

The Spot Program: Hello Racial Profiling, Goodbye Fourth Amendment?

Deborah L. Meyer

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), and the [Race and Ethnicity Commons](#)

Recommended Citation

Deborah L. Meyer, *The Spot Program: Hello Racial Profiling, Goodbye Fourth Amendment?*, 10 U. Md. L.J. Race Relig. Gender & Class 289 (2010).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol10/iss2/5>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE SPOT PROGRAM: HELLO RACIAL PROFILING, GOODBYE FOURTH AMENDMENT?

BY DEBORAH L. MEYER*

I. INTRODUCTION

Without a doubt, the terrorist attacks on September 11, 2001 (“9/11”) left the United States reeling from the incredible destruction and loss of life¹ caused by what was thought to be a generally safe and commonplace mode of transportation: the airplane.² Certainly, the planes themselves did not cause the attacks; however, they became the perfect “bombs” for those who did.³ Now, the world is more afraid of the potential for terrorist attacks using aircrafts as explosive devices. As evidence of this fear, airlines suffered tremendous economic losses after 9/11 as the flying public considered alternative forms of

Copyright © 2011 by Deborah L. Meyer.

* Product Manager, LexisNexis, North American Legal Markets.

1. In total, 2,973 people died on 9/11. The New York Fire Department (FDNY) lost 343 emergency personnel, “[t]he largest loss of life of any emergency response agency in history.” NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9-11 COMMISSION REPORT 311 (*henceforth* known as the 9/11 REPORT). The Port Authority Police Department (PAPD) suffered “37 fatalities – the largest loss of life of any police force in history.” *Id.* The New York Police Department (NYPD) suffered “23 fatalities–the second largest loss of life of any police force in history, exceeded only by the number of PAPD officers lost the same day.” *Id.*

2. The 9/11 Timeline:

8:46:40 A.M. - American Airlines Flight 11 flew into the upper portion of the North World Trade Center (WTC) Tower, cutting through floors 93–99.

9:03:11 A.M. - United Airlines Flight 175 hit the South WTC Tower, crashing through the 77th to 85th floors.

9:37 A.M. - American Airlines Flight 77 hit the west wall of the Pentagon.

9:58:59 A.M. – the South Tower collapses, killing everyone remaining inside as well as individuals on the concourse, in the Marriott hotel, and on the street.

10:28:25 A.M. – the North Tower collapses, killing everyone on upper floors and numerous individuals on the floors below.

9/11 REPORT 285, 293, 305, 311. For a more detailed account of the events of 9/11, *see* FEDERAL AVIATION ADMINISTRATION, UPDATE TO FAA HISTORICAL CHRONOLOGY: CIVIL AVIATION AND THE FEDERAL GOVERNMENT, 1926-1996 p. 53-54 http://www.faa.gov/about/media/FAA_Chronology_1997-2008.pdf.

3. American Airlines Flight 11 was a Boeing 767-200ER with a maximum fuel capacity of approximately 23,980 U.S. gal. United Airlines Flight 175 was a Boeing 767-200 with a maximum fuel capacity of approximately 16,700 U.S. gal. BOEING, 767 FAMILY TECHNICAL CHARACTERISTICS, <http://www.boeing.com/commercial/767family/specs.html> (last visited Nov. 30, 2009).

transportation.⁴ While not all of those financial losses can be blamed on the attacks of 9/11, certainly the devastation caused that day played a significant role in the decrease in air travel and airline profit. During the nine years since 9/11, the conveniences of flight have slowly gained ground against any remaining fears of flying.⁵ Yet, the threat of new attacks still remains a real and credible danger.⁶

The government quickly enacted new laws and regulations regarding airport security to guard against any possibility of another 9/11 attack. Most airline passengers are now very familiar with the onslaught of security obstacles awaiting them at domestic airports. They plan accordingly for the additional security checkpoint time, leaving home hours before a flight knowing the long lines that will certainly be waiting for them.⁷ They walk through the visible

4. During the eight years prior to 9/11 (1993–2000), the six largest legacy carriers – American, Delta, Northwest, United, Continental, and USAir – had cumulative net profits of \$17.1 billion. “The same airlines had a cumulative net loss of \$38.5 billion in the following eight years (2001–2008).” In addition, over 155,000 jobs have been lost from these six carriers alone since 9/11. Robert Herbst, *How the Legacy Airlines Lost So Much Altitude Since 9/11*, 24/7 WallSt., Aug. 31, 2009, <http://247wallst.com/2009/08/31/45418/>.

5. In July 2005, airlines saw both passenger travel and airline capacity numbers (measured in the number of available seats) overtake pre-9/11 peak numbers. The number of available seats increased 0.6 percent over August 2001 numbers while passengers traveling increased 9.7 percent from the same time period. Research and Innovative Technology Administration Bureau of Transportation Statistics, *Airline Travel Since 9/11*, http://www.bts.gov/publications/special_reports_and_issue_briefs/issue_briefs/number_13/html/entire.html (last visited Aug. 21, 2010).

6. Umar Farouk Abdulmutallab attempted to detonate a bomb made from PETN during the final descent of Northwest Airlines Flight 253 from Amsterdam to Detroit on December 25, 2009. Devlin Barrett and Eileen Sullivan, *Alleged Christmas Day Terrorist is Charged*, *The Associated Press*, December 26, 2009. “PETN is a powerful explosive (50 percent more powerful than TNT, 90 percent of the power of RDX) which is used in detonating cords and plasticized explosive sheets. It has been manufactured and used for commercial and military purposes in many countries since the 1940s.” GIS Staff, *More Details of “Shoe Bomb” Technology Becoming Available*, *Defense & Foreign Affairs Daily*, (Jan. 14, 2002). Abdulmutallab was indicted on six counts including attempted murder in the United States District Court for the Eastern District of Michigan on Jan. 13, 2010. *See also generally* United States General Accounting Office Report, *Aviation Security: DHS and TSA Have Researched, Developed, and Begun Deploying Passenger Checkpoint Screening Technologies, but Continue to Face Challenges*, GAO-10-128, Oct. 7, 2009 (outlining three broad trends in the types of threats now faced by airport security: “interest in catastrophic destruction of aircraft”; the expanded range of weapons, many of which cannot be detected by current technologies; and the vulnerability of “soft” airports targets such as lobbies).

7. The TSA recommends that domestic passengers arrive at the airport least two hours prior to their flight. International passengers should allot additional time. Transportation Security Administration, *Our Travel Assistant*, <http://www.tsa.gov/travelers/airtravel/assistant/arrival.shtm> (last visited Aug. 21, 2010).

magnetometers⁸ after putting carry-on baggage on conveyor belts to be X-rayed. They take off their shoes, remove their coats, and place every known piece of metal on their person in a round plastic container to prevent the dreaded beeping of the alarm and the follow-up inspection that then ensues.⁹

But most airline passengers may not know of a relatively new “unseen” program airport security is using to ferret out would-be terrorists before they even make it to the security checkpoint. This unpublicized program is the Screening of Passengers by Observation Technique, otherwise known as “SPOT.”¹⁰ The Transportation Security Administration (“TSA”) ¹¹ now uses SPOT as one of its newest security innovations to hopefully recognize potential terrorists through “behavior observation and analysis techniques to identify high-risk passengers.”¹² To implement this program, the TSA specially trained several of its agents, called Behavior Detection Officers (“BDOs”),¹³ to observe travelers for “involuntary physical and

8. “The basic magnetometer consists of a sensor that produces a signal that is proportional to the strength of the magnetic field around it.” Moreland, Carl, *Search for Ferrous Objects with a Fluxgate Magnetometer*, POPTRONICS, (May 1, 2001).

9. See Transportation Security Administration, *Layers of Security*, http://www.tsa.gov/what_we_do/layers/index.shtm (last visited Aug. 21, 2010).

10. The SPOT program is a “behavior observation and analysis program designed to provide the TSA Behavior Detection Officers (BDOs) with a means of identifying persons who pose or may pose potential transportation security risks.” See Department of Homeland Security, *PRIVACY IMPACT ASSESSMENT FOR THE SCREENING OF PASSENGERS BY OBSERVATION TECHNIQUES (SPOT) PROGRAM*, (Aug. 5, 2008). SPOT is one such technique used by the TSA under the authority granted to it by the Aviation and Transportation Security Act (ATSA), sec. 114(f), (Pub. L. 107-71, Nove. 19, 2001). *Id.* The Department of Homeland Security (DHS) published its approval of this Privacy Impact Assessment concerning its new program in the Federal Register, 73 FR 72812 (Dec. 1, 2008).

11. The TSA was established as part of the Aviation and Transportation Security Act (ATSA), Pub. Law 107-71, 115 STAT. 597, 49 USCS §114 passed on Nov. 19, 2001. Airline passenger security screening was delegated to the TSA under 49 USCS §44901. On their home website, the TSA lists its mission as “protect[ing] the Nation’s transportation systems to ensure freedom of movement for people and commerce.” Transportation Security Administration, *Mission, Vision, and Core Values*, www.tsa.gov/public/display?theme=7 (last visited Jan. 14, 2010).

12. Transportation Security Administration, *Where We Stand: TSA Trains Hard for New Threats*, http://www.tsa.gov/press/where_we_stand/training.shtm (last visited January 1, 2010).

13. Transportation Security Administration, *Behavior Detection Officers (BDO): Layers of Security*, http://www.tsa.gov/what_we_do/layers/bdo/index.shtm (last visited Jan. 3, 2010) (the BDOs are “designed to detect individuals exhibiting behaviors that indicate they may be a threat to aviation and/or transportation security”). To become a BDO, a TSA screener must only complete four days of classroom training and 24 hours of supervised on-the-job work. Transportation Security Administration, *BDOs SPOT More Than Just Opportunities at TSA*, May 8, 2007 (http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm). Currently, more than 3,000 BDOs patrol 161 airports nationwide. Liliana Segura, *Feeling Nervous? 3,000*

physiological reactions that people exhibit in response to a fear of being discovered.”¹⁴ BDOs watch for these types of reactions by simply observing a person of interest or by actually engaging that person in what appears to be harmless dialogue. If warranted, BDOs may “refer these individuals for additional screening at the passenger security checkpoint.”¹⁵

While most people acknowledge the importance of successful airport security programs to ensure airline passenger safety, Americans should not blindly throw political and/or financial support behind every program pioneered by the TSA.¹⁶ Considering the money now being used to further the program, SPOT supporters must be able to overcome two very fundamental obstacles. First, most scientific

Behavior Detection Officers Will Be Watching You at the Airport This Thanksgiving, AlterNet, Nov. 24, 2009 (http://www.alternet.org/rights/144101/feeling_nervous_3,000_behavior_detection_officers_will_be_watching_you_at_the_airport_this_thanksgiving).

14. Transportation Security Administration, *Behavior Detection Officers (BDO): Layers of Security*, *supra* note 13. *But see* JAMES MOORE, 27–641 MOORE’S FEDERAL PRACTICE – CRIMINAL PROCEDURE §641.131 (Matthew Bender, 3d ed. 2009) (arguing that an insufficient basis exists for arresting someone based on inherently “unsuspicious characteristics common to many innocent travelers, such as *nervous behavior*,...*walking quickly through the terminal, and clutching one’s luggage*”) (emphasis added).

15. Transportation Security Administration, *Behavior Detection Officers (BDO): Layers of Security*, *supra* note 13. In 2008, BDOs nationwide subjected 98,805 passengers to secondary screenings. Ken Kaye, *TSA Screening More Than Just Carry-On Bags; ‘Behavior Detection’ Officers Covertly Watch Travelers’ Conduct*, WASH. POST, Nov. 9, 2009 at A15. Secondary screenings involve additional security measures beyond walking through a metal detector and subjecting carry-on bags to X-ray machines. These additional security measures may include “hand-wand, physical pat-down, an ETP [explosive trace portals], which is used to detect traces of explosives on passengers by using puffs of air to dislodge particles from their body and clothing into an analyzer.” UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-10-128 *supra* note 6.

16. To achieve its mandate to protect the flying public of the United States and international visitors, the TSA and the Department of Homeland Security (DHS) have invested over \$795 million for the “research, development, test and evaluation (RDT&E), procurement, and deployment of checkpoint screening technologies.” UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-10-128 *supra* note 6. The result of this substantial investment is a multilayered system of security consisting of three pivotal parts: the screeners themselves, the procedures they follow, and the technology they use during the screening process. *Id.* The TSA works with the Science and Technology Directorate (“S&T”) within the DHS to develop new technologies. S&T provides the research while the TSA, through their Passenger Screening Program (“PSP”) identifies the need and then implements the output. *Id.* at 2. Of the \$6 billion budget in the President’s fiscal year 2009 for aviation security, \$4.5 billion was earmarked for “1) screening operations, including transportation security officer (TSO) and private screener allocation, and checkpoint screening technologies; 2) air cargo; and 3) and passenger watch-list matching.” UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, AVIATION SECURITY TRANSPORTATION SECURITY ADMINISTRATION HAS STRENGTHENED PLANNING TO GUIDE INVESTMENTS IN KEY AVIATION SECURITY PROGRAMS, BUT MORE WORK REMAINS, GAO-08-456T, Feb. 28, 2008.

studies suggest that human beings are not capable of making such quick subjective judgments.¹⁷ However, success with this type of security has been seen in other countries, most notably Israel. Israel has not had a hijacking in over forty years¹⁸ using this passenger screening technique.

Second, stopping and searching an individual based on the behavioral observations may be a violation of the Fourth Amendment. The Fourth Amendment protects all citizens against unreasonable searches and seizures, granting them the right “to be secure in their persons. . . against unreasonable searches and seizures” and to have warrants issued only “upon probable cause.”¹⁹ In order for any search or seizure prompted by a BDO’s observations to be constitutionally sound, the BDO must have had probable cause of criminal activity or must demonstrate that the search or seizure fell within an exception to the probable cause requirement. Two well-developed and well-known exceptions to the probable cause requirement apply in the majority of

17. See COMMITTEE OF LAW AND JUSTICE, ET. AL., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISM: A FRAMEWORK FOR PROGRAM ASSESSMENT at 251 (National Academies Press, 2008) (“...even if deception or the presence of an emotion can be accurately and reliably detected, information about the reason for deception, a given emotion, or a given behavior is not available from the measurements taken. A person exhibiting nervousness may be excited about meeting someone at the airport or about being late. A person lying about his or her travel plans may be concealing an extramarital affair. A person fidgeting may be experiencing back pain. None of those persons would be the targets of counterterrorist efforts, nor should they be—and the possibility that their true motivations and intents may be revealed has definite privacy implications.”). See also Thomas Frank, *TSA’s ‘Behavior Detection’ Leads to Few Arrests*, USA TODAY, Nov. 19, 2008 available at http://www.usatoday.com/travel/flights/2008-11-17-behavior-detection_N.htm, (quoting Robert Levinson, a psychologist at the University of California-Berkeley, “[t]he use of these technologies for the purpose that the TSA is interested in moves into an area where we don’t have proven science.”).

