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RACIAL PROFILING IN THE NAME OF NATIONAL SECURITY: PROTECTING MINORITY TRAVELERS' CIVIL LIBERTIES IN THE AGE OF TERRORISM

YEVGENIA S. KLEINER*

Abstract: Government-sponsored ethnic and racial profiling in the form of computerized and behavioral screening initiatives implemented as a response to 9/11 has led to the subjection of minorities to increased scrutiny and suspicion in American airports. In the name of national security, safety protocols are being enacted in non-uniform ways that disproportionately infringe on minority passengers' civil liberties and reinforce harmful racial stereotypes. Focusing on the dissonance between basic freedoms guaranteed by the United States Constitution and the security policies implemented by the federal government, this Note argues that the disparity in scrutiny received by minority travelers is counterproductive because it reinforces racism and ethnocentrism as social norms and fails to ensure a consistent level of protection for all passengers. This Note ultimately advocates for a federal government mandate that delineates a universal, race-blind standard for the level of scrutiny (and accompanying procedures) that all passengers should be subjected to while traveling aboard commercial aircraft.

INTRODUCTION

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.

—Benjamin Franklin¹

On January 1, 2009, AirTran Airways officials ordered nine Muslim passengers off AirTran flight 175, a Washington, D.C. flight bound for Orlando, Florida.² The group of travelers, all of South Asian descent,

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¹ 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labtree et al. eds., Yale Univ. Press 1963).

² See Amy Gardner, *9 Muslim Passengers Removed from Jet*, WASH. POST, Jan. 2, 2009, at B1; Liz Robbins, *Muslim Family Excluded from AirTran Flight*, The Lede N.Y. Times News Blog, <http://thelede.blogs.nytimes.com/2009/01/02/muslim-family-excluded-from-airtran-flight/> (Jan. 2, 2009, 12:12 PM EST).

consisted of three young boys ages two, four and seven, two adult brothers, their wives, a sister-in-law, and a family friend who coincidentally happened to be on the same flight.³ All but one of the nine passengers were U.S.-born American citizens.⁴ Moreover, Abdul Aziz, the family friend, is an attorney for the United States Library of Congress.⁵ The Irfan family was on their way to a vacation in Orlando, Florida, where they planned to visit family and attend a religious retreat.⁶ When two teenage girls aboard the aircraft reported a conversation between Atif Irfan and his wife regarding the “safest seats” on an airplane, federal air marshals aboard the flight notified the Transportation Security Administration (TSA) about a potential security concern.⁷ In response to the notification by the air marshals, the FBI ordered the Irfan family and Mr. Aziz off the plane.⁸

While the Irfan family and Mr. Aziz were questioned in a quarantined area of the passenger lounge (where authorities forbade the three young boys from consuming food contained in the family’s carry-on luggage), the plane’s remaining ninety-five passengers and their luggage were re-screened, as were the crew and the airplane itself.⁹ Although the FBI concluded that Mr. Aziz and the Irfan family posed no danger to the airline or its passengers and informed AirTran that the passengers were cleared to travel, the airline refused to rebook the flights and offered only to refund the cost of the original tickets.¹⁰ While AirTran spokesman Tad Hutcheson agreed that the incident was the result of a misunderstanding, he affirmed that AirTran’s “better safe than sorry” approach complied with strict federal rules on responding to potential security threats and downplayed the ethnic-profiling aspect of the incident.¹¹ In a similar statement, Ellen Howe, a spokeswoman for the TSA, told the *Washington Post* that this incident “just highlights that security is

³ See Gardner, *supra* note 2; Mike Ahlers, “Safest” Seat Remarks Get Muslim Family Kicked Off Plane, CNN, Jan. 2, 2009, <http://cnn.com/2009/US/01/01/family.grounded/index.html>.

⁴ See Robbins, *supra* note 2.

⁵ See Ahlers, *supra* note 3; Robbins, *supra* note 2. Among the Irfan family members on the flight were thirty-four year old Kashif Irfan, an anesthesiologist, and his twenty-nine year old brother, Atif Irfan, an attorney. See Gardner, *supra* note 2.

⁶ See Gardner, *supra* note 2; Ahlers, *supra* note 3.

⁷ See Ahlers, *supra* note 3; Robbins, *supra* note 2.

⁸ See Ahlers, *supra* note 3.

⁹ See *id.*; Robbins, *supra* note 2.

¹⁰ See Gardner, *supra* note 2; Robbins, *supra* note 2. The FBI agents were able to assist the family in booking a later U.S. Airways flight to Orlando, but the flight was twice as expensive as the family’s original AirTran seats. See Robbins, *supra* note 2.

¹¹ See Gardner, *supra* note 2; Robbins, *supra* note 2.

everybody's responsibility. Someone heard something that was inappropriate, and then the airline decided to act on it. We certainly support [the pilot's] call to do that."¹² Not surprisingly, the Muslim passengers removed from the flight reacted differently to the experience.¹³ Atif Irfan told CNN, "Really, at the end of the day, we're not out here looking for money. I'm an attorney. I know how the court system works. We're basically looking for someone to say . . . 'We're apologizing for treating you as second class-citizens.'"¹⁴

In an age where terrorists use mass transportation as a forum to execute attacks, federal agencies have their hands full as they work to protect the American people and keep public transportation running smoothly and safely.¹⁵ In recent years, the U.S. government has taken steps to improve its ability to ensure domestic security—steps that have earned criticism for subordinating civil liberties protections to national security interests.¹⁶ Perhaps the most notorious of these measures was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, more commonly known by the nationalistic acronym, USA PATRIOT Act, which President George W. Bush signed into law on October 26, 2001.¹⁷ Drafted in secrecy "under [the] cloak of national security," the government used the USA PATRIOT Act to include domestic terrorism in

¹² See Gardner, *supra* note 2.

¹³ See Ahlers, *supra* note 3.

¹⁴ *Id.*

¹⁵ See UCLA Int'l Inst., Terror on Mass Transit, July 7, 2005, <http://www.international.ucla.edu/article.asp?parentid=26530>. Episodes within the past fifteen years include the release of sarin gas into the Tokyo Metro in 1995, frequent bus bombings in Israel in the 1990s and early 2000s, the March 2004 attacks on trains in Madrid, the July 2005 bombings of the London Underground and the September 11, 2001 attack on the World Trade Center in New York. *See id.*

¹⁶ See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 49 U.S.C.; 5 U.S.C. §§ 5315, 8331; 26 U.S.C. § 9502; 31 U.S.C. § 1105).

¹⁷ *See id.* The USA PATRIOT Act's stated intention is "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." *See id.* Just as many of the provisions of the 2001 USA PATRIOT Act were about to sunset in 2005, the House of Representatives passed the USA Terrorism Prevention and Reauthorization Act, aimed to reinstate and maintain most of the original language from the 2001 USA PATRIOT Act. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, 120 Stat. 192 (codified in 18 U.S.C.A. § 1). In the same month, the Senate passed its own version of the Act and made revisions to parts of the original Act that were criticized as violating individuals' civil rights. 151 CONG. REC. S13546-61 (daily ed. Dec. 14, 2005) (statements of Sens. First, Feingold and Sessions).

its definition of the types of terrorist activities under its purview—a move that garnered criticism for the broad scope of power it afforded the government.¹⁸

Of all of the federal agencies criticized for abusing their discretion under the PATRIOT Act, the TSA has perhaps suffered the most vehement attacks for violating travelers' civil liberties.¹⁹ Formed in response

¹⁸ See WALTER M. BRASCH, AMERICA'S UNPATRIOTIC ACTS 4 (2005). The PATRIOT Act allows police officers to search suspects' homes and offices without a warrant and without notifying them prior to the search. *See id.* at 12. The bill also allows the Attorney General to detail persons based on mere suspicion. *See id.*

¹⁹ See generally *National Security Letters: The Need for Greater Accountability and Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1–34 (2008) (statements of Sens. Patrick J. Leahy, Arlen Specter, Russell Feingold, Benjamin L. Cardin, Sheldon Whitehouse; statements of James A. Baker, Former Counsel for Intelligence Policy, Dep't of Just.; Gregory T. Nojeim, Director, Project on Freedom, Security & Technology, Center for Democracy & Technology; Michael J. Woods, Former Chief, National Security Law Unit, Office of the General Counsel, Federal Bureau of Investigation) (discussing the dangers of reauthorizing and expanding the USA PATRIOT Act); *Misuse of Patriot Act Powers: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. S4039 (2007) (statement of Sen. Feingold). Since September 11th, Arab, Middle Eastern and Muslim women, particularly those who wear the traditional hijab, or veil, have been the targets of street and airport profiling and have endured discriminatory searches because of their appearance. See Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. SOC. JUST. 175, 208 (2008). Several incidents that took place in U.S. airports in late 2001, when post-September 11th fear was at a high, are illustrative of this discrimination. *See id.* In November 2001, a twenty-two year-old Muslim-American woman was subjected to a full body search and was made to remove her headscarf so that security officers (albeit females) could run their fingers through her hair after the woman passed through an airport security metal detector without setting it off and after a metal detector passed along her body also did not go off. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND (LCCREF), WRONG THEN, WRONG NOW: RACIAL PROFILING BEFORE & AFTER SEPTEMBER 11, 2001, at 28 (2003), available at http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf. In December 2001, police stopped a Muslim woman in a hijab for driving with suspended plates. *See* Ritchie & Mogul, *supra*, at 208. In any other situation, the police would have likely demanded the driver to produce her driver's license and registration and then issued her a ticket. *See id.* In this case, however, the officer *arrested* the driver, shoved her into the patrol car and made inappropriate remarks about her veil and her religion. *Id.*

Even five years after September 11, the merits of racial profiling in airports continue to be debated in the media. *See, e.g.*, Editorial, *The "Profiling" Debate*, WALL ST. J., Aug. 19, 2006, at A10. The editorial states:

Nobody is suggesting using ethnicity or religion as the only—or even the primary—factors in profiling terrorists. But it also makes no sense to take zero account of the fact that every suicide attack against U.S. aviation to date has been perpetrated by men of Muslim origin. While al Qaeda is no doubt seeking recruits who don't obviously display such characteristics, that doesn't mean we should ignore the likeliest candidates.

....

to the terrorist attacks of September 11, 2001, the TSA is an agency of the Department of Homeland Security and is responsible for screening all airline passengers.²⁰ Now that airlines can no longer use independent contractors to supply their security personnel, all of the screeners currently employed in U.S. airports are federal employees.²¹ In implementing directives aimed at ensuring the nation's security, TSA employees, and thus the federal government, have been accused of discriminating against minority travelers in violation of constitutionally protected rights.²² As the experiences of the Irfan family and countless others demonstrate, the TSA's current methods of ensuring passengers' safety often result in unnecessary delays and examinations prompted by loose directives and unconstitutional prejudices.²³

The law on this is settled, and in the other direction. On multiple occasions the federal courts have upheld programs that treat groups differently when a "compelling" public interest can be identified: affirmative action, minority set-asides, composition of Congressional districts, and the all-male draft have all met that legal test. Yet the same people who would allocate jobs, federal contracts and college admissions by race or ethnicity object to using them merely as one factor in deciding whom to inconvenience for a few minutes at an airline checkpoint. Surely aviation security is a far more compelling public interest than the allocation of federal set-asides.

