*

189. *See* N.Y. Times, Sept. 6, 1972, § 1, at 6, col. 1.

190. *See id.,* Feb. 23, 1974, § 1, at 1, col. 4; *Id.,* Oct. 30, 1972, § 1, at 1, col. 2.

In addition, no screening system is foolproof.[191] Even under a wholly nonselective system a cleverly concealed weapon could escape notice. Moreover, under the 1973 system, only those travelers who activate the general metal detector and wand and fail to clear them after removing metal are frisked; no effort is made to detect nonmetal explosives. Further, very few manual inspections of carry-on baggage are so thorough as to discover a very small weapon or explosive which someone might try to use in a hijacking.

2. *The Sufficiency of the Screening Condition*

The belief that hijacking is a uniquely serious threat to air travel or a uniquely dangerous crime of violence could be combined with an awareness of the limited effectiveness of screening to create pressure to adopt a still more drastic response. However, even if the history of hijacking supported such a belief, a greater response would not be necessary or desirable, and, in fact, hijacking has not been so uniquely destructive of life or property that the search for the least drastic of the screening alternatives should be lessened.

This is not to say that hijacking is not a serious crime. A single incident may involve a substantial number of people,[192] expensive equipment, and, in many instances, a princely ransom.[193] The inherent drama of hijacking has resulted in extensive coverage in the mass media, generating a sustained public focus on hijacking and its perceived threats to public safety. Perhaps because the increase in hijacking incidents coincided with a period of intensive public concern with crime and violence in general, hijacking has been seen as epitomizing all the evils of what many believe to be a widespread crime wave. Because of these factors, aircraft hijacking evoked a uniquely frightened and hostile response. Out of this generalized anger, there evolved a demand that the crime be prevented at any cost and an accompanying willingness to acquiesce in almost any measures seen as combating hijacking.[194] This was expressed in the unusually high level of public

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Contra, State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972). In *Damon*, the court noted the difficulty of stopping a hijacking that begins at the gate, concluding with the non sequitur that this difficulty supports nonselective screening. *Id.* at 425, 502 P.2d at 1364. *See also House Hearings, supra* note 108, at 419; Comment, *supra* note 5, at 415-16; Butler letter, *supra* note 3.

191. *See* Brower, *International Enforcement of Air Security—United States Initiatives*, 18 VILL. L. REV. 1020, 1024 (1973).

192. The largest reported number of persons aboard any hijacked domestic aircraft was 379. See App. II, *infra* at 754, Item 77.

193. The largest ransom ever paid a hijacker in a single domestic incident was $2 million. App. II, *infra* at 762, Item 142. It was recovered. *Id.* A total of $9.4 million has been paid in ransom to domestic hijackers. *See Ransom Demands Total $12.7 Million*, AVIATION WEEK & SPACE TECH., Nov. 20, 1972, at 14.

194. The shift in January 1973 to a more thorough and universally applied screening

acceptance of the screening in use both before and after January 1973. Not only did most people not resent the imposition of screening, they welcomed it with a sense of relief.[195]

Public acceptance of screening can be explained in part by the impact which the prospect of hijacking may have on the anxieties naturally attendant to air travel. Thus, the prospect of hijacking simply adds one more element to an already anxious experience, creating such a desire to be free of that anxiety that one would submit to almost any condition to obtain that freedom.[196] The fear of hijacking is acknowledged in many court opinions. As one court stated: "It is difficult to imagine a more frightening and dangerous event than armed piracy of a passenger aircraft in flight."[197] Another court noted that: "[T]he crime of air piracy exceeds all others in terms of potential for great and immediate harm to others."[198] Perhaps because of fears like these, courts have, in some cases, approved responses to hijacking which go beyond simply conditioning air travel on consent to screening at the boarding gate.

One such response has been to relax the standards for conducting a *Terry*-type stop and frisk[199] of persons at the boarding gate or in the airport area, permitting inspections of carry-on luggage[200] on the

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system followed close on the heels of two spectacular incidents in the fall of 1972. *See* United States v. Davis, 482 F.2d 893, 897-902 (9th Cir. 1973); Comment, *supra* note 5, at 385-92; App. II, *infra* at 762, Item 14Z.

195. Early media reports indicated widespread public acceptance of the system instituted in January 1973. *See* NEWSWEEK, May 7, 1973, at 88; U.S. NEWS & WORLD REPORT, Feb. 19, 1973, at 66; Lindsay, *Air Riders Take Search in Stride*, N.Y. Times, Jan. 27, 1973, § 1, at 1, col. 7; *Id.*, Apr. 8, 1973, § 5, at 25, col. 6; Raleigh (N.C.) News & Observer, Aug. 12, 1973, § 3, at 6; *cf.* Abramovsky, *supra* note 17, at 139 n.62. *See also* Fenello, *supra* note 11; *Symposium—Skyjacking*, *supra* note 17, at 1063.

196. There are no in-depth psychological studies of the reactions of individuals who have actually experienced hijacking. However, one psychiatrist, after interviewing several victims of hijacking, found among them very positive feelings toward their experiences, combining a sense of being part of history with an identification with the hijackers' own iconoclasm and defiance of authority. D. HUBBARD, THE SKYJACKERS: THEIR FLIGHTS OF FANTASY 219, 220 (1971).

197. United States v. Epperson, 454 F.2d 769, 771-72 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

198. United States v. Moreno, 475 F.2d 44, 48 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

199. Terry v. Ohio, 392 U.S. 1 (1968), approved forcible detention and an accompanying pat-down frisk on the basis of facts that gave the officer reasonable suspicion to believe that the defendant was armed and dangerous and that the risk was necessary to protect himself and others from immediate danger. The consequence of meeting *Terry*-type standards in the screening context is that the frisk and perhaps other procedures can be carried out with reasonable force, thereby making consent and conditioning immaterial.

200. Permitting inspection of carry-on baggage is itself an extension of *Terry*, even when reasonable suspicion is present, since that case permitted only a carefully limited pat-down of the outer surfaces of an individual's clothing. Under the pre-1973 screening system, the frisk usually was completed before the baggage search was initiated. *See* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972). One court has held that a baggage search is improper if not preceeded by an unsuccessful frisk of the person. United States v. Meulener, 351 F. Supp. 1284, 1291-92 (C.D. Cal. 1972). It is not clear what this requirement accomplishes. If the frisk turns up nothing, the baggage may be

basis of facts which do not amount to the reasonable suspicion normally required.[201] This response was adopted in its most limited form in *United States v. Lopez*,[202] where the court upheld the unconsented frisk of a traveler at the boarding gate on the basis of his matching the Hijacker Personality Profile, activating the magnetometer, and failing to produce identification.[203] While the court conceded that such facts would not justify a frisk outside the airport context,[204] it concluded that, "in the light of the circumstances, a 6% danger of arms suffices to justify a frisk."[205] The court in *United States v. Epperson*[206] went further, permitting a frisk on the basis of an unexplained high magnetometer reading.[207] Similarly, in *United States v. Moreno*,[208] the court found that the "gravity of the air piracy problem" justified the application of special *Terry* standards to an airport frisk, even though the defendant had not yet entered the boarding or screening area.[209]

Another such response is to move forward the point at which the traveler is said to have impliedly consented to screening and to make the consent irrevocable.[210] In *United States v. Skipwith*,[211] the court

searched as the only remaining place where a weapon might be concealed. Yet, if the frisk uncovers a weapon, it may provide the basis for an arrest and a search of the baggage incident to that arrest under Chimel v. California, 395 U.S. 752 (1969), and United States v. Robinson, 414 U.S. 218 (1973).

201. The *Terry* standard of reasonable suspicion is not very precise, requiring less certainty than probable cause but more certainty than an "inchoate and unparticularized suspicion or 'hunch.'" 392 U.S. at 27. *See also* Adams v. Williams, 407 U.S. 143 (1972). It requires at least "articulable facts" on which "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, 392 U.S. 1, 27 (1968).

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

203. *Accord*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972). *Contra*, United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972). Other courts have approved a forcible frisk after detention, but in each case additional facts had been turned up during the interview. *See* United States v. Bell, 335 F. Supp. 797, 802-03 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (selectee admitted that he had just been released from the "Tombs" and was out on bail on murder and narcotics charges).

204. *See* 328 F. Supp. at 1097-98.

205. *Id.* at 1097.

206. 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

207. "When the high metal indication of the magnetometer was not satisfactorily explained by Epperson, the subsequent physical 'frisk' of his jacket was entirely justifiable and reasonable under *Terry*." *Id.* at 772. *See also* State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972); People v. Bleile, — Cal. App. 3d —, 108 Cal. Rptr. 682 (Ct. App. 1973).

208. 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

209. *Id.* at 51. *See also* cases cited note 21 *supra*.

210. The concept of implied consent appears in the following sources: United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973); United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973); United States v. Davis, 482 F.2d 893, 913-14 (9th Cir. 1973); United States v. Kroll, 351 F. Supp. 148, 155 (W.D. Mo.), *aff'd*, 481 F.2d 884 (8th Cir. 1973); People v. Erdman, 69 Misc. 2d 103, 105-06, 329 N.Y.S.2d 654, 657-58 (Sup. Ct. 1971); Comment, *Constitutional Problems*, *supra* note 17, at 363; Note, *Constitutionality*, *supra* note 17, at 151-52; Comment, *supra* note 5, at 407. *But see* United States v. Meulener, 351 F. Supp. 1284, 1287-88 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971). It is generally agreed that before a consent to screening may be implied from conduct such as purchasing a ticket or stepping in line at the screening

found that travelers must cooperate with the screening procedure from the time they step in line at the screening checkpoint, asserting that after this point travelers can no longer avoid screening by abandoning their plans to travel by air.[212] Arguably, this point could be advanced to the time a ticket is purchased or the airport is entered.[213] The practical effect of making the consent irrevocable is to permit the forcible screening of those who pass it.[214] Conceptually, however, it simply means that the conditions on air travel have been broadened to include the loss of the opportunity to change one's mind about screening and are imposed earlier and on a larger class of persons than those who seek to board an aircraft.

Neither the diluted reasonable suspicion standard nor the advanced point of consent is necessary, even assuming that hijacking poses a unique threat to air safety. The threat of in-flight hijacking, which screening is most effective in preventing, can be avoided by denying boarding to any person who does not consent at the moment screening is about to occur.[215] It does not increase the risk of in-flight

checkpoint, the traveler must have known that screening was going to occur. *See* Note, *Constitutionality, supra* note 17, at 151. Whether such knowledge was in fact possessed by a particular defendant has been decisive in some cases. *See* United States v. Miner, *supra* at 1076 (holding frequent air travel and the presence of signs at the airport entrance as sufficient to permit imputation of such knowledge to frequent air travelers); United States v. Skipwith, 482 F.2d 1272, 1274 (5th Cir. 1973) (holding the defendant knew or should have known screening would occur); United States v. Davis, *supra* at 915 (remanding for a finding on this issue); People v. Erdman, *supra* at 105-06; 329 N.Y.S.2d at 657-58 (signs insufficient). *See also* Comment, *Constitutional Problems, supra* note 17, at 363 (arguing that signs alone ought to be sufficient to impute such knowledge).

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

212. The court did not use the word consent in its opinion. There are several indications, however, that the concept of consent and an acceptance of conditioning air travel on that consent were at the heart of its rationale. The court relied on the fact that Skipwith "came to the specific part of the airport where he knew or should have known that all citizens were subject to being searched," *id.* at 1274, and noted that the person to be searched "must voluntarily come to and enter the search area, [and] has every opportunity to avoid the procedure by not entering the boarding area." *Id.* at 1276. In addition, a distinction was made between "the person entering any specific area—here the boarding gate—where searches are regularly conducted, and one like Moreno who was in an airport restroom." *Id.*

213. No court has specifically done so. However, a finding that *Terry* standards apply less stringently in the airport could be premised, in part, on the unarticulated assumption that entry into the airport may be conditioned on consent to stop and frisk on less than reasonable suspicion. *Cf.* United States v. Moreno, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). "[W]e think that the airport, like the border crossing, is a critical zone in which special fourth amendment considerations apply." 475 F.2d at 51.

214. If the concept of implied consent adds anything to the analysis of air traveler screening it is as an expression of this result. There is no need to rely on implied consent if there is actual cooperation with a screening procedure, since the consent implicit in such cooperation may be so strong that it is tantamount to express consent. If cooperation does not occur and the procedure is forcibly imposed, a conclusion that the traveler impliedly and irrevocably consented at an earlier time is simply an expression of approval for the use of that force. It does not necessarily give a reason for that approval.

215. *See* United States v. Albarado, 495 F.2d 799, 808-09 (2d Cir. 1974); United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973); United States v. Davis, 482 F.2d

hijacking to allow those who refuse to consent to screening to leave the airport; they will not be on the plane.

It has been argued that allowing such persons to leave the airport would allow hijackers to play "heads-I-win, tails-you-lose" with the system, thus encouraging hijack attempts.[216] There are two flaws in this argument. First, to the extent that it assumes that any individual who decides not to board is more likely than others to be a hijacker, it draws an inference of hijacking purpose from the decision not to submit to screening.[217] It is questionable whether any negative inference may permissibly be drawn from what would otherwise represent the exercise of a constitutional right.[218] Moreover, the inference is unwarranted. There are many innocent reasons, as well as criminal reasons unconnected with hijacking intent, for deciding not to go through with screening.[219] Even if such an inference were warranted, it would not be strong enough standing alone to amount to reasonable suspicion under an undiluted *Terry* standard.[220] Most important, any potential hijacker who leaves the airport as part of a game of heads-I-win, tails-you-lose will confront the same impasse the next time he tries to board the

893, 914 (9th Cir. 1973); United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973); State v. Miller, 110 Ariz. 491, 520 P.2d 1115 (1974); *cf.* People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (Ct. App. 1973) (illustrating revocation of implied consent). The Second Circuit has gone so far in narrowing the consent condition as to hold that even a traveler who has been frisked may still be denied boarding only if he refuses to consent to the opening of an object discovered during the frisk. United States v. Albarado, *supra* at 809.

216. United States v. Skipwith, 482 F.2d 1272, 1281 (5th Cir. 1973) (Aldrich, J., dissenting). This part of Judge Aldrich's dissent was adopted by a majority of the court. *Id.* at 1277.

217. In support of such an inference, it could be argued that willingness to cooperate is so widespread, and legitimate reasons for asserting fourth amendment rights at the boarding gate so few, that requiring cooperation is a relevant way to determine immediately who is and who is not a potential threat to air safety. Under this reasoning, refusal to permit screening could be taken as evidence of potential danger. This position was rejected in State v. Miller, 110 Ariz. 491, 520 P.2d 1115 (1974).

218. Inference of guilt was once relied upon to deny public employment to those who refused, on either first or fifth amendment grounds, to answer questions relating to organization memberships. *See* Daniman v. Board of Educ., 202 Misc. 915, 118 N.Y.S.2d 487 (Sup. Ct. 1952), *aff'd sub nom.* Shlakman v. Board of Higher Educ., 282 App. Div. 718, 122 N.Y.S.2d 286 (1953), *aff'd sub nom.* Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954), *rev'd sub nom.* Slochower v. Board of Educ., 350 U.S. 551 (1956). In *Slochower*, however, the Supreme Court emphatically rejected this sort of negative inference in the fifth amendment context, partly on the ground that there are many reasons other than guilt for asserting fifth amendment rights. 350 U.S. at 557. *See also* Cohen v. Hurley, 366 U.S. 117, 125-27 (1961); Beilan v. Board of Pub. Educ., 357 U.S. 399, 409 (1958); Konigsberg v. State Bar (I), 353 U.S. 252, 259-61 (1957); Willcox, *supra* note 36, at 54-55.

219. *Cf.* Slochower v. Board of Educ., 350 U.S. 551, 557 (1956).

220. In *Terry*, the Court may have permitted the officer to consider refusal to cooperate as a factor in forming reasonable suspicion, since the frisk was not initiated until after the defendant mumbled in response to the officer's initial questions. 392 U.S. 1, 7 (1968). In Adams v. Williams, 407 U.S. 143 (1972), the defendant refused to cooperate fully, merely rolling down the window of his car instead of stepping out of the car as requested, and the frisk was not initiated until after this. *Id.* at 145. However, in both cases noncooperation was only part of the circumstances and was not the sole fact known about the defendants, as it would be in many screening situations.

plane.[221]

It is also unnecessary to relax *Terry* standards or make consent irrevocable at a point before the screening checkpoint in order to protect the safety of those in the airport from frustrated hijackers staging spontaneous shootouts or from persons whose modus operandi presumes a storming of the boarding gate. An argument that more drastic responses may be justified solely because the airport itself may be the target of violent criminal activity is unsupportable. *Terry* reflected a desire to allow an officer to protect himself and others on a busy street from immediate harm during an investigation by frisking the suspect.[222] But it did so *only* by reducing traditional probable cause standards to those of reasonable suspicion.[223] It did not reduce the standard further, despite the danger inherent in the many situations in which investigative stops and frisks take place. The airport is not sufficiently different from typical *Terry* situations to call for a further reduction of standards, still less for a condition imposing forcible screening procedures on all who enter an airport or its boarding areas. Only a small number of hijacking and hijacking-related incidents have involved violence at the airport,[224] and there is no reason to believe that the incidence of this violence was any higher than that affecting other locations. Nor is the presence of airport crowds a factor justifying greater protection than that given other locations, since many of them, including the city streets where most stop and frisks occur, are as likely to be crowded when a crime occurs or an investigation of suspicious behavior is initiated.

Even if it is presumed that hijacking is a uniquely dangerous crime, it has been shown that more drastic responses than conditioning air travel on consent to screening at the boarding gate are not justified. Furthermore, the incentive to seek the least drastic means of imposing that condition is increased if in-flight hijacking is not a uniquely dangerous crime of violence or threat to air safety. The history of domestic hijacking supports this contention.

A major task in the preparation of this Article involved assembling data regarding the 144 domestic hijackings which have occurred since 1961 and about other hazards to air safety and crimes of violence. This data, which is presented in four appendices at the end of the Ar-

221. The defendants in *Terry* were as likely to persist in their efforts to hold up a store as a hijacker would be, yet the court did not give that as a reason for permitting their frisk in the absence of particularized facts indicating that they were in fact potential robbers.

222. 392 U.S. 1 *passim* (1968).

223. *Id.* at 30.

224. The research reflected in Appendix II discloses only four such incidents from 1961 to 1974. *See* note 440 *infra.*

ticle,[225] demonstrates that hijacking has not added measurably to the risk of death or injury which inheres in air travel or to the economic cost of flying mishaps. More strikingly, it indicates that hijacking has been among the least dangerous or costly of all crimes in America in the percentage of incidents resulting in injury or death to a victim, in the percentage of all victims injured or killed, and in the risk of injury which the crime poses for air travelers. Moreover, the hijacking injury and death rate was closely related to the response of passengers, crew, and law enforcement officers. Over three-fourths of the passenger and crew deaths or injuries resulted from actions taken in opposition to the hijacking, indicating that the danger of hijacking might have further been reduced by greater cooperation with the hijackers.

These conclusions reflect a common sense view of the dangerousness of hijacking, a view unobscured by a deeper emotional reaction to the crime. Hijacking is a crime in which the perpetrator has little to gain and much to lose by inflicting injury on any of his or her victims, either during or after the commission of the crime. Even the goal of avoiding detection by silencing the victims and preventing identification is impracticable or irrelevant in most cases, and those incidents in which killing is the object are usually not amenable to screening.[226] Thus, a quest for the least drastic means to impose a screening condition should proceed unburdened by any exaggerated view of the dangers of hijacking.

3. *The Need for Screening*

Although hijacking is not as dangerous as it is generally perceived to be, the risk of death or injury is still present in each incident, and those subjected to this risk are deserving of effective protection. The primary difficulty lies in finding the least drastic means of effectively dealing with the hijacking problem. Even screening might be abandoned if other means could as effectively prevent the recurrence of hijacking. However, no nonscreening alternative seems likely to do so.

a. *Penal Sanctions.* Without screening, society could rely primarily on what, apart from education and moral suasion, has always been its chief weapon against criminal behavior—the deterrent effect of the penal sanction. In pure Benthamite terms, to achieve this deterrence it is necessary to make hijacking penalties severe enough to offset whatever gain a potential hijacker may expect.[227] In the United States, hi-

225. See text accompanying notes 418-45 *infra.*
226. See text accompanying notes 188-90 *supra.*
227. 1 THE WORKS OF JEREMY BENTHAM 396 (J. Bowring ed. 1843).

jacking is a federal offense carrying a 20-year prison term,[228] and the crime is a prime candidate for inclusion in any restoration of the death penalty.[229] United States prosecutors have been seeking and obtaining increasingly severe sentences against captured hijackers.[230]

For the deterrent to be credible, the risk of detection and apprehension must be perceived by potential hijackers as being substantial.[231] In hijacking, the chance of detection is virtually 100 percent, since the fact of the crime and the identity of the criminals become known as part of the necessary modus operandi of the crime. However, as long as the hijacker could end a hijacking in a nation that would offer sanctuary, there has existed a low risk of punishment.[232] To eliminate these sanctuaries, the United States took the lead in the 1960's in drafting and seeking support for three international treaties, two of which require signatories to prosecute and punish, or to extradite, all hijackers who come within their jurisdictions.[233] While there has been substantial adherence to these treaties,[234] it is by no means universal, and many sanctuary nations have not signed.[235] Still, Cuba, one of the chief sanctuaries for United States hijackers, has entered into an extradition treaty with the United States,[236] and many former sanctuary nations seem to be adhering to internally-generated policies of dealing severely with hijackers. Thus, to the person seeking to avoid apprehension and punishment, hijacking is becoming one of the least promising of all criminal ventures.