18. See Jonathan B. Tucker, *Strategies for Countering Terrorism: Lessons from the Israeli Experience*, JOURNAL OF HOMELAND SECURITY (March 2003) (“El Al’s [the Israeli national airline] passenger screening system, established in the early 1970s, relies on psychological profiling techniques backed up with high-technology equipment. This system has been highly effective: the last successful hijacking of an El Al jet was in 1968...”); See also Don Lemon, et.al, *Tighter International Air Security; U.S. Closes Embassy in Yemen; NBA, Guns & Band Judgment; Full Body Scans in Britain; Lockdown at Newark Airport*, CNN: CNN NEWSROOM, (Jan. 3, 2010) (quoting Paula Hancocks, CNN Correspondent reporting from Ben Gurion Airport “...no airplane that has left [t]his airport has ever been hijacked. And Israel’s national carrier, El Al, is probably one of the safest if not the safest in the world.”), and Fredricka Whitfield, et. al., *Failed Bombing Suspect Indicted; Iran’s Nuclear Ambitions*, CNN: THE SITUATION ROOM, (Jan. 6, 2010) (quoting Michael Oren, Israel Ambassador to the United States “...Israel does present a different model for airport and airline security. Israel is less concerned with what people are wearing or the way they’re dressed and what they’re carrying. Rather, we’re more concerned with the way they behave.”).

19. U.S. CONST. amend. IV.

airport security search and seizure situations: *Terry v. Ohio*'s²⁰ "stop and frisk" and the administrative search exception.²¹

In Part II, this article will discuss the Fourth Amendment, specifically, the two main exceptions to its prohibition against unwarranted searches and seizures: *Terry*'s "stop and frisk" and administrative searches. Part III will then review a brief history of profiling in the United States, most importantly its legality under the Fourth Amendment. Part IV continues the discussion by asking if the SPOT program has been successful under its current design in stopping would-be terrorists. Part V will then apply the Fourth Amendment to the SPOT program to test whether the program is currently constitutionally sound and if it could remain so using limited profiling as well as behavioral analysis. Finally, this article will conclude with the proposition that the SPOT program, while not popular, could be successful if tailored to include minimal profiling techniques and does pass constitutional review if the ensuing security searches are limited in scope according to TSA regulations.

II. AIRPORT SEARCHES: AN UNUSUAL MARRIAGE OF "STOP AND FRISK" AND ADMINISTRATIVE SEARCHES²²

A. A Brief History of the Fourth Amendment

Royal authorities conducted unreasonable searches at will during the colonial period while the colonies were still under British

20. *Terry v. Ohio*, 392 U.S. 1 (1968). The Supreme Court's decision in *Terry* developed the now well-established search and seizure exception known as "stop and frisk." See *infra* Part II.B.

21. Administrative search warrants "may be issued solely on a showing that 'reasonable legislative or administrative standards for conducting an...inspection are satisfied with respect to the particular' place to be searched—there need be no probable cause that a violation is occurring in a particular place." 2–34 John Wesley Hall, SEARCH AND SEIZURE §34.1 (Matthew Bender, 2009). An administrative search when applied to airport security mutates from its original definition of a search necessitated to "passively advance the public health and welfare" to a search necessitated by the overwhelming governmental interest in preventing passengers from carrying weapons or explosives on board an airplane. 2–32 Hall, *supra*, at § 32.11. This governmental interest strives to ensure the safety of other passengers as well as prevent the destruction of the airplane and the potential devastation such destruction can cause. Since airport screening has now been taken over by the TSA, "flying on a commercial airline is a 'highly regulated industry.'" Thus, screening searches are now administrative searches, and implied consent is no longer a valid consideration. 2–38 Hall, *supra*, at §38.28.

22. As the focuses of this paper are the exceptions to the Fourth Amendment's prohibition to unwarranted searches and how they apply to the SPOT program, an extensive analysis of the origins of the Amendment itself fall outside this paper's purview. For a detailed explanation of the origins of the Fourth Amendment, see WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (Oxford 2009).

rule.²³ Indeed, hostilities over this unchecked search power spurred the enthusiasm for independence.²⁴ When the Revolutionary War was finally over, the writers of the newly formed United States Constitution realized that the Government needed to be checked; personal privacy needed to be preserved.²⁵ Thus, the Fourth Amendment was drafted to protect against the arbitrary searches and seizures so commonly executed before the war: “The notion that ‘a man’s house [is] his castle’ became ‘a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures.’”²⁶

As the Founding Fathers envisioned, searches and seizures must meet two conditions to fall under the Fourth Amendment prohibitions: (1) the searches cannot occur when the person who is searched has an expectation of privacy, (2) that expectation must be reasonable.²⁷ If these conditions are met, the authority conducting the search must have a warrant. Yet, the Supreme Court has also ruled that warrants are not required in every circumstance. Warrantless searches that satisfy “*some* fundamental requirements embodied in the Warrant

23. See *Boyd v. United States*, 116 U.S. 616, 625 (1886) (Justice Bradley writing for the Court noted that during colonial times, revenue officers could execute writs of assistance which allowed them to search people’s homes and possessions at their discretion; these writs of assistance were “pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;’ since they placed ‘the liberty of every man in the hands of every petty officer’” (citing COOLEY’S CONSTITUTIONAL LIMITATIONS, 301–03 (5th ed. 368, 369))). The famous debate in which these words were spoken was “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.” *Id.* Quoting John Adams, Justice Bradley adds that “‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”) *Id.*

24. *Id.*

25. See *Burdeau v. McDowell*, 256 U.S. 465 at 475 (1921) (“The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority...”); *Weeks v. United States*, 232 U.S. 383 at 393 (1914) (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”). See generally Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (Summer, 1998). But see Fabio Arcila, Jr., *The Framers’ Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363 at 365 (March, 2009) (the Fourth Amendment was not written to protect citizens from the government, but the government from the citizens).

26. Clancy, *supra* note 25, at 310 (quoting *Weeks*, 232 U.S. at 390).

27. *Kyllo v. United States*, 533 U.S. 27 at 33 (2001) (explaining that “a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable” (citing *Katz v. United States*, 389 U.S. 347 at 361 (1967))).

Clause also can be constitutional.”²⁸ Probable cause²⁹ is one of those important requirements.³⁰

Since the inception of the Fourth Amendment, however, the Court has increasingly allowed several exceptions to cut into its strict adherence to the constitutional mandate of probable cause.³¹ Indeed, the Court has decided that probable cause may be “irrelevant for judging the reasonableness of many government searches and seizures.”³² Some governmental searches fall outside the need for a warrant, “and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.”³³ Thus, probable cause is no longer *necessary* to judge the reasonableness of a search.³⁴ The reasonableness of a search is now “judged by balancing its intrusion on the individual’s Fourth Amendment interests of reasonable searches and seizures against its promotion of legitimate governmental interests.”³⁵

B. The “Stop & Frisk” Exception

The Supreme Court solidified this movement away from mandatory probable cause in *Terry v. Ohio*,³⁶ the first Supreme Court case to legalize a new exception to the probable cause requirement. In *Terry*, a long-time beat cop, Officer McFadden, watched two men walk back and forth in front a store window about twenty-four times.

28. Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707 at 1722 (Fall, 1996).

29. The Supreme Court has defined probable cause as “a fair probability that contraband or evidence of a crime will be found.” *United States v. Sokolow*, 490 U.S. 1, 7 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). *See also* *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (probable cause is “whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”); *and* *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (“Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed,’” (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))).

30. Cloud, *supra* note 28, at 1722.

31. *Id.* at 1723 (discussing how the Supreme Court has started to read the clause “disjunctively,” meaning that a warrant is only an example of balancing a person’s expectation of privacy against the government’s interest in conducting the search).

32. *Id.*

33. *Id.* (quoting *Vernonia Sch. Dist. 47 v. Acton*, 515 U.S. 646, 653 (1995)).

34. *Id.*

35. *Vernonia*, 515 U.S. at 652 (quoting *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 619 (1985)).

36. 392 U.S. 1 (1968).

The officer followed them where he saw them join a third man. The officer approached them and asked their names. The men “mumbled something” prompting McFadden to spin Terry around and pat down his outside clothing where he found a pistol. He ordered them into a store where he completed a pat down of the other suspects and retrieved all the guns. The men were charged with carrying concealed weapons; they moved to suppress.³⁷

Now commonly known as “stop and frisk” (or a “*Terry*” stop³⁸), the exception in *Terry* arose out of the nebulous parameters surrounding police encounters outside of a formal arrest.³⁹ No real guidelines existed to assist police on how far they could pursue an “on-the-street” encounter⁴⁰ when attempting to *prevent* a crime.⁴¹ However, this overwhelming interest in preventing a crime permitted, in the eyes of the Court, a “limited” stop.⁴² In *Terry*, Chief Justice Warren and seven other members of the Court, held that it is “not a violation of the Fourth Amendment for an officer to detain and search a man’s person for a weapon in absence of a search warrant, so long as the officer acts upon a reasonable belief based upon objective factors that the man is armed and dangerous.”⁴³ “Reasonableness” is key: “[s]omething in the activities of the person being observed or in his surroundings must affirmatively suggest particular criminal activity, completed, current, or intended.”⁴⁴ Over the years since the *Terry* decision, “stop and frisk” encounters between police and potential

37. *Id.* at 4–7.

38. “Stop and frisk” is used by the Court in *Terry*, at 10. The Court first uses the phrase “*Terry* stop” in *United States v. Robinson*, 414 U.S. 218, 253 (1973) (Marshall, J., dissenting).

39. *See Terry*, 391 U.S. at 9 (setting forth the “difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court”). The police activities in question are “on-the-street” encounters with suspicious persons. *Id.* at 9–10.

40. *Id.*

41. Prior to *Terry*, this type of police work was seen as outside the Fourth Amendment if no formal arrest was made. However, during the 1960’s, many believed the police to be overstepping their boundaries and using this preventative police power to harass minorities. 1–15 Hall, *supra* note 21, at §15.3.

42. *See Terry*, 391 U.S. at 27 (noting that a police officer has authority to search for weapons even though he may not be certain that the individual is armed; the criteria is whether a “reasonably prudent man” would believe his safety or the safety of others was in danger).

43. Peter Siggins, *Racial Profiling in an Age of Terrorism*, March 12, 2002 (<http://www.scu.edu/ethics/publications/ethicalperspectives/profiling.html>).

44. 1–15 Hall, *supra* note 21, at § 15.2.

suspects have become a widely accepted exception to the prohibition against warrantless searches.⁴⁵

The first pressure point with a stop and frisk is the legality of the initial stop. If the stop is "bad" (illegal), so is everything that follows from it (a frisk or search, detention, or even an arrest).⁴⁶ This inquiry into whether the stop (and any subsequent search) was legal is a two-pronged test: was the officer's action justifiable "at its inception" and was it reasonably "related in scope to the circumstances which justified the interference in the first place."⁴⁷ Yet it should be noted that not every dialogue between police and citizen constitutes a stop (or seizure):⁴⁸ "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."⁴⁹ In other words, a person has been "seized" only if a reasonable person in the same circumstance would have believed "that he was not free to leave."⁵⁰ For example, in *United States v. Mendenhall*, the Court pointed out that the respondent was not seized when the DEA agents asked her for her airline ticket and identification. As long as the respondent had no objective reason for thinking that she could not leave, she had not been seized.⁵¹ If at any point a respondent feels that she cannot simply walk away and leave, she has been seized for purposes of the Fourth Amendment.⁵² At that point when the intercourse between officer and citizen becomes a stop, the officer must be able to articulate the factors leading to a reasonable suspicion

45. But see the dissent in *Terry*. Justice Douglas in writing his dissent argues that reasonable suspicion is unconstitutional. The only "reasonable" infringement of personal liberty must be based in probable cause. *Terry*, 392 U.S. at 35–38.

46. Known as the "fruit of the poisonous tree" doctrine, so named in *Nardone v. United States*, 308 U.S. 338 (1939), this premise holds that evidence can be excluded if obtained via prior illegal police activities unless the taint is purged by some intervening event." 1–7 Hall, *supra* note 21, at § 7.1.

47. *Terry*, 392 U.S. at 20.

48. *Terry*, 392 U.S. at 19 n.16 (stating that "not all personal intercourse between policemen and citizens involves 'seizures' of persons."). See also *Terry*, 392 U.S. at 34 (White, J., concurring, "[there] is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

49. *Terry*, 392 U.S. at 19 n.16.

50. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Another "drug courier profile" case, the *Mendenhall* case involves a woman who was stopped by DEA agents at the Detroit Metropolitan Airport after exhibiting behaviors which they characterized as behaviors indicative of persons carrying illegal narcotics. *Mendenhall* voluntarily answered their questions before consenting to accompany them back to the DEA office. *Id.* at 547–550.

51. *Id.* at 555.

52. *Cal. v. Hodari D.*, 499 U.S. 621 (1991) (stating that "An arrest [or seizure] requires either physical force...or, where that is absent, *submission* to the assertion of authority."). *Id.* at 626.

of criminal activity.⁵³ In fact, the stopping officer must be able to demonstrate he had a reasonable suspicion for the stop before the stop occurred.⁵⁴ However, since a stop is less intrusive than a frisk, the constitutional requirements for a stop are less restrictive than for a frisk:⁵⁵ the officer must merely demonstrate a governmental interest in *preventing* a crime. An actual crime need not be committed.⁵⁶

In the airport, TSA agents play the role of the police officer. The agents are the enforcement authority of the airports, given the task of preventing terrorists from boarding aircrafts.⁵⁷ TSA BDOs look for suspicious behavior, and when they spot such behavior, they exercise the discretion of police officers who encounter such behavior on city streets. They have the legal right to detain and question the suspicious person as long as it stays within the confines of a *Terry* stop (or they have probable cause for an arrest).⁵⁸

Thus, as with police stops on the street, TSA agent seizures or stops of a person in an airport must fulfill a legitimate government interest.⁵⁹ To assess the general reasonableness of this stop, the ensuing analysis must focus on the governmental interest to see if the interest truly justifies the intrusion upon personal privacy; “there is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’”⁶⁰ Without argument, preventing would-be terrorists from blowing up an airplane is an overwhelming and exigent governmental interest.⁶¹ Inconveniencing a person for a few minutes to

53. See *Terry*, 392 U.S. at 27. See generally *United States v. Ledet*, 2010 U.S. App. Lexis 14388 (5th Cir. 2010); *United States v. Smith*, 2010 U.S. App. Lexis 13813 (4th Cir. 2010); and *Gentry v. Sevier*, 597 F.3d 838 (7th Cir. 2010).

54. 1–15 Hall, *supra* note 21, at § 15.1.

55. 1–15 Hall, *supra* note 21, at § 15.2.

56. *Terry*, 392 U.S. at 10 (stating that “...the police should be allowed to “stop” a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity.”). See also *Terry*, 392 U.S. at 34 (Harlan, J., concurring) (stating that “Officer McFadden’s right to interrupt Terry’s freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime”).

57. See *supra* note 14.

58. *Terry*, 392 U.S. at 15 (noting that “nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere”).

59. See *supra* note 56.

60. *Terry*, 392 U.S. at 21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)).

61. See The Intelligence Reform and Terrorism Prevention Act of 2004, codified at 49 USC § 44925(a) (mandating that the Secretary of Homeland Security give a “high priority” to airport screening checkpoint equipment). See also as examples *Tabbaa v. Chertoff*, 509 F.3d 89 at 106 (2007) (finding the “prevention of potential terrorists from entering the United

ask them questions about their travel plans is certainly a justified intrusion on personal privacy considering the overwhelming governmental interest in domestic safety and the prevention of another catastrophic air disaster. Clearly, the government's interest easily outweighs the minor intrusions thrust upon passengers as they pass through airport security.⁶² Under *Terry*, the reasonableness for these stops (when balanced against the need for these stops) passes constitutional scrutiny.⁶³

However, individual stops must be justified as reasonable given the circumstances leading to the stop.⁶⁴ In other words, just because BDOs can stop passengers in airports due to the government's interest in stopping terrorists does not mean they can stop just anybody.⁶⁵ They still must articulate the objective factors which led them to stop a particular individual.⁶⁶ "Inarticulate hunches" or "simple good faith" are not enough to warrant a stop.⁶⁷ In addition, the stop must satisfy the two-pronged test:⁶⁸ the stop must be reasonable at its inception and as conducted. The totality of the circumstances should be considered when evaluating the reasonableness of the "stop factors."⁶⁹ A "series of acts" when taken together may be enough to warrant the stop even though each of those acts is "innocent in itself."⁷⁰ If this series of acts would lead a reasonably prudent person to stop the offender, then the stop at its inception is good.⁷¹ If the BDO merely identifies himself or herself as a TSA agent⁷² and then questions the suspect about his behavior, including asking his name

States" a compelling governmental interest) and *Bolm v. Quranic Literacy Inst.*, 291 F.2d 1000 at 1027 (2002) ("[T]he government's interest in preventing terrorism is not only important but paramount.").