Id. But see Timothy M. Ravich, *Is Airline Passenger Profiling Necessary?*, 62 U. MIAMI L. REV. 1, 41 n.191 (2007) (citing Naureen Kamdar, Editorial, *Muslim Americans Are Americans, Too: Airport Security's Stereotypical Act Shames System*, ATLANTA J. CONST., Feb. 20, 2007, at A11).

²⁰ See TSA, What is TSA, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Nov. 19, 2009). In response to September 11, 2001, Congress federalized the aviation security system. See Ravich, *supra* note 19, at 20 n.95. Before 2001, airline security was the responsibility of individual airline companies. See *id.*

²¹ See TSA, Our People, http://www.tsa.gov/who_we_are/people/index.shtm (last visited Nov. 19, 2009). The TSA website reports that TSA employs 45,000 security officers who oversee security operations at over 450 airports located in the U.S. and its territories. See TSA, Contact Us, <http://www.tsa.gov/travelers/customer/claims/contact.shtm> (last visited Nov. 12, 2009).

²² See Kip Hawley, TSA's Take on the Atlantic Article, The TSA Blog, <http://www.tsa.gov/blog/2008/10/tsas-take-on-atlantic-article.html> (Oct. 21, 2008, 14:19 EST) (writing on a blog site maintained by the TSA in which the public is encouraged to react—and often does, negatively—to the TSA's methods of ensuring security on public transportation).

²³ See Gardner, *supra* note 2. On August 4, 2007, a new TSA policy permitting all persons wearing head coverings through airport security checkpoints to be searched went into effect. See Aliyah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L. J. 441, 494 (2008). Although the TSA maintains that this policy requires those passengers wearing cowboy hats and baseball caps to remove them, Muslim and Sikh community leaders have argued that because enforcement of the policy is at the discretion of TSA screeners, the policy provides TSA officials "an opportunity for profiling and violating civil rights." See *id.* at 494–95. To be sure, TSA has been taken to court for discrimination: although the case settled for \$240,000 on January 5, 2009, the ACLU filed suit against the

The tragic events of September 11, 2001 introduced a fear of terrorism into Americans' daily lives and inspired in many a suspicion of immigrants of Muslims and Middle Eastern descent.²⁴ Compounding the dangerous environment of racism these fears engender is what Jeffrey Goldberg, an acclaimed Israeli-American journalist, calls American "security theater."²⁵ Goldberg argues that airport security in America is a sham, entirely incapable of dealing with a myriad of security vulnerabilities, and accuses the security system of being able to catch only the most careless and "stupid" of terrorists.²⁶ If Goldberg is right, his argu-

TSA in August 2007 for its role in refusing to let a man wearing a t-shirt that read "We Will Not Be Silent" in English and Arabic board a JetBlue Airways flight. See ACLU, TSA Officials and JetBlue Pay \$240,000 To Settle Discrimination Charges, Jan. 5, 2009, <http://www.aclu.org/freespeech/gen/38225prs20090105.html>.

²⁴ See Abby Sullivan, Note, *On Thin Ice: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 102 (2009).

²⁵ See Jeffrey Goldberg, *The Things He Carried*, ATLANTIC, Nov. 2008, at 100. Most likely because of his skin color, Goldberg has managed to pass airport checkpoints while carrying a variety of suspicious objects he acquired as a reporter writing on terrorism. See *id.* at 100, 102. These items include al-Qaeda t-shirts, Islamic Jihad flags, Hezbollah videotapes, inflatable Yasir Arafat dolls, pocketknives, matches from hotels in Beirut and Peshawar, dust masks, lengths of rope, cigarette lighters, nail clippers, eight-ounce tubes of toothpaste, and box cutters. See *id.* at 102. Perhaps one of the most curious items that Goldberg managed to smuggle through airport security was a device known as the Beerbelly, a neoprene sling that suspends a polyurethane bladder and drinking tube over one's stomach. See *id.* Designed originally for sports fans who want to avoid paying for overpriced alcohol at football stadiums, a terrorist could use a Beerbelly to smuggle eighty ounces of a liquid into an airport and past airport security. See *id.* Other items that Goldberg smuggled, including a Leatherman Multi-Tool knife, a pair of nail clippers, a can of shaving cream and an eight-ounce bottle of water, were seized by the federal government. See *id.* Unsurprisingly, Jewish-American reporters are not the only individuals who smuggle contraband into airports to prove a point. See AMNESTY INT'L USA, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 24–25 (2004). In October 2003, college student Nathaniel Heatwole, a North Carolina resident, was charged with a felony for smuggling knives, box cutters, bleach, and items with the same consistency as plastic explosives onto six Southwest Airlines flights. *Id.* Heatwole had sent email messages to TSA regarding the location of the materials, but was ignored for over a month. See *id.* at 25. When he was finally caught, Heatwole claimed that he had acted in civil disobedience in order to improve airline security and revealed that TSA had only found his planted materials on two of six airplanes. See *id.* The charges against Heatwole were reduced to a misdemeanor, and at the time of the AIUSA report, he had been released on bail and was awaiting trial. See *id.*

²⁶ See Goldberg, *supra* note 25, at 100, 103–04. Among the airport vulnerabilities he identified while researching the attentiveness of airport security officials, Goldberg found a handful of weak points particularly troubling. See *id.* at 103–04. Whereas pilots and airline crew members are screened by magnetometers (metal detectors) and their belongings are searched daily, airport employees, such as those who work in airport kiosks and restaurants, those who drive fuel trucks and operate the mechanized gates, and those who perform janitorial work are not regularly screened. See *id.* at 104. Passengers who are eligible

ment lends support to the idea that existing security programs can be only partially successful because they assume that terrorists will wage future attacks using the same methods they used in the past.²⁷ If true, this theory would mean that the U.S. government is wasting millions of dollars on security equipment that is either obsolete or more likely to be put to use on an unsuspecting minority traveler than against a real terrorist.²⁸ Some authorities on the subject go so far as to argue that the United States would be better served if airport security was returned to pre-September 11 levels and the remaining funds allocated for intelligence, investigations and emergency response.²⁹ Until then, airlines continue to run the risk of conducting the most in-depth security checks on those who fit a certain ethnic or racial category—a method that succeeds primarily in embarrassing and delaying travelers of certain ‘inconvenient’ backgrounds while trampling on their civil rights.³⁰

The history of the United States is littered with similar examples of (what are now regarded as) civil rights abuses during periods of mass

for Elite Status have the convenience of expedited boarding on some airlines, suggesting perhaps that the wealthy may be less carefully scrutinized during the boarding process. *See id.* at 102. Medical supplies, such as saline solution for contact lens cleaning, do not fall under TSA’s three-ounce rule, which means that a terrorist could not only carry a bottle of contraband labeled “saline solution” through security with little difficulty, but that he could mix the contents of several three-ounce vials once aboard. *See id.* at 103. Passengers are checked against No-Fly Lists when they purchase their tickets, but not before they board the plane. *Id.* This means that a terrorist could well purchase a ticket with someone else’s credit card (a stolen one, for instance), thus avoiding a comparison of his name against those on the No-Fly List. *Id.* Furthermore, airlines have ceased to compare passengers’ IDs with the names on their boarding passes before allowing them to board the aircraft. *See id.* In their interview, Kip Hawley did tell Goldberg that TSA can follow passengers’ progress from the printer to the gate. *See id.* at 104. Finally, Goldberg found fault with the efficacy of TSA’s SPOT (Screening of Passengers by Observation Techniques) Program, which is intended to identify terrorists through “behavior detection.” *See id.* at 103. The training program for officers who perform behavior detection work is one week long, but this was insufficient training to prepare officers to detect the contraband Goldberg had hidden among his carry-ons. *See id.*

²⁷ *See id.* at 102–103.

²⁸ *See Secure Flight and Registered Traveler: A Flawed Assumption That Behavior Is Predictable Leads to New Security Weaknesses While Threatening Civil Liberties and Privacy: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 152d Cong. 58–71 (2006) (testimony of Timothy D. Sparapani, ACLU Legis. Counsel).

²⁹ *See Goldberg, supra* note 25, at 103.

³⁰ *See* U.S. CONST. amend. IV, XIV (guarding against unreasonable searches and seizures and providing for substantive and procedural due process rights, respectively); LCCREF, *supra* note 19, at 28; Ritchie & Mogul, *supra* note 19, at 208; Goldberg, *supra* note 25, at 103.

hysteria and great fear.³¹ Historical examples include the Alien and Sedition Acts (late eighteenth century statutes that allowed for the expatriation, fining and sentencing of persons found to oppose or defame the United States) and the Supreme Court's 1944 *Korematsu* decision (affirming the constitutionality of the evacuation of Japanese-Americans during World War II), as well as the passage of the PATRIOT Act (expanding the federal government's ability to investigate individuals and entities suspected of threatening national security interests), all of which stand for putting civil liberties on the proverbial 'back burner' in times of national crisis.³² However, the Supreme Court's recent holding in *Boumediene v. Bush* as well as President Barack Obama's vow to close the prison in Guantanamo Bay within a year of taking office suggest that the general holding of *Korematsu* has been weakened and should be re-examined with respect to the importance of civil liberties.³³

This Note analyzes the implications of recent government action and constitutional interpretation for the TSA's approach to ensuring the security of commercial air travel. Part I provides background on the U.S. government's profiling of suspects in the War on Terror based on race and ethnicity and introduces, from a constitutional perspective, the danger racial profiling poses to minorities' civil liberties. Part II presents the government's dual challenges of ensuring the safety and welfare of airline passengers while simultaneously protecting their constitutionally-guaranteed rights in an efficient and non-arbitrary manner. Part III then evaluates the constitutionality and effectiveness of the government's computer technology and behavioral profiling mechanisms. This section also evaluates the government's new Secure Flight program and the Secure Flight Final Rule that went into effect December 29, 2008. Part IV considers the challenges and merits of incorporating a race-blind security clearance system in airports and discounts various alternatives to a race-blind system. In concluding that race-blind, universally stringent security measures are the only method by which a constitutionally sound airport security system may be established, Part V reasons that TSA and U.S. airports must abandon computerized and behavioral

³¹ See LOUIS FISHER, *THE CONSTITUTION AND 9/11*, at 78–79, 149–50, 363 (2008); MARCUS RASKIN & ROBERT SPERO, *THE FOUR FREEDOMS UNDER SIEGE: THE CLEAR AND PRESENT DANGER FROM OUR NATIONAL SECURITY STATE* 3–5 (2007).