The utility of punishment as a deterrent to hijacking is still undermined by the fact that the prospect of future punishment is meaningless to a large number of hijackers. Psychological studies indicate that many hijackers act in response to internal compulsions, amounting in many cases to severe mental illness, which place them far beyond re-

228. 49 U.S.C. § 1472(i)(1) (1970). This section, as originally enacted, provided for a discretionary death penalty, or a 20-year term if the death penalty was not imposed. It is assumed that after Furman v. Georgia, 408 U.S. 238 (1972), only the 20-year term remains.

229. A bill to restore the death penalty for several crimes, including those hijackings in which any person suffers severe bodily harm or death, passed the Senate on March 13, 1974. N.Y. Times, Mar. 14, 1974, § 1, at 1, col. 6, and was in House committee when the 93d Congress ended. CCH CONGRESSIONAL INDEX 2521 (1974).

230. *Symposium—Skyjacking, supra* note 17, at 1076-78.

231. Andenaes, *General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-64 (1966).

232. *See* McGinley & Downs, *supra* note 5, at 299-300.

233. For summaries of the history and terms of these treaties, see Brower, *supra* note 191, at 1023; McGinley & Downs, *supra* note 5, at 296; Comment, *supra* note 5, at 417-18 n.216. As long as escape was part of the actor's plans, universal adherence to such a policy also would deter conduct not amenable to screening, such as storming the boarding gate. Brower, *supra* note 191, at 1026-27.

234. *See* Brower, *supra* note 191, at 1023.

235. For a list of major nonsignatories as of 1972, see McGinley & Downs, *supra* note 5, at 300.

236. *See* N.Y. Times, Feb. 16, 1973, § 1, at 4, col. 1.

sponding to the threat of punishment. They may wish to be caught and punished; they may hope to die trying; or the impulse to act may be so strong as to blur or obliterate any calculation of what will happen after the effort is made.[237]

Another group of hijackers, whose internal psychodynamics may not be much different from the former group, includes those who act to achieve goals so intrinsically valuable that no punishment, even death, can offset the hope of achieving them. These are the political hijackers whose cause transcends all personal considerations; they truly hope to achieve their demands for release of political prisoners, ransom for their cause, or a change in government policy. Others may be content with simply disrupting air travel, but all are willing to die martyrs in an unsuccessful attempt or to be put to death afterward if they succeed. For them the prospect of being caught and punished is no deterrent.

It could be argued that if screening denies deranged or politically-motivated hijackers access to planes in flight, they will shift to more dangerous activity, beginning their hijackings away from the airport or storming the airport or boarding gate. If so, the number of incidents instigated by nondeterrables would not be reduced by screening and those instigated would become more dangerous. None of these other activities, however, is as simple or risk-free as in-flight hijacking or as likely to accomplish purposes other than disruption. For this reason and because human behavior is not predictable, in-flight hijacking by nondeterrables is still likely to occur more frequently if there is no screening than the other incidents will if there is. Additionally, the presence of many nondeterrables among the population of potential hijackers indicates that the effective protection of air travel probably will not be accomplished by penal sanctions and extradition threats alone.

b. *Noncompliance.* Attempts have been made by some governments to adhere to an announced policy of not granting the demands of any hijackers.[238] The theory is that such a policy would remove entirely any incentive to attempt hijackings. Such a policy has not been adopted nor does it appear to have been seriously contemplated in the United States. The probable reason is that in the American experience there have been no hijack demands that, singly or as part of a pattern, so threaten the very existence of the nation or other vital interests that they outweigh, in the short run, the value of the lives under the control of the hijackers. Even on a case-by-case basis it is difficult to conceive

237. *See* D. HUBBARD, THE SKYJACKERS: THEIR FLIGHTS OF FANTASY (1971); Dailey, *supra* note 1, at 1008-09; McGinley & Downs, *supra* note 5, at 301.
238. McGinley & Downs, *supra* note 5, at 299 n.52.

of many situations where passengers' lives would be willingly sacrificed in order to avoid meeting immediate demands or to discourage future hijackings. Moreover, even if such a policy were adopted and adhered to, it would affect only those hijackers whose reasons for hijacking were rationally related to their demands. The wholly irrational hijackers would not be affected by such a policy.

c. *Armed Guards.* In the early 1970's, the FAA adopted a Sky Marshall program under which armed federal marshals traveled on every scheduled domestic flight.[239] This invisible police presence, however, appeared to have little deterrent effect on hijacking. A hijacker could simply take another passenger or a crewmember hostage, thus neutralizing the marshal's effectiveness. Also, any use of armed responsive force within the cabin of an airborne plane seemed so likely to increase the risk of injury or death without effectuating a significant deterrent effect that it became almost counterproductive as a means of protecting the safety of air travel. Therefore, it was abandoned.[240]

d. *Sealing the Cabin.* Another protective measure that has been suggested to cope with hijacking is sealing the pilot's cabin and other control areas of the aircraft so that they could not be reached from the passenger's compartment.[241] The chief utility of such a move would be to protect the pilots from becoming the immediate victims of the acts of the hijackers. In so doing, this measure might further reduce the already minimal risk to the safety of all passengers and crew posed by the possibility of an airplane crash following the injury or death of a pilot. It would not, however, protect those in the passenger compartment from being injured or killed by the hijackers. Nor would it seriously interfere with the hijacker's ability to commandeer the aircraft, since one hostage from among the passengers or crew would, in the absence of a policy of nonaccession, be adequate to extort changes in the flight plan, even from an isolated crew. Thus, this measure also seems ineffective as a means of protecting air travel from the threat of hijacking.

B. *Extent of Impact on Fourth Amendment Rights*

In determining the impact of air traveler screening on fourth amendment rights, the threshold inquiry is whether any screening procedure amounts to a search or seizure,[242] since the amendment uses

239. *See, e.g.*, Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 699, 704 (1969); Comment, *supra* note 5, at 386-87 n.40.
240. *See, e.g.*, Brower, *supra* note 191, at 1024; Fenello, *supra* note 11, at 999.
241. Evans, *supra* note 239, at 704; AVIATION WEEK & SPACE TECH., June 19, 1972, at 21.
242. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

those terms to identify the government conduct that is restricted.[243] If no screening procedure amounts to a search or seizure, the fourth amendment prohibitions would be inapplicable, and a quest for a less drastic system would be superfluous.[244] The quest also would be superfluous if the purposes of screening or the context in which it is carried out were found to offset the physical intrusiveness of the procedures, thus reducing the process to something less than a search.[245] However, if the procedures and the process do amount to a search, it is necessary to determine what screening system has the least impact on the values protected by the fourth amendment.

In *Katz v. United States*,[246] the Supreme Court stated the criterion of a search to be whether "[t]he Government's activities violated the privacy upon which [the individual] justifiably relied."[247] "What a person knowingly exposes to the public," it said, ". . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[248] Although privacy is the essence of what the fourth amendment protects, it remains largely undefined. Privacy includes, to some extent, the individual's interest in being "let alone,"[249] the interest in keeping all uninvited members of the public from those aspects of one's affairs which one has not chosen to reveal,[250] as well as the interest in the physical integrity of one's person.[251] Whether privacy is invaded by air traveler screening requires a more detailed examination of the procedures that make up the 1973 system and its predecessors and of the process of screening under any system.

1. *Screening Procedures Under the 1973 System*

a. *Procedures.* The 1973 air traveler screening system involves seven discrete procedures which may affect some or all travelers:

243. U.S. CONST. amend. IV.
244. *Cf.* United States v. Dionisio, 410 U.S. 1 (1973); United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966).
245. *Cf.* Cady v. Dombrowski, 413 U.S. 433 (1973), discussed at note 287 *infra.*
246. 389 U.S. 347 (1967).
247. *Id.* at 353 (citations omitted).
248. *Id.* at 351-52 (citations omitted).
249. *Cf.* Katz v. United States, 389 U.S. 347, 350-51 (1967).
250. Miller calls this aspect of privacy "[t]he individual's ability to control the circulation of information relating to him [or her]." A. MILLER, THE ASSAULT ON PRIVACY 25 (1971). For a fuller discussion of the meaning of privacy, see A. WESTIN, PRIVACY AND FREEDOM 32-42 (1967).
251. *See* Terry v. Ohio, 392 U.S. 1 (1968). While the Court indicated in Davis v. Mississippi, 394 U.S. 721 (1969), that the mere taking of fingerprints might not amount to a search, apart from the preceding seizure of the person, *id.* at 727, *as interpreted in* United States v. Dionisio, 410 U.S. 1, 15 (1973), it has subsequently held that the slightly more intrusive step of taking scrapings from underneath fingernails is a search. Cupp v. Murphy, 412 U.S. 291 (1973). Since this procedure involves only the most minimal invasion of privacy, calling it a search underscores the fourth amendment's protection of personal integrity. *See also* Schmerber v. California, 384 U.S. 757 (1966).

manual inspection of carry-on baggage, low-level x-ray weapon detector check of carry-on baggage, manual inspection of the person, pat-down frisk, removal of metal items by the traveler, wand check of the person, and check of the person by the general metal detector. As will be shown, all amount to searches under the fourth amendment.

(1) *Manual inspection of carry-on baggage.* In this procedure the inspector opens each piece of luggage and looks through it, lifting or moving aside clothing or other contents, opening inside compartments, opening smaller containers such as toilet kits and cosmetic cases, and sometimes dumping the entire contents on a table for closer inspection. This is usually done in full view of other travelers and bystanders.[252] The procedure involves a substantial invasion of privacy. Many articles are carried in a purse, briefcase, airline bag, or suitcase not only for convenience, but also in order that they may not be open to public view. For many people it is embarrassing to have these articles exposed to a stranger, no matter how innocent the articles may be from a criminal perspective. Indeed, this kind of procedure is so obviously within the strictures of the fourth amendment that the Supreme Court has never been called upon to hold that such a procedure is a search, even outside the screening context. The Court has often assumed so,[253] and if the fourth amendment's protection for the security of effects is to have any significance, an individual must be able to justifiably rely on the expectation that the contents of closed containers will remain free from peering eyes and rummaging hands.[254]

(2) *Low-level x-ray weapon detector check.* Under this procedure, the carry-on baggage remains shut and is passed on a conveyor belt through the detector. Some of these devices project onto a television-type screen an image of the objects inside each piece of baggage, while others appear to project only a complex of lines which enable a trained monitor to deduce the size and nature of each such object.[255] This procedure also invades privacy, although to a lesser degree than the manual inspection since the bag remains closed and there is no indiscriminate viewing of its contents or disruption of their order. However, the very process of projecting even an imprecise image of the shape and relative location of all items in any deliberately closed container is so similar to actually looking into the container as to partake of the essence of a search. The x-ray weapons detector does amount, then,

252. See authorities cited note 3 *supra.*
253. *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (duffel bag); Simmons v. United States, 390 U.S. 377 (1968) (suitcase).
254. *Accord,* United States v. Kroll, 351 F. Supp. 148, 151-52 (W.D. Mo.), *aff'd,* 481 F.2d 884 (8th Cir. 1973); Note, *supra* note 10, at 1058; Note, *Constitutionality, supra* note 17, at 135.
255. See authorities cited notes 3-4 *supra.*

to a search within the fourth amendment.[256]

(3) *Manual inspection of the traveler's person.* This procedure, usually conducted in an office or a booth, involves reaching into pockets and under the outer surface of clothing.[257] Such a process not only results in discovery and disclosure of items kept from a stranger's view, but also brings the inspector into direct contact with the body, invading the individual's interest in the physical security and integrity of his or her person as well as his or her broader privacy interests. It is so clear that this type of procedure is a search that the Supreme Court never has so held, but rather has assumed that it constitutes a search.[258]

(4) *Frisk. Terry v. Ohio*[259] established that a pat-down frisk is also a search under the fourth amendment.

> [I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity."[260]

While the screening frisk may be performed in an office or booth, the invasion of personal integrity and privacy is undiminished, and even in this context it remains a search.

(5) *Removal of metal.* The procedure which requires a traveler to remove any metal items and hand them over to an inspector also constitutes a search. Although this procedure involves no offensive touching by another person and no disclosure of any articles other than those actually produced by the traveler, the end result is to reveal articles which the traveler had otherwise chosen not to expose. By so requiring, this procedure may work a deeper invasion of privacy, as opposed to personal integrity, than a frisk.

The fact that the traveler is allowed to produce the desired articles is without constitutional significance. The similar production and surrender of property in compliance with a subpoena duces tecum is considered a search.[261] And, in *Davis v. United States*,[262] in which

256. Adverse environmental effects of the x-ray weapons detector has, at least in one instance, resulted in terminating its use for a short time. N.Y. Times, May 24, 1974, at 34, col. 5.

257. See authorities cited notes 3-4 *supra.*

258. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

259. 392 U.S. 1 (1968).

260. *Id.* at 16-17.

261. Hale v. Henkel, 201 U.S. 43 (1906).

> While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the

a service station operator was persuaded to go into a locked storeroom and bring out and turn over to Office of Price Administration agents a number of gasoline rationing coupons, the Court assumed that this method of obtaining the coupons amounted to a search and seizure.[263] By analogy, the forced removal of metal articles by the air traveler is a search and seizure under the fourth amendment.

(6) *Wand check.* Under this procedure, a hand-carried metal detector about the size and shape of an electric charcoal lighter is passed over the traveler from head to toe, either lightly touching or barely missing the surface of the skin and clothing.[264] This procedure invades or immediately threatens personal integrity. In operation, style, and probable emotional impact, it strongly resembles a pat-down frisk. Moreover, while it does not disclose the identity, contours, or size of the metal which it locates, the disclosure of the precise location of a metal item can in some instances be tantamount to disclosure of the nature of the item itself, and prove as embarrassing. Thus, in operation and effect, use of the wand amounts to a search under the fourth amendment.

(7) *General metal detector.* Here, the traveler steps through an arch about 6½ feet tall, 3 feet wide, and from a few inches to a few feet deep. The detector senses all metal, whether ferrous or nonferrous, located anywhere on the person of the traveler, and computes its aggregate mass, usually without determining the location, mass, or shape of any particular metal item.[265] Its activation may light up a console monitored by an inspector, or the detector itself may ring or buzz.[266]

This procedure presents fewer threats to the traveler's interest in personal security and privacy than any previously considered method. The traveler's body is not touched. The identity, shape, or location of any particular metal item is not discovered. The detector discloses only that there is or is not a predetermined aggregate amount of metal of some kind somewhere on the person. Even this fact, however, is not something that the traveler has chosen to disclose to the public, nor is it necessarily so neutral in its content or so devoid of connotation that no one would care if the whole world knew the fact. Moreover, the

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Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person . . . is entitled to protection.

Id. at 76. *See also* Mancusi v. DeForte, 392 U.S. 364, 370-72 (1968).

262. 328 U.S. 582 (1946).

263. *Id.* at 587, 594-95 (Frankfurter, J., dissenting). *See also* Chimel v. California, 395 U.S. 752 (1969) (opening of bedside table drawers by defendant's wife at direction of officer treated as search).

264. *See* authorities cited notes 3-4 *supra.*

265. *See* discussion note 5 *supra.*

266. *See* authorities cited notes 3-4 *supra.*

operation of the detector necessarily creates a checkpoint, and the need to stop there, even briefly, interferes with that freedom of movement which is protected by the fourth amendment's prohibition of unreasonable seizures.[267] For these reasons, this procedure should be considered a search. Indeed, if it is not a search, there is no basis for objecting to its use on every street corner, a prospect which underscores the necessity, as well as the accuracy, of characterizing it as a search.[268]

(8) *Comparisons.* Although all of these procedures are searches, they are not equally intrusive, and they are arranged within the 1973 system in order of increasing intrusiveness. Of the procedures affecting only carry-on baggage, the x-ray metal detector is less intrusive than the manual inspection. Of the procedures affecting only the person, the general metal detector is least intrusive, both in application and neutrality of results. The wand, in forcing a personal encounter with an inspector, in its style of operation, and in the potential embarrassment of the disclosure of the location of metal, is more intrusive, but still less so than the removal of metal by the traveler, which actually discloses otherwise concealed items. More intrusive still is the frisk, and most of all is the manual inspection of the person.

It is not clear whether the frisk of the person or the manual inspection of carry-on baggage is more intrusive. Some courts have stated that the former is the greater intrusion, because it involves the integrity of the traveler's person.[269] Other courts, in judging the rea-

267. *But cf.* Terry v. Ohio, 392 U.S. 1, 16, 19 n.16 (1968).

268. The majority of courts and commentators that have asked whether the magnetometer check is a search have answered the question in the affirmative. *See, e.g.,* United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769, 770 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972); State v. Damon, 18 Ariz. App. 421, 423, 502 P.2d 1360, 1362 (1972) (used on carry-on baggage), *noted in* "Airport Searches of Carry-On Luggage," 15 ARIZ. L. REV. 593, 720 (1973); Abramovsky, *supra* note 17, at 135; Note, *supra* note 10, at 1055; Note, *Constitutionality, supra* note 17, at 135; Comment, *supra* note 5, at 401-02; *cf.* United States v. Bell, 464 F.2d 667, 672-73 (2d Cir. 1972), *cert. denied,* 409 U.S. 991 (1972); State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974). Characterization of this procedure as a search has rested chiefly on the electronic nature of the device, *see* Note, *supra* note 10, at 1055; Note, *Constitutionality, supra* note 17, at 135, and on the fact that the metal which is detected is located out of sight. *See also* Abramovsky, *supra* note 17, at 135; Note, *supra* note 10, at 1055. One commentator has suggested that it is impossible to distinguish, in relevant fourth amendment terms, between the general metal detector or magnetometer and other electronic devices which might be used in the screening process, such as a fluroscope or x-ray machine. *See* Comment, *supra* note 5, at 403.

Most courts that have characterized the magnetometer check as a search have concluded that this search may reasonably be imposed on all air travelers, or at least that their travel may be conditioned on submission to it, thus giving the same permission to the use of this device as it would have if it were not classified as a search. *See* United States v. Slocum, *supra*; United States v. Epperson, *supra*; State v. Damon, *supra.* This approach allows the courts to reserve the question of whether the device could be used indiscriminately outside the screening context, while justifying its use in that context on the basis of the special exigencies of the hijacking menace.

269. *See, e.g.,* United States v. Kroll, 351 F. Supp. 148, 151-52 (W.D. Mo.), *aff'd,* 481 F.2d 884 (8th Cir. 1973); People v. Bleile, — Cal. App. 3d —, 108 Cal. Rptr. 682, 688 (Ct. App. 1973).

sonableness of pre-1973 screening under *Terry* standards, have held that carry-on baggage could not be searched until after a frisk had been conducted, reflecting a view that the baggage inspection is the greater intrusion, as well as reflecting a literal adherence to the scope limits of the pat-down frisk permitted on the basis of *Terry*-type reasonable suspicion.[270] This view is consistent with the Supreme Court's holding that a frisk may be initiated on less than probable cause. The Court, however, has never expressly authorized an inspection of personal effects on a lesser standard.[271] The determination that in the 1973 system the screening of carry-on baggage would be conducted independently of the screening of the person, and the interposition of a larger number of less intrusive procedures ahead of the frisk, may indicate a judgment that the baggage inspection is no more intrusive than the frisk. The best judgment probably is that their impact on fourth amendment values is equal, the inspection working a fuller disclosure, the frisk being more intimate, and both being serious invasions of personal privacy.

b. *Process.* Even though each of the procedures used in the 1973 system amounts to a search, there are three arguments which have been advanced urging that in the context of air traveler screening they either have no cognizable impact on fourth amendment values or have so slight an impact as to be entitled to no weight in an unconstitutional conditions balance. None of these arguments withstands analysis.

(1) *Expectations of privacy.* It might be argued that no screening system can amount to a search since the prevalence of screening removes any justifiable expectation of being free from screening at the airport.[272] This argument grossly distorts the reasonable expectation of privacy criterion. It implies that the government, simply by adopting a set of police practices and consistently following them at certain times or places, can remove ipso facto the justification for an individual's expectations of privacy. Adoption of this view would turn the expectation of privacy test into a device by which constitutional protections depend

270. *See* United States v. Meulener, 351 F. Supp. 1284, 1292 (C.D. Cal. 1972). *See also* United States v. Crain, 485 F.2d 297 (9th Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); People v. Bleile, — Cal. App. 3d —, 108 Cal. Rptr. 682 (Ct. App. 1973). In these cases the frisks preceded the baggage inspection.

271. *Compare* Terry v. Ohio, 392 U.S. 1 (1968), *with* Frazier v. Cupp, 394 U.S. 731 (1969).

272. Language suggestive of such reasoning was used by the Court in United States v. Biswell, 406 U.S. 311 (1972), when it asserted that inspections of the storerooms of firearms dealers "pose only limited threats to the dealer's justifiable expectations of privacy." *Id.* at 316. In context, however, this language appears simply to state the consent rationale which the Court later said had been decisive in that case. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

solely on the nature of police practices prevailing at any given time and place.