62. See generally *United States v. Aukai*, 497 F.3d 955 (2007).

63. *Terry*, 392 U.S. at 20–21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)).

64. See generally the discussion throughout *Terry*, 392 U.S. 1.

65. See *id.*

66. *Id.* at 21–22.

67. *Id.* at 22.

68. *Id.* at 27–28.

69. "...the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (internal quotation marks omitted).

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

71. *Id.*

72. See *supra* note 13 (all BDOs are specially trained TSA agents).

and travel destination (without doing anything more intrusive), the stop has also been conducted reasonably.⁷³

If the stop is legal, the court can then turn its attention to the more intrusive frisk.⁷⁴ As a frisk of an individual is much more invasive than mere questioning, the factors prompting the frisk must serve a greater interest.⁷⁵ Accordingly, an officer may constitutionally stop someone even though he has no constitutional grounds to frisk him.⁷⁶ No longer is the governmental interest in the prevention or detection of crime enough; now the interest rises to the preservation of the police officer who initiated the stop.⁷⁷ If an officer reasonably believes that the detainee is "armed and presently dangerous to the officer or to others," the officer clearly may take the necessary steps "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."⁷⁸ Since, however, the intrusion upon the sanctity of personal privacy is so great, even with a brief pat down, the circumstances which are articulated to justify the search must meet the "exigencies" of preserving the safety of the officer and those in the surrounding area.⁷⁹ The officer does not have to "know" that the detainee is armed; the standard is whether a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."⁸⁰ Since the stop and frisk are two separate events under the Constitution,⁸¹ the officer must again meet the two-pronged test for the frisk even if it has already been met for the stop. If the officer can articulate factors to meet the "reasonably prudent man" test, the search in its inception is good.⁸² When conducting the search, the scope "must be 'strictly tied to and justified

73. *Terry*, 392 U.S. at 28 (In *Terry*, Officer McFadden approached Terry and his companion, identified himself as a police officer and asked them their names. The Court found this reasonable in scope.).

74. See generally the premise in *Terry*, 392 U.S. 1.

75. See *Terry*, 392 U.S. at 23.

76. 1-15 Hall, *supra* note 21, at §15.2. However, circumstances may evolve during the stop which could justify a frisk. *Id.*

77. *Terry*, 392 U.S. at 23 (stating "[w]e are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.") *Id.*

78. *Id.* at 24.

79. *Id.* at 26.

80. *Id.* at 27.

81. See 1-15 Hall, *supra* note 21, at §15.2 for a discussion on the severability of stop and frisk.

82. *Terry*, 392 U.S. at 27.

by' the circumstances which rendered its initiation permissible."⁸³ If the search is limited to a pat down of areas on the detainee from which he could conceivably reach a concealed weapon, the search has been conducted reasonably.⁸⁴ The frisk must be limited to finding a weapon. "[G]eneral exploratory searches" to find any "evidence of criminal activity" are strictly prohibited.⁸⁵

C. The Administrative Search Exception

The Court of Appeals for the Ninth Circuit has defined administrative searches as "searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime. . . ."⁸⁶ While the need for probable cause applies to "any government intrusion on private property,"⁸⁷ the type of probable cause required for administrative searches is much less than in standard criminal searches: "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."⁸⁸ Prior to *Terry*, the Supreme Court decided two key administrative search cases: *Camara v. Municipal Court*⁸⁹ and *See v. City of Seattle*.⁹⁰ In these cases, the Court balanced the interests of regulatory enforcement against the Fourth Amendment's demand for individual privacy.⁹¹ The rulings in those cases stated that officials who conduct administrative searches may practice a lesser standard of probable cause than that required in criminal cases⁹² "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime[;] they involve a relatively limited invasion of the

83. *Id.* at 18 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)).

84. *Id.* at 30 (Officer McFadden only patted down Terry's outer clothing. He did not put his hands in Terry's pockets or under his clothing).

85. *Id.*

86. *United States v. Davis*, 482 F.2d 893 at 908 (9th Cir. 1973) (following the Supreme Court decisions of *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Camera v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967).

87. 2-34 Hall, *supra* note 21, at §34.1.

88. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538, (1967).

89. *Id.*

90. 387 U.S. 541 (1967).

91. *Camara*, 387 U.S. at 540; *see*, 387 U.S. at 545-46.

92. 1-15 Hall, *supra* note 21, at §15.3.

urban citizen's privacy."⁹³ As the Court would soon decide in *Terry*, "traditional Fourth Amendment protections" become impractical in certain search and seizure situations.⁹⁴ Thus, "the Court had to find a middle ground to accommodate the weighty competing public and private interests."⁹⁵

The Ninth Circuit found that "middle ground" when it ruled in *United States v. Aukai*⁹⁶ that airport searches are indeed administrative searches.⁹⁷ The Supreme Court has not definitively ruled upon this issue but has suggested that airport searches are indeed a form of administrative search.⁹⁸ "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."⁹⁹ In other words, if the government's interest outweighs an individual's expectation of privacy, the ensuing search and seizure may commence without a warrant.¹⁰⁰ Passenger screening in an airport is obviously part of an overall regulatory mandate to control aviation safety;¹⁰¹ stopping a terrorist attack using an aircraft as a weapon is a very real and overwhelming government concern. However, as Judge Friendly notes in *United States v. Edwards*, the search must be conducted in good

93. *Camara*, 387 U.S. at 537.

94. *See generally Terry*, 392 U.S. 1.

95. 1–15 Hall, *supra* note 21, at §15.3.

96. *United States v. Aukai*, 497 F. 3d 955 (9th Cir. 2007).

97. *See also Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (when judging the constitutionality of a highway checkpoint, the Court states that a stop must be judged by "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty" (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *United States v. Hartwell*, 436 F.3d 174 at 181 (3rd Cir. 2006) (ruling that a TSA search is permissible under the administrative search exception); and *United States v. Davis*, 482 F. 2d 893, 908 (9th Cir. 1973) ("screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The 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").

98. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

99. *Id.* at 665–66.

100. *See id.*

101. 49 U.S.C.S. §44901(a) ("The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation").

faith and must be tailored to prevent the searches goal: to prevent air piracy, hijacking or damage to passengers or the aircraft.

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.¹⁰²

If the search moves beyond these parameters, then the search becomes unconstitutional.¹⁰³

The stiff consequences of searching beyond the permissible scope became a stark reality for the government in the unreasonable search and seizure case of *United States v. Fode Amadou Fofana*.¹⁰⁴ In *Fofana*, TSA agents at the Port Columbus International Airport conducted permissible security searches of Mr. Fofana. As a selectee,¹⁰⁵ Mr. Fofana's person and luggage were subjected to thorough secondary searches¹⁰⁶ beyond the routine airport screening procedures.¹⁰⁷ As part of these searches, a TSA agent discovered

102. *United States v. Edwards*, 498 F. 2d 496, 500 (2d Cir. 1974) (quoting *United States v. Bell*, 464 F.2d 667 (Friendly, J. concurring).

103. *See United States v. Fofana*, 620 F. Supp. 2d 857, 866 (S.D. Ohio, 2009) (If a search was "ramped-up" to detect evidence of crime after the "presence of weapons and explosives had been ruled out, the search can no longer be justified under the administrative search doctrine and suppression is appropriate.").

104. *Id.*

105. A selectee is a passenger who is selected for additional screening.

106. Secondary searches have been upheld as constitutional. *See United States v. Marquez*, 410 F. 3d 612, 618 (9th Cir. 2005) ("The random, additional screening procedure...satisfies the...reasonableness test for airport searches. The procedure is geared toward detection and deterrence of airbourne terrorism, and its very randomness furthers these goals.... Given the randomness, the limited nature of the intrusion, the myriad devices that can be used to bring planes down, and the absence of any indicia of improper motive, we hold that the random, more thorough screening... was reasonable.").

107. Mr. Fofana's bags and pocket contents were placed on the scanning belt. He then walked through the metal detector. *Fofana*, 620 F. Supp. 2d at 859. No alarms were set off. *Id.* He was then subjected to a pat down as well as a screen with a handheld wand. *Id.* His bags were also hand searched and swabbed for explosive trace. *Id.* No items on the prohibited items list were discovered during these searches. The TSA has a prohibited items list that is posted for all airplane passengers to review prior to flight. Such items include guns, knives, razors, potentially explosive chemicals, etc. For a full list of these items, see TSA, *Prohibited Items*

sealed and unsealed envelopes.¹⁰⁸ Upon opening most of the unsealed envelopes, the agent discovered money.¹⁰⁹ The other unsealed envelopes¹¹⁰ contained three fake passports. Mr. Fofana was arrested for carrying fake passports.¹¹¹

The U.S. District Court for the Southern District of Ohio excluded the fake passports as fruit of an unconstitutional search.¹¹² Administrative airport searches balance an individual's right of privacy against the government's interest in preventing catastrophic destruction.¹¹³ "Therefore, an airport security search is reasonable if: (1) the search is 'no more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons or explosives;' (2) the search 'is confined in good faith to that purpose;' and (3) a potential passenger may avoid the search by choosing not to fly."¹¹⁴ According to the court, Mr. Fofana's person and luggage had been cleared of containing any type of potential weapon or explosive device.¹¹⁵ Indeed, the TSA agent testified that in opening the envelopes, she was no longer looking for weapons or explosives, but was looking for illegal documentation or contraband.¹¹⁶ At that point, all searching should have stopped.¹¹⁷ Under the administrative search exception to the Fourth Amendment, searching for the purpose of finding evidence of "general criminal activity is improper."¹¹⁸

In another improper airport search and seizure case, Steven Bierfeldt, treasurer for the Campaign for Liberty, was stopped and questioned by TSA agents because he was carrying \$4,700 in cash

for Travelers, <http://www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtm> (last visited Dec. 27, 2009).

108. *Fofana*, 620 F. Supp. 2d at 860.

109. Money is not on the prohibited items list (*see supra* note 107) although large quantities of money can be seen as indicia of criminal activity. *See Fofana*, 620 F. Supp. 2d at 860.

110. Mr. Fofana claimed that all the envelopes were sealed. *Fofana*, 620 F. Supp. 2d at 860 n. 1.

111. *Id.* at 861.

112. *Id.* at 865.

113. *See generally the premise in Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

114. *Fofana*, 620 F. Supp. 2d at 862 (quoting *United States v. Aukai*, 497 F. 3d 955, 962 (9th Cir. 2007)).

115. *Id.* at 864.

116. *Id.*

117. *Id.* at 863.

118. *Id.* *See also* *City of Indianapolis v. Edmund*, 531 U.S. 32 at 37-42 (2000) (administrative searches may not be used to find "evidence of ordinary criminal wrongdoing"); *Davis*, 482 F. 2d at 909 (noting a real danger that screening passengers for weapons and explosives could turn into a general search looking for evidence of a crime).

from campaign sales. The American Civil Liberties Union (“ACLU”) sued the Secretary for the Department of Homeland Security, alleging that Mr. Bierfeldt’s experience was not uncommon. The ACLU filed suit in the U.S. District Court in the District of Columbia, stating, “[w]hether as a matter of formal policy or widespread practice, TSA now operates on the belief that airport security screening provides a convenient opportunity to fish for evidence of criminal conduct far removed from the agency’s mandate of ensuring flight safety.”¹¹⁹

Such a declaration begs the question: is the TSA in fact moving beyond the restrictions imposed on airport searches? The TSA is required to look for evidence of weapons and explosives.¹²⁰ However, once a search has revealed neither, continuing to question passengers about cash, credit cards, or prescription drugs appears to stretch the boundaries of airport security.¹²¹ Indeed, in 2007, Kip Hawley, the TSA’s administrator, stated, “[i]n this kind of environment, you can’t be sure they are going to come to the checkpoint with a prohibited item, per se. Unless you do something more than that, you are going to miss the next attack.”¹²² In June, 2009, Gale Rossides then acting TSA administrator, testified before Congress that TSA had “moved past” trying to intercept weapons to “physical and behavioral screening to counter constantly changing threats,” meaning SPOT.¹²³ The problem is that this type of searching goes beyond its permitted scope.¹²⁴ “A limited administrative search cannot also serve unrelated law enforcement purposes.”¹²⁵ When the TSA crosses this line, its searches become unconstitutional.¹²⁶

119. Scott McCartney, *Is Tougher Airport Screening Going Too Far?*, THE WALL STREET JOURNAL, July 16, 2009, available at <http://online.wsj.com/article/SB10001424052970204556804574261940842372518.html>.

120. See TSA, *Prohibited Items for Travelers*, <http://www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtm> (last visited Dec. 27, 2009).

121. McCartney, *supra* note 119.

122. Wilber and Nakashima, *Searching Passengers’ Faces for Subtle Clues to Terror*, WASH. POST, Sept. 19, 2007, at D01.

123. McCartney, *supra* note 119.

124. See *Davis*, 482 F. 2d at 1254. The Seattle airport had established a relationship—which included a reward—between the Flight Terminal Security (“FTS”) officers and other law enforcement officers where FTS officers would routinely report drug and currency violations.

125. *Id.* at 1246.

126. See *generally* United States v. Fofana, 620 F. Supp. 2d 857 (S.D. Ohio, 2009).

D. The Airport Search: A Possible Hybrid of Terry and Administrative Searches?

In *Terry*, the stopping officer was investigating “suspicious circumstances.”¹²⁷ The officer watched Terry and his companion for what had to be several minutes as the two paced back and forth in front of the store window.¹²⁸ When questioned at trial, the officer added, “...they didn’t look right to me at the time.”¹²⁹ Suspicious circumstances such as these are exactly what BDOs want to detect. Essentially, BDOs are looking for people that “don’t look right.” However, the Supreme Court is clear that the protections of the Fourth Amendment extend to all persons whether they are in a private residence or on a public street.¹³⁰ Thus, these protections irrevocably extend to persons in a very public airport. On a street, people reasonably believe they will be free from police interrogation. In other words, a person has a reasonable “expectation of privacy” in just walking down the street.¹³¹ However, a person’s expectation of privacy is substantially diminished in an airport terminal.¹³² After 9/11, the increase of airport security was widely publicized and indeed welcomed by the flying population.¹³³ Passengers’ pleas of ignorance that they did not know they would be stopped or screened before boarding a plane is no longer legitimate.¹³⁴

127. *Terry v. Ohio*, 392 U.S. 1, 4, (1968).

128. *Id.* at 6.

129. *Id.*

130. *Id.* at 8–9.

131. *See Katz*, 389 U.S. 347, 351 (1967).

132. *See Fla. v. J.L.*, 529 U.S. 266, 274 (2000) (noting that a reasonable expectation of privacy is diminished in airports). *See also United States v. Mora-Santana*, 99 Fed. Appx. 397, 401 (2004) (noting that “privacy expectations of travelers at the airport are extremely low”).