³² See FISHER, *supra* note 31, at 78–79, 149–50, 363; RASKIN & SPERO, *supra* note 31, at 35–36.

³³ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262–63, 2277 (2008) (holding that detainees are not barred from seeking habeas relief or invoking the Suspension Clause merely because they have been designated as enemy combatants or held at the Guantanamo Bay prison); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

profiling programs in favor of a better-developed and more extensive physical security screening program that assumes that every airline passenger is equally capable, and even equally likely, to pose a security threat.

I. CIVIL LIBERTIES AND THE GOVERNMENT'S WAR ON TERROR

While no one definition of racial profiling can be held above others as the most accurate, government agencies, non-profit groups, and bills proposed in Congress have all attempted to define the phrase.³⁴

³⁴ See, e.g., End Racial Profiling Act (ERPA) of 2005, S. 2138, 109th Cong. § 2 (2005) (defining racial profiling as the reliance of law enforcement on race, ethnicity, national origin, or religion in selecting which individuals to subject to investigations); AMNESTY INT'L USA, *supra* note 25, at v (defining racial profiling as the targeting of individuals and groups by law enforcement officials, even partially, on the basis of race, ethnicity, national origin, or religion, except where there is trustworthy information, relevant to the locality and timeframe, that links persons belonging to one of the aforementioned groups to an identified criminal incident or scheme); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.php (defining racial profiling as the invidious use of race or ethnicity in conducting stops, searches and seizures and other law enforcement investigative procedures and finding it to be premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity). In its June 2003 Guidance, the Department of Justice condemned racial profiling in law enforcement as "not merely wrong, but also ineffective" and stated that "[r]ace-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society." See CIVIL RIGHTS DIV., *supra*. The Guidance defined racial profiling as:

[T]he invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.

Id. The version of ERPA proposed in 2005 defines racial profiling as:

The practice of a law enforcement agent relying, to any degree, on race, ethnicity, religion, or national origin in selecting which individuals to subject to routine or spontaneous investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except where there is trustworthy information, relevant to the locality and time frame, that links persons of a particular race, ethnicity, religion, or national origin to an identified criminal incident or scheme.

ERPA, S. 2138, at § 2. In an October 2004 report, Amnesty International defined racial profiling as:

[T]he targeting of individuals and groups by law enforcement officials, even partially, on the basis of race, ethnicity, national origin, or religion, except

Although the definitions entail varying levels of contempt for racial profiling, all hold that the use of criteria based on race, national origin, religion or ethnicity as the sole rationale for scrutinizing and searching certain individuals constitutes unlawful racial profiling based on the erroneous belief that these individuals are more likely than others to engage in proscribed conduct.³⁵ Not surprisingly, overt racism brought to light is loudly and vehemently condemned by the courts and in the media.³⁶ But whereas law enforcement agents rarely target individuals *solely* based on race, empirical evidence indicates that race is often “the” decisive factor in law enforcement decisions regarding who should be searched and questioned.³⁷ It is the position of this Note that racial profiling is wrong because it is both ineffective in ensuring security and constitutionally unlawful.³⁸

In his introduction to the 2004 Amnesty International (AIUSA) report, *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States*, the Honorable Timothy K. Lewis admonished the U.S. government that “focusing on race, ethnicity, national origin, or religion as a proxy for criminal behavior has always failed as a means to protect society from criminal activity.”³⁹ Instead, profiling has left society more susceptible to discriminatory abuse.⁴⁰ The AIUSA report identified racial profiling as a threat to U.S. national security, finding that targeting millions of innocent Americans has “undermined . . . law enforcement agencies’ ability to detect actual domestic security threats and apprehend serial killers, assassins, and other purveyors of terror.”⁴¹ Race-based profiling jeopardizes the effectiveness of anti-terrorist security measures because it prevents law enforcement officials from focusing on the real target—dangerous behaviors and legitimate

where there is trustworthy information, relevant to the locality and time-frame, that links persons belonging to one of the aforementioned groups to an identified criminal incident or scheme.

AMNESTY INT’L USA, *supra* note 25, at v.

³⁵ See AMNESTY INT’L USA, *supra* note 25, at v; LCCREF, *supra* note 19, at 11.

³⁶ See LCCREF, *supra* note 19, at 11; Kamdar, *supra* note 20; *The “Profiling” Debate*, *supra* note 20.

³⁷ See LCCREF, *supra* note 19, at 11. The Department of Justice, in the absence of a description of the suspect, defines “profiling” as relying in whole or in part on an individual’s race. See *id.* at 11 n.17.

³⁸ See *infra* Part III.

³⁹ See AMNESTY INT’L USA, *supra* note 25, at ix. The Honorable Timothy K. Lewis is Chair of Amnesty International’s National Hearings on Racial Profiling and is a former Judge of the United States Court of Appeals for the Third Circuit. *Id.*

⁴⁰ See LCCREF, *supra* note 19, at 19–22.

⁴¹ See AMNESTY INT’L USA, *supra* note 25, at xv.

threats—and poses great risks to our society’s criminal justice system and constitutional protections.⁴² Despite the hidden risks racial profiling poses to national security, AIUSA’s report conservatively estimates that one in three people living in the United States, or approximately eighty-seven million individuals out of a population of approximately 281 million, are at risk of being subjected to some form of racial profiling.⁴³

Although racial profiling implies the identification and singling-out of suspects of color, the reality is that anybody can be a terrorist, regardless of background, age, sex, ethnicity, education and economic status.⁴⁴ The recent cases of alleged “American Taliban” John Walker Lindh and British “shoe bomber” Richard Reid, for example, revealed that Al Qaeda has the ability to recruit sympathizers of diverse backgrounds.⁴⁵ Lindh, a white U.S. citizen, and Reid, a British citizen, would not have necessarily been identified by existing programs like the National Security Entry Exit Registration System (NSEERS) and US-VISIT, which target Arab, Muslim and South Asian men and boys.⁴⁶ Like Lindh and

⁴² *See id.* at 23; LCCREF, *supra* note 19, at 11. Reacting to Amnesty International’s report, Curt Goering, senior deputy executive director of AIUSA, told *Indian Country Today*, “Racial profiling blinds law enforcement to real criminal threats and creates a hole in the national security net large enough to drive a truck through.” *See* Brenda Norrell, *Amnesty International: Victims of Racial Profiling*, INDIAN COUNTRY TODAY, Sept. 10, 2008, <http://www.indiancountrytoday.com/archive/28173234.html>. Other effects of racial profiling include feelings of degradation, alienation and humiliation in those subjected to it. *See* LCCREF, *supra* note 19, at 19, 21. Furthermore, racial profiling contributes to the disparity in arrest and crime rates between minority and majority populations. *See id.*

⁴³ *See* AMNESTY INT’L USA, *supra* note 25, at 2. This figure was based on the number of U.S. citizens, permanent residents, and “other long-term visitors” whom the U.S. Census categorizes as African Americans, Native Americans, Hispanic/Latino Americans, Arab Americans, Iranian Americans, Asian Americans (including South Asians), Muslim Americans, Sikh Americans, and immigrants and visitors from Africa, Asia, South America, Mexico, Central American and the Caribbean. *See id.* at 1–2. These figures do not accommodate for the U.S. Census’s widely reported undercounting of citizens, residents and others of color. *See id.* at 2.

⁴⁴ *See* Ravich, *supra* note 19, at 3 n.6 (citing Richard W. Bloom, *Commentary on the Motivational Psychology of Terrorism Against Transportation Systems: Implications for Airline Safety and Transportation Law*, 25 *TRANSP. L.J.* 175, 179 (1998)) (“[M]ost profilers analyze external features, such as physical characteristics, behaviors or demographics. However, intrapsychic processes may be more robust correlates of terrorist behavior, but are more difficult to identify. Yet, some psychologists even believe that these correlates either do not exist or are irrelevant in analyzing behavior.”)

⁴⁵ *See* AMNESTY INT’L USA, *supra* note 25, at ix–x.

⁴⁶ *See id.* at 16–17. NSEERS established a series of regulations and registration requirements (including fingerprinting and being photographed and questioned) for all male nationals of twenty-five countries which, with the exception of North Korea, are all Arab and Muslim. *See* ACLU, *SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11*, at 6–7 (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>. US-VISIT is a U.S. Department of Homeland Security Program that provides visa-issuing posts

Reid, Oklahoma City Bomber Timothy McVeigh eluded arrest in 1995 while law enforcement searched for Arab suspects and detained a Jordanian.⁴⁷

While minority groups are most frequently singled out as suspects because of their race, racial profiling can also cause law enforcement officials to wrongly pursue majority targets.⁴⁸ During the 2002 search for the D.C. area snipers, police officers focused on finding a white suspect because the standard profile of a serial killer is a disaffected white male acting alone or with a single accomplice.⁴⁹ The police ignored the possibility that two black men, whose blue Chevrolet Caprice was seen near one of the shooting sites and who were stopped at least ten times during the course of the investigation, were actually at fault, allowing snipers John Allen Muhammad and Lee Boyd Malvo to continue their killing spree while officials searched for “a white man in a white van.”⁵⁰ Overly focused on race, the officials overlooked the fact that Muhammad had a military background and was embittered at having lost custody of his children following his divorce—characteristics that are often associated with serial killers.⁵¹

This reality leads scholars, security experts and political pundits to disagree over whether racial profiling systems are able to accurately predict which individuals are likely to commit acts of terror.⁵² Further exacerbating the problem is that attempts at racial profiling are often improperly executed, resulting in the ‘mis-targeting’ of individuals who are mistaken for Muslim Arabs.⁵³ American Sikhs, for example, are one

and ports of entry using biometric technology that enables the U.S. government to establish and verify travelers’ identities. See Dep’t of Homeland Sec., US-VISIT Traveler Information, http://www.dhs.gov/files/programs/content_multi_image_0006.shtm (last visited Nov. 19, 2009).

⁴⁷ See AMNESTY INT’L USA, *supra* note 25, at 24; LCCREF, *supra* note 19, at 27.

⁴⁸ See AMNESTY INT’L USA, *supra* note 25, at 24.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* Failed attempts at racial profiling are nothing new: over 100 years before the D.C. sniper case, the Secret Service overlooked the man who assassinated President McKinley, focusing instead on a seemingly suspicious African American who turned out to be a former law enforcement officer. See *id.* at 23–34 (citing ERIC RAUCHWAY, MURDERING MCKINLEY: THE MAKING OF THEODORE ROOSEVELT’S AMERICA 18 (2003)).

⁵² See Ravich, *supra* note 19, at 3; America After 9/11: Freedom Preserved or Freedom Lost?: Hearing Before the S. Comm. on the Judiciary, 108th Cong. D1291 (2003) (statement of former Rep. Bob Barr, R-GA).