In *Katz v. United States*,[273] the Court found that an individual had a justifiable expectation that his side of a telephone conversation from within a closed glass booth would not be overheard by anyone outside, especially by means of a recording device placed on top of the booth.[274] The Court did not suggest that the individual could no longer justifiably rely on the privacy of a phone booth if the practice of bugging phone booths were to become more widespread. Nor is any such interpretation of the justifiable expectation of privacy criterion suggested by the leading Supreme Court cases in which certain police practices have been held not to amount to searches. In *United States v. White*,[275] the Court held that an individual's justifiable expectation of privacy was not invaded when a police informer wearing a concealed radio transmitter visited him in his home and broadcasted their conversation to officers waiting outside. Having misplaced his trust in the informer, the individual ran the risk that the informer would subsequently reveal their conversation. The simultaneous broadcast was no greater breach of that confidence.[276] In *United States v. Dionisio*[277] and *United States v. Mara*,[278] the compelled production of voice and handwriting exemplars was held not to involve a search, since "[n]o person can have a reasonable expectation that others will not know the sound of his voice"[279] or "the physical characteristic of [his] script."[280] In *White*, the reason why the defendant could not be said to have justifiably relied on the privacy of his conversations with a wired informer lay not in the widespread use of such informers but in the fact that the risk of having any conversation disclosed by the other party is inherent in the very nature of human social interaction. Likewise, the characteristics of one's voice and handwriting inevitably come to be known by strangers. But it is not similarly inherent in the nature of human relations that one must inevitably undergo a process of screening.[281]

273. 389 U.S. 347 (1967).
274. *Id.* at 353.
275. 401 U.S. 745 (1971).
276. *Id.* at 751, *following* On Lee v. United States, 343 U.S. 747 (1952).
277. 410 U.S. 1 (1973).
278. 410 U.S. 19 (1973).
279. 410 U.S. at 14.
280. 410 U.S. at 21.
281. One court has made a "no reasonable expectation of privacy" argument by saying that the seriousness of hijacking, combined with the difficulties of detecting it, give the air traveler less expectation of privacy at the airport than elsewhere. People v. Lacey, 30 Cal. App. 3d 170, 105 Cal. Rptr. 72 (Ct. App. 1973). *But cf.* United States v. Davis, 482 F.2d 892, 904-05 (9th Cir. 1973). Reasoning such as that found in *Lacey* is circular, since it translates the conclusion that screening may be a necessary invasion of privacy into the premise that there is no expectation of privacy anyway. But this premise, if it is to be a true premise, must be established independently of a perceived need to screen passengers.

(2) *Criminal investigative purpose. Camara v. Municipal Court*[282] and *Wyman v. James*[283] illustrated the Court's tendency to view the lack of a dominant criminal investigative purpose as an important factor in judging the impact of certain procedures on fourth amendment rights.[284] In *Wyman*, and again in *Cady v. Dombrowski*,[285] it was argued that lack of such purpose deprived the procedure of its character as a search.[286] While the Court did not adopt this position in either case, lack of criminal investigative purpose was the central reason given in *Cady* for upholding, as reasonable, the search of the trunk of an automobile to retrieve the driver's revolver so that it would not fall into the hands of vandals.[287]

Similarly, it might be argued that air traveler screening lacks a dominant criminal investigative purpose since its purported purpose is only to prevent or deter future hijackings and not to detect evidence of past crime.[288] This premise is untrue. By the time any traveler

282. 387 U.S. 523 (1967).
283. 400 U.S. 309 (1971).
284. See text accompanying notes 138-39, 159 *supra.*
285. 413 U.S. 433 (1973).
286. *See* Cady v. Dombrowski, 413 U.S. 433, 442 (1973); Wyman v. James, 400 U.S. 309, 317 (1971). *But see* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). In both *Camara* and *See*, municipal building inspections were treated as searches despite the Court's assumption that they lacked a dominant criminal investigative purpose.
287. Cady v. Dombrowski, 413 U.S. 433, 439-48 (1973). In this case, police in a small Wisconsin town discovered that the driver of an automobile involved in a serious one-car crash was a member of the Chicago police force. They towed the disabled car from the scene and, before leaving it parked overnight in front of an isolated gas station, decided to retrieve the officer's service revolver. Since the driver had lapsed into a coma, they could not obtain his permission to do so. In the course of looking for the revolver, they unlocked and opened the trunk and came across wholly unanticipated evidence which eventually linked the officer to a murder. Although the entry into the trunk was made without probable cause or a warrant, the Court found it reasonable because the sole purpose of the police was to protect the general public by retrieving the weapon so that it would not fall into the hands of any vandals who might break into the car.

The situation in *Cady* bears some resemblance to the air traveler screening situation. In both cases, the purpose of the official action is to protect members of the public from the use of a weapon which might be located in the place searched. However, *Cady* is distinguishable in three respects. First, the officers did not believe that the driver's possession of the weapon was criminal and had no intention of prosecuting him if the weapon were found. Second, the officers' knowledge that the driver was a Chicago police officer, coupled with their belief that all such officers were required to have their service revolvers with them at all times, gave them grounds to believe that a weapon would be found somewhere in the car being searched. Third, although the *Cady* Court said, "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable," the only less intrusive means available was posting an officer to guard the car overnight. This the Court found to be an intolerable misallocation of the limited manpower resources of a small town police force. *Id.* at 447. But a selective air traveler screening system would use less manpower and, overall, be less expensive than the nonselective system. *See* Comment, *supra* note 5, at 413-14.
288. See United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972), in which the court observed, somewhat cryptically, that screening takes place "for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and precriminal events . . . ." 454 F.2d at 771. In United States v. Davis, 482 F.2d 893 (9th Cir. 1973), the court observed that: "The

has proceeded far enough for a weapon to be detected by screening, that person already has committed the federal crime of attempting to board an aircraft "while having on or about his person a concealed deadly or dangerous weapon,"[289] and the weapon itself will be the primary evidence of this crime. Of course, if screening were completely effective as a deterrent, no one would attempt to carry a weapon aboard an airplane, and there would be nothing to detect or prosecute. On the other hand, even when a weapon is detected, the hijack-preventing purpose of screening would be accomplished simply by taking the weapon or barring the passenger from the plane, without pressing criminal charges.[290] But in fact, the Justice Department has a policy of initiating prosecution even in cases where the defendant is not suspected of hijacking intent.[291]

Even if prosecution were not the usual response to the discovery of weapons, it would not follow that screening lacks a dominant criminal investigative purpose in the same sense that the procedures in *Camara* and *Wyman* did. In those cases, there were many things which the inspector or caseworker could do for the individual whether or not evidence of crime was discovered. Screening has no purpose other than the discovery of weapons. It pursues this purpose only as a means to detect or deter hijack attempts and may be effective with a nonprosecutorial response when that end has been achieved. This, however, does not alter the single-mindedness of its concern with the crime of hijacking.

Lack of a criminal investigative purpose is material, if at all, under the fourth amendment in minimizing the hostility or offensiveness of an officer-citizen encounter.[292] The fact that many people do not find the screening encounter hostile or offensive might militate against it being called a search. They find it inoffensive, however, not because the system is concerned with them for any reason other than to find weapons, but because they know they are innocent and are willing to

essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all." *Id.* at 908. The court did not conclude, however, that no search occurred, but only that air travel could be conditioned on consent to screening. *Id.* at 913.

289. Federal Aviation Act, 49 U.S.C. § 1472(1) (1970).

290. The practice of deporting rather than prosecuting illegal aliens was a factor which Mr. Justice Powell considered important in Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring) (noting that only 3 percent of aliens apprehended in this country are prosecuted).

291. *Symposium—Skyjacking, supra* note 17, at 1078 (statement of Mr. Culver, of the Criminal Division of the United States Department of Justice). *See also* United States v. Davis, 482 F.2d 893, 896 n.2 (9th Cir. 1973) (where the defendant was prosecuted upon discovery of a loaded revolver which he carried for self-protection because he had twice been exposed to sniper fire in connection with his drug rehabilitation work).

292. *See* Wyman v. James, 400 U.S. 309, 323 (1971).

tolerate their own screening in order to ensure that others will be screened. This thinking could occur in any criminal investigation, and its prevalence is no reason to conclude that screening is not a search.

(3) *Scope, duration, and predictability.* Screening has at least as great an impact on fourth amendment values as the welfare home visit, storeroom or business record inspection, building inspection, vehicle search, or border search. Although it does not occur in the home, screening involves that thorough rummaging of personal effects the absence of which was an important limiting factor in *Wyman* and *Camara.*[293] It also invades the integrity of the person, as the procedures in those cases did not. Further, it is conducted by uniformed personnel in a highly public location as the *Camara-Wyman* procedures were not. The personal nature of the search also distinguishes screening from the searches in *Zap, Colonnade,* and *Biswell,* which involved only business premises and records and not an individual's private effects and person.[294] Screening also goes beyond the automobile search for aliens in *Almeida-Sanchez,* since it is the person and personal effects that are searched in the screening context.

Nevertheless, many courts have stressed a supposed limited impact on fourth amendment values in the course of approving nonselective screening.[295] It is argued that screening applies only to those persons who choose to travel by air and invades the privacy only with regard to items they choose to wear or carry aboard the plane.[296] This, however, merely restates the fact that screening is only a condition on air travel and does not speak to the impact of screening on the privacy of those who do choose to fly and take with them intimate effects. It also is argued that screening is limited in duration since it occurs only once each flight and invades personal integrity and privacy for only a brief period, after which both are fully restored. It is a disparagement of fourth amendment values, however, to accord significance to these limits. The fourth amendment is violated by every invasion of privacy, especially where, as in screening, the person and personal effects are affected. No invasion is insignificant simply because it is brief or nonrecurring. Moreover, invasions do recur for the frequent air traveler.

Finally, it is argued that the predictability of screening means that its impact on personal integrity and privacy can be further mitigated by reducing the amount of carry-on baggage, placing items for which

293. See text accompanying notes 140-44, 158 *supra.*
294. See text & notes 123-24 *supra.*
295. *See, e.g.,* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) (search held reasonable by balance of interests); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972) (forcible frisk rationale); United States v. Kroll, 351 F. Supp. 148 (W.D. Mo.), *aff'd,* 481 F.2d 884 (8th Cir. 1973) (search held reasonable by balance of interests).
296. *Cf.* United States v. Skipwith, 482 F.2d 1272, 1275-76 (5th Cir. 1973).

privacy is sought in the checked baggage, choosing clothing which contains no metal fasteners, supports, or stays, and removing all other metal articles from the person so that the metal detector is not activated.[297] The need to mitigate by advance planning, however, is itself an inconvenience that would be unnecessary if an unwanted invasion of privacy were not foreseeable. The forced sacrifices are themselves invasions of privacy, and the ability to make them does not diminish the extent of the invasions which occur if such sacrifices are not made. If predictability could minimize the impact of screening on fourth amendment values, an extension of screening to a larger range of human activity would further minimize it, for if one could always predict that he would encounter screening somewhere, he or she could simply adjust so as to avoid privacy invasions on every excursion away from home.[298] However, the right to live without making such adjustments is inherent in the fourth amendment's most basic value structure.

2. *The Hijacker Personality Profile*

The Hijacker Personality Profile was created by a FAA task force, which was appointed in 1968 to study the airplane hijacking problem and to devise an effective and discrete system to detect weapons being carried aboard aircraft.[299] Composed of FAA and airline personnel and representatives of the Justice and Commerce Departments, who represented the disciplines of psychology, law, engineering, and administration,[300] the task force spent about 6 months[301] reviewing all the domestic and foreign hijackings which had occurred to date, analyzing the characteristics of hijackers,[302] and trying to find a simple but accurate way to identify potential hijackers before they boarded an airplane.[303]

The Hijacker Personality Profile[304] that emerged from this re-

297. *But see* United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) (holding, nevertheless, that a frisk must be preceded by less intrusive procedures).

298. *Cf.* Comment, *supra* note 5, at 406.

299. United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 5, at 302; Note, *Constitutionality, supra* note 17, at 130. *See also* Abramovsky, *supra* note 17, at 131; Comment, *supra* note 5, at 386.

300. *See* United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971); Fenello, *supra* note 11, at 997; Note, *supra* note 10, at 1039.

301. United States v. Davis, 482 F.2d 893, 896 (9th Cir. 1973); Comment, *supra* note 5, at 386.

302. *See* United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971); Dailey, *supra* note 1, at 1008-09; McGinley & Downs, *supra* note 5, at 302; *Symposium—Skyjacking, supra* note 17, at 1081; Comment, *supra* note 5, at 396. Appropriate statistical, sociological, and psychological techniques are said to have been used. United States v. Lopez, *supra* at 1086.

303. United States v. Davis, 482 F.2d 893, 898-99 (9th Cir. 1973).

304. The development and operation of the Profile is described generally in: United

search consisted of a relatively small number[305] of easily identified behavioral characteristics[306] which distinguished potential hijackers from other travelers.[307] Airline personnel trained in the use of this Profile were positioned so they could observe all persons entering the boarding area and identify those whose behavior matched the Profile.[308] After extensive empirical testing[309] and modification, the Profile-oriented system was put into operation in early 1970.[310] Under this pre-1973 system, the Profile was used before any other procedures were initiated.

Whether the use of the Profile amounts to a search must be determined by what happens when a trained observer views an individual air traveler and determines whether the traveler is exhibiting the behavioral characteristics included in the Profile. Because "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,"[311] it would initially appear that the Profile does not violate a person's justifiable expectations of privacy,[312] since nothing is observed other than behavior which is being exposed to the entire public.[313] Trained Profile observers use only their eyes and see

States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077, 1082, 1086 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 5.

305. Some sources say 25 or 30 characteristics were found. United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 5, at 302. These sources imply that only a small number of these characteristics were used at any one time in screening travelers. Whether this means that only a few were given to the personnel doing the Profile checking or that a person could be selected on the basis of meeting only a few out of a long list available to the checker is not clear, although the former seems more likely. Other sources suggest that the number of characteristics is closer to a dozen. Dailey, *supra* note 1, at 1009; Comment, *supra* note 5, at 386, 396.

306. Reference is made to "objective criteria," Dailey, *supra* note 1, at 1009, and "readily discernible" characteristics. United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971). *See also* United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973). The Profile is keyed to behavior and is not related to "inherited or social characteristics." McGinley & Downs, *supra* note 5, at 302. Moreover, it is not related to such behavior as nervousness, but to the manner in which the traveler approaches the ticket counter or boarding gate. *Id.* at 305. Some insight into what the relevant behavior might consist of is given by Dr. Dailey. He discusses the ways in which police officers are trained to distinguish potential criminals in the general public on the basis of differences in the way they go about apparently normal daily activities, for instance, by paying too much or too little attention to the officer or reacting oddly to the awareness that they are being watched. As a further example of a behavior profile, he cites a book written by a 17th century English highwayman, warning innkeepers to watch out for customers who continually look out the windows at all passersby, suddenly run out and go after one of them, have empty saddle bags, and do not look you in the eye. *Symposium—Skyjacking, supra* note 17, at 1068-69.

307. United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971); Dailey, *supra* note 1, at 1008.

308. United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Bell, 464 F.2d 667, 670-71 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); Note, *supra* note 10, at 1039. Often the traveler's ticket was given a special mark. *See* United States v. Ruiz-Estrella, 481 F.2d 723, 724 (2d Cir. 1973).

309. United States v. Lopez, 328 F. Supp. 1077, 1082, 1086 (E.D.N.Y. 1971).

310. *Id.* at 1082.

311. Katz v. United States, 389 U.S. 347, 351 (1967).

312. *See* People v. Lee, — Cal. App. 3d —, 108 Cal. Rptr. 555 (Ct. App. 1973); Note, *supra* note 10, at 1052 ("It cannot be seriously argued that the personality profile . . . constitutes an illegal search.").

313. Comment, *supra* note 5, at 396-97.

nothing that the rest of the world cannot see.[314]

The inferences that the observer draws with the assistance of this scientifically-developed Profile, however, do relate to matters which the individual has not knowingly exposed to the public. The Profile assumes that a person who does not know its contents cannot conceal from the public the behavior which distinguishes the potential hijacker from other members of the public. Through the Profile, the observer attains an insight into the individual's thoughts, motivations, and plans, even though the individual is unaware that such insights about him can be obtained. Undoubtedly, assessment of one's thoughts and motives through application of sophisticated psychological and sociological research has disturbing overtones.[315] On the other hand, human beings throughout history have run the risk that their supposedly hidden inner thoughts and motivations could effectively be divined by other persons with whom they came in contact and who possessed unusually sharp, if unscientific, powers of psychological insight. The research which led to the development of the Profile may make the insight more accurate, but it does not necessarily increase the nature of the intrusion wrought when one individual is observed by another unusually insightful person.[316]

A useful comparison may be drawn between Profile observation and eavesdropping. Both present threats to privacy which are inherent in the nature of human affairs. Just as an insightful person might make a shrewd judgment about one's character and motives, so a snooper might overhear someone's unguarded private conversations. Just as one could protect to some extent against insightful observation by adopting a guarded and circumspect demeanor, so could one protect against the risk of eavesdropping by restricting conversations to secluded locations. For these reasons, neither personal observation nor primitive forms of eavesdropping were thought to call for the protection

314. Note, *Constitutionality, supra* note 17, at 135.

315. *See* A. WESTIN, *supra* note 250, at 61-63. The court in United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), noted some of these overtones, although its concern was only with the magnetometer, not the Profile.

> We need not fear that approving use of the magnetometer . . . foretells approval of more frightening systems: for example, one searching the brain waves of members of the public, as they unsuspectingly pass by check points, to determine if they are tense or frightened and thus, possibly, contemplating anti-social conduct.

Id. at 1100.

316. A science called kinesics has developed the theory that body language can tell much about an individual's true thoughts and feelings in situations in which he or she is not communicating them verbally. *See generally* R. BIRDWHISTELL, INTRODUCTION TO KINESICS: AN ANNOTATION SYSTEM FOR ANALYSIS OF BODY MOTION AND GESTURE (1952). The popularization of this theory, *see* J. FAST, BODY LANGUAGE (1970), increases everyone's risk of having such insights drawn as a matter of course in all social intercourse.

of the fourth amendment.[317] But in each instance, modern science and technology have escalated the risks inherent in social relations and decreased the individual's ability to guard his privacy through self-help. This escalation has led the Supreme Court to conclude that electronic eavesdropping is a fourth amendment search.[318]

There are significant differences, however, between Profile observations and electronic eavesdropping which support the conclusion that the former is not a search. First, Profile observation is aimed at detecting demeanor and gestures, drawing only general inferences about what an individual may be thinking. Electronic eavesdropping usually detects words and conversations which are more direct and unambiguous expressions of thoughts. Second, Profile observation is a highly focused procedure, looking only for certain manifestations and consciously disregarding all others. Electronic eavesdropping is indiscriminate, overhearing all that is said. Finally, the results of Profile observation have none of the potential for permanent storage which the results of electronic surveillance have. The observer does not record the behavior that triggers the Profile, and the observation of relevant behavior leads to no more than a signal to another screening person, at most in the form of a note on a ticket folder. The specific content of everything perceived by electronic surveillance, on the other hand, can be recorded and preserved forever.[319]

The prospect that Profile observation could be used indiscriminately on the street, observing all citizens, is not a pleasant one. Profile observation in the airport, however, hardly marks the advent of such a day. Moreover, in judging screening, the question is whether it is less intrusive for all air travelers to be observed by Profile-trained personnel or for all travelers to be checked by one or more of the other screening procedures. The traditional privacy concerns of the fourth amendment remain so unthreatened by the mere Profile observation of public behavior that it should not be considered a search.[320]

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317. *Cf.* Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting); Berger v. New York, 388 U.S. 41, 74 (1967) (Black, J., dissenting).

318. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

319. *See* A. MILLER, *supra* note 250; A. WESTIN, *supra* note 250, at 158-68.

320. Visual surveillance by police, who draw inferences of criminality from the behavior which they unscientifically but often shrewdly interpret, appears in many cases. Not only has this surveillance never been held to be a search, it has been assumed to be the kind of proper, nonsearch police practice by which facts amounting to probable cause for greater intrusions should be obtained. This is not to say that such surveillance does not have troubling psycho-emotional overtones for the people being watched. *See* A. WESTIN, *supra* note 250, at 57-60. It is merely to say that visual surveillance in a public place is not the kind of thing for which the fourth amendment's reasonableness requirement mandates independent probable cause or a warrant.

3. *Comparative Breadth of Impact*

Use of the Profile works an enormous reduction in the number of persons whose travel is conditioned on consent to screening procedures which amount to searches. Under the nonselective 1973 system, all travelers must submit to the general metal detector and have their carry-on baggage examined, either by an x-ray weapon detector or a manual inspection. Also, all travelers who activate the general metal detector must submit to a wand check. In contrast, under many versions of the Profile system all travelers who cleared the Profile were allowed to board without encountering any of these procedures.[321] Under other versions, all travelers passed through a magnetometer, but often it was not monitored for those who had cleared the Profile.[322] Only those who both matched the Profile and failed to clear the magnetometer were subjected to further screening.[323] The next step was a brief detention for identification,[324] and only those who could not produce identification were frisked or had their carry-on baggage inspected.[325]

The extent to which the Profile narrows the impact of screening is shown by statistics cited in *United States v. Lopez*.[326] In three samples, each involving several hundred thousand applications of the Profile, only between .07 percent and .57 percent of all passengers were selected by the Profile.[327] Of these, about half activated the magnetometer.[328] Thus, only about .04 percent to .29 percent of all trav-

321. McGinley & Downs, *supra* note 5, at 303.

322. *See* United States v. Davis, 482 F.2d 893, 898 (9th Cir. 1973); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Mitchell, 352 F. Supp. 38, 40 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); Note, *supra* note 10, at 1040; Note, *Constitutionality*, *supra* note 17, at 130.