133. *See* Editorial, *Bus Security Still Has Kinks*, SAN ANTONIO EXPRESS-NEWS Nov. 9, 2001 at 6B (noting that “Americans have voiced few complaints recently as extra security measures have increased their waiting time in lines at airports”); Mullener, Elizabeth, *How We’ve Changed*, TIMES-PICAYUNE (NEW ORLEANS, LA), Sept. 8, 2002 at 1 (stating that “nobody is complaining about the hassle of increased airport security”); Wascoe, Dan, *A Flying Start for Airport Screeners*, STAR TRIBUNE (MINNEAPOLIS, MN), Oct. 24, 2002 at 1B (stating that passengers going through security checkpoints “didn’t mind because they understood the reasons”); Silverman, Adam, *Passengers Adapt to Airport Security*, THE BURLINGTON FREE PRESS, Dec. 29, 2003 at 1B (stating that passengers understand airport precautions and don’t mind extra searches or longer waits); Editorial, *Terror Warning in Holiday Season*, CHATTANOOGA TIMES FREE PRESS (TENNESSEE), Dec. 23, 2003 at B6 (stating that tightened security is “welcome and reassuring”);

134. *See Hartwell*, 436 F. 3d at 181 (“[a]ir passengers choose to fly, and screening procedures of this kind have existed in every airport in the country since at least 1974. The events of September 11, 2001, have only increased their prominence in the public’s

Part *Terry*, part administrative search, airport searches appear to be a type of search unique unto themselves. Airport security searches are arguably a “hybrid of stop and frisk and administrative searches. They are administrative searches when they are passively initiated and stop and frisk when suspicion is created and they are actively concluded by governmental action.”¹³⁵ The initial contact between passenger and airport security could be classified as an administrative search because “the prospective airline passenger merely walks through a magnetometer and sends his or her carry-on baggage through an x-ray machine.”¹³⁶ No *Terry* stop has occurred—no passenger has been specifically targeted for questioning and the airport screening procedures are far less invasive than a traditional stop; while the searches may be somewhat “inconvenient,” they “are experienced by the entire airplane-riding public.”¹³⁷

When a passenger is singled out for additional questioning due to his behavior, the screening process arguably becomes a *Terry* stop. The airport detention now very much mirrors a street detention as described in *Terry*. At this point, the BDOs must have reasonable suspicion to stop the passenger.¹³⁸ The main question now becomes whether the suspicious behavior targeted by BDOs is enough to rise to this *Terry* requirement. Considering what the TSA has released as the type of behaviors the BDOs look for, one could argue that it does. Nervously pacing, watching the crowd, and unexplainable sweating in an airport could certainly equal the erratic behaviors exhibited by *Terry* and his companions on that city street corner.¹³⁹ As noted above, the behavior validates the stop at its inception.¹⁴⁰ If the TSA agents only briefly question and then release the passenger, the stop is valid as conducted.¹⁴¹ If the agent questions the passenger and then detains that person for further questioning and, perhaps, further searching, the screening procedure has moved beyond *Terry* or administrative searching.¹⁴² The screening now turns into a full seizure under the

consciousness. It is inconceivable that Hartwell was unaware that he had to be searched before he could board a plane”).

135. 2–32 Hall, *supra* note 21, at §32.11.

136. *Id.*

137. *Id.*

138. See generally *Terry v. Ohio*, 391 U.S. 1 (1968).

139. *Behavior Detection Program Hitting Stride with TSA*, SecuritySolutions.com, Jan. 8, 2008 <http://securitysolutions.com/news/tsa-behavior-detection/>.

140. *Terry*, 392 U.S. at 22–23.

141. *Farag v. United States*, 587 F. Supp. 2d 436 at 455 (E.D.N.Y. 2008).

142. *Id.* at 456–57.

Fourth Amendment and probable cause is now necessary to continue.¹⁴³

In the airport context, the search component of “search and seizure” is even more problematic. An airport pat down serves the same compelling public interest served in a *Terry* frisk: neutralizing weapons and explosives.¹⁴⁴ However, the Court is clear in *Terry* that the suspect must have easy access to the weapon so that the officer is in fear for his/her safety.¹⁴⁵ In an airport, the weapon may not be intended to hurt the examining agent. In fact, the “weapon” may not be a weapon at all, but parts of a weapon that could be assembled once aboard the plane.¹⁴⁶ Arguably, searching for this type of weapon during a pat down (or frisk) goes beyond the limited scope outlined by the Court. According to *Terry*, frisks are constitutional only to find threats of imminent danger.¹⁴⁷ Thus, if the weapon has to be assembled, it technically is not yet an imminent threat. Yet prior to 9/11, the Fifth Circuit, in *United States v. Moreno*,¹⁴⁸ stated that “[d]ue to the gravity of the air piracy problem, we think that the airport. . . is a critical zone in which special fourth amendment considerations apply.”¹⁴⁹ If airport security were confined to only a limited pat-down search where there is a real possibility of a terrorist threat, the restriction would be “self-defeating.”¹⁵⁰ Thus, the overwhelming interest in preventing such disasters which could be completed with the smallest of weapons or explosives that could easily be missed during a *Terry* frisk is far greater than any intrusion inflicted upon the passenger being searched.

Additionally, the officer in *Terry* also had the right to search for weapons to protect those in the surrounding area.¹⁵¹ Clearly, the potential for destruction and loss of human life if a terrorist were to complete his/her mission affects not only those in the immediate area, but everyone who flies. A successful attack cripples the airport where the attack occurred, the people within that airport, and all other

143. *Id.*

144. “The lesson of 9/11...can be simply stated: in the new age of terror,...we...are the primary targets. The losses America suffered that day demonstrated both the gravity of the terrorist threat and the commensurate need to prepare ourselves to meet it.” 9/11 REPORT 323.

145. *Terry*, 392 U.S. at 30.

146. See Harvey Simon, *Screen Air Passengers for Bombs, Use Watch Lists, Commission Says*, 3 HOMELAND SECURITY & DEFENSE 3, July 28, 2004.

147. See *Terry*, 392 U.S. at 29.

148. 475 F. 2d 44 (5th Cir. 1973).

149. *Id.* at 51.

150. *Id.*

151. *Terry*, 392 U.S. at 30.

airports which must then heighten security, restrict flights, or shut-down completely. If would-be terrorists are in possession of a weapon or explosive that could potentially harm the passengers around them, not only in the terminal, but on the airplane, under the idea of protecting those around them, the agent performing a more invasive search than a *Terry* pat down is still within the limited scope of *Terry* and the ensuing searches are constitutional.

E. A Brief Note on Consent

Airport screening is not a new occurrence in American airports. Indeed, airport screening has been commonplace both in the United States as well as throughout the world for nearly three decades.¹⁵² Airline passengers are warned many times, from the purchasing of a ticket to arriving at the airport, that screening of their persons and carry-on baggage will occur. Anyone who enters the concourse of an airport is virtually charged with the knowledge that screening is required.¹⁵³ Such as with flying, persons who partake in activities in which there is an overwhelming public interest implicitly grant consent to those conducting searches to serve the public interest.¹⁵⁴ Anyone who refuses to submit to the search will not be permitted to pass into the sterile area¹⁵⁵ of the airport.¹⁵⁶ In fact, some courts have held that once the screening process has begun at the security checkpoint, the passenger no longer has a constitutional right to revoke

152. 2–32 Hall, *supra* note 21, at §32.12. On Dec 5, 1972, the FAA issued a landmark anti-hijacking emergency rule requiring all U.S. air carriers “to inspect all carry-on baggage for weapons or other dangerous objects and scan each passenger with a metal detector (magnetometer) before boarding or, if a detector was not available, conduct a physical search, or pat down.” FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996 <http://www.faa.gov/about/media/b-chron.pdf>.

153. 2–32 Hall, *supra* note 21, at §32.12.

154. 2–34 Hall, *supra* note 21, at §32.22.

155. The sterile area of the airport is that area “within the terminal where passengers are provided access to boarding aircraft and access is controlled in accordance with TSA requirements.” UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-10-128, *supra* note 6.

156. 49 CFR 1540.105(a)(2) (“[n]o person may: Enter, or be present within...a sterile area without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.”); 49 CFR 1540.107(a) (“No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.”).

the consent.¹⁵⁷ The passenger cannot attempt to enter the sterile area and then “beat a retreat if the search proves not to his liking.”¹⁵⁸

III. PROFILING: A NECESSARY EVIL IN FIGHTING TERRORISTS

A. The Hijacker Profile

The term “profiling” has been defined in many different ways by many different sources. Generally, the term encompasses the tendency of law enforcement officers to rely on race, ethnicity, or national origin to select individuals for “routine investigatory activities.”¹⁵⁹ Profiling, especially racial profiling, is not a new concept in American history.¹⁶⁰ Before terrorists using airplanes as bombs became the main focus of airport security, aircraft hijackings were the overwhelming threat to the nation’s skies.¹⁶¹ To combat the growing number of hijackings in the 1960’s, the “hijacker profile” was developed in 1969 by the Federal Aviation Administration’s (“FAA”)

157. 49 CFR 1540.111(a)(1) (“an individual may not have a weapon, explosive, or incendiary, on or about the individual’s person or accessible property—[w]hen performance has begun of the inspection of the individual’s person or accessible property before entering a sterile area, or before boarding an aircraft for which screening is conducted under this subchapter”). See also *United States v. Herzbrun*, 723 F. 2d 773 (11th Cir. 1984).

158. *Herzbrun*, 723 F. 2d 773, 776 (“[s]uch an option would constitute a one-way street for the benefit of a party planning airport mischief, since there is no guarantee that if he were allowed to leave he might not return and be more successful,” quoting *United States v. Skipwith*, 482 F. 2d 1272, 1281 (5th Cir. 1973)).

159. End Racial Profiling Act, S. 989, 107th Congress, Section 501 (2001) (this act is now dead, as are the 2004 and 2007 reintroduced versions). For additional variations on the definition of racial profiling, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 UNIVERSITY OF CHICAGO LEGAL FORUM 163 at n.24 (2002).

160. The term profiling is generally believed to come from the method of identifying and intercepting drug couriers in the 1970’s. NORTHEASTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, HISTORY OF RACIAL PROFILING ANALYSIS, DATA COLLECTION RESOURCE CENTER <http://www.racialprofilinganalysis.neu.edu/background/history.php> (last visited Jan. 6, 2010). See also *Sokolow*, 490 U.S. at 10 (“Since 1974, the DEA has trained narcotics officers to identify drug smugglers on the basis of...circumstantial evidence....”). However, singling out people because of the color of their skin dates back to before the Civil War. Anita L. Willis, *The Roots of Racial Profiling*, GEORGE MASON UNIVERSITY’S HISTORY NEWS NETWORK, Dec. 23, 2002 <http://hnn.us/articles/1167.html> (prior to the Civil War, the Free Negro Registry “was a means of identifying and tracking so-called Free Persons of Color”).

161. In 1969, eighty-seven aircrafts were hijacked as compared to only thirty-seven in 1968. U.S. aircrafts were involved in forty of these hijackings. FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996, *supra* note 152. On March 17, 1970, the first death in a United States domestic hijacking occurred. The hijacker shot and fatally wounded the copilot on an Eastern Air Lines shuttle from Newark to Boston. The captain, also wounded, was able to safely land his aircraft. Before he died, the copilot was able to shoot the hijacker with his own gun. *Id.*

Task Force on Deterrence of Air Piracy.¹⁶² The Task Force constructed the hijacker profile, a “characteristic-based passenger profile” to be used along with magnetometers to screen for potential hijackers in American airports.¹⁶³ The profile was actually tested at nine airports with the testers concluding that “no more than 2 percent of the flying public triggered enough of those characteristics to be detained.”¹⁶⁴

With airplane hijackings reaching their pinnacle in the 1970’s,¹⁶⁵ American courts starting taking these ever-present terroristic threats very seriously. Balancing the governmental interest against personal privacy, the Fifth Circuit ruled that using a profile to discover hijackers before they took the opportunity to complete their purpose was not only constitutional but was also necessary:

Although the problem of aerial hijacking is well known to the public, we think it appropriate, nevertheless, to single out our reasons for treating airport security searches as an exceptional and exigent situation under the Fourth Amendment. Obviously, in order to jeopardize the lives and safety of the smallest number of people, the hijacker must be discovered when he is least dangerous to others and when he least expects confrontation with the police. In practical terms, this means while he is still on the ground and before he has taken any overt action.¹⁶⁶

Although the type of airplane hijackings experienced in the 1970’s have been overtaken by insidious suicide bombings, the original hijacker profile is still used in American airports and is a constitutionally tested practice of singling out would-be threats. In

162. *Id.*

163. David Brown, *Letter to the Editor: Tracing the FAA’s Warnings*, WASH POST, Feb. 16, 2005 (NOTE: David Brown was the press officer for the Task Force on Deterrence of Air Piracy). *See also* FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996, *supra* note 152 (a hijacker profile could be constructed using the characteristics of past perpetrators).

164. Brown, *supra* note 163. On July 17, 1970, “New Orleans’ Moisant International Airport became the first U.S. airport to subject all passengers to the FAA-developed [behavioral] anti-hijacking screening system.” FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996, *supra* note 152. Only eighteen months after establishing the Task Force, the FAA replaced it with the Air Operations Security Division of the newly renamed Office of Air Transportation Security. *Id.*

165. FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996, *supra* note 152.

166. *United States v. Moreno*, 475 F.2d 44, 48–49 (5th Cir. 1973).

United States v. Lopez-Pages,¹⁶⁷ Lopez-Pages purchased a ticket for a flight from Orlando to Dallas.¹⁶⁸ The ticket agent observed characteristics that matched the FAA hijacker profile and noted this observation by writing the word “CODE” on Lopez-Pages’ ticket envelope.¹⁶⁹ Lopez-Pages was then told he would need to submit to a search as he fit the hijacker profile.¹⁷⁰ Lopez-Pages and a companion passed through the magnetometer without incident and then were taken to a separate security room where Lopez-Pages was patted down.¹⁷¹ The pat down revealed marijuana and cocaine.¹⁷² He was arrested and convicted of possession and intent to distribute.¹⁷³ The Eleventh Circuit, in affirming the district court’s conviction, reiterated the critical nature of airport security checkpoints, requiring less than probable cause or even reasonable suspicion to perform a search. Calling this lesser standard “mere suspicion,” the court ruled that “facts establishing the hijacker profile are sufficient to provide the requisite ‘mere suspicion’ necessary to conduct the searches in this case.”¹⁷⁴

B. The Race Factor: A Permissible Element that Cannot Stand Alone

Although many factors make up law enforcement profiles, none are as suspect as race. Under a drug profile, race cannot be the sole basis for the profile.¹⁷⁵ However, race may be considered as *part* of a profile as long as other factors are present.¹⁷⁶ In *Whren v. United States*,¹⁷⁷ the Court, concerned about the potential misuse of *Terry* to rationalize racially motivated preventative police work, reiterated the need for *objective* justification as the basis of a *Terry* stop under the Fourth Amendment: “[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions

167. 767 F. 2d. 776 (11th Cir. 1985).

168. *Id.* at 778.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 777–78.

174. *Id.* at 778.

175. 2–32 Hall, *supra* note 21, at §32.6.

176. See *Whren v. United States*, 517 U.S. 806 (1996).

177. *Id.*

play no role in ordinary, probable-cause Fourth Amendment analysis.”¹⁷⁸ In other words, the Court’s ruling appears to condone racial profiling (or using race as a “suspicious factor”) as a subjective factor as long as the officer can also articulate objective factors that a reasonable person would also find suspicious in the surrounding circumstances.