⁵³ See generally Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 58 (2002) (arguing that in the wake of September 11, 2001, just as during the internment of Japanese Americans after the Second

group that has experienced unfair prejudice as a result of their skin color, accents and style of dress because they have been confused with Muslim Arabs.⁵⁴ Such mistakes highlight the ignorance of many security officials; the fact is that “all Arabs are not Muslim, and all Muslims are not Arab.”⁵⁵ In the United States, most Arab Americans are not Muslim and most Muslim Americans are South Asian or African American.⁵⁶ Some Muslims who are assumed to be Arab are, for example, Iranian; a majority of Arab-Americans who are assumed to be Muslim are Christian Arabs.⁵⁷

Finally, racial profiling is wrong as a matter of constitutional law because it treats travelers unequally and discriminates against those who are perceived, often wrongly, as posing the greatest security risk.⁵⁸ Critics of airline passenger profiling have argued that computerized screening programs—such as CAPPs I, CAPPs II, Registered Traveler and the new Secure Flight program—are inherently “biased against passengers with connections to areas of the world whose behavior or policies conflict with the interests of the United States—namely the Middle East. As such, critics believe that profiling promotes an unconstitutional categorization of travelers by ethnicity, race, religion, or a combination of all three.”⁵⁹ Many such critics fear that TSA will be unable to design and implement egalitarian screening programs that “ignore the shared ethnic, geo-cultural, or religious backgrounds of the September 11 terrorists” and therefore urge the government to consider alternative solutions.⁶⁰

World War, the government “permit[ted] low probabilities to prevail over civil liberties” in trying to identify the opposition).

⁵⁴ *See id.*

⁵⁵ *See* LCCREF, *supra* note 19, at 43 n.85.

⁵⁶ *See* Wu, *supra* note 53, at 58.

⁵⁷ *See* LCCREF, *supra* note 19, at 43 n.85. A July 2002 Gallup Poll showed that public perception had turned slightly in favor of racial profiling, for example, fifty-three percent of respondents favored requiring all Arabs, including American citizens, to undergo “special, more intensive security checks” before being permitted to board an airplane. *See* Ruth Singer, *Race Ipsa? Racial Profiling, Terrorism and the Future*, 1 DEPAUL J. SOC. JUST. 293, 299–300 (2008) (citing Darren K. Carlson, *Civil Rights: A Profile in Profiling*, GALLUP, July 9, 2002, <http://www.gallup.com/poll/6361/Civil-Rights-Profile-Profiling.aspx>).

⁵⁸ *See* U.S. CONST. amends. IV, XIV; Ravich, *supra* note 19, at 8.

⁵⁹ Ravich, *supra* note 19, at 8. For more information regarding these computerized screening programs, see *infra* Part III.A.

⁶⁰ *See* Ravich, *supra* note 19, at 8–9.

II. STRIKING A BALANCE: THE GOVERNMENT'S POST-9/11 WAR ON TERROR AND ITS EFFORTS TO PROTECT CIVIL LIBERTIES

The United States has a dark history pertaining to the treatment of racial and ethnic minorities in times of war and domestic conflict.⁶¹ As Wisconsin Democratic Senator Russell Feingold stated in his 2001 Congressional address criticizing the contents of the USA PATRIOT Act:

There have been periods in our nation's history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese-Americans, German-Americans, and Italian-Americans during World War II, the blacklisting of supposed Communist sympathizers during the McCarthy era, and the surveillance and harassment of anti-war protesters, including Dr. Martin Luther King Jr., during the Vietnam War.⁶²

One explanation for these stains in our nation's history is that in times of mass hysteria, the legislature and the courts tend to subordinate civil rights in their effort to keep the peace.⁶³ Many scholars have

⁶¹ See Wu, *supra* note 53, at 52–53, 57–58.

⁶² Senator Russell Feingold, Statement on the Anti-Terrorism Bill, From the Senate Floor (Oct. 25, 2001) [hereinafter Feingold, On the Anti-Terrorism Bill]. Senator Feingold went on to warn his fellow lawmakers, “We must not allow these pieces of our past to become prologue.” See *id.* The Democratic leadership at the time rejected attempts by Senator Feingold, then the chair of the Constitution, Civil Rights, and Property Rights subcommittee of the Committee of the Judiciary to introduce amendments to the USA PATRIOT Act. See BRASCH, *supra* note 18, at 5; see also Russell Feingold, *Why I Opposed the Anti-Terrorism Bill*, COUNTERPUNCH, Oct. 26, 2001, <http://www.counterpunch.org/feingold1.html> (explaining that the USA PATRIOT Act should be opposed as detrimental to Americans' civil liberties). Russell Feingold was the only senator to vote against the bill that would enact the USA PATRIOT Act into law, warning on the day of the vote, “We must redouble our vigilance to ensure our security and to prevent further acts of terror. But we must also redouble our vigilance to preserve our values and the basic rights that make us who we are.” See BRASCH, *supra* note 18, at 7.

⁶³ See BRASCH, *supra* note 18, at 21. In the brief of amicus curiae in the *al Odal v. United States*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld* cases, Fred Korematsu, the plaintiff in the 1942 case against the U.S. government over the internment of Japanese Americans, was cited as arguing against the detention of terrorist suspects without due process of law:

It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that we often react too harshly in circumstances of felt necessity and underestimate the damage to civil liberties. Typically, we come later to

argued that the federal government and TSA would do well to learn from the *Korematsu* decision and particularly Fred Korematsu's petition for a writ of *coram nobis*.⁶⁴ In his petition, Mr. Korematsu contended that the government knowingly concealed contradictory evidence as to its claim of military necessity for the internment of thousands of Japanese Americans.⁶⁵ The U.S. District Court, relying largely on the finding by the Commission on Wartime Relocation and Internment of Citizens that "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II," granted Mr. Korematsu's petition despite acknowledging that it would be impossible to predict whether the concealed evidence may have led the Supreme Court to have reached a different outcome in 1942.⁶⁶

A. *The USA PATRIOT Act*

The USA PATRIOT Act of 2001 attracted serious criticism even before it was enacted into law.⁶⁷ Some scholars argued against the adoption of the Act because of its double standard of ensuring due process for citizens but not for legal immigrants, a violation of equal

regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

Brief for Fred Korematsu as Amici Curiae in Support of Petitioners, *Rasul et al v. Bush and Odah et al. v. United States*, 542 U.S. 466 (2004) (Nos. 03–334, 03–343); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Nos. 03–6696).

⁶⁴ See Singer, *supra* note 57, at 317, 321; see also Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 473 (2002) ("[T]hough wartime and national security interests do command an importance rarely matched, these interests should not simply grant the government a free pass to target Arabs merely because it sees fit.").

⁶⁵ See Singer, *supra* note 57, at 318.

⁶⁶ See *Korematsu v. United States*, 584 F. Supp. 1406, 1114–19 (N.D. Cal. 1984); Singer, *supra* note 57, at 318–19.

⁶⁷ See Feingold, On the Anti-Terrorism Bill, *supra* note 62; Anita Ramasastry, *Indefinite Detention Based Upon Suspicion: How the Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, FINDLAW'S WRIT, Oct. 5, 2001, <http://writ.news.findlaw.com/ramasastry/20011005.html>. There have been varying levels of discontent with the USA PATRIOT Act. See STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT 1* (2005). Schulhofer explains that "[f]or many Americans, it is synonymous with an egregious and unjustifiable suspension of the Bill of Rights. Others, troubled but more cautious, identify the Patriot Act with the grant of unprecedented powers that put civil liberties at some risk." SCHULHOFER, *supra*.

protection principles embodied in the United States Constitution.⁶⁸ Others, such as Senator Feingold, warned that the PATRIOT Act fell “short of meeting even basic constitutional standards of due process and fairness [because it] continues to allow the Attorney General to detain persons based on mere suspicion.”⁶⁹

The passage of the USA PATRIOT Act signaled the beginning of an era of reduced judicial oversight of surveillance by the federal government.⁷⁰ Although the Fourth Amendment protects against unreasonable searches and seizures and normally requires probable cause for government interference, no convenient provision exists to explicitly define the way the Amendment should be read in light of a potential terrorist threat.⁷¹ As a result, the USA PATRIOT Act granted the government wide-sweeping investigative powers by permitting it to obtain warrants without a demonstration of the truthfulness of its allegations.⁷² Furthermore, provisions under Section 505 of the USA PATRIOT Act granted the Department of Justice the freedom to use administrative subpoenas called National Security Letters to obtain records of individuals’ electronic communications without judicial oversight.⁷³ This

⁶⁸ See U.S. CONST. amend XIV; Ramasastry, *supra* note 67. All too prophetically, Ramasastry warned in 2001:

Indefinite detention upon secret evidence—which the Patriot Act allows—sounds more like Taliban justice than ours. Our claim that we are attempting to build an international coalition against terrorism will be severely undermined if we pass legislation allowing even citizens of our allies to be incarcerated without basic U.S. guarantees of fairness and justice.

See Ramasastry, *supra* note 67.

⁶⁹ See Feingold, On the Anti-Terrorism Bill, *supra* note 62.

⁷⁰ See BRASCH, *supra* note 18, at 10.

⁷¹ See Tobias W. Mock, *The TSA’s New X-Ray Vision: The Fourth Amendment Implications of “Body-Scan” Searches at Domestic Airport Security Checkpoints*, 49 SANTA CLARA L. REV. 213, 215 (2009).

⁷² See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, 120 Stat. 192 at § 114 (codified in 18 U.S.C. § 2516); BRASCH, *supra* note 18, at 10, 11 (noting that the government must believe the materials it seeks to be “relevant” to its inquiry). Of course, countless political activists and civil libertarians disagreed. As Jameel Jaffer, a staff attorney with the ACLU explained:

The FBI can obtain records . . . merely by specifying to a court that the records are ‘sought for’ an ongoing investigation. . . . That standard . . . is much lower than the standard required by the Fourth Amendment, which ordinarily prohibits the government from conducting intrusive searches unless it has probable cause to believe that the target of the investigation is engaged in criminal activity.

BRASCH, *supra* note 18, at 12.

⁷³ See BRASCH, *supra* note 18, at 15.

provision essentially means that National Security Letters enable federal officials to obtain information on anyone, because the Act does not require officials to demonstrate probable cause or a compelling need for access to the information.⁷⁴

It was not until 2003 that Attorney General John Ashcroft finally admitted in a statement before the House Judiciary Committee that the USA PATRIOT Act had lowered the standard of proof for a warrant to something “lower than probable cause,” and that it had enabled federal officials to investigate citizens who were neither spies nor terrorists.⁷⁵ Unfortunately, this admission did not lessen the burden on wrongfully targeted minorities who wish to assert their constitutional rights: in addition to proving a violation of their Fourth Amendment Due Process rights, individuals alleging a racial profiling claim against the government are required to show that the relevant government agency violated the Equal Protection Clause of the Fourteenth Amendment by complying with a “purposefully discriminatory policy.”⁷⁶ Not surprisingly, meeting such a high burden of proof is usually difficult, if not impossible since government agencies are reluctant to admit such grievous error.⁷⁷

B. *Presidential Promises Broken, International Treaties Contravened*

Besides its accountability for constitutional protections against racial profiling, the United States is also responsible for honoring the race-related provisions of international treaties that it has ratified.⁷⁸ The International Convention on the Elimination of All Forms of Racial Discrimination (“the Convention”) is a United Nations treaty that was adopted in order to eliminate racial discrimination and promote understanding among all races.⁷⁹ Along with dozens of other nations,

⁷⁴ See *id.*

⁷⁵ *Hearing Before the H. Comm. on the Judiciary*, 108th Cong. 41 (2003) (statement of John Ashcroft, Att’y Gen. of the United States).