323. *See generally* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); Note, *supra* note 10, at 1040; Comment, *supra* note 5, at 387.

324. Nearly all of the cases involved this procedure. *See generally* Comment, *supra* note 5, at 388. Some requests for identification required retrieval of baggage checked with the airline. *See* United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973), *petition for cert. dismissed*, 415 U.S. 902 (1974).

325. United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); McGinley & Downs, *supra* note 5, at 304. In some instances, however, further screening was conducted even after identification was produced. United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); People v. Lee, — Cal. App. 3d —, 108 Cal. Rptr. 555 (Ct. App. 1973). Sometimes a traveler was permitted to remove metal before being frisked. *See, e.g.*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (Ct. App. 1973); Comment, *supra* note 5, at 388. A manual inspection of the carry-on luggage sometimes was conducted at the same time. *see, e.g.*, United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884 (8th Cir. 1973); State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972); People v. Lee, *supra*, although often the baggage search was preceded by a frisk.

326. 328 F. Supp. 1077 (E.D.N.Y. 1971).

327. *Id.* at 1084.

328. *Id.*

elers were required to undergo even a brief detention for identification and questioning. Of those detained, only about one-third failed to be cleared and were subjected to further screening.[329] Thus, under this system an average of 713 out of 714 travelers experienced no more screening than being matched against the Profile and being passed through the magnetometer which, for 356 out of 357, was usually unmonitored. Nineteen hundred and ninety-nine out of every 2000 passengers experienced no more screening than Profile and magnetometer checks, plus a brief detention for identification. Only one in 2000 had either his or her carry-on baggage searched or his or her person frisked. Of these persons, one in 15 was found to be carrying a weapon.[330]

Exempting 1999 out of 2000 air travelers from any of the more intrusive screening procedures makes a Profile-initiated system less drastic than a nonselective system. Nevertheless, since an equal narrowing of the impact of screening on the traveling public could be achieved by random selection, it is necessary to determine the impact of a selective system on the rights of those selected before finally pronouncing it the least drastic screening alternative.

C. *Least Drastic Means*

1. *Conditioning Based on Facts*

a. *The Selective Model.* Under the fourth amendment, no individual traveler can be searched, without consent, in the absence of facts which relate specifically to him or her and which indicate criminality with a sufficient degree of certainty.[331] *Terry v. Ohio*[332] teaches that the standard of certainty is flexible. Some searches that are found to be less intrusive than a full search may be initiated on facts that are less indicative of criminality than probable cause. The frisk is one such lesser search; reasonable suspicion is the standard upon which it may be initiated.[333] The general principle of *Terry* is that the less intrusive search, the less certain the indication of criminality need be for it to be forcibly initiated.[334]

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329. *Id.*
330. *Id.*
331. The type of criminality necessary to justify a search is the presence of contraband or the fruits, instrumentalities, or evidence of crime. *See* Warden v. Hayden, 387 U.S. 294 (1967); FED. R. CRIM. P. 41(b). The requisite degree of certainty for a full search is probable cause—facts indicating that it is more probable than not that this criminality exists. *See* United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Preston v. United States, 376 U.S. 364 (1964); Johnson v. United States, 333 U.S. 10 (1948).
332. 392 U.S. 1 (1968).
333. *Id.* at 27. For initiating the frisk itself, *Terry* required reasonable suspicion that the defendant was armed and dangerous. *Id.* at 12. Conceivably, one could be in *lawful* possession of a weapon, and yet dangerous, in which case the search would not be related to discovery of evidence as such. *Cf.* Adams v. Williams, 407 U.S. 143 (1972).
334. For a thorough evaluation of the "sliding scale approach" to the fourth amend-

The least drastic air traveler screening system would be one in which no search was conducted unless sufficient facts were known about a traveler to permit the search to be conducted without consent.[335] However, if the facts which are developed in the screening process[336] do not meet even the flexible standard of *Terry*, a screening system cannot proceed without consent. If consent is made a condition to air travel, the fourth amendment reasonableness standard requires that travel be conditioned only on the basis of the most certain facts which can be developed by a screening system.

The spectrum of intrusiveness across which the screening procedures are arrayed,[337] together with the increasingly certain facts yielded by these procedures, suggests that it is possible to create a model screening system which is both selective and factually based. This model would begin with the Profile and then retain all the procedures of the 1973 system in a slightly different sequence. All travelers would be observed with reference to the Profile, which, since it is not a search,[338] may be carried out without either an indication of criminality or consent. Only those selected by the Profile would proceed to the general metal detector, which would be applied separately to the traveler and to his carry-on baggage. Only if the baggage activated this device would it pass through the x-ray weapon detector, and it would be manually inspected only if a positive image were projected by that device. The traveler would be subjected to a wand check only if he activated the general metal detector, and removal of metal would be required only of those who activated the wand and only from the specific areas indicated by it. The frisk would be required only of travelers who still could not clear the metal detector and would intrude only on those areas indicated by the wand. As in all systems, at each step those not selected by the previous procedure would be allowed to board

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ment, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375-77, 387-95 (1974).

335. In United States v. Albarado, 495 F.2d 799 (2d Cir. 1974), the Court of Appeals for the Second Circuit provided a similar criterion for least drastic means.

> [W]hat is the minimal invasion of privacy consistent with the need for the further investigation? Differences in equipment and facilities may change the actual procedure, but the rule is easy to state: exhaust the other efficient and available means, if any, by which to discover the location and identity of the metal activating the magnetometer before utilizing the frisk.

Id. at 808.

336. The only results of a screening procedure which are necessarily available at the next step are those facts which the procedure is designed to detect—a positive profile evaluation, activation of a general metal detector, projection of a weapon-shaped image on an x-ray screen, activation of a wand, inability to clear a detector after removing metal, or feeling a weapon-shaped object during a frisk. Other facts may come to light during the screening process, ranging from nervous behavior to a full confession of hijacking intent. If such factors are present, reasonable suspicion or probable cause for a nonconsensual search or arrest may exist. *See* authorities cited note 21 *supra.*

337. *See* text accompanying notes 252-71 *supra.*

338. *See* text & notes 299-320 *supra.*

without further screening. This model would develop as many facts as possible under the screening procedures now available before requiring consent to any of its search procedures. Travel would not be conditioned on consent to even the general metal detector unless the Profile evaluation were positive.

Each of the procedures of this model is important in developing facts about the individual which indicate that he is more likely than other travelers to pose a threat to air safety. At each step in this system the individual's travel is less drastically conditioned when the results of all the previous procedures are known than when any of them is not known. Each procedure supplies additional facts which either indicate that the traveler may pose the kind of threat against which the conditioning process is designed to guard or limit the scope of the search to those areas most relevant to that design. The deletion of any procedure from this model would make the system more drastic.

While this model is the least drastic system that can be created out of available screening procedures, it does not develop sufficient facts to proceed without consent at any step. Unless facts independent of the screening results come to light, this system still must rely on consent. The traveler who declines to consent to any procedure must be allowed to leave.[339] Although the necessary consents are obtained by conditioning air travel, this system is less drastic in its impact on travelers selected for screening than a system which would either conduct unconsented searches or require consent on the basis of fewer facts. These conclusions are supported by an analysis of the probative value of the results of the procedures in this system.

b. *Screening Results as Facts.* (1) *Profile results.* A positive Profile result means that an individual traveler has displayed a requisite number of the behavior manifestations that the FAA task force determined distinguished hijackers from the rest of the traveling public.[340] Its use increases the reasonableness of conditioning air travel on consent to the general metal detector by establishing that an individual has given some indication of hijacker potential.[341]

Three factors indicate that a Profile determination sufficiently increases the prediction of hijacker potential over random selection to conclude that conditioning air travel on this fact is a less drastic alternative. First, the courts' conclusion that appropriate social science methodology was used in devising the Profile[342] indicates that the Pro-

339. *See* text accompanying notes 210-21 *supra.*
340. *See* text & notes 305-08 *supra.*
341. *But cf.* Comment, *supra* note 5, at 398 n.115.
342. *See* authorities cited note 302 *supra.*

file is at least a more accurate predictor than the more instinctive observations from which everyday law enforcement conclusions of suspicious behavior are drawn. Second, in the samples reported in *United States v. Lopez*,[343] involving over 1 million air travelers, between 60 and 70 out of over 3,000 persons who matched the Profile were denied boarding, mostly, it appears, for carrying weapons.[344] This means that about 1 in 50 profile selectees was carrying a weapon. Common sense dictates that this is a significantly higher percentage of weapons carriers than is found in the general public, unless it can be assumed that two passengers on every 100-passenger flight would be carrying a weapon if there were no screening. Finally, during the Profile's use prior to 1973 no flight subjected to a proper Profile-oriented screening was ever hijacked.[345] This indicates that the Profile selected all of those potential hijackers who were not deterred by screening. The fact that the group of Profile selectees, .3 percent of air travelers, included all hijackers who attempted boarding further indicates the Profile's ability to predict hijacker potential more reliably than random selection.

This does not mean that the fact of Profile selection alone constitutes probable cause or reasonable suspicion for the imposition of any subsequent procedure.[346] Even the relatively mild intrusion of the general metal detector ought not to be imposed, without consent, on the basis of Profile selection alone. However, if consent to this procedure is required as a condition of air travel, the person whose travel is conditioned is less drastically affected by the condition if he or she is a selectee than if not.

(2) *General metal detector results.* A positive result from the general metal detector means that a certain aggregate amount of metal is located someplace on the traveler or in his or her carry-on baggage.[347] The device, if properly set, is accurate in detecting the requisite amount

343. 328 F. Supp. 1077 (E.D.N.Y. 1971).

344. *Id.* at 1084. It is not clear whether all of the denials were for carrying weapons, although the cou t implies that they were. With reference to one group of ten selectees, it was reported that 16 weapons and one pack of marijuana were confiscated, indicating that in that sample almost all denials were for carrying weapons. If this were generally true, the percentage of weapons carriers among the profile selectees would approximate the percentage of persons denied boarding in the sample groups.

345. *See* text & notes 406-07 *infra.*

346. Four courts have held that a search of carry-on baggage solely on the basis of Profile results may not be initiated without consent. United States v. Miner, 484 F.2d 1075 (9th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); State v. Miller, 110 Ariz. 491, 520 P.2d 1115 (1974). *But cf.* United States v. Cyzewski, 484 F.2d 509, 514 (5th Cir. 1973), *petition for cert. dismissed*, 415 U.S. 902 (1974) (dictum approving detention for identification on basis of Profile results alone); United States v. Skipwith, 482 F.2d 1272, 1274-75 (5th Cir. 1973) (hinting, in dictum, that Profile results might justify the forcible search of a coat pocket); People v. Botos, 27 Cal. App. 3d 774, 104 Cal. Rptr. 193 (Ct. App. 1972) (approving detention for identification on basis of Profile results alone).

347. *See* text & note 5 *supra.*

of metal.[348] The predictive value of the fact of activation depends in part on how low the device is set. If it is set to detect the amount of metal contained in the smallest item that could be used as a weapon, it also will detect keys, coins, belt buckles, foundation stays, and many other innocuous items. If so, and if travelers are not divesting themselves of all such items before attempting to board, the fact of activation will give little indication of hijacker potential. It merely eliminates the possibility that the traveler is not carrying enough metal to make up a weapon.

The cumulative information supplied by both metal detector activation and Profile match-up makes a condition requiring consent to the x-ray weapons detector or wand check less drastic than it would be without both of these facts. But even this combination does not amount to probable cause.[349] Fewer than 1 in 45 of those persons with positive results for both the Profile and the metal detector were found to be carrying weapons.[350] This is still too low a probability of criminality to support the forcible imposition of procedures as intrusive as use of the wand or the x-ray weapon check.[351]

(3) *Detention for identification.* Many pre-1973 screening systems interposed a brief detention for identification of all persons producing positive magnetometer results, cleared for boarding all those Profile magnetometer selectees who produced identification, and forcibly frisked those who did not.[352] The model system deletes this procedure because inability to provide identification has not been shown to bear

348. Efforts to prove the inaccuracy of the magnetometer have been unsuccessful. *See* United States v. Bell, 335 F. Supp. 797, 801-02 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667, 673 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077, 1085 (E.D.N.Y. 1971).

349. *Accord*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); *cf.* United States v. Clark, 475 F.2d 240 (2d Cir. 1973). *But see* United States v. Doran, 482 F.2d 929 (9th Cir. 1973) (approving removal of metal after mere Profile and magnetometer activation, but on broader grounds); People v. Hyde, 33 Cal. App. 3d 128, 108 Cal. Rptr. 785 (Ct. App. 1973), *vacated*, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974) (indicating approval of forcible frisk on such results).

350. United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

351. General metal detector activation alone provides a lesser degree of probable cause or reasonable suspicion than does the Profile selection, if only because many more people activate the device than match the Profile. Still, some courts have held that a traveler may be forcibly frisked on the basis of magnetometer activation alone. *See* United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); State v. Damon, 18 Ariz. App. 421, 502 P.2d 1360 (1972); People v. Bleile, — Cal. App. 3d —, 108 Cal. Rptr. 682 (Ct. App. 1973). These holdings reflect the view that hijacking requires a more drastic response than mere conditioning of air travel. *But see* text accompanying notes 192-226 *supra*. *See also* People v. Hyde, 33 Cal. App. 3d 128, 108 Cal. Rptr. 785 (Ct. App. 1973), *vacated*, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974) (approving forcible detention, but no more, on the basis of magnetometer results alone).

352. *See* text & notes 8-10 *supra*.

any rational relationship to hijacker potential. Failure to produce identification is not a necessary concomitant of either hijacking intent or the carrying of weapons. Nor is there any suggestion in the cases or commentary that the FAA task force identified failure to produce identification as one of the behavioral characteristics of hijackers. Indeed, any hijacker with enough foresight to be dangerous might be expected to take the precaution of supplying himself with identification papers.

Still, the *Lopez* court attributed some probative value to the fact of failure to produce identification, since it concluded that this factor plus Profile and magnetometer selection permitted an unconsented frisk.[353] The court conceded, however, that these facts, which in its samples still indicated no more than a 6 percent chance of weapons possession, would not amount to reasonable suspicion outside the airport context, doubting that in a community where 1 person in 15 regularly carried concealed weapons that the police would be justified in arbitrarily stopping and frisking anyone on the street.[354] Only by diluting reasonable suspicion standards for the airport did the *Lopez* court approve the frisk.[355]

That these facts do not amount to undiluted reasonable suspicion, even if probative value is accorded to the failure to produce identification, is evidenced by the facts of *Terry* and its sequel, *Adams v. Williams*.[356] In *Terry*, an officer personally observed two men make about 24 separate trips past a certain jewelry store, stopping briefly each time to look into the store, conferring with one another between trips, and at one point conversing with a third man. The policeman then saw the two men follow the third down another street and rejoin him in front of another store.[357] In *Adams*, an officer was approached on the street in the wee hours of the morning by a known informer who told him that a man sitting in a car down the street had a gun in his belt and heroin in his car.[358] The conduct in *Terry* was inherently suggestive of "casing" for a stickup, and the tip in *Adams* was, in the Court's view, corroborated by the time of night, the nature of the neighborhood, and the fact that the informant subjected herself to immediate arrest if the information proved false.[359] In contrast, acting in a manner similar to previous hijackers, possessing some small amount of metal, and not producing identification lack both the immediacy and specificity of the

353. 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971). *See also* United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972).
354. 328 F. Supp. at 1097.
355. *Id.*
356. 407 U.S. 143 (1972).
357. 392 U.S. 1, 5-6, 23 (1968).
358. 407 U.S. at 144-46.
359. *Id.* at 147-48.

facts in *Terry* and *Adams*. Nor is the sum total of the data contained in these facts as great as in those cases.

(4) *Wand checks and metal removal.* After the Profile and general metal detector, the next procedure affecting the person in the model system is a wand check. A positive result of this procedure shows that the amount of metal registered in the aggregate on the general detector is located in one place. This may increase the likelihood that the item is a weapon, since there are fewer innocuous single items which contain this amount of metal than separate items which contain this amount in the aggregate. Still, this abstract fact would not supply an adequate basis for requiring removal of metal items or a forcible frisk. The real importance of the wand in the model system is that it narrows the scope of the next intrusion into the traveler's privacy. Only one metal item needs to be removed from only one place on the person, rather than all metal wherever located. Therefore, it is necessary to frisk only one place rather than conduct a general pat-down of all of the outer surfaces of the person's clothing.[360] In this respect then, the wand makes the subsequent condition that a traveler remove metal or consent to a frisk much less drastic than it otherwise would be.

At this stage, there still is not reasonable suspicion justifying a forcible frisk, nor does inability to clear the metal detector after ostensibly removing all metal from the area indicated by the wand tip the scale. Although at this point the system has discovered that an individual identified as a potential hijacker by the Profile cannot or will not remove a metal object from his person, the inference of immediate danger is not so great as to rule out simply conditioning travel on consent to a frisk of the relevant area. The individual, as a Profile selectee, is more likely than other travelers to be using this charade in the hope of escaping the discovery of a weapon, thus making the consent condition highly reasonable. However, the possibility of there being innocent reasons for this conduct should preclude a forcible frisk of the individual. The individual's travel, however, is still less drastically conditioned when these facts have been discovered, than when they have not.[361]

(5) *Frisk results.* Positive results of the frisk consist of feeling a weapon-shaped object under the surface of the traveler's clothing. This result will justify a forcible search under *Terry*,[362] but only for the purpose of seizing the weapon. A variety of objects might present a weapon-like feel to a frisking officer. In the screening context, a hard

360. United States v. Albarado, 495 F.2d 799, 809 (2d Cir. 1974).
361. *Id.*
362. 392 U.S. 1, 29-30 (1968).

object ¾ by 6 by 4 inches which later turned out to be a tinfoil-covered plastic container tightly packed with heroin,[363] a hard object 4 by 5 inches in a raincoat pocket which later was found to be a brown paper bag containing heroin,[364] a bulge under a boot that was created by an ordinary cigarette package and a small bottle,[365] and a bulge at the top of a boot created by two 35 millimeter film cartridges[366] have all been found sufficiently suggestive of a weapon to justify their forcible removal following a frisk. Outside the screening context the courts seem to have drawn the line at the lumps created by things like a folded $10 bill,[367] a cellophane package of pills,[368] a packet of counterfeit bills,[369] or a soft package of powder,[370] holding that these objects could not reasonably suggest a weapon. While it may be hard to believe that any of the above items could feel like a weapon, approval of that judgment in some cases suggests that screening personnel have fairly wide latitude in interpreting various bulges and lumps under the surface of clothing as potential weapons and forcibly going beneath the surface to seize them. However, if such an object turns out not to be a weapon, there is no reason to permit an unconsented search of the inside of the object to see whether it contains a weapon or explosive, since it is still less drastic to condition travel on consent to the search or surrender of the object.[371]

(6) *X-ray weapon detector results.* With respect to the carry-on baggage, a positive result of the x-ray weapon detector consists of a weapon-shaped image projected on a television screen. This result should supply probable cause for a search of the baggage. Unless ambiguous shapes are interpreted as weapons, it is probable that something projecting the image of a weapon will be a weapon. A crime thus has been committed and the bag may be forcibly searched. This search should be limited to the most direct route to seizing the weapon. If the item turns out not to be a weapon or explosive device, the search should end since there is no factual basis for the forcible exploration of any other part of the bag. However, if the item is in fact a weapon,

363. United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).
364. United States v. Bell, 335 F. Supp. 797, 802-03 (E.D.N.Y. 1971), *aff'd*, 464 F. 2d 667 (2d Cir.), *cert. denied*. 409 U.S. 991 (1972).
365. People v. Kluga, 32 Cal. App. 3d 409, 411, 108 Cal. Rptr. 160, 162 (Ct. App. 1973).
366. People v. Lacey, 30 Cal. App. 3d 170, 173, 105 Cal. Rptr. 72, 74 (Ct. App. 1973).
367. United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972) (relying in part on the assumption that the officer was subjectively looking for narcotics, as in Sibron v. New York, 392 U.S. 40 (1968)).
368. Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969).
369. United States v. Reid, 351 F. Supp. 714 (E.D.N.Y. 1972).
370. United States v. Gonzalez, 319 F. Supp. 563 (D. Conn. 1970).
371. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974). *See also* discussion note 372 *infra.*

an arrest would be made at that time, and a more thorough search of the bag and the person could be conducted incident to that arrest.[372]

2. *Fairness to Those Selected*

Even though the model system spares the vast majority of air travelers any surrender of fourth amendment rights and conditions the travel of those selected on as sound a factual basis as any system can now provide, it still selects for screening many travelers who are not hijackers or weapons carriers. With respect to these travelers, it could be argued that selection under the selective model is more drastic than under a wholly nonselective system, that the model system's adverse impact on them offsets its overall gain in fourth amendment reasonableness, and that for this reason the selective model is not, in the final analysis, less drastic than the 1973 system or even a more nonselective system. However, some of the supposed adverse effects of selection also will occur under nonselective screening, others have not been proved to exist, many can be minimized by careful application of the model, and in all, the adverse effects do not offset the selective model's less drastic impact on the fourth amendment rights of all travelers.

a. *Abuse in Application and Judicial Control.* The selective model might be thought to be subject to more abuse than a nonselective system.[373] Screening personnel may inadvertently or deliberately determine that a traveler meets the Profile when he or she does not.[374] A general metal detector or a wand may inadvertently or deliberately be miscalibrated to register less than the requisite mass of metal, or a positive reading may be claimed when it is known that there was none.[375] Ambiguous images projected by the x-ray detector may be misinterpreted or fabricated. And, in a frisk the feel of a weapon-shaped object beneath the surface of the clothing may be creatively

372. A question might arise as to whether the bag, already seized for the purpose of the original inspection, was still under the immediate control of the arrestee, as is required for a search incident to arrest under Chimel v. California, 395 U.S. 752, 763 (1969). If it were, then the doctrine of United States v. Robinson, 414 U.S. 218 (1973), might permit a thorough inspection of all parts of the bag, whether or not they were likely to contain further weapons or explosives. In *Robinson*, the court approved a minute inspection of the contents of a crumpled cigarette package taken from an inside pocket of a coat worn by the arrestee, despite its concession that neither destructible evidence nor a weapon was likely to be found inside the package. *See* Nakell, *Search of the Person Incident to a Traffic Arrest: A Comment on Robinson and Gustafson*, 10 CRIM. L. BULL. 827 (1974).