While the history of hijacker and drug courier profile cases certainly acts as guidance for courts confronted with law enforcement using race as a means to prevent crime, perhaps nothing in America’s judicial past could prepare the courts for the “profiling” cases to come after 9/11. In 2008, the U.S. District Court for Eastern District of New York became the first court to consider racial profiling in an airport screening case post 9/11. In *Farag v. United States*,¹⁷⁹ several police officers detained two Arabs, Farag and his friend, Elmasry, for four and a half hours, seizing them as soon as they deplaned from their flight from San Diego to New York City.¹⁸⁰ The counterterrorism officers who were sued (collectively the “Government”) contended that the agents conducted a valid *Terry* stop, or, if the stop was deemed an arrest, they had requisite probable cause.¹⁸¹ The agents sought to justify the arrests by putting together, what the court called, a “number of benign circumstances in the apparent belief that their numerosity [would] carry the day.”¹⁸² The court refused to give credence to their suspicions: “[y]et, even viewing all of these circumstances as a whole, it cannot rationally be held that if, hypothetically, the plaintiffs were two Caucasian traveling companions speaking French, or another non-Arabic language which the agents did not understand, ‘a person of reasonable caution’ would have believed that they were engaged in terrorist surveillance.”¹⁸³ The District Court in *Farag* did not shy away from the fact that its case was the first case after 9/11 to consider whether race could be considered as a factor to establish criminal propensity; but ignoring the overwhelming temptation to allow what it considered unconstitutional principles, it refused to validate using race to further the security of the country.¹⁸⁴

178. *Id.* at 813.

179. 587 F. Supp. 2d 436 (E.D.N.Y. 2008).

180. *Id.* at 442.

181. *Id.*

182. *Id.* at 458.

183. *Id.*

184. *Id.* at 467–68.

Yet, the Supreme Court clearly requires a different type of analysis. In *United States v. Arvizu*,¹⁸⁵ the Court stated that all reasonable, articulated suspicions (as mandated in *Terry*) must be considered as a whole; courts must “take into account ‘the totality of the circumstances’” when evaluating the individual observations that caused the officer to act.¹⁸⁶ As in *Whren*,¹⁸⁷ the Court in *Arvizu* believed that numerosity does “carry the day.” Even if race played a role in the initial stop, the Court plainly stated in *Whren* that race may be used to support reasonable suspicion as long as it is combined with other objective factors. Although the District Court in *Farag* granted summary judgment in favor of the defendant, it did not follow the rulings of the Supreme Court when it refused to allow race as one factor to validate reasonable suspicion. Arguably, the court was in error by refusing the agents’ articulated factors for stopping Farag.¹⁸⁸ Race is a valid factor when considered within the totality of the circumstances.¹⁸⁹

In 2006,¹⁹⁰ a highly publicized incident unequivocally demonstrated just how prevalent racial profiling has become when dealing with airport security. The incident is now known simply as “The Flying Imams,”¹⁹¹ case. The Flying Imams¹⁹² controversy began with the removal of six imams from US Airways Flight 300 from Minneapolis to Phoenix on November 20, 2006.¹⁹³ Passengers became alarmed by what they perceived as suspicious or “unsettling” behavior by the imams.¹⁹⁴ One passenger captured the suspicious activities in a

185. 534 U.S. 266, 274 (2002).

186. *Id.* (noting that *Terry* precludes a “divide-and-conquer” analysis; each of a series of acts may be innocent, but when taken together, may warrant “further investigation”). *Id.*

187. *Whren v. United States*, 517 U.S. 806 (1996).

188. *See supra* note 179.

189. *But see* *United States v. Montero-Camargo*, 208 F. 3d 1122 (9th Cir. 2000). In ruling that Hispanic appearance is not a relevant factor when proving particularized or individualized suspicion, the Ninth Circuit states, “[s]tops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.” *Id.* at 1135.

190. *Shqeirat v. United States Airways Group, Inc.*, 645 F. Supp. 2d 765 (D. Minn. 2009). Although the incident occurred in 2006, the U.S. District Court in Minnesota did not decide the matter until 2009 thus keeping *Farag* as the first case to consider race after 9/11.

191. Imam is a “prayer leader of a mosque”: a sinless, divine Muslim leader and successor to Mohammad. *Shabazz v. Martin*, No. 00-73005, 2007 U.S. Dist. LEXIS 70342, at *5 (D. Mich. Sep. 24, 2007).

192. *Shqeirat*, 645 F. Supp. 2d 765.

193. *Id.* at 774.

194. *Id.* at 785.

note then passed the note to a flight attendant prior to departure.¹⁹⁵ According to the police report, these behaviors included negative statements about President Bush and the Iraq war; negative statements about the death of Saddam Hussein; loud prayers to “Allah” while waiting in the lobby;¹⁹⁶ seat changes to spread out on the plane (which was done by the terrorists on 9/11); one-way tickets held by three of the imams; and no checked baggage.¹⁹⁷

The Minnesota police listed the type of incident as “Suspicious Activity.”¹⁹⁸ Officer Brad Wingate, one of the officers dispatched to the scene, met with the U.S. Airways Manager who not only told the officers that the imams were acting suspiciously, he also mentioned they were of Middle Eastern descent.¹⁹⁹ Wingate then conferred with the Federal Air Marshall on the scene and decided all the actions taken together amounted to “suspicious behavior.”²⁰⁰ The suspects, after being detained for an hour on the jetway, were handcuffed, patted down and their carry-on bags were sniffed by a drug dog.²⁰¹ They were then led down the outside stairs of the jetway (in full view of the other passengers) and transported to the Airport Police Department Police Operations Center and placed in holding cells where they were held for approximately five to six hours.²⁰² Ultimately, no imam was charged.²⁰³ The imams sued, among others, the federal agent, police officers and airport authority on multiple charges including a violation of the Fourth Amendment.²⁰⁴

The FBI agent admitted that the imams were arrested rather than simply being stopped.²⁰⁵ As their seizure went beyond a *Terry* stop and quickly became a full-blown arrest, the agent and police

195. *Id.* at 772–73.

196. *Id.* at 771. The imams were praying “Allahu Akbar!” meaning “God is great.” While a seemingly innocuous prayer, “The very last human sound on the cockpit voice recorder of United Flight 93 before it screamed into the ground at 580 miles per hour is the sound of male voices shouting “*Allahu Akbar*” in a moment of religious ecstasy.” Debra Burlingame, *On a Wing and a Prayer*, WALL ST. J., Dec. 6, 2006 at A16.

197. AIRPORT POLICE DEPARTMENT, MINNESOTA REPORT FORM OFFENSE/INCIDENT/ARREST REPORT, Dec. 20, 2006 <http://pajamasmedia.com/upload/2006/12/FlyingImamsPolice%20Report.pdf>.

198. *Id.*

199. *Id.*

200. *Shqeirah*, 645 F. Supp. at 773.

201. AIRPORT POLICE DEPARTMENT, MINNESOTA REPORT FORM OFFENSE/INCIDENT/ARREST REPORT, *supra* note 197. See also *Shqeirah*, 645 F. Supp. 2d at 774.

202. *Id.*

203. *Id.*

204. *Id.* at 777.

205. *Id.* at 778.

officers needed probable cause to meet constitutional standards. “An officer has probable cause for an arrest ‘when the totality of the circumstances demonstrates that a prudent person would believe that the arrestee has committed or was committing a crime.’”²⁰⁶ According to the court, nothing the imams had done prior to the arrest was a crime; “praying in public, commenting on current events, and even criticizing governmental policy is protected speech under the First Amendment.”²⁰⁷ Since the imams had not committed a crime, the defendants did not have probable cause.²⁰⁸ By arresting them, the defendants violated the imams’ Fourth Amendment rights.²⁰⁹

Although basing her ruling on probable cause, Judge Montgomery continued her reasoning by focusing on the race of the detainees. In her words, “[p]laintiffs’ Middle Eastern descent does not change the analysis. Similar behavior by Russian Orthodox priests or Franciscan monks would likely not have elicited this response.”²¹⁰ The Judge also refused to accept the “9/11 claim” argued by certain defendants, “that the attacks of September 11, 2001—perpetrated by men of Middle Eastern descent who espoused a radical version of Islam—justifies a massive curtailment of liberty whenever terrorism, and in this case, the suspicion of Islamic terrorism, is concerned.”²¹¹ In denying this argument, the court remained focused on the Constitution and the need to defend its protections regardless of the circumstances: “[u]nquestionably the events of 9/11 changed the calculus in the balance American society chooses to make, especially in airport settings, between liberty and security. But when a law enforcement officer exercises the power of the Sovereign over its citizens, she or he has a responsibility to operate within the bounds of the Constitution and cannot raise the specter of 9/11 as an absolute exception to that responsibility.”²¹²

While the imams ultimately won their case because the acting agents did not possess probable cause, they may not have won under the reasonable suspicion standard promulgated under *Terry*. The fact that the defendants used race and religion as two factors to justify their detention of the plaintiffs would not be fatal to their argument under a *Terry* claim. As long as the officers could supply other factors to

206. *Id.* at 778 (quoting *Kuehl v. Burtis*, 173 F. 3d 646, 650 (8th Cir. 1999)).

207. *Id.* at 786.

208. *Id.* at 779.

209. *Id.*

210. *Id.* at 786.

211. *Id.* at 788.

212. *Id.*

support their assessment of the situation, the Fourth Amendment would be satisfied.²¹³

Interestingly, soon after the incident occurred (but prior to trial), “official” probes into the removal of the imams found that the removals were not racially biased.²¹⁴ US Airways, the Department of Homeland Security (“DHS”) and the Air Carrier Security Committee of the Air Line Pilots Association all investigated the decisions made by the parties involved. “We believe the ground crew and employees acted correctly and did what they are supposed to do,” Andrea Rader, a US Airways spokeswoman said.²¹⁵ Russ Knocke, spokesman for the DHS said, “There is no indication there is any inappropriate activity, at least no indication at this time,” calling the review “a fairly routine practice with incident’s like this.”²¹⁶ The Air Carrier Security Committee’s report concluded, “The crew’s actions were strictly in compliance with procedures and demonstrated overall good judgment in the care and concern for their passengers, fellow crew members, and the company. The decisions made by all the parties were made as a result of the behavior of the passengers and not as a result of their ethnicity.”²¹⁷

It should also not be forgotten that the entire incident began when the other *passengers* got “nervous” at the behavior of these Middle Eastern clerics and expressed their concern to the airline employees.²¹⁸ Although most Americans espouse an anti-profiling attitude, these passengers had no reservations in calling attention to relatively benign behaviors only because Arabs exhibited them. In the tense airport atmosphere following 9/11, the imams should have known better. Espousing anti-American sentiments while loudly praying in Arabic at a U.S. airport gate would, without a doubt, attract attention. Any reasonable citizen who had remotely heard of 9/11 would find this behavior troubling if not dangerous. Congress agreed: as a result of this incident, new legislation was passed protecting citizens from prosecution when they report suspicious behaviors to authorities.²¹⁹ President Bush signed H.R. 1401, 110th Cong. (1st Sess.

213. See *Whren v. United States*, 517 U.S. 806 (1996).

214. Audrey Hudson, *Probes Dismiss Imams’ Racism Claim*, WASH. TIMES, Dec. 6, 2006 at A01.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Shqairat v. United States Airways Group, Inc.*, 645 F. Supp. 2d 765 (D. Minn. 2009).

219. H.R. 1401, 110th Cong. (1st Sess. 2007) (codified at 6 U.S.C. §1104(e)).

2007) into law on Aug. 3, 2007.²²⁰ Rep. Peter King of New York introduced this bill two weeks after the plaintiffs in “The Flying Imams” case filed their complaint against the reporting passengers aboard Flight 300. The law now protects private individuals who report suspicious activity, including passengers aboard airplanes.²²¹ Not surprisingly, the text of the law mirrors the *Terry* standard of objective reasonable suspicion: “[a]ny person who, in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official shall be immune from civil liability under Federal, State, and local law for such report.”²²² As race may be used as a factor under *Terry* as long as there are other factors to support the stop, race may be an initial factor for citizens to consider as long as they can articulate other objective factors which led them to their reasonable suspicion.²²³

The defendants ended up settling with the imams in order to avoid the expense of an ongoing lawsuit.²²⁴ Since the settlement, concerns have now arisen on all sides that the case will have a chilling effect on identifying and catching potential terrorists.²²⁵ One columnist for the *Star Tribune* in Minneapolis went so far as to state that Judge Montgomery “aided and abetted” the imams’ victory, acting “arrogantly dismissive of law-enforcement realities.”²²⁶ Even Muslims are leery of the precedent being set by the settlement.²²⁷ Zuhdi Jasser, chairman of the American Islamic Forum for Democracy wonders if the result will cause future pilots to avoid making the quick decision which may ultimately protect the lives of everyone onboard. He was quoted in *USA Today* as saying “[p]eople are going to wonder: Am I going to be another captain who will end up costing my employer X

220. Although the law was signed on Aug. 3, 2007, it is retroactive back to Oct. 1, 2006, one month prior to the imams incident. 6 U.S.C. §1104(e).

221. 6 U.S.C. §1104. Immunity for reports of suspected terrorist activity or suspicious behavior and response.

222. 6 U.S.C. §1104(a)(1).

223. *Shqairat*, 645 F. Supp. 2d 775 n. 3 (noting that the plaintiffs voluntarily dismissed their complaint against the civilians in Aug. 2007 after the legislation was passed).

224. *Flying Imams’ Settlement Carries Cost for Air Safety*, USA TODAY, Oct. 26, 2009 at 10A.

225. See generally Stu Bykofsky, *Flying on a Wing and an Unfamiliar Prayer*, THE PHILADELPHIA DAILY NEWS, Jan. 25, 2010 (arguing that the imams’ behavior was provocative and they were rewarded for it).

226. Katherine Kersten, *Flying Imam’ Case is Settled at Our Expense*, STAR TRIBUNE, Oct. 25, 2009 at 30P.

227. See Oren Dorell, *Imams Settle Case Over ’06 Flight Removal*, USA TODAY, Oct. 21, 2009 at 3A.

dollars because I made a bad decision that was a bit quick.”²²⁸ This type of “second-guessing” simply cannot stand if American skies are to remain terrorist free: “[t]he day we tell the captain of a commercial airliner that he cannot remove a problem passenger unless he divines beyond question what is in that passenger’s head and heart is the day our commercial aviation system begins to crumble.”²²⁹

The First Circuit took a different view of a very similar situation. In *Cerqueira v. American Airlines, Inc.*,²³⁰ Cerqueira claimed, under 42 U.S.C. §1981,²³¹ that he was illegally removed from American Airlines Flight 2237 from Boston to Fort Lauderdale.²³² He claimed that he was removed and then denied rebooking because of his race.²³³ The airlines countered his claim, stating that under 49 U.S.C. §44902, the airline had a legal right to refuse to transport the passenger if it felt he was “or might be, inimical to safety.”²³⁴ In practice and as a matter of law,²³⁵ the Captain, as pilot in command, “stands in the role of the air carrier for a decision to remove a passenger from a flight.”²³⁶ In support of his removal, the Captain of Flight 2237 took into consideration at least nine separate factors which led him to ask Cerqueira and his two “row mates” to leave the plane.²³⁷ Taken together, he believed these factors serious enough to bring the jetway back to the plane and delay the takeoff.²³⁸ After the men were removed, another passenger reported that one of the three men had box cutters confiscated by TSA agents at the security checkpoint.²³⁹ With this additional knowledge, the Captain, with nearly seventeen years of experience with American Airlines, decided to have all the passengers disembark and have all the baggage removed so the plane could be

228. *Id.*

229. Burlingame, *supra* note 196.

230. 520 F. 3d 1 (1st Cir. 2008) (*cert. denied* 129 S. Ct. 111 (2008)).