⁷⁶ See Singer, *supra* note 58, at 298 n.29 (citing Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 *LAW & INEQ.* 73, 82 (2004)).

⁷⁷ See *id.* at 289 n.30 (citing R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 *STAN. L. REV.* 571, 600 (2003) (“racial profiling is clearly unconstitutional only if irrational”).

⁷⁸ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

⁷⁹ See *id.* at art. 2, § 1.

the United States expressed reservations regarding specific portions of the Convention but nevertheless ratified the Convention in 1994.⁸⁰

Echoing the recommendations of the Convention, former President George W. Bush promised in 2001 to end racial profiling in the United States.⁸¹ It took the government two years to follow through on President Bush's promise, as it was not until June 17, 2003, that the Department of Justice issued its *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* ("the *Guidance*").⁸² Although the *Guidance* contains a definition of racial profiling modeled after a definition endorsed by AIUSA and other human and civil rights organizations, it "fails to address religious and ethnic profiling, provides no enforcement mechanisms for victims of profiling, does little to ensure accountability, and provides a blanket exception for cases in which national security is threatened."⁸³ Furthermore, the *Guidance* is merely advisory and therefore lacks the authority of a legally binding statute.⁸⁴

A 2007 report prepared for the United Nations Committee on the Elimination of Racial Discrimination argues that despite the federal governments' ratification of the Convention, the United States, thirteen years after ratification, has failed to "prevent and punish acts of excessive force, rape, sexual abuse and racial profiling committed by law enforcement officers against people of color."⁸⁵ The report additionally

⁸⁰ See U.N., Declarations and Reservations of the International Convention on the Elimination of All Forms of Racial Discrimination, http://treaties.un.org/Pages/viewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Nov. 19, 2009) (listing the declarations and reservations of each nation). In ratifying the Convention, the U.S. Senate reserved in relevant part the right of the United States to disregard portions of the Convention incompatible with the U.S. Constitution's protections of the freedom of speech, expression and association. *See id.*

⁸¹ See AMNESTY INT'L USA, *supra* note 25, at vii; 30. President Bush stated in his February 27, 2001, address to a joint session of Congress, "Earlier today I asked John Ashcroft, the Attorney General, to develop specific recommendations to end racial profiling. It's wrong, and we will end it in America." *See id.* at vii. President Bush repeated his promise later in 2001 during his appearance at the annual convention of the National Association for the Advancement of Colored People (NAACP), stating: "Finally, my agenda is based on the principle of equal opportunity and equal justice. Yet, for too long, too many African-Americans have been subjected to the unfairness of racial profiling. That's why, earlier this year, I asked Attorney General John Ashcroft to develop specific recommendations to end racial profiling." *See id.* at 30.

⁸² See AMNESTY INT'L USA, *supra* note 25, at 30.

⁸³ *See id.* at vii, 30-31; *see also* Norrell, *supra* note 42.

⁸⁴ See AMNESTY INT'L USA, *supra* note 25, at vii.

⁸⁵ See Ritchie & Mogul, *supra* note 19, at 179. Ritchie and Mogul's report for the U.N. Committee on the Elimination of Racial Discrimination was prepared on the occasion of the U.N. Committee's review of the United States' progress under the Convention. *See id.* at 175.

alleges that the government has failed to collect and ensure access to “comprehensive statistical or other information on complaints, prosecutions, and convictions relating to acts of racism and xenophobia as well as compensation awarded to the victims” as required by the Convention.⁸⁶ This information is vital to the government’s protection of minorities’ civil liberties because it is required to include records of acts perpetrated against civilians by law enforcement officials.⁸⁷

Furthermore, the 2007 report found that the U.S. government has failed to take “any meaningful action” to address discriminatory law enforcement practices in the United States.⁸⁸ The report attributed this state of affairs to the absence of binding federal legislation that would prohibit and monitor the racial profiling by law enforcement officers at the federal, state and local level.⁸⁹ Existing federal guidelines, such as the *Guidance*, have little legal significance because they are not mandatory; furthermore, they are inapplicable to the majority of state law enforcement agents because, at the time of the report, twenty-six states lacked explicit prohibitions on racial profiling by law enforcement officials.⁹⁰ The ability of government agencies and independent third parties to evaluate discrimination in law enforcement officials’ treatment

⁸⁶ See *id.* at 204; U.N. Comm. on the Elimination of Racial Discrimination (CERD), *Report: General Recommendation XXXI On the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, § 1(A)(1)(5), U.N. Doc A/60/18 (Aug. 19, 2005).

⁸⁷ See Ritchie & Mogul, *supra* note 19, at 204 (citing CERD, *supra* note 86, at § 1(A)(1)–(3)).

⁸⁸ See *id.* at 207.

⁸⁹ See *id.* at 205.

⁹⁰ See *id.* at 205 n.111 (citing AMNESTY INT’L USA, *supra* note 25, at 33). To demonstrate the dearth of binding federal legislation enacted to protect racial minorities, the authors point to Congress’s failure to pass the End Racial Profiling Act (ERPA), introduced on February 26, 2004, in the House of Representatives by Congressmen John Conyers, Jr. (D-MI) and Christopher Shays (R-CT), which would have defined and banned racial profiling at all levels of government, prohibited the use of race, ethnicity, national origin or religion in making routine spontaneous law enforcement decisions, and provided funding and training for data collection and monitoring in compliance with the Act’s terms. See *id.* The Act also included provisions for remedial measures and would allow courts to respond to individual complaints by ordering specific police departments to stop engaging in racial profiling. See AMNESTY INT’L USA, *supra* note 25, at 30. Along with fourteen colleagues, Senator Feingold simultaneously introduced an identical bill in the U.S. Senate, but this bill was also defeated. See *id.* ERPA was reintroduced in the House and Senate in 2004 and 2005, but it “languished in committee without ever receiving an up-or-down vote.” See Press Release, ACLU, ACLU Applauds Senate Reintroduction Of Racial Profiling Bill, Urges Congress To Finally Pass Comprehensive Legislation Next Year (Dec. 19, 2005) (on file with ACLU). Most recently, ERPA was reintroduced to the 110th Congress by Senator Feingold and Representative Conyers on December 13, 2007. See ACLU, The 110th Congress So Far, <http://www.aclu.org/legislative/34133leg20080215.html>.

of minorities is further hindered by the U.S. government's failure to collect the comprehensive statistical information on "acts of excessive force, racial profiling, or false arrests and wrongful prosecutions" as required by the Convention.⁹¹

Finally, because individuals seeking remedies must demonstrate proof of intent to discriminate, the judicial process itself presents another factor that perpetuates racial profiling.⁹² In the United States, victims of racial profiling have three forms of recourse against law enforcement officials who subject them to racial profiling.⁹³ A first option is to request that the appropriate government body prosecute the official(s), a method that puts the onus of initiating a criminal prosecution on the agency that employed the official.⁹⁴ A second option is to file a complaint with an internal disciplinary agency or civilian complaint board, but even when such an agency or board exists, fair investigations and adequate resolutions are rare.⁹⁵ The final option is to file a civil rights challenge to racial profiling by the government or private individuals and institutions in the form of a civil suit under 42 U.S.C. § 1983.⁹⁶ Overall, however, these mechanisms have been criticized as

⁹¹ See Ritchie & Mogul, *supra* note 19, at 204. The authors cite a 2006 report issued by the U.S. Department of Justice's Bureau of Statistics entitled *Citizen Complaints About Use of Force*. See *id.* at 204 n.109. Although the report tracked excessive force complaints filed with a police disciplinary agency in 2002 against some fifty-nine percent of U.S. law enforcement officers, the report "failed to collect or analyze the number of excessive force complaints against all law enforcement officers nationwide, or to include information regarding the racial demographics of complainants and officers, or regarding whether any of the officers faced any criminal investigation, prosecution or sanctions for any misconduct." *Id.* The Department of Justice's report also recognized that the report captured only a small portion of allegations of excessive force by law enforcement officials since only an estimated ten percent of individuals actually report such incidents to police disciplinary agencies and only an estimated one percent actually report such incidents to civilian complaint review boards. See *id.* (citing MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 4 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf>).

⁹² See *id.* at 205.

⁹³ See *id.* at 232.

⁹⁴ See *id.*

⁹⁵ See *id.* at 232-33.

⁹⁶ See Ritchie & Mogul, *supra* note 19, at 232-33; see also Howard Friedman & Charles J. DiMare, *Strategies in Litigating Intentional Tort Cases*, 4 LITIGATING TORT CASES § 50:46 (2008) (explaining how challenges to civil rights violations may be brought in court). This method was cited at page 157 of the U.S. Report as evidence of compliance with article 6 of the Convention, which requires member States to assure "everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as

“largely ineffective and insufficient to meet the U.S. Government’s obligations to provide remedies and redress for violations of rights under the Convention” because such suits, even in rare instances of success, seldom lead to individual or systemic changes in law enforcement policies and practices.⁹⁷

C. *The Role of the TSA*

Shortly after the attacks of September 11th, Congress created the Transportation Security Administration (TSA), an entity now responsible for the security of domestic U.S. airports as well as all remaining United States mass transportation systems.⁹⁸ The TSA’s aim is to execute a “risk-based and multi-layered approach to security,” a strategy that its immediate past Assistant Secretary, Edmund S. “Kip” Hawley, described in a 2007 statement to Congress as requiring “a broad range of interlinked measures that are flexible, mobile, and unpredictable.”⁹⁹ Under the Aviation and Transportation Security Act (ATSA), airport security measures such as screenings have both a private and public component.¹⁰⁰ Because the federal government is directly responsible for airport security, airports and airlines partner with private entities to execute these activities under Federal Aviation Administration (FAA) supervision.¹⁰¹

No doubt in part to assuage fears that such “flexible, mobile and unpredictable” measures risk jeopardizing travelers’ civil liberties, the TSA formed an Office of Civil Rights and Liberties and charged the External Compliance Division (“the Division”) with ensuring that “the civil rights and liberties of the traveling public are respected throughout screening processes, without compromising security.”¹⁰² Among its

a result of such discrimination.” See CERD, *supra* note 86, at 98; Ritchie & Mogul, *supra* note 19 at 233.