373. *See, e.g.*, United States v. Davis, 482 F.2d 893, 909 (9th Cir. 1973); Comment, *Constitutional Problems, supra* note 17, at 359 n.35.

374. For an example of a misselection, see United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973). Error in applying the Profile may be compounded by the fact that its details are never written down but are passed on orally from one screening official to another. Comment, *supra* note 5, at 398 n.117.

375. For an example of possible miscalibration of a magnetometer, see United States v. Bell, 464 F.2d 667, 673 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

imagined.[376]

Apart from whatever harassment motive may exist for such abuses,[377] there is also a strong crime detection motive. Under any screening system, the boarding gate becomes a checkpoint, and any checkpoint is a convenient device for detecting many kinds of criminal activity. Not only potential hijackers, but also a substantial number of drug carriers, smugglers, AWOL soldiers, illegal aliens, and others bearing evidence of their crime on their persons may appear at any boarding gate.[378] An officer who suspects a traveler of one of these activities usually will have neither probable cause to arrest or search nor reasonable suspicion to stop or frisk. However, if the traveler were in fact to meet the Profile,[379] a basis would be laid for subjecting him or her to further screening procedures. If these further procedures were to produce evidence of a crime, the fourth amendment's plain view doctrine[380] would allow that evidence to be seized and the traveler to be arrested, despite the absence of probable cause relating to that crime at the time screening was initiated.[381] An officer, however, might act on this suspicion even if the screening results were not positive, and a discovery of the suspected evidence would heighten the temptation to state that the screening results had been positive and that the action had a purely antihijack motive.

The opportunity to use the boarding search as a means of detecting unrelated crimes has not been overlooked, as is evidenced by the number of cases involving nonweapon evidence.[382] One report indi-

376. For examples where this particular abuse is suggested by the facts, see text accompanying notes 363-70 *supra.*

377. *See* United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

378. *See, e.g.,* United States v. Mitchell, 352 F. Supp. 38. 43 (E.D.N.Y. 1972), *aff'd,* 486 F.2d 1397 (2d Cir. 1973).

379. The creators of the Profile have vigorously denied that selection is made on the basis of any characteristics other than those of hijackers. Characteristics of narcotics violators or other criminals are not included. *Symposium—Skyjacking, supra* note 17, at 1081.

380. The plain view doctrine, most narrowly stated, provides that officers lawfully present in a given location who inadvertently discover property which they then have probable cause to believe is seizable may seize it without then obtaining a warrant and without previously having had probable cause or a warrant to search for it in that location. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Under any screening system, application of this doctrine to justify seizure of nonweapon evidence would require that the initial intrusion into the traveler's suitcase or pocket be lawful. Under the model system, the lawfulness of such intrusion would depend on the traveler's consent, which would be valid only if all the previous procedures had produced positive results. A claim that the intrusion was motivated only by these results would camouflage the fact that the discovery of the nonweapon evidence was not inadvertent.

381. To discourage abusive use of a selective screening system to discover nonweapon evidence, some judges and commentators have suggested that nonweapon evidence be excluded in a criminal proceeding even if the procedure during which it was discovered was lawfully initiated to prevent hijacking. *See* United States v. Skipwith, 482 F.2d 1272, 1280-88 (5th Cir. 1973) (Aldrich, J., dissenting); Gora, *The Fourth Amendment at the Airport: Arriving, Departing or Cancelled?,* 18 VILL. L. REV. 1036, 1050-55 (1973). So far no court has accepted such a suggestion.

382. Of the 49 cases cited at note 16 *supra,* only five involved prosecutions for

cates that before 1973 only 20 percent of those persons who were arrested as a result of air traveler screening were arrested for crimes relating to the possession of weapons.[383] This serendipity does not establish that the pre-1973 systems were abused, but it suggests that there is a temptation to abuse selective screening.

A parallel problem is present in any crime detection situation where a search or seizure may be initiated without prior approval by a neutral and detached magistrate. Any officer may be tempted to initiate action on the basis of inadequate facts and then allege the prior existence of facts sufficient to have supplied probable cause for initiating the search or seizure. The chief control against this abuse is judicial review, usually in the context of a hearing on a motion to suppress evidence. Here the officer will be subject to cross-examination and the defendant will have the opportunity to call witnesses in order to show that the officer did not in fact see or hear what he now claims gave rise to probable cause.[384] Additionally, in most search and seizure situations the facts claimed to have existed are, at least in theory, susceptible to some independent check, however difficult that check may be in individual cases.

Profile results, however, are less susceptible to after-the-fact checking than the facts constituting probable cause in most search and seizure situations.[385] Even if the court and the defendant's counsel hear testimony about the characteristics of the Profile and its application in the case in question, it will be difficult to challenge an assertion that the defendant's behavior matched the Profile, since it is unlikely that a defendant could remember the presence or absence of behavior which was, by definition, probably unconscious at the time.[386] Nor is

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weapons-related offenses. *See* United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974). In one other case a weapon was discovered, although the prosecution was not related to it. *See* United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973). Thus 90 percent of the prosecutions and 88 percent of the discoveries in these cases had nothing to do with the ostensible purpose of air traveler screening.

383. Gora, *supra* note 381, at 1037 n.6; Comment, *Constitutional Problems, supra* note 17, at 356 n.3; Comment, *supra* note 5, at 399 n.122.

384. When a search or seizure is initiated without a warrant, a factual determination is a necessary part of any hearing on a motion to suppress, since the government will not have the warrant to give rise to any presumption that there was an adequate factual basis for the search or seizure. *Compare* McCray v. Illinois, 386 U.S. 300 (1967) (pretrial hearing held on existence of facts supplying probable cause for warrantless arrest), *with* People v. Bak, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970) (hearing on existence of facts for probable cause denied where warrant obtained).

385. For general expressions of confidence in the ability of judicial review to control abuses in the operation of a Profile-initiated system, see United States v. Mitchell, 352 F. Supp. 38, 43 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); *Symposium—Skyjacking, supra* note 17, at 1081.

386. Nevertheless, several courts that have taken in camera testimony on the charac-

there a practical means to preserve an independent record of that behavior. Filming all travelers would be expensive and would increase the offensiveness of the Profile even if a way could be devised to immediately erase the clips of all passengers not selected and reuse the film.

Because there is so little chance for after-the-fact review of careless or deliberate Profile misselection, considerable trust must be placed in the competence, integrity, and good faith of the personnel administering it. In most cases, of course, that trust is warranted. Personnel can themselves be screened for personality traits which might work against impartial application of the Profile.[387] Moreover, since neither the application for the immediate results of the Profile bring the person applying it into direct contact with the selected traveler, there may be little reason to expect a temperamentally unqualified selector to abuse selection merely for whatever pleasure he may derive from harassing a traveler in that way. Also, the fact that the personnel applying the Profile normally are not law enforcement officers may reduce the likelihood that they will be sensitive to suspicions concerning nonweapons crime or motivated to warp Profile selection in order to pursue those whom they so suspect.

More importantly, however, the overall operation of the selective model contains important internal controls on deliberate abuse of Profile selection. The number and type of subsequent procedures which must combine to produce positive results before any nonweapons evidence could be seized cuts down the utility of making a false Profile selection. To make a manual inspection of carry-on baggage, the general metal detector and x-ray weapons detector also would have to give positive results. To make a search of the person, the general metal detector would have to give positive results, the wand would have to locate metal in the same place as the nonweapon evidence, the traveler would have to be unable to remove the metal without removing the evidence, and something in that place would have to reasonably suggest a weapon to a frisking officer.

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teristics and operation of the Profile have made definite conclusions that the defendant in question did or did not satisfy its criteria. *See* United States v. Mitchell, 352 F. Supp. 38, 42 (E.D.N.Y. 1972), *aff'd*, 486 F.2d 1397 (2d Cir. 1973); United States v. Riggs, 347 F. Supp. 1098, 1102-03 n.4 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); United States v. Bell, 335 F. Supp. 797, 801 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971). The courts' ability to reach such a conclusion is baffling. If the Profile truly focuses only on how the defendant acted in the airport, that ought to be virtually impossible to recreate in court. Since these courts do not say why they concluded that a defendant did or did not match the Profile, it is impossible to tell whether these conclusions cast doubt on the behavior orientation of the Profile, reflect the courts' taking of the Profile checker's testimony at face value, or are the product of defense counsel's failure to press the factual issue.

387. Comment, *supra* note 5, at 398 n.116.

The likelihood of these results all occurring coincidentally in a case in which screening personnel hope to find something other than a weapon is remote. In addition, each of these results seems considerably more susceptible to after-the-fact verification than Profile results. If a piece of baggage turns out to contain no weapon-shaped or weapon-suggesting object, the screener's claim that the x-ray weapon detector projected such an image would be unconvincing. The general metal detector and wand can be designed to give an audible sound so as to eliminate false claims about their activation, and while an impermissibly low setting of the machine may be harder to detect, in many cases the size of the metal items eventually produced would evidence such a setting. Similarly, the size and shape of any object discovered during a search following a frisk could call into question the existence or reasonableness of the frisker's claimed belief that a weapon had been detected during the frisk.

These internal checks on abuse are an important respect in which a selective model is less drastic than the pre-1973 systems which, although using the Profile, still did not use all the procedures of the model. Under those systems, the lack of a full series of increasingly certain procedures made it possible to leap to a full search or frisk on the basis of a suspicion relating to a collateral crime. The searchers then could justify the leap on the basis of preliminary facts indicating some hijacker potential and could avoid careful after-the-fact review of that leap. Indeed, the considerable judicial leniency in admitting nonweapon evidence on the basis of facts that were insufficient to support an unconsented search or frisk for weapons may have resulted in part from the absence in those systems of intermediate procedures which would have either confirmed or denied the traveler's weapon-carrying potential before a full search or frisk occurred.

Even if these controls do not entirely eliminate the abusive potential of the selective model, the 1973 system is no less subject to such abuse.[388] Conditioning travel on manual inspection of all travelers' carry-on baggage gives the inspector who is really looking for nonweapon evidence an opportunity to delve into every bag without the need to rely on any facts to justify his or her inquiry.[389] In addition, nonselective screening is subject to abuses which are less likely in selective screening. The fact that all travelers may be screened on all flights can easily result in variation in the thoroughness with which individual inspections are conducted. On any given flight, some travelers' bags

388. Gora, *supra* note 381, at 1038.

389. This fact, of course, may simply operate as a general deterrent to carrying nonweapon evidence aboard aircraft. *See* Comment, *supra* note 5, at 399 n.122 (noting a decline in nonweapon arrests after implementation of the 1973 screening system).

may receive cursory treatment while others are inspected with exaggerated care. The differences may reflect no more than the mood of the screener or his or her own personal hunches, suspicions, or prejudices about which traveler looks like a hijacker. When this happens some travelers will experience more screening than others, but without the rational basis for distinction provided by the selective model. Moreover, petty harassment in the manner in which manual inspection of bags and packages is conducted can occur more frequently when frustrated, angry, mean, or perverse screeners come into contact with numerous travelers all day long. The need to hire many more screeners under a nonselective system increases the likelihood of such persons being employed.[390]

Finally, judicial control of abuses in the administration of nonselective screening may be even more difficult than in the case of selective screening. With respect to the latter, although the occurrence of an abuse may be hard to prove, there are at least clear criteria for determining what constitutes abuse. In nonselective screening the only criterion of abuse in the initiation of a procedure would be bad faith, which is vague and difficult to prove. Moreover, in selective screening the very occurrence of selection is out of the ordinary, and the government, therefore, should bear the burden of showing a factual basis to justify selection. In contrast, in nonselective screening the most intrusive procedures would be no more than what every traveler may expect, and the burden would seem to lie on the defendant to show that his or her screening, though authorized by the system, was still out of the ordinary and in bad faith.[391]

390. Personal tales of harassment under the 1973 system, as related to the author, abound. An elderly lady tourist unwittingly carries a loaf of sourdough bread to the boarding gate in San Francisco; the screening personnel insist on tearing it apart in their ostensible quest for hidden weapons. At Los Angeles, in the early hours of the morning, a shapely black woman is required to remove her bra with its metal foundation and walk through the metal detector, and past the screening personnel, a second time before being cleared for boarding. An unsuspecting man carrying an elegantly wrapped birthday present sees the wrapping torn off and the package slit open as part of the inspection of his carry-on baggage. A lawyer hoping to use his flight time to clip excerpts from advance sheets has his scissors confiscated and mailed to him a week later. Scissors confiscated from another traveler were never received in the mail. And, many travelers find the contents of their purses and suitcases returned to them in a state of total disarray. *See also* Lindsay, *Air Raiders Take Search in Stride*, N.Y. Times, Jan. 27, 1973, § 1, at 31, col. 7.

391. *See* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

> [T]he circumstances under which the airport search is conducted make it much less likely that abuses will occur. Unlike searches conducted on dark and lonely streets at night where often the officer and the subject are the only witnesses, these searches are made under supervision and not far from the scrutiny of the traveling public. Moreover, the airlines, which have their representatives present, have a definite and substantial interest in assuring that their passengers are not unnecessarily harassed. The officers conducting the search under these circumstances are much more likely to be solicitous of the Fourth Amendment rights of the traveling public than in more isolated, unsupervised surroundings.

Id. at 1276.

b. *Discrimination.* Concern about abuse in the selective model would cut much deeper if it could be shown that the Profile contained any elements which would link selection to an inherently suspect category such as race, sex, ethnic background, or poverty. Indeed, one district court held the search of a passenger selected on the basis of the Profile invalid simply because the airline applying it introduced "an ethnic element for which there is no experimental basis."[392] Courts and commentators, however, have uniformly concluded that the Profile, as devised by the task force and properly applied, is entirely neutral as to race, sex, ethnic background, poverty, and even dress, hair length, and personal appearance.[393] Indeed, its operative theory would preclude inclusion of a characteristic geared to these elements if the Profile selects only on the basis of behavior and not on physical and personal characteristics.

If it could be shown that the Profile, even without an express reference to a minority factor, in practice tended to select a disproportionate number of Blacks, Chicanos, Puerto Ricans, Greeks, Arabs, men, hippies, or indigents, it would be discriminatory in effect and arguably as offensive as if it made specific reference to these characteristics.[394] Selection of a disproportionate number of minority group members would call into question the claim that race, sex, ethnicity, and poverty are not considered.

There are, unfortunately, no statistics available on the race, ethnic background, sex, poverty level, or physical appearance of those persons selected by the Profile, much less any comparisons between the percentage of various minorities in the group selected and in the larger group of travelers from which they were selected. There are also lacking any statistics on the percentages of minority group members among those persons actually found to be carrying weapons. The only data available relates to the race and sex of many of the actual hijackers, and it shows that of the 140 hijackers[395] whose race and sex were reported, 22 percent were Black males, 5 percent Black females, 26 percent latin males, 45 percent other males, and 2 percent other females.[396]

392. United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971).

393. United States v. Slocum, 464 F.2d 1180, 1183 (3d Cir. 1972); United States v. Bell, 335 F. Supp. 797, 800-01 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); Abramovsky, *supra* note 17, at 137; McGinley & Downs, *supra* note 5, at 302-03.

394. *See* Turner v. Fouche, 396 U.S. 346 (1970). *See also* Norris v. Alabama, 294 U.S. 587 (1935).

395. This represents 65 percent of all hijackers.

396. *See* App. II, *infra* at 747, col. 5. Extrapolation from this column shows the following:

From the disproportionate number of minority group members among hijackers, it might be argued that the Profile could have deliberately selected an equally disproportionate number of minority group members without invidiously discriminating against such minority selectees. However, it does not follow from the fact that a certain percentage of hijackers were minority group members that minority people would constitute the same percentage of the persons then or now carrying weapons aboard an airplane. Still less does it follow that minority people should make up a disproportionate number of nonweapon carriers selected by a truly neutral profile. Regardless of how many hijackers are minority members, hijackers are still such an infinitesimal portion of any minority population that being a part of that population cannot increase sufficiently any individual's chance of being a hijacker to add to the predictive value of purely behavioral characteristics.

Still, if behavior, and not physical characteristics, is the sole basis for selection it might be argued that some skewed effect is permissible, as long as behavior is not so genetically or culturally determined as to be found universally or commonly in one group and rarely or never in other groups. Such behavior would necessarily be exhibited by substantial numbers of nongroup members and not exhibited by substantial numbers of group members. Moreover, it would be subject to change, if not deliberately at the moment of approaching the boarding gate, at least consciously or unconsciously over a longer period of time. Thus, in time the percentage of minority and nonminority group members selected by the Profile could change even if its contents were never disclosed or altered.

Without more data, these speculations cannot control the final assessment of the Profile. Taking at face value the assurances of insiders that it is neutral, it raises no discrimination problem. If data were to reveal a substantially disproportionate number of minority individuals

Total Hijackers:		212
Male:		123
White:	55	
Black:	31	
Latin:	37	
Female:		10
White:	3	
Black:	7	
Latin:	0	
Sex Not Reported:		31
White:	7	
Black:	4	
Latin:	20	
Race Not Reported:		23
Male:	19	
Female:	4	
Neither Race Nor Sex Reported:		25

among selectees, that fact could raise serious questions as to whether a system which discriminates in effect against minorities can be said to be less drastic than a system which treats all equally, even if the former does allow substantial numbers of minority and nonminority travelers to escape screening in a way consistent with the fourth amendment.

c. *Secrecy of the Profile.* The contents of the Profile have been kept secret from the public on the theory that their disclosure would enable hijackers to simulate an acceptable Profile.[397] This secrecy is arguably another respect in which the model system is more drastic in its operation than a nonselective system. It makes objective evaluation of the abusive potential and neutrality of the Profile difficult. Rather, reliance must rest on the judgments of the courts in which its contents have been revealed that it is scientifically based, behaviorally oriented, racially and sexually neutral, objective in application, and perhaps subject to after-the-fact review. These judgments have been based on full in camera hearings in which witnesses familiar with the Profile have testified about its characteristics and have been subject to cross-examination by counsel representing defendants.[398] While this review by federal courts may not give the Profile as exhaustive a review as public exposure would, it does at least interpose the judiciary between the traveling public and the executive agencies which devised the Profile, whose assurances might well be taken with a grain of salt.

Not only the public, but the individuals selected by the Profile do not know its characteristics. In *Lopez,* the defendant was excluded from the hearing on the characteristics of the Profile because he was a habitual drug user "who would feel no compunction about telling what he knew to all who would lend an ear in prison or out."[399] This exclusion is another respect in which the model system may be more drastic in its impact on the individual selectee than the more nonselective systems.[400]

This exclusion, however, has been held not to infringe a defendant's sixth amendment right to a public trial or to confront the witnesses

397. *See* Dailey, *supra* note 1, at 1010.

398. The cases in which the contents of the Profile have been revealed are: United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), *cert. denied,* 416 U.S. 987 (1974); United States v. Fern, 484 F.2d 666 (7th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Miller, 480 F.2d 1008 (5th Cir.), *cert. denied,* 414 U.S. 1041 (1973); United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Riggs, 347 F. Supp. 1098 (E.D.N.Y. 1972), *aff'd,* 474 F.2d 699 (2d Cir.), *cert. denied,* 414 U.S. 820 (1973); United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971), *aff'd,* 464 F.2d 667 (2d Cir.), *cert. denied,* 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

399. 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).

400. *But cf.* McGinley & Downs, *supra* note 5, at 318.

against him.[401] Moreover, since the less drastic impact of the selective model depends primarily on assuring the individual traveler that selection was based on facts objectively determined by a procedure that was neutral and fair and sufficiently indicative of hijacker potential to give the condition on his or her travel a fact-based reasonableness, the judgment of an impartial court, after an adversary hearing, ought to be sufficient. The secrecy of the Profile does not deprive the selected individual of all opportunity to establish that he or she did not meet the Profile, for the individual can still testify, in response to informed questions of counsel, as to whatever is remembered about his or her behavior in the boarding area. Finally, the fact that the courts can continually review the Profile and its application, in addition to scrutinizing the other steps in the selective model, makes the model less drastic than a wholly nonselective system under which there are no established procedures that can be reviewed.

d. *The Stigma of Selection.* The final and perhaps most troubling adverse impact of the model system, as of any system that is selective, lies in the possible stigma of selection.[402] This stigma may be heightened by the factual basis upon which selection rests and by the small numbers selected, since the selectees will be identified as objectively resembling a hijacker. Clearing a subsequent procedure may not dissipate this stigma or the anger felt at having been selected. It may be particularly irksome to a frequent traveler if he is repeatedly selected.