231. 42 U.S.C. §1981 “Equal rights under the law: Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. §1981.

232. *Cerqueira*, 520 F. 3d at 4.

233. *Id.* at 10–11.

234. 49 U.S.C. §44902(b).

235. 14 C.F.R. §91.3(a)

236. *Cerqueira*, 520 F. 3d at 12.

237. *Id.* at 4–8.

238. *Id.* at 7.

239. *Id.* at 7–8.

thoroughly searched.²⁴⁰ Although the plaintiff believed his appearance was the reason for his removal,²⁴¹ the Captain testified he could not see the plaintiff from the front of the plane.²⁴² The first time the Captain saw the plaintiff was at trial.²⁴³

In applying §44902, courts must balance the need for airline safety with the potential for racial discrimination.²⁴⁴ The standard for liability under the statute is the “arbitrary and capricious” standard: “the air carrier’s decision to refuse air transport must be shown to be arbitrary or capricious.”²⁴⁵ In determining whether the refusal was arbitrary or capricious in this case, the court applied four principles: (1) the decision of the pilot in charge is the decision for the air carrier; (2) review of that decision is limited to what the Captain knew at the time the decision was made—not what he should have known; (3) since the decision must be made quickly and expediently, the Captain is entitled to rely upon the representations made to him about the situation, even if reliance on those representations is mistaken; and (4) biases of those giving information to the Captain cannot be attributed to the Captain himself.²⁴⁶ In *Cerqueira*, the plaintiff presented no evidence that the Captain acted out of racial bias.²⁴⁷ Indeed, the Captain, not having seen the plaintiff, did not even know of his Middle Eastern appearance. If the Captain had based his judgment solely on the plaintiff’s appearance, the removal would have been arbitrary and thus, illegal under §44902.²⁴⁸ Having been presented with other objective and reasonably believable factors at the time of the incident when the decision was made, his decision was valid.²⁴⁹

Advocates against profiling use the popular argument that the 9/11 attacks fueled a baseless racial hysteria within the United States.²⁵⁰ Indeed, it does seem that prior to 9/11, racial profiling was

240. *Id.* at 8.

241. *Id.* at 10–11. The plaintiff had dark hair and olive colored skin as did the other two men who were removed. The plaintiff was an American citizen. The other two men were Israeli. *Id.* at 5.

242. *Id.* at 9.

243. *Id.* at 9.

244. *Id.* at 14.

245. *Id.* at 14 (citing *Williams v. Trans World Airlines*, 509 F. 2d 942, 948 (2d Cir. 1975)).

246. *Id.* at 14–15.

247. *Id.* at 17.

248. *Id.* at 17–18.

249. *Id.* at 17.

250. See Ally Hack, *Forfeiting Liberty: A Collective Sense of Vulnerability and the Need for Proactive Protection After 9/11*, 2 CARDOZO PUBLIC LAW, POL’Y & ETHICS J. 469, 514

condemned by nearly everyone: the President, Congress, the Courts, and the American people.²⁵¹ Yet, what is proclaimed in public is not necessarily the sentiments expressed in private. As evidence of this fact, the White House was exploring the benefits of profiling nearly five years prior to 9/11. In the “White House Commission on Aviation Security and Safety Report” issued to President Clinton, the Commission, chaired by then Vice President Al Gore, recommended passenger profiling.²⁵² Recommendation 3.19 advocated “passenger profiling” to “leverage an investment in technology and trained people.”²⁵³ By using profiling, “passengers could be separated into a very large majority who present little or no risk, and a small minority who merit additional attention.”²⁵⁴ While many political leaders may publically demonize such overt profiling language, in private, most Americans (as well as their leaders) understand the ever-growing necessity of such potentially discriminating actions to further the safety of the country.²⁵⁵

As a part of its profiling research, the Commission met with a Civil Liberties Advisory Board to consider the potential for intrusion upon and even denial of civil liberties to any American airline passenger. Based on this meeting, the Commission recommended that safeguards be placed on any profiling system. The first of these safeguards was that “no profile should contain or be based on material of a constitutionally suspect nature - e.g., race, religion, or national origin of U.S. citizens.”²⁵⁶ The profile must be based on “. . . measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations. A

(May, 2004) (“The choice of security over liberty made by Americans after 9/11 was an emotional one...”).

251. Alschuler, *supra* note 159.

252. VICE PRESIDENT AL GORE, CHAIRMAN, WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON, Recommendation 3.19, February 12, 1997 <http://www.fas.org/irp/threat/212fin~1.html>). The White House Commission on Aviation Safety and Security was formally established Aug 21, 1996. FEDERAL AVIATION ADMINISTRATION, FAA HISTORICAL CHRONOLOGY, 1926–1996, *supra* note 152.

253. GORE, WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON, *supra* note 252.

254. *Id.*

255. COMMITTEE OF LAW AND JUSTICE, ET. AL., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISM: A FRAMEWORK FOR PROGRAM ASSESSMENT, *supra* note 17. As recent as December, 2006, over fifty percent of the United States population would favor “extra checks” by airport personnel on passengers who appear to be of Middle-Eastern descent. *Id.*

256. GORE, WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON, *supra* note 252.

relationship must be demonstrated between the factors chosen and the risk of illegal activity.”²⁵⁷ In fact, this recommendation is very similar to the approach courts use today. Race may be considered as a factor when stopping a passenger; it just cannot be the only factor used.²⁵⁸

However, many times, measurable factors fail in comparison to the valued judgment of a well-trained and seasoned security agent. In discussing the terrorists’ attacks of 9/11, the 9/11 Commission praised the inherent instincts of just such an agent: “[o]ne potential hijacker was turned back by an immigration inspector as he tried to enter the United States. The inspector relied on intuitive experience to ask questions more than he relied on any objective factor that could be detected or “scored” by a machine.”²⁵⁹ The 9/11 Report calls this “screening,” not “profiling.”²⁶⁰ Yet, it defines screening as looking for “identifiable suspects or indicators of risk.”²⁶¹ Arguably, looking for “indicators of risk” is profiling. Unfortunately, an indicator of risk in today’s world of terrorism possibly includes ethnic origin.²⁶² At the airports, the SPOT program mandates watching for what could easily be called “indicators of risk.”²⁶³ In *Terry*, the police officer articulated the risk factors he observed when making the decision to stop and ultimately frisk Terry and his companions. What may be an uncomfortable truth is that now, ethnicity might just be as viable a risk factor as staring in a store window one too many times.

After the attempted bombing on Christmas Day, 2009 aboard Flight 253,²⁶⁴ the TSA quickly implemented new rules on domestic passenger screening while also issuing what could be called blatant ethnic profiling mandates when it decreed that all inbound passengers from fourteen suspect countries must be subjected to more intense screening than passengers from other countries. Notably, nearly every country located in the Middle East is on the list as well as certain African countries believed to have citizens with ties to terrorist organizations.²⁶⁵ These enhanced screenings include full-body pat

257. *Id.*

258. *See Whren v. United States*, 517 U.S. 806 (1996).

259. 9/11 REPORT 387.

260. *Id.*

261. *Id.*

262. Associated Press, *Bin Laden Purportedly Lauds Detroit Bomb Plot*, MSNBC, Jan. 24, 2010 http://www.msnbc.msn.com/id/35042867/ns/world_news-mideastn_africa/.

263. Transportation Security Administration, *Behavior Detection Officers (BDO): Layers of Security*, *supra* note 14.

264. *See supra*, note 6.

265. Associated Press, *Obama: Airline Attack was Preventable*, MSNBC.com, Jan. 6, 2010 http://www.msnbc.msn.com/id/34679532/ns/us_news-airliner_attack/. Countries include

downs, carry-on baggage searches, full-body scanning, and explosives detection.²⁶⁶ However, according to the TSA, these new rules are not profiling. As is apparently taught during TSA training, “[s]ingling out people based on ethnicity or religion is verboten—but it’s OK if it’s based on a person’s *nationality*.”²⁶⁷

IV. SPOT: LIMITED SUCCESSES AND MONUMENTAL FAILURES

The behavioral analysis done in the SPOT program may more properly be called *biobehavioral* analysis. Biobehavioral analysis uses outward physical manifestations to infer an attempt to mask illegal intentions.²⁶⁸ BDOs, trained in SPOT, look for biobehaviors such as facial expressions,²⁶⁹ vocalization,²⁷⁰ fidgeting, reddening of face, or profuse sweating.²⁷¹ Many people believe that these biobehaviors are “automatic” or involuntary. However, most of these behaviors can be easily manipulated by an ordinary citizen: “[d]epending on the robustness of the biobehavioral techniques involved, it may be possible in the face of countermeasures for a subject to induce false negatives by manipulating his or her behavior.”²⁷² Indeed, with practice, most people can become quite good at hiding their true

Algeria, Afghanistan, Cuba, Iran, Iraq, Lebanon, Libya, Nigeria, Pakistan, Saudi Arabia, Somalia, Sudan, Syria, and Yemen. *Id.*

266. *Id.*

267. Barbara S. Peterson, *New TSA Rules: Déjà vu All Over Again*, CONDÉ NAST TRAVELER, Jan. 4, 2010.

268. COMMITTEE OF LAW AND JUSTICE, ET. AL., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISM: A FRAMEWORK FOR PROGRAM ASSESSMENT, *supra* note 17 at 250.

269. *Id.* at 252. Generally, decoding facial expression requires analyzing many different factors associated with the face, taking master decoders several hours to interpret. *Id.* See also Patti Davis, *Smile ... Or Else: 'Behavior Detection Officers' Are Now Watching Passengers' Facial Expressions for Signs of Danger*, NEWSWEEK, 2007 (reprinted at <http://www.911blogger.com/node/10721>) (last visited January 2, 2010); and Dr. John M. Grohol, *Behavior Detection Officers at U.S. Airports*, World of Psychology, <http://psychcentral.com/blog/archives/2007/08/18/behavior-detection-officers-at-us-airports/> (last visited January 2, 2010).

270. Meaning paralinguistic information carried by a voice’s pitch, timbre, and tempo. COMMITTEE OF LAW AND JUSTICE, ET. AL., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISM: A FRAMEWORK FOR PROGRAM ASSESSMENT, *supra* note 17 at 254.

271. See J. E. Schmidt, M.D., ATTORNEY’S DICTIONARY OF MEDICINE (Matthew Bender 2008). Circulation and perspiration is controlled by the autonomic nervous system (“ANS”). These functions are “independent of the will” (unlike acts dependent upon will such as walking, chewing, etc. which are governed by the central nervous system). *Id.*

272. COMMITTEE OF LAW AND JUSTICE, ET. AL., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISM: A FRAMEWORK FOR PROGRAM ASSESSMENT, *supra* note 17, at 251.

emotions by “faking” a smile or inflecting their voice.²⁷³ Thus then, perhaps the most important objective of any security program, including SPOT, is the ability to limit these potentially devastating errors: “[i]n addition to the highly desirable true positives and true negatives that are produced, there will be the troublesome false positives (an innocent person is thought to be guilty) and false negatives (a guilty person is thought to be innocent).”²⁷⁴ As with all law enforcement, mistakes will occur. In any circumstance, these errors are unpalatable and cause great concern with everyone involved in the legal process. However with airport security, such errors can be catastrophic.

Although an obvious comment, it must be noted that SPOT will only work if the person intent on committing the crime is anxious about committing it.²⁷⁵ One need only dissect the Dec. 25, 2009 bombing attempt over Detroit to verify this SPOT restriction.²⁷⁶ All reports of the incident noted how calm the bomber went about his work.²⁷⁷ Even after being tackled by other passengers, the bomber simply stated he had an explosive device and became extremely cooperative with authorities.²⁷⁸ He appeared to be a “normal” passenger flying to the U.S. Instead, he was a suicide bomber with ties to terrorist organizations in Yemen.²⁷⁹

To determine the success of the SPOT program as implemented today, one need only look at its brief history. The SPOT program started in Boston at the Logan International Airport in 2003.²⁸⁰ By 2008, the program was in place at more than 150

273. *Id.*

274. *Id.*

275. Transportation Security Administration, *The Truth Behind the Title: Behavior Detection Officer*, THE TSA BLOG, Feb. 29, 2008 available at <http://blog.tsa.gov/2008/02/truth-behind-title-behavior-detection.html> (last visited Sept. 1, 2010) (noting that behavior analysis is “based on the fear of being discovered”).

276. *See supra*, note 6.

277. James Gordon Meek and Rich Schapiro, *Alleged Nigeria Terrorist Umar Farouk Abdulmutall [sic] Tries to Explode Northwest Airlines 253 to Detroit*, NY DAILY NEWS, Dec. 26, 2009, http://www.nydailynews.com/news/national/2009/12/25/2009-12-25_passenger_sets_off_firecrackers_ aboard_detroit_bound_delta_plane.html).

278. *Id.* *See also* Associated Press, *U.S. Files Charges in Jet-Terror Incident*, USA TODAY, Dec. 26, 2009 http://www.usatoday.com/travel/flights/2009-12-25-airliner-disturbance-detroit_N.htm.

279. Brian Ross and Richard Esposito, *Abdulmutallab: More Like Me in Yemen*, ABC NEWS, Dec. 28, 2009 <http://abcnews.go.com/Blotter/abdulmutallab-yemen-northwest-flight-253-terror-suspect/story?id=9430536>.

280. Transportation Security Administration, *BDOs SPOT More Than Just Opportunities at TSA*, *supra* note 13.

airports.²⁸¹ During this year alone, 98,905 passengers nationwide were subjected to secondary screenings as requested by BDOs.²⁸² Of those passengers, police actually questioned only 9,854.²⁸³ Of those passengers, only 813 were arrested.²⁸⁴ Since 2006, SPOT has led to the secondary screenings of more than 160,000 passengers.²⁸⁵ Less than one percent of these passengers, 1,266 passengers to be exact, were arrested.²⁸⁶ These arrests consisted mainly of drug crimes, possessing fraudulent documents, and having outstanding warrants.²⁸⁷ The TSA, however, continues to praise the successes of the program; yet, none of the arrests reported have been terrorist related.²⁸⁸

Critics soon denounced the program, arguing that the program is flawed.²⁸⁹ The United States General Accounting Office (“GAO”), very critical of the job the TSA has done in implementing the DHS’s National Infrastructure Protection Plan (“NIPP”), analyzed the risk assessment the TSA performed in creating its strategic passenger screening plan. As part of that analysis, the GAO confirmed that “these efforts [do not] meet the risk-based framework outlined in the NIPP.”²⁹⁰ Thus, the TSA continues to invest in security technologies that may not work.²⁹¹ In support of this analysis, statistics show that

281. Frank, *supra* note 17.

282. Kaye, *supra* note 15.

283. *Id.*

284. *Id.*

285. Frank, *supra* note 17 (taken from a graph TSA provided to *USA Today*).

286. *Id.*

287. *Id.* An interesting question also arises with these arrests: Were they fruits of illegal searches? If these suspects were discovered via searches beyond the scope permitted by *Terry*, they quite possibly could have a Fourth Amendment claim.

288. See Transportation Security Administration, *Tampa BDO Team ‘SPOTs’ Man Alleged to Have Illegal Drugs*, April, 2009 (http://www.tsa.gov/press/happenings/tampa_bdo_illegal_drugs.shtm) (passenger charged with twenty-two counts of illegal possession of prescription drugs after being spotted by BDO team); and Transportation Security Administration, *SPOT Proves Its Value at BWI*, Aug. 2, 2007 (http://www.tsa.gov/press/happenings/bwi_story.shtm) (BDO at Baltimore/Washington International Airport referred suspicious man to authorities who found a loaded gun and ammunition).