⁹⁷ See Ritchie & Mogul, *supra* note 19, at 233.

⁹⁸ See Aviation & Transportation Security Act, 49 U.S.C.A. § 114 (2001); Mock, *supra* note 71, at 215; TSA, *supra* note 20.

⁹⁹ See *One Year Later: Have TSA Airport Security Checkpoints Improved?: Hearing Before the H. Comm. on Oversight and Gov’t. Reform*, 110th Cong. 4 (2007) (statement of Kip Hawley, Assistant Secretary, Transportation Security Administration). Kip Hawley was succeeded by Acting Administrator Gale Rossides in late January of 2009. See TSA, Gale D. Rossides, Acting Administrator, http://tsa.gov/who_we_are/people/bios/gale_rossides_bio.shtm (last visited Nov. 18, 2009).

¹⁰⁰ See LCCREF, *supra* note 19, at 27.

¹⁰¹ See *id.*

¹⁰² See *One Year Later*, *supra* note 99, at 4 (statement of Hawley); TSA, Civil Rights for Travelers, http://www.tsa.gov/what_we_do/civilrights/travelers.shtm (last visited Nov. 19, 2009).

several responsibilities, the Division provides “civil rights guidance and services to TSA program offices, including security offices, technology offices, and communications offices.”¹⁰³ The Division is also responsible for reviewing TSA policies and procedures “to ensure that the civil rights and liberties of the traveling public are taken into account.”¹⁰⁴ Additionally, the TSA issued a civil rights policy statement asserting the organization’s vision of excellence in transportation security.¹⁰⁵ In the civil rights policy statement, the TSA pledges that “[w]ith this vision, comes a commitment that all TSA employees and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner.”¹⁰⁶

Besides the confines of the laws of the United States and the TSA’s own Civil Rights Policy Statement, the TSA is obligated to comply with unique rules applicable to particular modes of transportation—specifically, civil aviation security rules, maritime and land transportation security rules, and rules that apply to many other modes of transportation.¹⁰⁷ The airport security rules require that airport operators adopt and carry out TSA-approved security programs.¹⁰⁸ The rules delineate

¹⁰³ See TSA, Civil Rights, *supra* note 102.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ TSA, CIVIL RIGHTS POLICY STATEMENT 1 (2008), available at http://www.tsa.gov/assets/pdf/civil_rights_policy.pdf. The Civil Rights Policy Statement provides that it is TSA’s policy that:

- TSA employees, applicants for employment, and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner, without regard to race, color, national origin, religion, age, sex, disability, sexual orientation, status as a parent, or protected genetic information.
- TSA’s equal employment opportunity policy applies to all personnel and employment programs and management practices and decisions.
- TSA will comply with all applicable Federal laws and Executive Orders regarding civil rights protections.
- TSA has no tolerance for harassment in the workplace or in the treatment of the public we serve.
- TSA will not tolerate reprisal against those who exercise their rights under the civil rights laws.
- TSA will scrutinize processes, review results, and work to remove any barriers that may impede equal opportunity for recruitment, hiring, promotion, reassignment, career development, or other employment benefits.
- TSA will review and analyze from a civil rights perspective how its programs, policies, and operations impact the public we serve.

Id.

¹⁰⁷ See 49 C.F.R. § 1542.101–.307 (2009).

¹⁰⁸ See § 1542.101. Subsections 1542.201 through .209 lay out a variety of security measures and regulations. § 1542.201 (security of the secured area); § 1542.203 (security of the air operations area); § 1542.205 (security of the identification area); § 1542.207 (require-

the requirements for such programs and discuss expectations for established secured areas, air operations areas, security identification display areas, security directives issued to airports, and access control systems.¹⁰⁹

As TSA's efforts are constantly expanding, on September 9, 2009, it announced that during that day's morning and evening commutes, Amtrak police, TSA personnel, and law enforcement officers from over one hundred federal, state and local rail, and transit agencies were deployed at approximately 150 rail stations in the Northeast Corridor as "an exercise of expanded counterterrorism and incident response capabilities."¹¹⁰ TSA's far-reaching efforts are also targeting children: On September 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano and Girl Scouts of the USA CEO Kathy Cloninger announced a new partnership between the Department of Homeland Security's Citizen Corps and the Girl Scouts.¹¹¹ In addition to collaborating on a "preparedness patch," which may be earned by Girl Scouts of any level who identify and prepare for potential emergencies, learn about local alerts, and warning systems and engage in community service activities, Secretary Napolitano and Ms. Cloninger formally agreed to an affiliation between Citizen Corps and the Girl Scouts.¹¹² According to the TSA press release, this new partnership will "motivate young women to become community leaders in emergency management and response fields and raises public awareness about personal preparedness, training and community service opportunities."¹¹³

III. FAILED AIRPORT SECURITY "SOLUTIONS", PAST AND PRESENT

In response to the increased airliner hijackings of the 1960s, the Federal Aviation Administration (FAA) instituted its Anti-Air Hijack Profile, a passenger profiling system that identified potential hijackers based on a combination of approximately twenty-five empirically-linked characteristics that hijackers were thought to possess.¹¹⁴ The luggage of

ments for the access control systems); § 1542.209 (policy for fingerprint-based criminal record checks).

¹⁰⁹ See § 1542.103.

¹¹⁰ See Press Release, TSA, AMTRAK, TSA and Local Law Enforcement Deploy Across Northeast Corridor Rail Stations (Sept. 9, 2009) (on file with TSA).

¹¹¹ See Press Release, Dep't of Homeland Sec., Secretary Napolitano and Girl Scouts of the USA Announce New Preparedness Patch (Sept. 8, 2009) (on file with author).

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See Ravich, *supra* note 19, at 9. In computer-based profiling, pattern-based or subject-based data is typically used. See James X. Dempsey & Lara M. Flint, *Commercial Data and*

passengers who fit the Anti-Air Hijack Profile was X-rayed or otherwise investigated.¹¹⁵ In 1974, Congress enacted two statutes to further improve safety on passenger airlines.¹¹⁶ The Anti-Hijacking Act made it illegal to bring a concealed weapon aboard an aircraft, and the Air Transportation Security Act required the screening of all carry-on luggage.¹¹⁷ The primary difference between these procedures and passenger profiling is that these procedures were in effect for every passenger, regardless of whether they were thought to possess certain characteristics prevalent among terrorists.¹¹⁸

Some scholars argue that airline passenger profiling is necessary because “screening for bad people is at least as important as screening for bad things.”¹¹⁹ Proponents of profiling see it as an effective tool that allows security personnel to “use what [they] know” about past terrorists to identify potential future ones.¹²⁰ The FAA, however, found such profiling to be ineffective and abandoned it in 1972 in favor of performing X-rays on all passengers’ carry-on luggage.¹²¹

Although eventually determined to have been caused by a faulty fuel tank and not an act of terror, the explosion of TWA flight 800 on July 17, 1996 spurred the U.S. government to revisit airline passenger

National Security, 72 GEO. WASH. L. REV. 1459, 1464 (2004). Pattern-based searches are typically used in the consumer sector to track customer purchases and prevent credit card fraud and identify information that matches or departs from a pattern. *See id.* On the other hand, “subject-based” queries “are data searches that seek information about a particular subject already under suspicion based on information derived from traditional investigative means, whether that subject is represented by a name, a telephone number, or a bank account number.” *See id.*

¹¹⁵ *See* Ravich, *supra* note 19, at 10.

¹¹⁶ Jamie L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 852–53 (2000).

¹¹⁷ *See* Anti-Hijacking Act of 1974, H.R. REP. NO. 93–885, at 1–5; Rhee, *supra* note 116, at 852–53 (citing Air Transportation Security Act of 1947, 49 U.S.C. §§ 1356–58 (1988) (repealed 1994)).

¹¹⁸ *See* Rhee, *supra* note 116, at 853. In *United States v. Slocum*, the federal appellate court found that because the Anti-Hijacking Profile was based on a “statistical comparison of . . . passengers to past hijackers” using “nondiscriminatory indicia characteristic of the hijacking problem,” the Profile did not necessarily attempt to establish probable cause and therefore was not subject to scrutiny under the Fourth Amendment. *See* *United States v. Slocum*, 464 F.2d 1180, 1183 (3d Cir. 1972).

¹¹⁹ *See* Ravich, *supra* note 19, at 2.

¹²⁰ *See id.* at 9.

¹²¹ *See id.* at 10 (citing Gregory T. Nojeim, *Aviation Security Profiling and Passengers’ Civil Liberties*, AIR & SPACE L. 3, 6 (1998)) (“In 1972, the last year[] the United States used profiles to determine whose carry-on luggage would be X-rayed to stop hijacking, there were 28 hijackings of U.S. passenger aircraft. Hijacking dropped off when profiling was abandoned and every passenger’s carry-on luggage was X-rayed.”).

profiling.¹²² In response to initial fears that terrorists had caused the accident, then-President William J. Clinton announced the creation of the White House Commission on Aviation Safety and Security, also known as the “Gore Commission,” on August 22, 1996.¹²³ The Gore Commission’s role was to “advise the President on matters involving aviation safety and security, including air traffic control” and to “develop and recommend to the President a strategy designed to improve aviation safety and security, both domestically and internationally.”¹²⁴ Among its several security recommendations, the Gore Commission advised in favor of reinstating a form of the FAA’s 1960s passenger profiling system.¹²⁵ The Gore Commission took care to warn against racial profiling and recommended eight important safeguards, the first of which was that profiles should not “contain or be based on material of a constitutionally suspect nature” such as race, religion or national origin and that the elements of a profiling system ought to be developed “in consultation with the Department of Justice and other appropriate experts.”¹²⁶ The Gore Commission instead recommended that factors to

¹²² See *id.* Government officials did initially believe that terrorists had caused the accident. See *id.*

¹²³ See *id.* at 10–11.

¹²⁴ See Exec. Order No. 13,015, 61 Fed. Reg. 43,937 (Aug. 22, 1996).

¹²⁵ See Ravich, *supra* note 19, at 11. The Gore Commission recommended three steps to improve and promote passenger profiling:

First, FBI, CIA, and BATF (Bureau of Alcohol, Tobacco, and Firearms) should evaluate and expand the research into known terrorists, hijackers, and bombers needed to develop the best possible profiling system. They should keep in mind that such a profile would be most useful to the airlines if it could be matched against automated passenger information which the airlines maintain.

Second, the FBI and CIA should develop a system that would allow important intelligence information on known or suspected terrorists to be used in passenger profiling without compromising the integrity of the intelligence or its sources. Similar systems have been developed to give environmental scientists access to sensitive data collected by satellites.

Third, the Commission will establish an advisory board on civil liberties questions that arise from the development and use of profiling systems.