401. United States v. Bell, 464 F.2d 667, 669-72 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); United States v. Lopez, 328 F. Supp. 1077, 1086-92 (E.D.N.Y. 1971); *cf.* United States v. Miller, 480 F.2d 1008, 1010 (5th Cir.), *cert. denied*, 414 U.S. 1041 (1973); United States v. Slocum, 464 F.2d 1180, 1184 (3d Cir. 1972). *But cf.* United States v. Ruiz-Estrella, 481 F.2d 723, 725-26 (2d Cir. 1973) (exclusion of the defendant from the parts of the hearing not concerned with the contents of the Profile is improper); United States v. Clark, 473 F.2d 240, 244-45 (2d Cir. 1973) (to the same effect). In rejecting the public trial claim, the *Lopez* court reasoned that the public interest in keeping the Profile confidential was comparable to the need to preserve order in the courtroom or avoid harassment of witnesses and similarly justified excluding the public. United States v. Lopez, *supra* at 1086-88. In rejecting the right to confrontation claim, it treated the Profile as a kind of informer and found precedent for not disclosing its contents in McCray v. Illinois, 386 U.S. 300 (1967), which approved nondisclosure of the identity of informers at probable cause hearings. 328 F. Supp. at 1092. Actually the *Lopez* court, in holding an in camera hearing and in allowing defense counsel to be present, went beyond anything required by *McCray*. *Cf.* McCray v. Illinois, *supra* at 307-08, *quoting* State v. Burnett, 42 N.J. 377, 385-88, 201 A.2d 39, 43-45 (1964). Moreover, the fact that the contents of the Profile and an individual's Profile selection are not introduced at the guilt phase of the trial considerably mitigates any prejudice the individual suffers from not personally learning the characteristics of the Profile. *Compare* McCray v. Illinois, *supra, with* Roviaro v. United States, 353 U.S. 53 (1957).

402. One such factor [making nonselective screening less offensive than selective screening] is the almost complete absence of any stigma attached to being subjected to search at a known, designated airport search point. As one commentator has put it in the border search context, "individuals searched because of their membership in a morally neutral class have less cause to feel insulted. . . ."

United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973). *See also House Hearings, supra* note 108, at 421.

Still, this sort of stigma or embarrassment inheres in any system which permits the selection of persons for involvement in the criminal investigative process on any basis less than certainty of guilt. A person arrested on the basis of probable cause may be innocent of crime and embarrassed by his arrest, yet the arrest remains lawful and the system that permits it bears the imprimatur of the fourth amendment. Perhaps such arrestees would be less embarrassed if their arrest were part of a random or blanket system, but this has never been thought to suggest that such a system would be preferable to the fourth amendment's limitations. Similarly, the factual basis of selection in a selective screening system justifies the minimal stigma which might inhere in selection for air traveler screening.

Any stigma can be minimized. The notices which warn passengers approaching the boarding area that they are all subject to screening also could announce that some will be selected, that these persons will include all hijackers but also many who are not hijackers, that the innocent will be cleared by subsequent procedures, and that for them initial selection means nothing. This notice can be bolstered by similar announcements in the media.[403] In addition, selection can be made as unobtrusively as possible so that few if any other passengers are aware of one traveler's selection. The procedures following initial selection can be carried out in private and completed swiftly enough so that innocent selectees may rejoin the other passengers on the plane without obvious delay.[404]

In the last analysis, apart from the embarrassment of being selected, the selected traveler experiences the same screening procedures which all experience under a wholly nonselective screening system, while the vast majority of travelers escape the invasion which those procedures work. As long as embarrassment is the only way in which the selective model is more drastic for anyone than nonselective screening, the gain in fourth amendment values for all air travelers should not be sacrificed so that the innocent passengers who are selected can be spared, not the experience of further screening which they would face under any system, but some slight embarrassment that attends being selected for that screening.

3. *Comparative Effectiveness of the Selective Model*

A suspicion may remain that a system which allows as many as 99.77 percent of all passengers to board a plane simply on the basis of not matching the Profile must run a greater risk of failing to detect

403. *See* Fenello, *supra* note 11, at 997.
404. *See* Comment, *supra* note 5, at 403-04.

a potential hijacker than a system that manually inspects all carry-on luggage and frisks all passengers.[405] This suspicion, however, is not confirmed by the observable effects of screening before and after the institution of the 1973 system, by the operation of the two systems, or by the deterrent theory that underlies the screening concept.

The Profile systems in effect prior to 1973 were as effective in detecting and deterring hijack attempts as has been the 1973 system. Several sources assert that no flight subjected to a pre-1973 screening was ever hijacked,[406] and no account of a hijacking contains any suggestion that the hijacker had been properly screened under a pre-1973 system.[407] Moreover, as screening under the pre-1973 systems became more widespread, a coincidental decline in the number of hijackings began even before the adoption of the 1973 system, and the last 5 months of 1973 saw only two true hijackings.[408] Any further reduction in the number of hijackings after the adoption of the present system[409] would seem to be attributable more to the institution of some screening at all airports than to the shift to a more nonselective system.[410]

In addition, the actual operation of selective and nonselective screening systems suggests that the selective model is no more and per-

405. Several discussions of the Profile suggest that it may fail to select as many as 15 percent of all hijackers. *See Symposium—Skyjacking, supra* note 17, at 1082 (remarks of Dr. Dailey). *See also* United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D. N.Y. 1971). It has been noted that the evolution of new types of hijackers with new preboarding behavior might leave the Profile ineffective until their characteristics were incorporated, presumably after several had carried off hijack attempts. McGinley & Downs, *supra* note 5, at 305-06.

406. United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971); *House Hearings, supra* note 108, at 416, 418; *Symposium—Skyjacking, supra* note 17, at 1062, 1080. *See also* 37 Fed. Reg. 2501 (1972) ("The FAA is of the opinion that a majority of the air piracies occurring recently would have been prevented had the [pre-1973] system been used to the fullest extent possible.")

407. *See Symposium—Skyjacking, supra* note 17, at 1062; discussion note 437 *infra*; App. II, *infra* at 747. Since evidence that the Profile failed to detect a hijacker would have tended to call its effectiveness into question, the press would have been highly motivated to make such evidence public. The absence of such a disclosure corroborates the assertions that no flight screened pursuant to the Profile was ever hijacked.

408. *See* App. II, *infra* at 762, items 141-42. The well-publicized incident in Houston, Texas in October 1972 was not a hijacking since the perpetrator stormed the boarding gate. It is ironic that this incident, which could not have been prevented by any screening, precipitated the shift to the nonselective 1973 system.

409. The *New York Times* reported that four hijacking attempts occurred in 1973-74. N.Y. Times, Sept. 5, 1974, § 1, at 17, col. 1. At least one of these incidents was not a true hijacking. *See* discussion note 440, *infra*. One commentator has noted that the FAA reported the occurrence of two hijacking attempts since the adoption of the 1973 system. Only one of these was successful. *See* Note, *Constitutionality, supra* note 17, at 128 n.1.

410. Although both the 1973 system and its predecessors were effective in preventing hijackings, the decline in hijack attempts also may have been attributable to such factors as the announced intention of Cuba to deal severely with hijackers, N.Y. Times, Nov. 19, 1972, § 4, at 1, col. 6; *Id.*, Feb. 16, 1973, § 1, at 1, col. 5, the limited extradition agreement entered into between Cuba and the United States, *id.*, Feb. 16, 1973, § 1, at 1, col. 5; *Id.*, at 5, col. 1, and the decreasing success rate of domestic hijack attempts. *Symposium—Skyjacking, supra* note 17, at 1071.

haps less susceptible to having its effectiveness at a given time undermined by careless or inconsistent application. Although there is some concern that proper application of the Profile requires a level of concentration which is difficult to sustain during periods of heavy travel,[411] this defect could be corrected by assigning personnel to do nothing but make Profile checks, rather than giving this task to the gate agents who must also take tickets, answer questions, and supervise the boarding, as was done in pre-1973 systems. On the other hand, administration of the nonselective system indicates that its manual inspections, wand checks, and frisks vary greatly in thoroughness from airport to airport, from day to day, from hour to hour, and even from person to person in the same line. The cumbersome and time-consuming nature of these procedures and their obvious offensiveness to many air travelers create pressure on screening personnel to relax the rigor of the inspection at certain times. At such times, the screening personnel may be clearing, on the basis of unscientific judgments, travelers who would have been selected by the more scientific Profile. In contrast, the selective model, after applying the Profile, can concentrate on relatively few persons and can screen such persons more thoroughly.[412]

Finally, the deterrent theory, which underlies the screening concept, is as applicable to selective as to nonselective screening. Most of the effectiveness of the screening process is said to lie not in its detection of actual attempts but in its ability to keep most persons from ever attempting a hijacking by making them think that insuperable obstacles lie in their path.[413] This theory lay at the heart of the pre-1973 systems, and their effectiveness was in large part the product of this deterrent effect.[414]

It might appear that a wholly nonselective system would be a more credible deterrent than the selective model, since those who calculate in advance might be more likely to think they could deceive the Profile than a baggage inspector, and those who arrive at the airport without having taken screening into account might be more likely to turn back if they saw everyone's baggage being inspected than if they saw most travelers boarding without such an inspection. Also, a publicized shift from nonselective to selective screening might be interpreted as a relax-

411. *Symposium—Skyjacking, supra* note 17, at 1058. *Accord,* S. REP. No. 93-13, 93d Cong., 1st Sess. 8 (1973); McGinley & Downs, *supra* note 5, at 319.

412. *See Symposium—Skyjacking, supra* note 17, at 1061-62.

413. *See* McGinley & Downs, *supra* note 5, at 304-05 & n.81.

414. United States v. Cyzewski, 484 F.2d 509, 511 (5th Cir. 1973), *petition for cert. dismissed,* 415 U.S. 902 (1974); United States v. Bell, 335 F. Supp. 797, 802 (E.D.N.Y. 1971), *aff'd,* 464 F.2d 667 (2d Cir.), *cert. denied,* 409 U.S. 991 (1972); Dailey, *supra* note 1, at 1010-11; Comment, *supra* note 5, at 391 n.69, 416.

ation of the standards, which could induce some persons to make a fresh try at running the gauntlet.

Even under the 1973 system there was an increase in the number of persons attempting to carry weapons aboard planes after the initial novelty of the system wore off.[415] Any system will have to cope with some persons who attempt to slip through its procedures. As long as both are equally effective in doing that, the selective model's need to cope with a few more will not impair its overall effectiveness in protecting air travel from hijacking attempts. Indeed, the fact that this model undertakes to screen thoroughly only a small number of selected air travelers makes it more likely to detect weapon-bearing hijackers, even in the face of a slight increase in their numbers, than a system which is always trying to screen everyone thoroughly.

Furthermore, even if a wholly nonselective system could bring about a greater decrease in the occurrence of hijackings than the selective model, the difference would be no more than marginal.[416] Both systems will prevent almost all hijackings, and neither will prevent occurrences that depart from the pure hijacking model. The actual dangers of in-flight hijacking are not so great[417] as to permit adoption of a more drastic system to eliminate whatever marginal difference in effectiveness there is between it and a less drastic system. The selective model, which is less drastic in its impact on the rights of air travelers, is so close in effectiveness to the most nonselective system as to be the constitutionally-required alternative for screening air travelers to prevent hijacking.

CONCLUSION

The attempt to prevent hijacking by screening air travelers creates complex constitutional problems for which no entirely satisfactory solution can ever be found. Because of this complexity and because the problem is not unique to air traveler screening, the importance of finding the best possible solution goes far beyond the airport context. Society and the traveler seem caught between two fears—the fear that the continuation of hijacking will cause society either to give up the fullest public enjoyment of air travel or accept an increased risk of death in the midst of that enjoyment and the fear that imposition of screening will cause the individual either to give up the personal enjoyment of

415. Charlotte (N.C.) Observer, Aug. 24, 1973, at 12A, col. 1; *Id.*, Aug. 30, 1973, at 27A, col. 1.

416. In 1973, the FAA Director of Air Transportation Security stated that a more selective system than the 1973 system "appeared to be 'equally safe and less onerous' [than the present one]." N.Y. Times, June 5, 1973, § 1, at 1, col. 7.

417. *See* App. I, *infra* at 743.

air travel or surrender some measure of highly valued privacy, security, and integrity. That neither of these fears is entirely rational does not diminish the tension between them.

This Article proposes a resolution for this tension, one that reconciles the conflicts which give rise to these fears and that retains as much as possible of the values whose loss is threatened by hijacking and screening. The unconstitutional conditions doctrine provides the simplest and most comprehensive conceptual framework for achieving this reconciliation. Its least drastic means criterion best resolves the tension between fourth amendment values and the overwhelming public desire to be secure from the perceived terrors of aircraft hijacking. In resolving that tension, the criterion employed here expresses an essential democratic value: society in protecting its citizens from evil must do so in the most humane manner possible, so as to prevent its protective means from supplanting the original evil. Thus, the method employed to protect society's air travelers from hijacking must be the least drastic means possible.

This least drastic means is the most selective system that can be constructed from available procedures. Such a system would use a large number of screening procedures arranged from the most minimally intrusive to the full search. This model system would effectively protect air travel from the dangers of hijacking with the least possible impact on the rights of air travelers. It would spare the vast majority any contact with even the mildest of the procedures amounting to a search. For those who were affected by any procedure, it would do no more than condition travel on consent. Such consent could be given or withheld up to the moment a procedure is about to begin. Before imposing even a consent condition on anyone at any point, this system would develop as many facts as possible under its less intrusive prior procedures. No shift from consented to unconsented searches and no broader consent condition is necessary to protect air travel.

Inclusion of the Hijacker Personality Profile seems, on the basis of public information, to make the model system less drastic. Of all of the available procedures, it works by far the largest reduction in the number of travelers subjected to the screening. Additionally, its results correlate significantly with the discovery of weapons on selectees, and the courts that have reviewed its contents have found them to be nondiscriminatory. A system which uses the Profile is as free from abuse, as fair to those selected, and as effective in preventing in-flight hijacking as any nonselective system.

Admittedly, public information about the Profile is limited and conclusory. This suggests that any court judging screening within the

analytical framework of the unconstitutional conditions doctrine should make a new assessment of the Profile to determine whether it is sufficiently effective, probative, and nondiscriminatory so that its inclusion makes a screening system less drastic. If it does, its use is required. Even if it does not, the least drastic means criterion still requires that a system employ all of the remaining procedures in order to minimize the impact of screening at each step in the screening process. A meaningful choice can still be made between systems which do and do not use a general metal detector and an x-ray weapon detector before rummaging through a traveler's bags, or between systems which do and do not use a general metal detector, a wand, and removal of metal before subjecting a traveler to a pat-down frisk.

The fact that many screening procedures, when viewed separately, make relatively small intrusions on personal privacy and security is no reason to be lax in applying the least drastic means criterion. Even if the airport were the only place where enjoyment of a benefit were conditioned on consent to a minor search, the fact that there is a search which does entail inconvenience as well as intrusion is reason enough to question any screening condition as long as effective protection can be afforded by still less drastic means.

But air traveler screening is not an isolated phenomenon. Entry into prisons, military basis, defense facilities, and even most federal buildings is conditioned on consent to inspection of the entrant and his or her belongings.[418] Use of a public library is conditioned on presenting a purse or briefcase for inspection at the exit. Living in a dormitory at a state university has been conditioned on consent to periodic room inspections.[419] Even attendance at the Supreme Court of the United States is conditioned on submission to a general metal detector check. Further extensions of screening could be justified by analogy to antihijacking measures. Bank robbery and shoplifting are more expensive crimes than hijacking.[420] These crimes also might be detected or deterred by searching all customers and employees at the doors of banks and stores.[421]

418. In United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884 (8th Cir. 1973), the court listed a number of cases involving such conditions, 351 F. Supp. at 152, and asserted that, "[s]imilar searches are also a matter of routine in every Federal building in the country open to the public." *Id.* at 151 n.2.

419. *See, e.g.*, Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971); Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970); Note, *Students' Constitutional Rights on Public Campuses*, 58 U. VA. L. REV. 552 (1972).

420. D. MULVIHILL, M. TUMIN & L. CURLES, CRIMES OF VIOLENCE, A STAFF REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE Vol. 11, at 400-01 (1969) [hereinafter cited as CRIMES OF VIOLENCE].

421. Many writers have expressed concern about the potential spread of screening.

The proliferation of even limited screening amplifies the impact of each screening event. The inconvenience and intrusiveness, which may be minor when confronted only on the infrequent occasions of air travel, would be aggravated when encountered several times in the course of a normal day's activity. The temptation to use each screening location as a checkpoint to search for evidence of unrelated crimes and to harass the persons being screened is increased with the number and frequency of the checks.

Despite all this, the widespread occurrence of screening could lead, in time, to its general public acceptance in all situations. The public seems to have accepted fairly drastic screening as a normal concomitant of air travel. Yet even in this limited context, the sight of millions of Americans dutifully lining up to submit to official inspection of their persons and belongings, even for an apparently important purpose, is not one which brings comfort to those who have seen similar behavior in peoples inured to totalitarian regimes.[422] This surrender of privacy and other personal rights to obtain security runs counter to the essential values of democracy. It would be more troubling still if a general fear of crime led us to accept even more widespread screening.[423]

The unconstitutional conditions doctrine was developed in large part in response to concern with the government's ability to buy up constitutional rights by extensive use of the conditioning device.[424] With respect to screening, the doctrine teaches that no occasion, however minor, can be viewed in isolation. Each must be carefully scrutinized, so that it may have the least immediate impact on fourth amendment rights and make no contribution to a more general restriction of personal liberty.

The unconstitutional conditions doctrine also provides the conceptual and analytical tools with which to judge conditions imposed outside the air traveler screening context. It does not dictate that all must fail or that any must be approved. It simply requires that each must be judged in terms of its relevance to the particular public benefit being

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See Fenello, *supra* note 11, at 1001; Gora, *supra* note 381, at 1048; *Symposium—Skyjacking, supra* note 17, at 1080-81. *See also* United States v. Bell, 464 F.2d 667, 675-76 (2d Cir.) (Mansfield, J., concurring), *cert. denied*, 409 U.S. 991 (1972).

422. *See* Fenello, *supra* note 11, at 996.

423. "If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

424. *See* Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting); Hale, *supra* note 36, at 321-23; Van Alstyne, *Demise, supra* note 36, at 1461-62; Note, *First Amendment, supra* note 36, at 409; Note, *Unconstitutional Conditions, supra* note 36, at 1596, 1599; Comment, *supra* note 34, at 144, 148-49.

conditioned, its overall impact on fourth amendment rights, and the availability of less drastic means to protect the benefit. Some conditions may fail because they are irrelevant to the government's interest in protecting the benefit or because the threat protected against is too remote or inconsequential. Others may be approved because they have no impact on fourth amendment rights. But when a relevant condition does have an impact, a careful search for a less drastic but effective alternative must be undertaken. Some conditions with greater impact on fourth amendment rights than air traveler screening may be approved because no less drastic alternative is available. But in most cases, imagination and ingenuity can devise a feasible alternative with little or no impact on fourth amendment rights. The genius of the unconstitutional conditions doctrine is that it maintains constant pressure to keep searching for that alternative and to rest only when the benefits of modern society are protected from its many perils in the most democratic way possible.

APPENDIX I

INTERPRETIVE SUMMARY OF DATA IN APPENDICES II, III, AND IV

PHYSICAL THREAT

Impact on Air Safety

The threat posed by a hijacking to the physical safety of the crew and passengers of the hijacked aircraft could be realized if, in the course of the hijacking, the plane were to crash, indiscriminately taking the lives of all those on board. Even without a crash, one or more passengers or crewmembers could be killed or injured in the course of a hijacking. No plane has actually crashed during any domestic hijacking, however. Only two were forced to make landings because of crew injuries or damaged equipment. Only four (2.8 percent) of the 144 domestic hijacking incidents resulted in death to any passenger or crewmember, and in only one incident (.7 percent) was the killing unprovoked. Only 10 incidents (7 percent), including the four just mentioned, resulted in either death or injury to a passenger or crewmember, and in only three (2.1 percent) of these was the killing or injury unprovoked. In the four incidents involving death, two passengers and two crewmembers were killed, with the one unprovoked killing involving a crewmember. In the 10 incidents involving death or injury, seven passengers and 10 crewmembers were killed or injured, with the three incidents of unprovoked killing or injury involving one passenger and three crewmembers.

If the precise number of passengers and crewmembers involved in all 144 hijacking incidents were known, the percentage of all victims of hijacking who suffered either death or injury could be computed. But the number of passengers and crew aboard has been reported with respect to only 99 hijacking incidents. Still, these incidents have involved a total of 7,666 passengers and crewmembers, or an average of 77.4 victims per hijacking incident. If this average prevailed over all 144 hijacking incidents, the number of passengers and crewmembers involved in these incidents would have totaled 11,151.

Using this figure, the four victims killed were only .04 percent of all hijacking victims, and the 17 victims killed or injured were only .15 percent of all victims. The one victim of an unprovoked killing was only .009 percent of all hijack victims, and the three victims of unprovoked injuries were only .03 percent. Otherwise stated, for all incidents there was only about a 1 in 35 chance of someone aboard being killed and only a 1 in 14 chance of someone being killed or injured.

But for all hijacking victims, there was only a 1 in 2734 chance of being killed and a 1 to 643 chance of being killed or injured.