289. Frank, *supra* note 17. See also UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-10-128 *supra* note 6 (noting that the TSA had not incorporated “key risk management principles” as required by the DHS).

290. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-10-128 *supra* note 6.

291. See *id.* “[The] TSA has continued to invest in checkpoint technologies without the benefit of the risk assessment information outlined in the NIPP. Consequently, TSA increases the possibility that its investments will not address the highest priority security needs.” *Id.* SPOT itself cost nearly \$200 million in 2009. Armen Keteyian, *TSA’s Program to Spot Terrorism a \$200M Sham?*, CBSNews.com, May 19, 2010 available at <http://www.cbsnews.com/stories/2010/05/19/eveningnews/main6500349.shtml> (last visited Aug. 31, 2010).

SPOT does not catch the criminal it is designed to catch. “Behavioral profiling has never turned up someone planning harm to aviation security. It has never turned up a person with weapons, guns, bombs, or any other implement that would cause a flight to be delayed, much less brought down.”²⁹² Put bluntly, the program has a 100% failure rate: it has never stopped a terrorist.²⁹³ Since 2004, sixteen individuals later accused of terrorist involvement flew twenty-three times within the United States and were never caught by the BDOs working in those airports.²⁹⁴ Stephen Fienberg, a Carnegie Mellon scientist who studied the TSA program stated, “I think it’s a sham. We have no evidence it works.”²⁹⁵

However, one could argue that SPOT, with all of its untapped potential, is no less flawed than most of the security features used by the TSA today.²⁹⁶ More technology becomes the country’s “battle cry” with every attempted terrorist attack. As a result increasingly sophisticated metal detectors and explosive detection devices are being designed and ordered for the largest airports around the country. The newest and most highly publicized of these machines is a full-body scanner which can literally see under clothes to find weapons or explosives taped to a person’s body.²⁹⁷ But, unfortunately, this type of security cannot detect “powders, liquids, thin pieces of plastic or anything that resembles skin.”²⁹⁸ It also cannot detect anything “concealed internally.”²⁹⁹ Proponents of SPOT can then argue that machines simply do not work all the time. In that case, it may indeed be up to a human assessment to prevent potential disaster.

292. Jim Harper, *Not Just a Program with Problems, a Program with Constitutional Problems*, CATO@LIBERTY, Nov. 21, 2008 <http://www.cato-at-liberty.org/2008/11/21/not-just-a-program-with-problems-a-program-with-constitutional-problems/> (last visited 10.27.2009).

293. Keteyian, *supra* note 291.

294. *Id.*

295. Frank, *supra* note 17.

296. Sammy Elrom, *TSA and Aviation Security: What is Wrong with Their Concepts and Strategy*, GLOBAL POLITICIAN, Oct. 12, 2007.

297. See generally JetSetCD, *Full-Body Scanners 101: The Two Types and How They Work*, JAUNTED, Jan. 5, 2010 <http://www.jaunted.com/story/2010/1/5/163631/3181/travel/Full-Body+Scanners+101%3A+The+Two+Types+and+How+They+Work>.

298. Cynthia Boll, *Can Airport Body Scanners Stop Terrorist Attacks?*, Time.com, Jan. 5, 2010 available at <http://www.time.com/time/world/article/0,8599,1951529,00.html> (last visited Aug. 31, 2010).

299. *Id.*

V. SPOT: SUBJECTIVE PROFILING UNDER THE FOURTH AMENDMENT

Publically, the TSA is quick to stress that SPOT is “race-neutral” profiling.³⁰⁰ “[r]eferrals are based on specific observed behaviors only, not on one’s appearance, race, ethnicity or religion.”³⁰¹ As quoted in the *Washington Post*, TSA spokeswoman Sari Koshetz stated, “[w]e’re not looking for a type of person, but at behaviors.”³⁰² Conveniently, the TSA will not reveal all the suspicious behaviors that will catch the eye of well-trained BDOs. Opting instead for the generic labels of “anxiety” or “nervousness,” the TSA argues that discussing the “other behaviors” in detail will compromise the integrity of the program.³⁰³ The American Civil Liberties Union (“ACLU”), however, does not believe that explanation. Tim Sparapani, senior legal counsel with the ACLU in Washington, stated, “[t]he other unidentified criteria are unjustified ways to profile,” adding that the program “is a fictional bit of defense against terror.”³⁰⁴

Privately, the ultimate decision on who to stop for additional questioning rests with the individual agents.³⁰⁵ Although they may be trained to ignore race or ethnicity when observing the passengers, separating oneself from making internal subjective judgments can be extremely difficult if not impossible.³⁰⁶ In fact, it is quite reasonable to believe that many BDOs are making racially based decisions

300. Donnell, Sally B., *A New Tack for Airport Screening: Behave Yourself*, Time.com, May 17, 2006.

301. Transportation Security Administration, *Behavior Detection Officers (BDO) Layers of Security*, http://www.tsa.gov/what_we_do/layers/bdo/index.shtm (last visited Jan. 3, 2010).

302. Kaye, *supra* note 15.

303. *Behavior Detection Program Hitting Stride with TSA*, SecuritySolutions.com, Jan. 8, 2008 <http://securitysolutions.com/news/tsa-behavior-detection/>.

304. Bill Meyer, *TSA Sweats the Small Stuff to Spot Subtle Terror Signs*, Cleveland.com, Aug. 31, 2008 (http://www.cleveland.com/nation/index.ssf/2008/08/tsa_sweats_small_stuff_to_spot.html).

305. See Transportation Security Administration, *Job Title: Expert TSO – Behavior Detection Officer (BDO)*, USAJobs, available at [http://www.usajobs.org/jobs/68848213/Expert%20TSO%20-%20Behavior%20Detection%20Officer%20\(BDO\).htm](http://www.usajobs.org/jobs/68848213/Expert%20TSO%20-%20Behavior%20Detection%20Officer%20(BDO).htm) (last visited Sept. 1, 2010). In the Administration’s job listing, they list as a job requirement the ability to “independently complete the majority of work without need to refer issues to a superior for decision.” *Id.*

306. Nasir Naqvi, et. al, *The Role of Emotion in Decision Making*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 260 (2006) (noting that decision-making is “aided by emotions, in the form of bodily states, that are elicited during the deliberations of future consequences...”). See also David Brooks, *The Empathy Issue*, N.Y. TIMES, May 28, 2009 at 25. “In reality, decisions are made by imperfect minds in ambiguous circumstances.” *Id.*

unconsciously.³⁰⁷ Going into the job with the prior knowledge that all nineteen hijackers who perpetrated the worst act of terrorism on U.S. soil were Middle Eastern³⁰⁸ must certainly color every decision an agent makes.³⁰⁹ Furthermore, in knowing this truth, should an agent exercising limited profiling (whether consciously or unconsciously) when supported by other reasonable objective suspicions be condemned? “Effective and tight security is about preventing a perpetrator at all cost, all the time, from bypassing or fooling the system. This critical objective is not achievable if a political, religion or ethnic ‘passenger correctness’ is in place.”³¹⁰

Of course, blatant racial bias cannot be tolerated. Indeed, in *Adarand Constructors v. Peña*,³¹¹ the Supreme Court ruled that racially motivated classifications must come under strict scrutiny;³¹² these classifications are constitutional “only if they are narrowly tailored measures that further compelling governmental interests.”³¹³ “When [political judgments] touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a

307. *Id.* “The mind tries on different solutions to see if they fit. Ideas and insights bubble up from some hidden layer of institutions and heuristics.... The emotions serve as guidance signals...as you feel your way toward a solution.” *Id.*

308. 9/11 REPORT 160, 162–163, 225, 231, 435–436. Nineteen total hijackers carried out the plot on 9/11. American Airlines Flight 11: Mohamed Atta (“pilot hijacker”) from Egypt, and Wail al Shehri, Waleed al Shehri, Satam al Suqami, and Abdul Aziz al Omari (“muscle hijackers”) from Saudi Arabia. United Airlines Flight 175: Marwan al Shehhi (“pilot hijacker”) from the United Arab Emirates (UAE), Ahmed al Ghamdi, Hamza al Ghamdi, and Mohand al Shehri (“muscle hijackers”) from Saudi Arabia, and Fayeze Banihammad (“muscle hijacker”) from the UAE. American Airlines Flight 77: Hani Hanjour (“pilot hijacker”) from Saudi Arabia, and Nawaf al Hazmi, Khalid al Mihdhar, Majed Moqed, and Salem al Hazmi (“muscle hijackers”) from Saudi Arabia. United Airlines Flight 93: Ziad Jarrah (“pilot hijacker”) from Lebanon, and Saeed al Ghamdi, Ahmad al Haznawi, and Ahmed al Nami (“muscle hijackers”) from Saudi Arabia. *Id.* Thirteen of the muscle hijackers were between the ages of 20–28. *Id.* at 231.

309. See generally Brooks, *supra* note 306.

310. Elrom, *supra* note 296.

311. 515 U.S. 200 (1995).

312. *Id.* at 224 (establishing three propositions that when taken together mandate that any governmental racial classification be subject to the “strictest judicial scrutiny”: (1) skepticism—“any preference based on racial or ethnic criteria must necessarily receive a most searching examination”; (2) consistency—“the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”; (3) congruence—“equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”) (citations omitted).

313. *Id.* at 227.

compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.”³¹⁴

Thus, under *Adarand*, racial or ethnic profiling is constitutional if the government’s interest is compelling.³¹⁵ As discussed above in *Sokolow* and *Whren*, the constitutionality of the governmental action is dependent on the circumstances surrounding it: “[c]ontext matters when reviewing race-based governmental action. Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government’s reasons for using race in a particular context.”³¹⁶ Knowing that racial profiling is tolerated when governmental interest—taken in context—is compelling, one must then ask the question, “What is more compelling than preventing a repeat of 9/11?”

According to the Department of Justice Backgrounder on Outreach and Enforcement Efforts to Protect American Muslims, nearly seven million American Muslims live in the United States.³¹⁷ Yet considering only a fraction of that number may at any time be flying within the United States (as well as the non-American Muslims flying into the United States), the percentage of those who have been confirmed or accused terrorists is extremely small. As the *Farag* court noted, “[e]ven granting that all of the participants in the 9/11 attacks were Arabs, and even assuming *arguendo* that a large proportion of would-be anti-American terrorists are Arabs, the likelihood that *any given airline passenger* of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value in a particularized reasonable-suspicion or probable-cause determination.”³¹⁸

Profiling also has the real potential of “fueling the terrorists’ fire.” Rhetoric such as the quote from Retired Lieutenant General Thomas McInerney, who proclaimed on Fox News, “If you are an 18

314. *Id.* at 244–55 (quoting Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

315. *See also* *Shaw v. Hunt*, 517 U.S. 899 at 908 (1996) (“we have recognized that, under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a ‘compelling state interest’”).

316. *Grutter v. Bollinger*, 539 U.S. 306, 327(2003).

317. DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE BACKGROUNDER ON OUTREACH AND ENFORCEMENT EFFORTS TO PROTECT AMERICAN MUSLIMS (June, 2009) (<http://www.justice.gov/opa/documents/muslim-protect-effort.pdf>). Considering the population of the United States - 307,006,550 as of July 1, 2009 as reported by the U.S. Census Bureau (available at <http://www.census.gov/popest/states/NST-ann-est.html>) - Muslims, at seven million, is not a high percentage of the population (approximately two percent)).

318. *Farag*, 587 F. Supp. 2d at 464.

to 28-year-old Muslim man, then you should be strip searched,”³¹⁹ only strengthens al-Qaeda’s message that the United States is at war with Islam and all Muslims.³²⁰ But should airport security really subject an eighty-year-old white woman from rural Kentucky to the same scrutiny as a twenty-year-old Middle Eastern man who also seems a bit nervous about getting on the plane? “A racial-profiling ban, under which police officers [or TSA agents] were required to stop and question suspects in precise proportion to their demographic representation . . . would lead to *massive* inefficiencies in police work.”³²¹ Proportionally, police officers generally stop more young people than old people since more young people generally commit more violent crimes than old people.³²² Proportionally, police officers generally stop more African-Americans than whites since more African-Americans commit more violent crime than whites.³²³ If, however, police officials were to ever admit that profiling plays any role in their officers’ decisions on whom to stop, they would be immediately targeted as racists. With all the evidence that the world now possesses on who desires to commit more terroristic crime than others, perhaps such “knee-jerk” reactions have lost their viability:

The campaign to ban racial profiling is, as I see it, a part of that large, broad-fronted assault on common sense that our over-educated, over-lawyered society has been enduring for some forty years now, and whose

319. *FOX News Guest: ‘Strip Search All 18-28-Year-Old Muslim Men at Airports’*, THE HUFFINGTON POST, Jan. 3, 2010 http://www.huffingtonpost.com/2010/01/03/fox-news-guest-strip-sear_n_409545.html

320. See National Commission on Terrorist Attacks Upon the United States, *The Foundation of the New Terrorism*, Aug. 21, 2004 available at http://www.9-11commission.gov/report/911Report_Ch2.htm (last visited Sept. 1, 2010).

321. John Derbyshire, *In Defense of Racial Profiling: Where is Our Common Sense?*, NATIONAL REVIEW, Feb. 19, 2001 (available at <http://www.nationalreview.com/19feb01/derbyshire021901.shtml>). “Which is to say, massive declines in the apprehension of criminals.” *Id.*

322. The average age for arrestees in the United States for violent crimes between the years 1993-2001 was 29 years old. UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1993-2001, Nov. 2003 (available at http://www.fbi.gov/filelink.html?file=/ucr/adducr/age_race_specific.pdf).

323. African-Americans committed over fifty percent of all the murders and non-negligent manslaughters committed in 2008. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, 2008 CRIME IN THE UNITED STATES TABLE 43: ARREST BY RACE, 2008 (http://www.fbi.gov/ucr/cius2008/data/table_43.html). However, black persons make up only 12.8 percent of the U.S. population. U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, USA, Nov. 17, 2009 (<http://quickfacts.census.gov/qfd/states/00000.html>).

roots are in a fanatical egalitarianism, a grim determination not to face up to the realities of group differences, a theological attachment to the doctrine that the sole and sufficient explanation for all such differences is “racism.”³²⁴

Courts continue to struggle with the concept of racial profiling at airports since 9/11. The law clearly states the race cannot be the only factor when detaining someone at an airport, even if the conversation is consensual and any “other reasons” articulated by the officers that may justify the stop must be more than “an ‘inchoate and unparticularized suspicion or hunch.’”³²⁵ “Although the Fourth Amendment does not single out race as a matter of special concern, it does impose a general requirement that *any* factor considered in a decision to detain must contribute to ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’”³²⁶ For example, race may be used as an “identifying factor” in the description of a suspect.³²⁷ If the ethnicity of a perpetrator is known, such as from the statement of a victim or witness, the ethnicity limits the investigation and police may consider this factor when questioning suspects.³²⁸ With today’s ever-increasing terroristic threat, diligent governments cannot turn a blind eye to the known seed of most of the world’s terror cells: the radical Islamic group al-Qaeda based primarily in the Middle East. Indeed, with Osama bin Laden continuing to issue terror threats against the United States and its allies, ignoring such an obvious fact would be not only irresponsible, but should another attack such as 9/11 occur, nearly unforgivable.³²⁹

If this is true, then why are so many people skittish about admitting that profiling is a “necessary evil”? Perhaps it is not so much the country’s current situation as it is a remembrance of a controversial past. Racial or ethnic profiling immediately brings back memories of the Japanese interments during World War II. Affirmed at the time by

324. Derbyshire, *supra* note 321.

325. *Terry*, 392 U.S. at 27.