WHITE HOUSE COMM’N ON AVIATION SAFETY & SEC., FINAL REPORT TO PRESIDENT CLINTON § 3.19 (Feb. 12, 1997), available at <http://www.fas.org/irp/threat/212fin~1.html>.

¹²⁶ See WHITE HOUSE COMM’N ON AVIATION SAFETY & SEC., *supra* note 125, at § 3.19. The Gore Commission Report’s eight recommended safeguards are:

1. No profile should contain or be based on material of a constitutionally suspect nature—e.g., race, religion, national origin of U.S. citizens. The Commission recommends that the elements of a profiling system be developed in consultation with the Department of Justice and other appropriate experts to

be considered for government-sponsored profiling should be based on “measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations” and that the factors chosen would need to correspond in a demonstrable way with the risk of illegal activity.”¹²⁷

A. *Four Faulty Generations of Passenger Screening Systems: A Criticism of CAPPS I, CAPPS II, Registered Traveler, and the Newly-Launched Secure Flight Program*

The first airline passenger profiling program to be widely implemented in response to the Gore Commission’s findings was the Computer Assisted Passenger Prescreening System (CAPPS).¹²⁸ Developed by Northwest Airlines in 1996 with an FAA grant, CAPPS was initially presented not as a profiling system, but rather as a “management tool” that would be used “not to pick a needle out of the haystack . . . but to make

ensure that selection is not impermissibly based on national origin, racial, ethnic, religious or gender characteristics.

2. Factors to be considered for elements of the profile should be based on measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations. A relationship must be demonstrated between the factors chosen and the risk of illegal activity.

3. Passengers should be informed of airlines [sic] security procedures and of their right to avoid any search of their person or luggage by electing not to board the aircraft.

4. Searches arising from the use of an automated profiling system should be no more intrusive than search procedures that could be applied to all passengers. Procedures for searching the person or luggage of, or for questioning, a person who is selected by the automated profiling system should be premised on insuring respectful, non-stigmatizing, and efficient treatment of all passengers.

5. Neither the airlines nor the government should maintain permanent databases on selectees. Reasonable restrictions on the maintenance of records and strict limitations on the dissemination of records should be developed.

6. Periodic independent reviews of profiling procedures should be made. The Commission considered whether an independent panel be appointed to monitor implementation and recommends at a minimum that the DOJ, in consultation with the DOT and FAA, periodically review the profiling standards and create an outside panel should that, in their judgment, be necessary.

7. The Commission reiterates that profiling should last only until Explosive Detection Systems are reliable and fully deployed.

8. The Commission urges that these elements be embodied in FAA standards that must be strictly observed.

Id.

¹²⁷ See *id.* at app. A.

¹²⁸ See Ravich, *supra* note 19 at 11–12.

the haystack smaller.”¹²⁹ CAPPs worked by collecting approximately thirty-nine pieces of data intended to identify those travelers that warranted being subjected to heightened security procedures.¹³⁰ The specifics of these data points, however, are unknown because the FAA has declined to reveal the nature of the criteria.¹³¹ Predictably, the FAA has insisted that race, ethnicity, religion and gender were not factors in the CAPPs analysis but refuses to make the profiles or the criterion on which the profiles were compiled public, alleging that such transparency would eliminate the profiles’ effectiveness.¹³² Those who have tried to discern the factors on which a CAPPs profile is compiled suggest that:

CAPPs focuses on specific features such as the method of payment for an airline ticket (i.e., cash or credit); the timing of a purchase (i.e., immediately before departure or much earlier); the identity of travelers, including with whom, if anybody, the passenger is traveling; the activity at the destination, including whether the passenger intends to rent a car; the flight itinerary, including where the flight originates and its ultimate destination; the passenger’s specific travel plans, including ultimate destination when different from the flight on which the traveler is aboard; and whether the flight is round trip or one-way.¹³³

In the event that a particular passenger’s profile were to trigger the CAPPs system’s selection criteria, that passenger would be identified as a “selectee” and would undergo additional security measures.¹³⁴ The type and extent of such measures would depend on several factors, in-

¹²⁹ See *id.* at 12 (citing Bill Dedman, *FAA Looking to Expand System*, BOSTON GLOBE, Oct. 12, 2001, at A27).

¹³⁰ See *id.*

¹³¹ See Rhee, *supra* note 116, at 865.

¹³² See Ravich, *supra* note 19 at 12; Rhee, *supra* note 116, at 865. As FAA spokeswoman Rebecca Trexler explained, making the FAA’s profiling system public “would be telling the terrorist what we’re looking for.” See Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, 83 A.B.A. J. 48, 50 (1997).

¹³³ Ravich, *supra* note 19, at 12.

¹³⁴ See *id.* at 12–13. The security measures taken typically involve “bag-matching,” or ensuring that any luggage checked by the passenger be flown only if that passenger boards the aircraft, examination by a certified explosive detection system, and the use of other advanced technology such as trace detectors and explosive detection devices. See *id.* at 13.

cluding the passenger's destination and the advanced technology available.¹³⁵

In 1997, a Department of Justice analysis of CAPPs selection criteria concluded the CAPPs program to be non-discriminatory.¹³⁶ Not surprisingly, opponents to the profiling program assigned little weight to the Department's conclusions.¹³⁷ Objections to the use of the CAPPs system came primarily in two forms.¹³⁸ First, CAPPs was criticized as ineffective in preventing against certain kinds of terrorist threats, and second, the CAPPs system facilitated unconstitutional discrimination as well as an invasion of privacy (and possibly enabled identity theft) of all those who were vetted by the system.¹³⁹ Proponents of the first part of this argument contended that a computer-assisted passenger screening system is insufficient to uncover explosives planted on a terrorist's unsuspecting friend or relative.¹⁴⁰ For instance, CAPPs' detractors have argued that CAPPs would not have prevented even the earliest documented U.S. bombing of a commercial airplane—a 1955 incident in which a son, scheming to collect on his mother's life insurance policy, planted a bomb in his mother's luggage.¹⁴¹

¹³⁵ See *id.* at 13. Some scholars have argued that because the CAPPs program identified ten of the nineteen September 11 terrorists, profiling and even a "corresponding infringement of some existing travel and privacy rights" may be justified. See *id.* at 32. Professor Ravich, for example, argues that the subsequent failure of TSA officials to prevent the hijackers from boarding (instead, officials focused on the hijackers' baggage) constituted a failure in enforcement, but not in the CAPPs profiling system. See *id.*

¹³⁶ See *id.* at 14.

¹³⁷ See *id.*

¹³⁸ See Ravich, *supra* note 19, at 46.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 13, 32–33. It is interesting to compare the American airport security system with that of Israel, a nation under constant terrorist threat and where El Al (the primary Israeli airline) passengers are routinely subjected to profiling, among other security measures. See *id.* at 33. One 1986 incident is telling: when officials selected a pregnant woman flying alone from London to Tel Aviv for additional screening, they discovered that a bomb had been planted in her suitcase by her Jordanian boyfriend. See *id.* Not one successful hijacking has ever taken place out of an Israeli airport. See *id.*

¹⁴¹ See *id.* (citing Ted Rohrlich, *Response to Terror Aviation Security*, L.A. TIMES, Nov. 5, 2001, at A1). One critic stated:

How long does it take the United States to counter a threat to commercial aviation? In the case of a bomb stowed in luggage in the belly of an airliner, the answer is nearly half a century. And counting. Since a man placed a bomb in his mother's suitcase in 1955 and blew up a United Airlines flight over Colorado, more than two dozen fatal explosions have been recorded on aircraft around the world.

Proponents of the second part of this argument believe that the potential for CAPPS to facilitate unlawful discrimination and the invasion of profiled travelers' privacy is significant because the integrity of CAPPS data and the reliability of CAPPS sources is questionable.¹⁴² Another concern is that CAPPS profiles and travelers' personal data may be distributed to government agencies beyond the FAA for purposes unrelated to terrorism or aviation security.¹⁴³ As an alternative to CAPPS, the ACLU suggested the implementation of methods other than profiling, such as, "training security personnel to identify tangible evidence of suspected criminal activity on reasonable; articulable bases other than stereotypes; screening airline personnel and employees of air security vendors (within constitutional means); adding measures to enforce security standards at foreign airports; and limiting FBI and law enforcement access to passenger records" in order to ensure airline passenger privacy without jeopardizing aviation security.¹⁴⁴

Instead, in 2003, the federal government gave Lockheed Martin a five-year grant and \$12.8 million during the first year in order to develop an enhancement of CAPPS called CAPPS II.¹⁴⁵ TSA intended that CAPPS II would "bridge law enforcement and intelligence databases" and enable airlines to authenticate commercial airline passengers' identities by comparing a travelers' passenger name record (PNR) against governmental databases.¹⁴⁶ A large portion of the data used by the CAPPS II computer system was obtained from airlines that had already once supplied passenger data to the U.S. Army for what was billed as a non-CAPPS-like program.¹⁴⁷

¹⁴² See *id.* at 15.

¹⁴³ See Ravich, *supra* note 19, at 15. These concerns regarding personal privacy are not unfounded. See *id.* As the ACLU has pointed out, computerized profile systems permit information collected by airlines for non-profiling purposes—to book flights or enroll in frequent flyer programs, for example—to be used for other purposes. See *id.* The information computerized profiling systems collect about their passengers includes, *inter alia*, passengers' names, addresses, flight destinations, method of purchasing tickets (who paid and the method of payment), whom the passenger traveled with, and whether the passenger also reserved a car or hotel. See *id.* The information might also include passengers' addresses over the span of several years, the kinds of cars the passenger owns or has owned and the length of ownership of those cars, the names and addresses of businesses the passenger has used, and a list of the newspapers the passenger has subscribed to. See BRASCH, *supra* note 18, at 142.

¹⁴⁴ Ravich, *supra* note 19, at 15 (citing Nojeim, *supra* note 121, at 7).

¹⁴⁵ See BRASCH, *supra* note 18, at 142.

¹⁴⁶ See *id.*; Ravich, *supra* note 19, at 16. A passenger's PNR typically contains his "full name, home address, telephone number and date of birth." See Ravich, *supra* note 19, at 16.

¹⁴⁷ See BRASCH, *supra* note 18, at 142.

Civil liberty and privacy advocates' primary argument against CAPPs II was that it would enable information provided and intended for one purpose to be exploited for another.¹⁴⁸ CAPPs II would single out passengers of interest to the government, even when they posed non-travel-related risks, such as those with outstanding warrants and those who had filed for bankruptcy or were late paying their bills.¹⁴⁹ This concern proved to be CAPPs II's undoing, as the use of private data provided to the government by commercial data miners could result in "arrest, deportation, loss of a job, greater scrutiny at various screening gates, investigation or surveillance, or being added to a watch list."¹⁵⁰ TSA halted the application of CAPPs II after the U.S. General Accounting Office (GAO) issued a report stating that CAPPs II faced significant implementation challenges and that "[u]ntil TSA finalizes its privacy plans for CAPPs II and addresses [concerns over the combined analysis of PNR data with commercial and law enforcement databases], we lack assurance that the system will fully comply with the Privacy Act."¹⁵¹

Subsequent testimony before the Senate Governmental Affairs Committee and an investigation by *Wired News* revealed that TSA had in fact continued to mine data without meeting the safeguards the GAO had required.¹⁵² By the time the Department of Homeland Security

¹⁴⁸ See Ravich, *supra* note 19, at 16–17.