All this is true only if the plane is actually hijacked. In the years 1961-72 there were some 50 million aircraft flights of the type which are now the subject of screening.[425] The 144 which were actually hijacked represented only .0003 percent of them. Thus, the traveler approaching the gate to board any flight faced only a 1 in 350,000 chance of being hijacked at all, a 1 in 12.5 million chance of being on a plane on which anyone other than the hijacker was killed or injured, a 1 in 325 million chance of being killed in a hijacking, and a 1 in 30.5 million chance of being killed or injured in a hijacking.

Comparison to Other Crimes[426]

Viewed in gross, the violent crime rate (murder, forcible rape, and aggravated assault) for the general population in 1972 was 217.8 per 100,000 or 1 in 460.[427] The murder rate was 8.9 per 100,000 or 1 in 11,236.[428] This compares with the 11-year death and injury rate from hijacking of 1 in 30.5 million and a death rate of 1 in 325 million.

When the per incident and per victim rates of death or injury for

425. NATIONAL TRANSPORTATION SAFETY BOARD, PRELIMINARY ANALYSIS OF AIRCRAFT ACCIDENT DATA, U.S. CIVIL AVIATION 23 (1972) (2-year survey) [hereinafter cited as 1972 PRELIMINARY ANALYSIS]; NATIONAL TRANSPORTATION SAFETY BOARD, REVIEW OF AIRCRAFT ACCIDENT DATA, U.S. CIVIL AVIATION Tables 12 & 14, at 44, 46 (1969).

426. The following comparisons are tentative. Statistics on the percentages of deaths and injuries resulting from various crimes are presented, not as an exhaustive analysis of the impact of those crimes upon their victims, but as a general indication of the comparison between the risk of injury to hijacking victims and the risk of injury to victims of other crimes. Information about other crimes must be derived from general crime statistics which are generally believed to be reliable, if at all, only to show the most general of trends. *See* NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, CRIMES OF VIOLENCE vol. II, ch. 2 (1969) [hereinafter cited as CAUSES AND PREVENTION OF VIOLENCE]; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT ch. 10 (1967) [hereinafter cited as TASK FORCE REPORT: CRIME]. Even the most inclusive of statistics make little effort to report information from which the rates of death and injury to the victims of specific crimes could be computed. Studies that do report such data have, to date, been regional in scope. *See* authority cited note 430 *infra*.

Moreover, there is some difficulty in picking those crimes which are appropriate for comparison to hijacking. Rates for crime in general are naturally distorted by the inclusion of crimes such as homicide or rape which by definition involve some injury to the victim. On the other hand, such crimes as robbery and kidnapping which share with hijacking the use of threats to inflict bodily harm in order to obtain some concession from the victim or others, usually involve only one or a few victims, so that the rates of injury per incident and per victim are not as disparate as in the case of hijacking. Bank robbery and some other armed robberies of commercial establishments share with hijacking both the threat of force and the involvement of more than one or two victims per incident, but very little has been reported of the per incident rate of death or injury for such crimes, and no data, even speculative, is available concerning the total number of customers and employees involved in bank robberies and similar crimes.

427. 1973 FBI UNIFORM CRIME REP. 2.

428. *Id.*

hijacking are compared to such information as is available for other comparable crimes, hijacking appears to have been among the least dangerous to the physical safety of its victims. The President's Commission on Law Enforcement estimated that injury occurs in as many as two-thirds of all crimes against the person.[429] The District of Columbia Crime Commission reported that in the period studied, 80 percent of all aggravated assaults and 25 percent of all robberies resulted in secondary physical injury to the victims.[430] With respect to robberies, the National Commission on the Causes and Prevention of Violence reported that in the period studied, 13.7 percent of armed robberies and 27.7 percent of unarmed robberies resulted in injury.[431] In terms of death rates, the District of Columbia Crime Commission reported that in the period studied, .05 percent of robberies and 3 percent of rapes resulted in death of the victim.[432]

In this context, hijacking fares well on a per incident comparison. Its 7 percent rate of incidents resulting in death or injury is lower than any similar rate reported above. Its 2.8 percent rate of incidents resulting in death is lower than any rate except that for robbery in the District of Columbia Crime Commission Report. When a per victim comparison is made, hijacking fares even better, for its .04 percent death rate per victim and .15 percent death or injury rate per victim fall below any comparable rates reported above.[433]

ECONOMIC THREAT

Hijacking also poses a potential threat of economic loss. For the persons injured or killed and their families, there is the cost of medical treatment and lost earnings. The crash of an airplane destroys a costly piece of equipment, and even lesser damage requires expensive repairs. Extra fuel is consumed in the course of any hijacking, and there is also the cost of overtime pay for the crew and extra food and lodg-

429. TASK FORCE REPORT: CRIME, *supra* note 426, at 14.
430. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 64, 79 (1966) [hereinafter cited as D.C. CRIME REPORT].
431. CAUSES AND PREVENTION OF VIOLENCE, *supra* note 426, Table 10, at 235.
432. D.C. CRIME REPORT, *supra* note 430, at 45-46.
433. Similar comparisons between hijacking and other crimes are drawn in Gora, *supra* note 381, at 1049; Comment, *supra* note 5, at 405 n.157. One writer suggests that 1 out of every 75 crewmembers on United States commercial airlines has had a personal confrontation with air terrorists. *See* O'Donnell, *Air Crimes: Perspective from the Cockpit*, 18 VILL. L. REV. 988, 990 (1973). Assuming that all of these confrontations occurred during domestic hijackings, and further assuming that the 144 domestic flights hijacked carried an average of four crew members per flight the 1 in 75 ratio would suggest that at least 43,000 persons served as crewmembers between 1961 and 1972. If so, the 10 killed or injured represent only about .03 percent of all crewmembers, a rate still lower than that for the victims of any other crime of violence. This rate would be lower still if some of the 1 in 75 crewmembers were involved in foreign hijackings.

ing and return transportation for the passengers. The diversion of one plane creates rescheduling problems, and other aircraft have to be temporarily pressed into service on the routes allocated to the hijacked aircraft. For the government, there is the cost of law enforcement and other emergency measures taken at the airports visited in the course of the hijacking. If a ransom is paid and not recovered, it could be the most substantial cost of all.

It is difficult to estimate the extent to which the potential economic costs of hijacking have been realized or to compare the actual costs of hijacking to those of other hazards to air safety or of other crimes of violence.[434] However, no plane has been totally destroyed in a domestic hijacking, and only two have suffered anything more than minor damage. The cost of diverting a plane as far as Cuba was once estimated to average between $2,500 and $3,000,[435] although other figures suggest Cuba's fees alone could range from $1,600 to $9,000.[436] If the cost of a diversion were computed at charter rates, it might have run to $2.35 a mile, plus $1,300 departure fee for the return trip.[437] But if such costs average $10,000 for all flights, they would total less than $1.5 million for all 144 hijackings since 1961, or less than $150,000 per year. As far as ransom is concerned, it would appear that only a little more than $500,000 remains unrecovered of the $9.3 million paid out in all incidents involving ransom.[438]

The cost of hijacking can be compared roughly to that of other major crimes. In 1969 the National Commission on the Causes and Prevention of Violence estimated that the annual cost of murder and nonnegligent homicide was between $480 and $850 million, of rape and assault between $65 and $142 million, of arson and vandalism between $300 and $750 million, of robbery, burglary, larceny and auto theft between $499 and $672 million, and of shoplifting about $1.5 billion.[439] In whatever manner the costs of hijacking are computed it would seem that it is by far the least costly of all of the major crimes in America.

434. The FAA is said to have two studies underway in this regard. Comment, *supra* note 5, at 412 n.181.
435. Evans, *supra* note 239, at 699.
436. Comment, *supra* note 5, at 412 n.182.
437. *Id.*
438. *See* Comment, *supra* note 5, at 412 n.183; discussion note 193 *supra.*
439. CRIMES OF VIOLENCE, *supra* note 420, vol. II, at 400-01.

APPENDIX II

DOMESTIC HIJACKINGS[440]
1961 TO 1974

Date and Data Source[441]	*Place of Dept./Dest.*	*Airline and Total Persons Aboard*	*Weapon and Method*	*No. of Hijackers/ Race/ Sex*[442]	*Outcome*	*Death and Injury*
1. May 1, 1961 a, b	Miami-Key West	National Unreported	Pistol & Knife	1LM	Cuba	None
2. July 24, 1961 a, c (July 1:7)	Miami-Tampa	Eastern 38	Held crew at gunpoint	1LM	Cuba	None
3. July 31, 1961 a, b	Chicago-San Francisco	Pacific Unreported	Firearm	1WM	Hijacker subdued by passengers and crew.	Pilot and passenger agent wounded in struggle with hijacker.
4. Aug. 3, 1961 a, c (Aug. 4:1:2)	Los Angeles-Houston	Continental 73	Pistols	2WM	Hijackers captured by FBI and Border Patrol agents who boarded craft.	None
5. Aug. 9, 1961 a, c (Aug. 10:1:4)	Mexico City	Pan Am 90	Hijacker armed with pistol forced his way into cockpit.	1WM	Cuba	None
6. Aug. 13, 1962 a, b	Local from Miami	Charter Unreported	Unreported	2WM	Cuba	None
7. Feb. 18, 1964 a, b	Local from Miami	Charter Unreported	Unreported	2LM	Cuba	None
8. Oct. 26, 1965 a, b	Miami-Key West	National Unreported	Pellet gun used to hold stewardess hostage.	1LM	Hijacker was disarmed after struggle with crew.	None

(For footnotes see page 764)

	Date and Data Source[441]	*Place of Dept./Dest.*	*Airline and Total Persons Aboard*	*Weapon and Method*	*No. of Hijackers/ Race/ Sex*[442]	*Outcome*	*Death and Injury*
9.	Nov. 17, 1965 a, c (Nov. 18:1:7)	Los Angeles-Melbourne, Fla.	National 91	Pistol	1WM	Hijacker was subdued by passenger	None
10.	Feb. 23, 1968 a, c (Feb. 24:1:1)	Chicago-Miami	Delta Unreported	Used pistol to force stewardess into cockpit, and held crew at gunpoint.	1WM	Cuba	None
11.	Mar. 12, 1968 a, c (Mar. 13:1:7)	San Francisco-Miami	National 58	Used pistol to force stewardess into cockpit, and held crew at gunpoint.	3LM	Cuba	None
12.	June 29, 1968 a, c (June 30:25:1)	Miami-Key West	Southeast 20	Used pistol to force stewardess into cockpit, and held crew at gunpoint.	1BM	Cuba	None
13.	July 1, 1968 a, c (July 2:1:6)	Minneapolis-Miami	Northwest 92	Pistol	1LM	Cuba	None
14.	July 4, 1968 a, c (July 5:28:8)	Las Vegas-New York	TWA 71	Hijacker was federal prisoner accompanied by U.S. Marshals; he told stewardess he had dynamite.	1WM	Marshals learned of threat when aircraft changed course and subdued their prisoner.	None
15.	July 12, 1968 a, c (July 13:1:7)	Philadelphia-Houston	Delta 54	Pistol	1WM	Pilot talked hijacker out of the attempt.	None
16.	July 12, 1968 a, b	Key West-Miami	Charter Unreported	Unreported	1WM	Cuba	None
17.	Sept. 20, 1968 a, b	San Juan-Miami	Eastern Unreported	Unreported	1LM	Cuba	None
18.	Nov. 2, 1968 a, c (Nov. 3:52:1)	Mobile-Chicago	Eastern 50	Shotgun	1WM	Hijacker was disarmed by pilot.	None

19.	Nov. 4, 1968 a, c (Nov. 5:38:4)	Houston-Miami	National 65	Unreported	1BM	Cuba	None
20.	Nov. 23, 1968 a, c (Nov. 24:83:3)	Chicago-Miami	Eastern 87	Firearms	5LM	Cuba	None
21.	Nov. 24, 1968 a, c (Nov. 25:1:1)	New York-Puerto Rico	Pan Am 103	Firearms, knives	3LM	Cuba	None
22.	Nov. 30, 1968 a, c (Dec. 1:10:1)	Miami-Dallas	Eastern 45	Unreported	1LM	Cuba	None
23.	Dec. 3, 1968 a, c (Dec. 4:1:5)	New York-Miami	National 35	Forced stewardess into cockpit at gunpoint	1LM	Cuba	None
24.	Dec. 11, 1968 a, c (Dec. 12:49:8)	Nashville-Miami	TWA 38	Pistol	1BM 1BF	Cuba	None
25.	Dec. 19, 1968 a, c (Dec. 20:30:1)	Philadelphia-Miami	Eastern 146	Pistol	1BM	Cuba	None
26.	Jan. 2, 1969 a, c (Jan. 3:7:1)	New York-Miami	Eastern 146	Held 2-year old boy hostage with a firearm	1BM 1BF	Cuba	None
27.	Jan. 9, 1969 a, c (Jan. 10:5:1)	Miami-Nassau	Eastern 79	Knife	1WM	Cuba	None
28.	Jan. 11, 1969 a, c (Jan. 12:1:1)	Jacksonville-Miami	United 20	Unreported	1WM	Cuba	None

(For footnotes see page 764)

Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
29. Jan. 13, 1969 a, c (Jan. 14:89:5)	Detroit-Miami	Delta 77	Threatened stewardess with shotgun.	1WM	Hijacker remained seated with his son for the entire flight and was arrested without a struggle.	None
30. Jan. 19, 1969 a, c (Jan. 20:1:4)	New York-Miami	Eastern 171	Handgrenade	1LM	Cuba	None
31. Jan. 24, 1969 a, c (Jan. 25:58:1)	Key West-Miami	National 47	Threatened stewardess with knife.	1W	Cuba	None
32. Jan. 28, 1969 a, c (Jun. 29:-:-)	New Orleans-Miami	National 31	Held crew at gunpoint; threatened to blow up aircraft with dynamite.	2BM	Cuba	None
33. Jan. 28, 1969 a, c (Jan. 29:82:1)	Philadelphia-Miami	Eastern 113	Unreported	2B	Cuba	None
34. Jan. 31, 1969 a, b	San Francisco-Miami	National Unreported	Firearm	1W	Cuba	None
35. Feb. 3, 1969 a, c (Feb. 4:17:1)	Newark-Miami	Eastern 93	Held knife at throat of stewardess in cockpit.	2W	Cuba	None
36. Feb. 3, 1969 a, c (Feb. 4:17:1)	New York-Miami	National Unreported	Forced stewardess into cockpit with knife, threatened crew with fake bomb.	1WM 1WF	Crew talked hijackers out of attempt; they surrendered to FBI when aircraft landed.	None
37. Feb. 4, 1969 c (Feb. 5:41:2)	San Francisco-Hilo, Hawaii	United 85	Told stewardess he wanted to go to Cuba; unclear as to whether hijacker actually had a weapon.	1	Hijacker arrested when aircraft landed.	None

38.	Feb. 10, 1969 a, c (Feb. 11:62:5)	San Juan-Miami	Eastern 120	Held stewardess at gunpoint.	1	Cuba	None
39.	Feb. 22, 1969 c (Feb. 23:72:2)	On ground, Augusta, Ga.	Eastern Unreported	Threatened to hijack the aircraft.	1	Hijacker arrested.	None
40.	Feb. 23, 1969 c (Feb. 24:8:4)	Chicago-San Francisco	Eastern 41	Stewardess overheard remark about going to Cuba; two men wore Black Panther badges, and one had a concealed weapon.	4BM	All were arrested.	None
41.	Feb. 25, 1969 c (Feb. 26:94:4)	St. Louis-San Juan	Eastern 68	Firearm	1	Cuba	None
42.	Mar. 5, 1969 a, c (Mar. 6:84:4)	New York-Miami	National 26	Firearm	1BM	Cuba	None
43.	Mar. 17, 1969 a, c (Mar. 18:28:4)	Atlanta-Charleston, S.C.	Delta 64	Firearm	1WM	Cuba	None
44.	Mar. 19, 1969 a, c (Mar. 20:94:3)	New Orleans-New York	Delta Unreported	Firearm	1WM	FBI agent, traveling as a passenger, disarmed hijacker after a struggle.	None
45.	Mar. 25, 1969 a, c (Mar. 26:30:31)	Newark-Los Angeles	Delta 114	Unreported	1LM	Cuba	None
46.	Apr. 13, 1969 a, c (Apr. 14:47:1)	San Juan-Miami	Pan Am 91	Firearms	4L	Cuba	None
47.	May 4, 1969 c (May 5:10:1)	Los Angeles-Miami	National 73	Told stewardess he wanted to go to Cuba; apparently unarmed.	1M	Hijacker arrested without a struggle.	None

(For footnotes see page 764)

	Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
48.	May 5, 1969 a, c (May 6:27:4)	New York-Miami	National 75	Unreported	2W	Cuba	None
49.	May 26, 1969 a, c (May 27:94:5)	Miami-New York	Northeast 18	Firearms	3L	Cuba	None
50.	June 18, 1969 a, c (June 19:94:4)	Oakland-New York	TWA 87	Firearm	1BM	Cuba	None
51.	June 22, 1969 a, c (June 23:78:6)	Newark-Miami	Eastern	Forced stewardess into cockpit at knifepoint.	2L	Cuba	None
52.	June 25, 1969 a, c (June 29:30:2)	Los Angeles-New York	United 59	Unreported	1LM	Cuba	None
53.	June 28, 1969 a, c (June 29:30:2)	Baltimore-Tampa	Eastern 104	Pilot reported hijacking but with no details.	1WM	Cuba	None
54.	July 27, 1969 a, c (July 28:15:6)	California-Texas	Continental Unreported	Knife	1BM	Cuba	None
55.	July 31, 1969 a, c (Aug. 1:9:1)	Philadelphia-Los Angeles	TWA 131	Threatened crew with razor.	1WM	Cuba	None
56.	Aug. 5, 1969 a	Charlotte-Tampa	Eastern Unreported	Razor, pocket knife	1WM	Hijacker surrendered to crew when informed aircraft would have to refuel before going to Cuba.	None
57.	Aug. 14, 1969 a, c (Aug. 15:70:3)	Boston-Miami	Northeast 52	Unreported	2LM	Cuba	None

58.	Aug. 29, 1969 a, c (Aug. 30:5:2)	Miami-Houston	National 55	Forced stewardess into cockpit at gunpoint.	1LM	Cuba	None
59.	Sept. 7, 1969 a, c (Sept. 8:2:4)	New York-San Juan	Eastern 96	Firearm	1LM	Cuba	None
60.	Sept. 10, 1969 a, c (Sept. 10, 1969)	New York-San Juan	Eastern 192	Seized stewardess at knifepoint and attempted to drag her to the cockpit.	1L	Hijacker was subdued by passengers and crew.	None
61.	Sept. 24, 1969 a, c (Sept. 25:21:1)	Charleston-Jacksonville	National 79	Unreported	1LM	Cuba	None
62.	Oct. 9, 1969 a, c (Oct. 10:95:3)	Los Angeles-Miami	National 70	Unreported	1L	Cuba	None
63.	Oct. 31, 1969 a, c (Nov. 1:1:1)	Los Angeles-San Francisco	TWA 46	Held crew at riflepoint.	1WM	Rome, Italy	None
64.	Nov. 10, 1969 a, c (Nov. 11:93:4)	On ground, Cincinnati	Delta 73	Held passenger at knifepoint.	1WM	FBI persuaded hijacker to surrender.	None
65.	Dec. 2, 1969 a, c (Dec. 3:109:6)	San Francisco-Philadelphia	TWA 28	Unreported	1BM	Cuba	None
66.	Dec. 26, 1969 a, c (Dec. 27:43:1)	New York-Chicago	United 29	Firearm	1L	Cuba	None
67.	Jan. 6, 1970 a, c (Jan. 7:86:1)	Orlando-Columbus	Delta 64	Held stewardess hostage with knife.	1WM	Overpowered by passengers.	None
68.	Feb. 16, 1970 c (Feb. 17:85:6)	Newark-Miami	Eastern 104	Gasoline bomb, firearm	4	Cuba	None

(For footnotes see page 764)

Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
69. Mar. 11, 1970 c (Mar. 12:81:6)	Cleveland-West Palm Beach	United 106	Unreported	6	Cuba	None
70. Mar. 17, 1970 a, c (Mar. 18:1:1)	Newark-Boston	Eastern 71	Held crew at gunpoint in cockpit.	1WM	Pilot was able to land aircraft safely although shot in both arms.	Hijacker shot copilot when copilot told him aircraft would have to land in Boston; before dying, copilot wounded and disarmed hijacker.
71. Apr. 6, 1970 a, b	San Francisco-Pittsburgh	TWA Unreported	Unreported	1W	Hijacker surrendered.	None
72. Apr. 22, 1970 a, b	Local from Gastonia, N.C.	Charter	Unreported	1BM 1BF	Cuba	None
73. May 25, 1970 a, c (May 26:82:1)	Chicago-New York	American Unreported	Held stewardess hostage with a firearm	1LM	Cuba	None
74. May 25, 1970 a, c (May 26:82:1)	Chicago-Miami	Delta 102	Firearm	2LM	Cuba	None
75. June 4, 1970 c (June 5:1:4)	Phoenix-Washington, D.C.	TWA 60	Took over cockpit with razor, firearms, and a can of gasoline.	1WM	Hijacker captured when FBI boarded the aircraft after shooting tires out.	Hijacker wounded pilot; FBI wounded hijacker during struggle in cockpit.
76. July 1, 1970 a, b	Las Vegas-Tampa	National Unreported	Unreported	1LM	Cuba	None
77. Aug. 2, 1970 c (Aug. 3:1:3)	New York-San Juan	Pan Am 379	Firearm	1L	Cuba	None
78. Aug. 19, 1970 c (Aug. 20:70:6)	Newark-San Juan	Trans-Caribbean	Grenade, Firearm	3L	Cuba	None