326. *Faraq*, 587 U.S. at 462 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

327. *Id.*

328. *Id.* See also Tom Head, *Levy: Can Ethnic Profiling be Constitutional*, About.com: Civil Liberties (Aug. 17, 2006) (<http://civilliberty.about.com/b/2006/08/17/levy-can-ethnic-profiling-be-constitutional.htm>).

329. United Press International, *Bin Laden Message*, DAILY BRIEFING, Jan. 25, 2010 available at <http://www.upi.com/Daily-Briefing/2010/01/25/Bin-Laden-message/UPI-97361264427618/> (last visited Sept. 1, 2010) (noting that this most recent message directed to President Obama from bin Laden warns of upcoming terror attacks).

the Supreme Court in *Korematsu v. United States*,³³⁰ ethnic discrimination against Japanese Americans was overtly promulgated by Acts of Congress, Executive Orders and Military Command.³³¹

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.³³²

While superseded by statute,³³³ the ruling in *Korematsu* still stands,³³⁴ not for the proposition that the Japanese (or any ethnic

330. 323 U.S. 214 (1944) (Korematsu remained in San Leandro, CA, within the mandatory evacuation area described in Order No. 34 and was arrested).

331. The Civilian Exclusion Order No. 34 at issue in *Korematsu* directed that “all persons of Japanese ancestry, both alien and non-alien, will be evacuated from [a portion of Alameda County, CA] by 12 o’clock noon, P.W.T., Saturday, May 9, 1942.” J. L. DeWitt, Lieutenant General, U.S. Army Commanding, Western Defense Command and Fourth Army Wartime Civil Control Administration, EXCLUSION ORDER NO. 34, May 3, 1942 (<http://www.hsp.org/default.aspx?id=1131>) (last visited Jan. 4, 2010).

NOTE: The exact description of the evacuation area can be found within the order itself.

332. *Korematsu*, 323 U.S. at 223–24.

333. See Pub. L. 100-383, §2(a), 102 Stat. 903 (as quoted in *Adarand Constructors*, 515 U.S. at 215, “The Congress recognizes that...a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and interment of civilians during World War II”). Codified at 50 USCS Appx §1989 et. seq.

334. For a Japanese perspective on the internment experience, see 8 Natsu Taylor Saito, *Symbolism Under Seige: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, ASIAN L.J. 1 (May, 2001) (also noting that *Korematsu* has not been overturned and remains, for better or worse, the law of the land).

group) should be constrained to internment camps or subject to curfew, but for the ideal that any classification based on race must withstand rigorous judicial analysis weighing the burden on the racial group compared to the governmental interest driving the classification. Are Arab-Americans and Muslims really being “raced as terrorists: foreign, disloyal, and imminently threatening?”³³⁵ Interestingly, a cover on *The New Yorker* published in 1993 showed several “American” children building a replica of New York City on the beach with an “Arab” dressed child trying to destroy the World Trade Center.³³⁶ Today, as harsh as it may sound, the cover seems to be an ominous warning of the anti-American sentiment growing among the most radical members of Islam. As recognized in the 9/11 Report, the enemy today is not some “generic evil.”³³⁷ The enemy threat is *Islamist* terrorism, “especially the al Qaeda network.”³³⁸

The TSA acknowledges that SPOT is based largely on the successes of a similar program utilized by the Israeli’s at their Ben-Gurion International Airport in Tel Aviv. Israeli airport security also monitors suspicious behavior, often engaging passengers in lengthy conversations before they even enter the terminal.³³⁹ In fact, passengers must receive a pass from these profilers before they are allowed to check in for their flight.³⁴⁰ But unlike Israel, the United States bans ethnic, racial, or religious profiling. “The Israeli airline El Al has a policy of singling out young Arabs for extensive search procedures, but is quick to point out that, in spite of ongoing war in the Middle East, it has not had a hijacking in over thirty years.”³⁴¹

While many civil rights groups have called for an end to the profiling, Israel maintains that “profiling. . . is essential to focus on a very small percentage of passengers with terrorist intent.”³⁴² “No

335. Hack, *supra* note 250.

336. David Mazzucchelli, *Castles in the Sand*, THE NEW YORKER, July 26, 1993, at cover (can be seen at <http://archives.newyorker.com/?i=1993-07-26>) (last visited Jan. 5, 2010).

337. 9/11 REPORT 362.

338. 9/11 REPORT 362. Clearly, Islam does not teach such extreme violence. As President Bush stated after the 9/11 attacks, “Islam is a faith that brings comfort to a billion people around the world. It’s a faith that has made brothers and sisters of every race. It’s a faith based upon love, not hate.” 9/11 REPORT 54. Indeed, “Bin Ladin’s followers are commonly nicknamed *takfiri*, or ‘those who define other Muslims as unbelievers,’ because of their readiness to demonize and murder those with whom they disagree.” 9/11 REPORT 54.

339. Jeff Jacoby, *What Israeli Security Could Teach Us*, THE BOSTON GLOBE, Aug. 23, 2006.

340. *Id.*

341. Siggins, *supra* note 43.

342. Harvey Simon, *U.S. Urged to Look at Israel as Model for Airline Security*, 1 Aviation Week’s Homeland Security & Defense 7, Feb. 6, 2002.

sensible person imagines that ethnic or religious profiling alone can stop every terrorist plot. But it is illogical and potentially suicidal not to take account of the fact that so far every suicide-terrorist plotting to take down an American plane has been a radical Muslim man.”³⁴³ Ariel Merari, an Israeli terrorism expert, calls such political correctness foolish: “[i]t’s foolishness not to use profiles when you know that most terrorists come from certain ethnic groups and certain age groups. A bomber on a plane is likely to be Muslim and young. We’re talking about preventing a lot of casualties, and that justifies inconveniencing a certain ethnic group.”³⁴⁴ As stated by Rafi Sela, a security consultant with Ben-Gurion International Airport, “[y]es, the Arabs are going through a much tighter investigation-interrogation because of threat they pose than an Israeli who served in the army who is going on vacation. How many blond, blue-eyed ladies have brought down planes in the last 20 years? They were all fanatic Muslims. So, if you are a Muslim, we have to find out if you are a fanatic or not.”³⁴⁵

Ideally, airport security agents should have all options open to them in order to make the best decision possible under the circumstances. As long as the agents can identify other factors which appear suspicious, race as a factor must be allowed: “most Muslims are not violent jihadis, but all violent jihadis are Muslim. How much longer will we tolerate an aviation security system that pretends, for reasons of political correctness, not to know that?”³⁴⁶ Even Khalid Mahmood, a British Member of Parliament and a Muslim, believes racial profiling is necessary in today’s society: “I think most people would rather be profiled than blown up. It wouldn’t be victimisation [sic] of an entire community. I think people will understand that it’s only through something like profiling that there will be some kind of safety.”³⁴⁷

343. Jacoby, *supra* note 339.

344. Associated Press, *Rights Group Challenges Israel’s Airport Security*, March 19, 2008 (<http://www.msnbc.msn.com/id/23714853/>).

345. Glen McGregor, *Looking Passengers in Eye Best Airport Security, Israeli Expert Says*, Canwest News Service, Jan. 3, 2010 (<http://www.canada.com/news/world/Looking+passengers+best+airport+security/2401529/story.html>).

346. Jacoby, *supra* note 339.

347. CNN-IBN, *Muslim MP in UK says racial profiling need of the day*, IBNLive, World section, Jan. 6, 2010 (<http://ibnlive.in.com/news/muslim-mp-in-uk-says-racial-profiling-need-of-the-day/108271-2.html>).

VI. CONCLUSION

Prior to 9/11,³⁴⁸ the major threat to aviation security appeared to be the placing of bombs on planes, not the planes becoming bombs.³⁴⁹ As late as 1999, the FAA Civil Aviation Security Intelligence Office assessed a suicide hijacking as “an option of last resort.”³⁵⁰ After 9/11, however, what was once thought inconceivable became all too real. After 9/11, racial profiling became not merely a “good idea,” but an argued requirement for national security:

More than 6,000 people are dead, some would argue, because of insufficient attention to racial or ethnic profiles at our airports. . . . Let’s be blunt: How can law enforcement not consider ethnicity in investigating these crimes when that identifier is an essential characteristic of the hijackers and their supposed confederates and sponsors, and when law enforcement’s ignorance of the community heightens the importance of such broadly shared characteristics? Law enforcement tactics must be calibrated to address the magnitude of the threat society faces.³⁵¹

Mohamed Atta, one of the 9/11 terrorists who boarded American Airlines Flight 11 bound for Los Angeles, was actually selected by CAPPS (Computer Assisted Passenger Prescreening System)³⁵² in Portland for additional security measures. All “additional

348. As of September 11, 2001, air space safety for the United States was controlled by the Federal Aviation Administration (FAA) and the North American Aerospace Defense Command (NORAD). While the FAA was concerned with only “internal” airspace and NORAD was generally concerned with only “external” threats, the two agencies had developed protocols to work together in the event of a hijacking. 9/11 REPORT 4, 17.

349. VICE PRESIDENT AL GORE, CHAIRMAN, WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY, FINAL REPORT TO PRESIDENT CLINTON, *supra* note 252 (most of the recommendations to aviation security concern bomb or explosive detection. The report also notes with significant concern a potential for surface to air missiles being used to bring down commercial aircraft. The one significant recommendation which considers the actual passengers boarding the aircraft (rather than their baggage) is one which mandates stricter passenger profiling. *See id.* at Recommendation 3.19).

350. 9/11 REPORT 345. It should be noted, however, the some governmental agencies did propose the idea of hijacked aircraft crashing into American buildings. However, the threat was thought to be from flights overseas, not from within the United States. *See id.* at 346.

351. Alschuler, *supra* note 159 at 164 (quoting John Farmer, Jr., the Attorney General of New Jersey, in *Rethinking Racial Profiling*, Newark Star-Ledger §10, p. 1 Sept. 23, 2001).

352. CAPPS is a computerized algorithm that identifies passengers for secondary screening “based on certain travel behaviors reflected in their reservation information that are associated with threats to aviation security, as well as through a random selection of

security measures” meant was “that his checked bags were held off the plane until it was confirmed that he had boarded the aircraft.”³⁵³ “Primarily because of concern regarding potential discrimination,”³⁵⁴ the FAA did not submit passengers selected by CAPPS to any other additional screening.³⁵⁵ Atta was cleared and went onto Boston unimpeded. Three of his assistant hijackers were also selected by CAPPS in Boston, each with the same result: their baggage was held but no additional checkpoint screening was performed. Having passed easily through the metal detector, the four hijackers boarded the plane.³⁵⁶

Meanwhile in Washington, D.C., Hani Hanjour, Khalid al Mihdhar and Majed Moqed, three of the five hijackers on board American Airlines Flight 77 bound for Los Angeles, were also flagged by CAPPS. The other two hijackers, Nawaf al Hazmi and Salem al Hazmi, were flagged by a customer service representative who found the passengers to be “suspicious.” Again, the only true consequence was that their baggage was held until they boarded the plane. At the checkpoint, Mihdhar and Moqed both set off the metal detector alarm. They were directed to a second detector. Mihdhar passed the second test and was allowed into the sterile area. Moqed set off the second detector and was hand-wanded. He passed and was allowed through. Twenty minutes later, Hanjour passed through security without incident. Salem al Hazmi also passed but his brother Nawaf failed both the first and second metal detector. After being hand-wanded, he was allowed to pass. When questioned later, none of the screeners could recall anything out of the ordinary about these passengers.³⁵⁷

In Newark, hijacker Ahmad al Haznawi was also selected by CAPPS. His checked bag was screened for explosives and he was allowed on the plane. As in Boston, the screeners when interviewed about the event could not recall anything unusual or suspicious.³⁵⁸ “Until the hijackers stormed the cockpit door, they were just a handful of Middle Eastern-looking men on their way to sunny California. So, yes, let’s be exceedingly clear about the whole matter. Some 3,000

passengers.” UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, GAO-08-456T, *supra* note 6.

352. 9/11 REPORT 84.

353. 9/11 REPORT 1. The checked baggage was screened for explosives or held off the plane until the passenger boarded. *Id.* at 84.

354. *Id.*

355. *Id.*

356. *Id.* at 2.

357. *Id.* at 3.

358. *Id.* at 4.

men, women and children are dead because the unassuming people on those airplanes did not look at them and see murderers. Or dangerous Arabs. Or fanatical Muslims. They saw a few guys in chinos.”³⁵⁹

If we were truthful with ourselves, we must all admit that we “profile” to some extent. Whether we inadvertently cross the street to avoid “a certain type of person” or drive ten minutes out of our way to avoid “that part of town,” we all make decisions in our daily lives on who to socialize with and who to avoid.

On the scientific evidence, the primary function of stereotypes is what researchers call “the reality function.” That is, stereotypes are useful tools for dealing with the world. Confronted with a snake or a fawn, our immediate behavior is determined by generalized beliefs—stereotypes—about snakes and fawns. Stereotypes are, in fact, merely one aspect of the mind’s ability to make generalizations, without which science and mathematics, not to mention, as the snake/fawn example shows, much of everyday life, would be impossible.³⁶⁰

Arguably airport security has moved past mere stereotypes and into verifiable fact. Treating passengers who are Middle Eastern in appearance differently is using a constitutionally sound, objective factor backed by irrefutable evidence. Ultimately, “[t]he mission of responsible law enforcement officials in combating domestic terrorism is to take what they know to be true about the ethnic identity of the September 11th assailants, and combine it with other factors developed through investigation and analysis to focus investigative efforts and avoid casting a net too wide.”³⁶¹

Profiling does have the ability deter would-be terrorists. According to an interview given on May 10, 2003 by Khalid Sheikh Mohammed, the alleged architect of the 9/11 attacks, the “review of Muslims’ immigration file . . . forced al-Qaeda to operate less freely in the United States.”³⁶² However, race can never be the only factor when making the crucial decision to search and seize. Stopping every Middle Eastern passenger without additional factors would not only over-extend scarce security resources, but would also fail

359. Burlingame, *supra* note 196.

360. Derbyshire, *supra* note 321.

361. Siggins, *supra* note 43.

362. 9/11 REPORT 328.

constitutional standards. Using race, however, as one factor when determining whether to stop an individual exhibiting other suspicious behaviors is not only legitimate law enforcement, but constitutionally responsible. As the 9/11 Commission stated, “The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home.”³⁶³

Quite simply, “we must confront our national hysteria about race, which causes large numbers of otherwise sane people to believe that the hearts of their fellow citizens are filled with malice towards them.”³⁶⁴ Airport security, flight crews, and fellow passengers do not harbor irrational ethnic hatred, flying millions of miles with people of every race and religion. Yet, they do not, and cannot, lose their common sense.

Today, when travelers and flight crews arrive at the airport, all the overheated rhetoric of the civil rights absolutists, all the empty claims of government career bureaucrats, all the disingenuous promises of the election-focused politicians just fall away. They have families. They have responsibilities. To them, this is not a game or a cause. This is real life.³⁶⁵

SPOT can work. SPOT does work. One only need look at Israel’s success to see the phenomenal potential of the program. However, it needs the freedom to work within our society as it truly exists. By allowing limited profiling in conjunction with other objective suspicious behaviors, America may hopefully find itself one step closer to eliminating terror in its skies.

363. 9/11 REPORT 395.

364. Derbyshire, *supra* note 321.

365. *Id.*