79.	Aug. 20, 1970 c (Aug. 21:65:1)	Atlanta- Savannah	Delta 82	Bomb	1BM	Cuba	None
80.	Aug. 24, 1970 a, c (Aug. 25:16:4)	Las Vegas- Philadelphia	TWA 86	Hijacker claimed there was a bomb aboard.	1WM	Cuba	None
81.	Sept. 16, 1970 a, c (Sept. 17:43:5)	New York- Los Angeles	TWA Unreported	Unreported	1WM	Hijacker shot by Brinks Security guard who was a passenger on the aircraft.	Hijacker wounded by passenger.
82.	Sept. 19, 1970 a, c (Sept. 20:15:1)	Pittsburgh- Boston	Allegheny 98	Pistol, dynamite	1BM	Cuba	None
83.	Sept. 22, 1970 a, b	Boston- San Juan	Eastern Unreported	Hijacker was prisoner under escort by federal marshals; locked himself in restroom and threatened to burn aircraft.	1WM	Federal marshals broke into restroom and overpowered prisoner.	None
84.	Sept. 30, 1970 c (Nov. 1:30:1)	Miami- San Francisco	National Unreported	Held stewardess hostage at gunpoint.	7	Cuba	None
85.	Nov. 2, 1970 a, c (Nov. 3:68:1)	San Diego- Los Angeles	United 71	Firearm	1L	Cuba	None
86.	Nov. 13, 1970 a, b	Raleigh- Atlanta	Eastern Unreported	Unreported	1B	Cuba	None
87.	Nov. 13, 1970 c (Nov. 14:60:1)	Richmond- Dallas	Eastern Unreported	Firearm	1	Cuba	None
88.	Dec. 19, 1970 a, b	Albuquerque- Tulsa	Continental Unreported	Handed note to stewardess claiming to have a pistol and demanding to go to Cuba.	1BM	Hijacker arrested without struggle when aircraft landed.	None

(For footnotes see page 764)

	Date and Data Source[441]	*Place of Dept./Dest.*	*Airline and Total Persons Aboard*	*Weapon and Method*	*No. of Hijackers/ Race/ Sex*[442]	*Outcome*	*Death and Injury*
89.	Jan. 1, 1971 c (Jan. 2:15:6)	New York-Pittsburgh	United Unreported	Threatened to use firearm.	1	Hijacker arrested by FBI when aircraft landed.	None
90.	Jan. 3, 1971 a, c (Jan. 4:61:1)	Los Angeles-Miami	National 96	Firearms	2BM 2BF	Cuba	None
91.	Jan. 22, 1971 a, c (Jan. 23:5:1)	Minneapolis-Washington, D.C.	Northwest Orient 60	Unreported	1BM	Cuba	None
92.	Feb. 4, 1971 a, c (Feb. 5:2:4)	Chicago-Nashville	Delta 27	Explosives	1B	Cuba	None
93.	Feb. 25, 1971 a, c (Feb. 26:4:5)	Ontario, Calif.-Seattle	Western 94	Unreported	1WM	Hijacker forced aircraft to Canada; he later was extradited.	None
94.	Mar. 8, 1971 a, c (Mar. 9:73:3)	Pensacola, Fla.-Mobile, Ala.	National 45	Sixteen-year-old forced aircraft to Miami with pistol.	1WM	Hijacker arrested at Miami and released to his father.	None
95.	Mar. 31, 1971 a, c (Apr. 1:82:6)	Birmingham-Chicago	Delta 82	Held stewardess hostage at gunpoint and demanded to go to Cuba.	1WM	Stewardess talked hijacker out of attempt.	None
96.	Mar. 31, 1971 a, b	New York-San Juan	Eastern Unreported	Unreported	1LM	Cuba	None
97.	Apr. 4, 1971 a, b	Key West-Miami	Charter Unreported	Unreported	1LM	Cuba	None
98.	Apr. 21, 1971 a, b	Newark-Miami	Eastern Unreported	Hijacker claimed to be armed with firearm and grenade and demanded to go to Italy; he permitted a landing in Miami.	1WM	Hijacker arrested at Miami, he had no weapons.	None

99.	May 28, 1971 a, c (May 29:1:2)	Miami- New York	Eastern 139	Hijacker threatened to blow up aircraft; forced aircraft to Nassau, Bahamas.	1WM	Hijacker arrested at Nassau; he was unarmed.	None
100.	June 4, 1971 a, c (June 5:56:7)	Charleston- Newark	United 74	Used pistol to force aircraft to land at Dulles and demanded larger aircraft for flight to Italy.	1WM	Hijacker was disarmed by crew at Dulles.	None
101.	June 11, 1971 a, c (June 12:1:1)	Chicago- New York	TWA Unreported	Used gun to force his way on aircraft on ground at Chicago.	1BM	Hijacker arrested by FBI after being shot and wounded during gun battle with FBI agents.	Hijacker wounded by FBI. Passenger killed by hijacker when he intervened in struggle between hijacker & stewardess.
102.	June 18, 1971 a, c (June 19:54:8)	New York- Winston-Salem, N.C.	Piedmont 1	Boarded aircraft on ground while empty of passengers.	1WM	Hijacker subdued by sky marshal who slipped aboard disguised as pilot.	None
103.	July 23, 1971 a, c (July 24:1:1)	New York- Chicago	TWA 60	Hijacker took stewardess hostage at gunpoint and forced aircraft to return to New York where he attempted to drive to another airport to get larger aircraft.	1WM	Hijacker was shot by FBI while attempting to drive to JFK.	Hijacker killed by law enforcement officers.
104.	July 24, 1971 a, c (July 25:25:1)	Miami- Jacksonville	National Unreported	Hijacker held stewardess hostage at gunpoint.	1L	Cuba	Stewardess and passenger inadvertently wounded by hijacker when he was startled by passenger who opened restroom door.
105.	Sept. 3, 1971 a, c (Sept. 4:9:4)	Chicago- Miami	Eastern Unreported	Screwdriver	1LM	Hijacker subdued by crew.	Three passengers were slashed in the struggle.

(For footnotes see page 764)

	Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
106.	Sept. 24, 1971 a, c (Sept. 25:38:2)	Detroit-Unreported	National 61	Pistol, dynamite	1WF 1BF	Before takeoff, hijackers seized by sky marshals and county police, who evacuated aircraft after receiving a tip about the attempt.	None
107.	Oct. 4, 1971 a, b	Nashville-Atlanta	Charter Unreported	Hijackers forced aircraft to Jacksonville to refuel for flight to Bahamas.	2WM 1WF	One hijacker captured after gun battle with FBI in which aircraft tires were shot out.	Two hijackers were killed by FBI; the pilot was killed by hijackers.
108.	Oct. 9, 1971 a, c (Oct. 10:73:1)	Detroit-Miami	Eastern 44	Hijacker held stewardess hostage at gunpoint.	LWM	Cuba	None
109.	Oct. 18, 1971 a, c (Oct. 19:19:1)	Anchorage-Bethel, Alaska	Wein Consolidated 36	Firearm	1WM	Hijacker was captured on ground without struggle at Vancouver, B.C.	None
110.	Oct. 24, 1971 a, c (Oct. 26:47:1)	New York-San Juan	American 236	Hijacker held stewardess hostage at gunpoint.	1L	Cuba	None
111.	Nov. 24, 1971 c (Nov. 25:1:1)	Washington, D.C.-Seattle	Northwest Cooper 42	Hijacker who called himself D.B., claimed he had bomb and demanded ransom and parachutes.	1WM	Hijacker parachuted somewhere between Seattle and Reno with $200,000 ransom and was never captured.	None
112.	Nov. 27, 1971 a, c (Nov. 28:83:1)	on ground, Albuquerque	TWA 49	Automatic weapons	3BM	Cuba	None
113.	Dec. 12, 1971 c (Dec. 13:21:1)	Washington, D.C.-New York	Braniff Unreported	Hijacker threatened to hijack aircraft to Cuba and threatened stewardess.	1	Hijacker was in New York, arrested by FBI unarmed.	None

114.	Dec. 24, 1971 a, c (Dec. 25:1:4)	Minneapolis-Miami	Northwest Orient 35	Hijacker held passenger hostage and threatened to blow up aircraft if ransom demands not met.	1WM	Hijacker surrendered on ground at Chicago when FBI refused to let aircraft depart.	None
115.	Dec. 26, 1971 a, b	San Francisco-Chicago	American Unreported	Hijacker claimed he had a bomb and pistol.	1WM	Hijacker subdued by passenger and stewardess.	None
116.	Jan. 1, 1972 c (Jan. 2:51:3)	Las Vegas-Newark	United Unreported	Hijacker threatened to blow up aircraft.	1	Hijacker arrested in Omaha, Nebraska without struggle.	None
117.	Jan. 7, 1972 a, c (Jan. 8:58:5)	San Francisco-Los Angeles	Pacific Northwest 144	Shotgun, pistol	1BM 1BF	Cuba	None
118.	Jan. 12, 1972 a, c (Jan. 13:35:6)	Houston-Kansas City	Braniff 100	Hijacker threatened to blow up aircraft if ransom demands were not granted.	1WM	Hijacker surrendered to police at Dallas.	None
119.	Jan. 20, 1972 a, c (Jan. 21:1:1)	Las Vegas-Reno	Hughes Air West 71	Hijacker forced aircraft to fly in direction of Denver after receiving ransom and parachutes at Reno.	1WM	Hijacker parachuted but was injured and captured by state patrol.	Hijacker was injured in jump.
120.	Jan. 26, 1972 a, c (Jan. 27:1:5)	Albany-New York	Mohawk 45	Hijacker held stewardess hostage at gunpoint and received parachutes and ransom at Poughkeepsie; he permitted landing at Dutchess County Airport and transferred to auto.	1WM	Hijacker was shot and killed by FBI as he was transferring to car.	Hijacker was killed by FBI.
121.	Jan. 29, 1972 a, c (Jan. 30:1:8)	Los Angeles-New York	TWA 101	Hijacker held crew hostage and made ransom demands.	1WM	FBI agent disguised as relief crewman shot and captured hijacker at JFK.	Hijacker was wounded by FBI agent.

(For footnotes see page 764)

	Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
122.	Mar. 7, 1972 c (Mar. 8:28:1)	On ground, Miami	International 7	Hijacker armed with shotguns jumped aboard aircraft.	2M	Cuba	Pilot and mechanic were wounded when they tried to prevent hijacking.
123.	Mar. 7, 1972 c (Mar. 8:28:2)	On ground, Tampa	National Unreported	Hijacker attempted to force aircraft to Sweden with pistol.	1WM	Hijacker was overpowered by federal marshal.	None
124.	Mar. 19, 1972 c (Mar. 20:45:5)	Key West-Dry Tortugas Island	Tortugas Airways 3	Unreported	1M 1F	Cuba	None
125.	Apr. 6, 1972 c (Apr. 8:1:1; Apr. 9:1:2)	Newark-Los Angeles	United 95	Hijacker used pistol and grenades to force aircraft to Denver where he recived parachutes and ransom.	1WM	Hijacker bailed out over Utah and later was arrested by the FBI.	None
126.	Apr. 11, 1972 c (Apr. 12:9:5)	Portland Unreported	Continental Unreported	Demanded ransom.	1M	Hijacker arrested before takeoff without a struggle by FBI.	None
127.	Apr. 13, 1972 c (Apr. 14:11:1)	Albuquerque-Phoenix	Frontier Unreported	Hijacker forced aircraft to Los Angeles at gunpoint where he conducted TV and radio news conference concerning minority rights.	1LM	Hijacker surrendered to pilot and was arrested by FBI.	None
128.	Apr. 17, 1972 c (Apr. 18:5:3)	Unreported	Eastern 91	Demanded $500,000 ransom.	1M	Hijacker surrendered when aircraft landed at Chicago.	None

129.	May 5, 1972 c (May 6:1:1)	Allentown, Pa.-Miami	Eastern 55	Hijacker used pistol and dynamite to force aircraft to land at Dulles where he received parachutes and $303,000 in ransom.	1WM	Hijacker parachuted over Central America with ransom and was later captured and the ransom returned.	None
130.	May 6, 1972 c (May 6:32:4)	Los Angeles-Salt Lake City	Western 64	Pistol	1M	Cuba	None
131.	June 2, 1972 c (June 3:1:1; June 4:70:2)	Phoenix-Seattle	Western 98	Hijacker who claimed he had bomb demanded and received $300,000 ransom and larger aircraft at Seattle. He then flew to New York and received a Boeing 707.	1BM	Aircraft was forced to Algers, and ransom not recovered.	None
132.	June 23, 1972 c (June 24:1:1; June 30:1:5)	St. Louis-Tulsa	American 94	Hijacker forced aircraft to St. Louis where he received parachute.	1M	Hijacker parachuted near Peru, Indiana and was later arrested by FBI.	None
133.	July 1, 1972 c (July 2:51:1)	Portland-Salt Lake City	Hughes Air West Unreported	Hijacker demanded ransom and parachute from stewardess.	1M	Hijacker arrested when aircraft landed.	None
134.	July 5, 1972 c (July 6:1:5)	Sacramento-San Francisco	Pacific 86	Hijacker held passengers at gunpoint and demanded ransom.	2WM	Hijackers were killed by FBI agents who boarded aircraft disguised at ilots.	Two hijackers killed by FBI; one passenger killed and one wounded by hijackers in exchange of gunfire.
135.	July 5, 1972 c (July 6:20:3)	Buffalo-not reported	American empty	Hijacker held daughter hostage with knife and demanded to be flown to unspecified foreign country.	1WM	Hijacker surrendered to FBI before takeoff.	None

(For footnotes see page 764)

	Date and Data Source[441]	Place of Dept./Dest.	Airline and Total Persons Aboard	Weapon and Method	No. of Hijackers/ Race/ Sex[442]	Outcome	Death and Injury
136.	July 7, 1972 c (July 8:52:1)	Oakland-San Diego	Pacific Southwest 57	Hijacker used pistol to force aircraft to land at San Diego and received ransom and parachute.	1M	Hijacker forced aircraft back to Oakland, but was persuaded to surrender when aircraft landed.	None
137.	July 12, 1972 c (July 13:1:3; July 14:1:3)	Philadelphia-New York	National 119	Hijacker forced aircraft to return to Philadelphia where ransom and parachutes were demanded.	2M	Hijackers surrendered when demands were refused, after forcing aircraft to Houston, Tex.	None
138.	July 13, 1972 c (July 14:1:3)	Oklahoma City-Dallas	American 58	Hijacker took over aircraft with pistol and demanded ransom and parachutes.	1M	Hijacker surrendered after forcing the aircraft to fly around the Oklahoma City area for 2 hours.	None
139.	July 28, 1972 c (July 29:23:3)	New York-San Juan	Unreported	Hijacker attempted to board aircraft at JFK Airport with a pistol.	1LM	Hijacker arrested by customs officials and charged with attempted air piracy.	None
140.	July 31, 1972	Detroit-Miami	Delta Unreported	Hijackers demanded and received $1 million in ransom.	5M 3F	The aircraft was forced to Algeria; the ransom was returned.	None
141.	Aug. 18, 1972 c (Aug. 19:1:6)	On ground, Reno	United 27	A rifle was used to force the aircraft to Seattle; a $1 million ransom was received.	1M	Hijacker wounded and arrested by FBI agents who boarded aircraft disguised as relief pilots.	Hijacker was wounded by FBI.
142.	Nov. 11, 1972 c (Nov. 12:1:8)	Birmingham-Memphis	Southern 31	Hijackers took over aircraft with firearms and grenades, after seven stops they finally landed in Cuba; they threatened at one	3BM	Hijackers forced aircraft to Cuba; $2 million ransom was returned to U.S. by Cubans.	Copilot shot and wounded by hijackers to reinforce their demands.

				time to crash into AEC facilities at Oak Ridge if demands not met.			
143.	Jan. 2, 1973 c (Jan. 3:26:3)	Washington, D.C.-Baltimore	Piedmont Unreported	Hijacker took stewardess hostage after aircraft landed and demanded to be flown to Canada.	1WM	Hijacker was talked out of attempt and surrendered to FBI.	None
144.[448]	Sept. 4, 1974 c (Sept. 5:17:1)	LaGuardia-Unreported	Unreported	Rusty nail, straight razor, and firearm found on plane.	1	The hijacker was overpowered.	None

(For footnotes see page 764)

440. The data in this chart was compiled from the following sources: S. REP. No. 93-13, 93d Cong., 1st Sess. 45-51 (1973) [hereinafter cited as SENATE REPORT]; R. TURE, C. FRIED, R. SHELDON & J. MATTHEWS, DESCRIPTIVE STUDY OF HIJACKING 20-41, 155-63 (Institute of Contemporary Corrections and the Behavioral Sciences Criminal Justice Monograph, vol. III, No. 5, 1972) [hereinafter cited as R. TURE]; and the *New York Times* reports, as appearing in the late city edition.

Five incidents which did not constitute in-flight hijacking were omitted from the chart. (1) On May 7, 1964, a flight from Reno, Nevada to Stockton, California crashed in California, killing all 44 persons aboard. Investigators subsequently pieced together the following evidence: one brief distress message from the pilot was cut short; the pilot and copilot's bodies were found shot; and a weapon found in the wreckage was traced to a passenger who had taken out $60,000 of insurance just before boarding the plane. From this evidence the investigators concluded that the passenger had simply shot the pilots without making any effort to commandeer the airplane, hold its passengers hostage, or accomplish any other hijacking-related objective. Thus, although the possibility that the incident was a hijack attempt was not entirely ruled out, the greater likelihood was that it was an insurance-related suicide-murder. N.Y. Times, May 10, 1964, § 1, at 1, col. 7. (2) On April 23, 1970, a hijacker seized a bus and attempted to use the driver as a hostage to board a North Central aircraft on the ground at Petosky, Michigan. He was overpowered by the state police as he attempted to board the aircraft. SENATE REPORT, *supra*; R. TURE, *supra*. (3) On October 29, 1972, four hijackers stormed the boarding gate at Houston, killing one airline employee and wounding another before forcing the aircraft to Cuba. N.Y. Times, Oct. 30, 1972, § 1, at 1, col. 2. (4) On October 31, 1972, one person was seized at the boarding gate in New York by federal sky marshals and airline ticket agents as he attempted to board the aircraft brandishing what he claimed was a bag containing nitroglycerine. *Id.*, Nov. 1, 1972, § 1, at 89, col. 1. (5) On February 23, 1974, a hijacker shot his way on board an airplane waiting to take off at Baltimore's Friendship Airport. A security guard who was conducting screening was killed before he had an opportunity to screen the hijacker. After wounding the copilot and killing the pilot, the hijacker killed himself when airport security personnel shot the aircraft's tires out. *Id.*, Feb. 23, 1974, § 1, at 1, col. 4.

441. This column contains the date of the incident followed by letters indicating the sources from which the data relating to the incident was compiled: "a" for R. TURE, *supra* note 440; "b" for the SENATE REPORT, *supra* note 440; and "c" for the *New York Times*. The *New York Times* entry is followed in parentheses by the date the information appeared, the page, and the column number.

442. L = Latin; B = Black; W = Other; M = Male; F = Female.

443. In addition to this incident, the *New York Times* reported that three other hijack attempts occurred in 1973-74, including one on a plane at Sarasota, Florida. N.Y. Times, Sept. 5, 1974, § 1, at 17, col. 1. At least one of these incidents was not a true hijacking. See discussion note 440 *supra*.

APPENDIX III

INCIDENTS INVOLVING DEATH OR INJURY AND NUMBERS OF PERSONS INVOLVED

Incident Number	Deaths						Injuries						Total Deaths and Injuries
	Hijacker		Passenger		Crew		Hijacker		Passenger		Crew		
	U[444]	P[445]	U	P	U	P	U	P	U	P	U	P	
3.												2	2
70.					1			1				1	3
75.								1				1	2
81.								1					1
101.				1				1					2
103.		1											1
104.									1		1		2
105.										3			3
107.		2				1							3
119.								1					1
120.		1											1
121.								1					1
122.												2	2
134.		2		1						1			4
141.								1					1
142.											1		1
Total	0	6	0	2	1	1	0	7	1	4	2	6	30

444. U=Unprovoked: those incidents in which death or injury occurred before any action in opposition to the hijacking was taken by a passenger, crewmember, or law enforcement officer.

445. P=Provoked: those incidents in which death or injury occurred during or after an attempt by law enforcement officers, passengers, or crewmembers to stop the hijacking.

APPENDIX IV

EXTRAPOLATION OF APPENDIX III

Incidents Involving:	*Number of Incidents*		*Percent of All Incidents*		*Persons Involved*	
Death (total)	6		4.2%		10	
Hijacker Only		2		1.4%		6
Passenger or Crew		4		2.8%		4
Unprovoked Killing:		1		0.7%		1
of Passenger or Crew		1		0.7%		1
of Hijacker Only		0		0.0%		0
Provoked Killing:		5		3.5%		9
of Passenger or Crew		3		2.1%		3
of Hijacker Only		2		1.4%		6
Death or Injury (total)	16		11.1%		30	
Hijacker Only		6		4.2%		13
Passenger or Crew		10		6.9%		17
Unprovoked Killing or Injury:		3		2.1%		4
of Passenger or Crew		3		2.1%		4
of Hijacker Only		0		0.0%		0
Provoked Killing or Injury:	14		9.7%		26	
of Passenger or Crew		8		5.6%		13
of Hijacker Only		6		4.2%		13