¹⁴⁹ See *id.* at 16.

¹⁵⁰ See Dempsey & Flint, *supra* note 113, at 1471; Ravich, *supra* note 19, at 16. In testimony before the Aviation Subcommittee of the House Transportation and Infrastructure Committee, Nancy Holtzman, Executive Director of the Association of Corporate Travel Executives argued that CAPPs II was "in direct conflict with privacy policies of most major American corporations" and that "distinguished experts on personal freedoms can easily make the case that CAPPs II can be extended into every aspect of American life from the purchase of train tickets to real estate." BRASCH, *supra* note 18, at 142. Organizations such as the ACLU, the Electronic Privacy Information Center and others similarly argued against the implementation of CAPPs II. See *id.* at 143.

¹⁵¹ See U.S. GEN. ACCOUNTING OFFICE (GAO), AVIATION SECURITY: COMPUTER-ASSISTED PASSENGER PRESCREENING SYSTEM FACES SIGNIFICANT IMPLEMENTATION CHALLENGES 42 (2004), available at <http://www.gao.gov/new.items/d04385.pdf>. Among its criticisms, the GAO highlighted that TSA had not fully addressed seven of eight issues identified by Congress as issues TSA would have to fully address before CAPPs II could be implemented. See *id.* at 13.

¹⁵² See BRASCH, *supra* note 18, at 143; see also Ryan Singel, *JetBlue Shared Passenger Data*, WIRED NEWS, Sept. 18, 2003, <http://wired.com/politics/security/news/2003/09/60489> (reporting on JetBlue officials' acknowledgment that the airline, assisted by the TSA, provided five million passenger itineraries to defense contractor Torch Concepts for "proof of concept" testing of a Pentagon project unrelated to airline security in 2002); Ryan Singel, *No Law Broken in Jet Blue Scandal*, WIRED NEWS, Feb. 21, 2004, <http://www.wired.com/politics/security/news/2004/02/62373> (citing a report issued by Department of Home-

finally suspended CAPPS II in July 2004, about \$102 million had been spent on the program and another \$60 million was earmarked for CAPPs II-related spending during the coming fiscal year.¹⁵³ The Department of Homeland Security claimed that it would review CAPPs II data and confine it to the names of potential terrorism suspects, but within two weeks of George W. Bush's reelection, the Department of Homeland Security converted CAPPs II into a program called Secure Flight and required U.S. airlines to supply the government with personal data on all of their passengers.¹⁵⁴

As of December 29, 2008, the government's Secure Flight program aims to ensure the uniform prescreening of passengers on domestic and international flights by concentrating the task of passenger watch list-matching in the hands of the TSA.¹⁵⁵ Under the program, the name,

land Security Chief Privacy Officer Nuala O'Connor Kelly concluding that Homeland Security had not violated the Privacy Act in sharing its customer database with Torch Concepts).

¹⁵³ See BRASCH, *supra* note 18, at 143.

¹⁵⁴ See *id.* As Ravich explains, the TSA's willingness to remedy shortcomings in profiling systems like CAPPs and Secure Flight provides little consolation for many privacy advocates and civil libertarians because they find intolerable the notion that the federal government, private vendors or both will gain access to passengers' personal and biometric data through programs like Registered Traveler. See Ravich, *supra* note 19, at 25, 45. Unlike CAPPs, CAPPs II and Secure Flight, Registered Traveler is a program in which passengers enroll voluntarily. See *id.* at 25. The program expedites boarding and grants these travelers a low-level security clearance. See *id.* Registered Traveler is administered by four private service providers—Verified Identity Pass and Verant Identification Systems, Inc., both based in New York; Unisys Corporation, based in Virginia; and Vigilant Solutions, based in Florida—at participating airports. See *id.* at 26 & n.116. A Verified Identity Pass program called "Clear" gives travelers a "clear card" in exchange for filling out an application providing various credentialing information, and paying a membership fee (twenty-eight dollars of which is a TSA enrollment fee). See *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani); Ravich, *supra* note 19, at 27. Critics of Registered Traveler accuse the program of giving special treatment to those who can afford it and "misaligning" the motive to profit with the need to establish a functional national security system. See *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani); Ravich, *supra* note 19, at 27–28. Furthermore, the ACLU has warned that the Registered Traveler Program may thwart the anti-terrorism effort by enabling terrorists to discover which of their operatives are on terrorist watch lists against which Registered Travelers are compared. See Ravich, *supra* note 19, at 28. The use of identity theft to perpetrate acts of terrorism is also a concern: terrorists might obtain false identification and become Registered Travelers, allowing them to take advantage of lessened security screenings to commit acts of terrorism. See *id.*

¹⁵⁵ See Mock, *supra* note 71 at 219; TSA, Secure Flight Program, http://www.tsa.gov/what_we_do/layers/secureflight/index.shtml (last visited Nov. 19, 2009). Prescreening programs were previously implemented by individual airlines, but the TSA contended that such non-uniform enforcement resulted in unnecessary "inconsistencies and misidentifications." See Mock, *supra* note 71, at 219. Under the Secure Flight Program, the Secure Flight passenger watch list matching will apply "to all domestic and international passengers traveling on covered aircraft operator flights into, out of, within or over the United States.

birth date, gender and itinerary of each passenger is compared against government watch lists to identify known and suspected terrorists, prevent individuals on the government's No Fly Lists from boarding aircraft, and identify individuals on the government's selectee lists for enhanced screening.¹⁵⁶ The TSA insists that Secure Flight does not assign security scores to individuals, collect or use commercial data to conduct Secure Flight watch list matching or attempt to predict passengers' behavior.¹⁵⁷

In an August 12, 2009 press release, the TSA announced that it would begin the second publicly noticeable security phase of its Secure Flight program on August 15, 2009.¹⁵⁸ This phase of the TSA's passenger vetting program involves participating U.S. airlines requiring certain passengers to provide their birth date and gender when making air travel reservations.¹⁵⁹ This step comes on the heels of a phase that began on May 15, 2009, when airlines participating in the Secure Flight program began asking passengers to provide their name as it appears on the government-issued identification they will use while traveling in making their airline reservations.¹⁶⁰ According to its website, TSA's larger goal is to vet "100 percent of passengers on all domestic commercial flights by early 2010 and 100 percent of passengers on all international commercial flights into, out of, or over the U.S. by the end of 2010."¹⁶¹

Critics of Secure Flight are nonetheless as mistrustful of the new program as they were of its predecessor, CAPPS II.¹⁶² The ACLU, for example, has argued that Secure Flight requires the acceptance of the "dubious premise" that terrorists use legitimate documentation containing their true names to book airline tickets and to pass airport security checkpoints.¹⁶³ Given the frequency of identity theft in the

Secure Flight will also apply to point-to-point international flights operated by U.S.-based aircraft operators." See TSA, *supra*.

¹⁵⁶ See TSA, *supra* note 155. While the program does not require individuals to provide other information, such as passport information and known redress numbers to aircraft operators, aircraft operators are required to transmit such data to TSA when passengers voluntarily provide it to them. See *id.* The TSA website announcing the launch of the Secure Flight program argues that "[p]roviding the optional information is beneficial to passengers as it helps ensure they are not misidentified as a person on a watch list." See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See Press Release, TSA, Secure Flight Program Enters Next Public Phase (Aug. 12, 2009) (on file with author).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani).

¹⁶³ See *id.*

United States and the ability of terrorists to forge identification documents enabling the purchase of tickets under an assumed name, Secure Flight is likely to result in “False Negatives” and fail to achieve its goals.¹⁶⁴ Secondly, critics argue that the use of “bloated” No Fly Lists will prevent innocent people from traveling and thus deprive them of a constitutionally protected right to travel.¹⁶⁵ Furthermore, the failure to establish a working, comprehensive redress process under CAPPS II suggests that those who are wrongly put on the Secure Flight List have no guarantee that their names will be removed permanently, if at all.¹⁶⁶ Finally, the ACLU warns that because of the types of names most likely to appear on the No Fly and selectee lists, travelers of Arab and Middle Eastern descent will be most vulnerable to being targeted for additional screenings and prevented from flying altogether.¹⁶⁷

B. Behavioral Profiling: Racial Profiling Poorly Disguised

Behavioral profiling appears at first glance to be a race-blind, politically neutral mechanism for ensuring the safety of all passengers.¹⁶⁸

¹⁶⁴ See *id.*; Ravich, *supra* note 19, at 8. As early as 2003, the U.S. Federal Trade Commission estimated that “over a one-year period nearly 10 million people—or 4.6 percent of the adult population—had discovered that they were victims of some form of identity theft.” See *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani). Mr. Sparapani made clear that the ACLU does not oppose the TSA’s comparison of passenger lists against a narrowly constructed list of known terrorists who pose a specific threat to aviation security. See *id.*

¹⁶⁵ *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966) (confirming the existence of a “constitutional right to travel from one State to another”) and *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (concluding that the right to travel is “assertable against private interference as well as government action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all”).

¹⁶⁶ See *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani). Mr. Sparapani argued in February 2006, “if TSA cannot build a redress process after nearly four and one-half years for Secure Flight to prevent against civil liberties violations, how can TSA be trusted to build an effective, civil liberties-respecting passenger pre-screening program?” See *id.* Mr. Sparapani’s fears are not unfounded: On January 5, 2005, Maya Shaikh, an American citizen and a graduate of Stanford University School of Law, was arrested by the FBI, led through Honolulu International Airport before her own teenage daughter and other airport patrons in handcuffs, detained, questioned and placed in a holding cell because her name was on a No-Fly List. See James Fisher, *What Price Does Society Have to Pay for Security? A Look at the Aviation Watch Lists*, 44 WILLAMETTE L. REV. 573, 573 (2008). Subjected to secondary security screenings and unpleasant interrogations on subsequent trips, Ms. Shaikh contacted TSA to have her name cleared from the list. See *id.* at 574. She was informed, however, that her name would not be removed from the list and that “this was the price she and society ha[d] to pay for security.” See *id.*

¹⁶⁷ See Fisher, *supra* note 166, at 573.

¹⁶⁸ Ritchie & Mogul, *supra* note 19, at 217.

Grasping at this superficial solution, federal and state agencies and law enforcement bodies—ranging from the Department of Homeland Security itself to local police departments—have issued security advisories to guide officials and civilians alike as to what constitutes “suspicious” behavior.¹⁶⁹ Unfortunately, this unscientific practice threatens to disguise some racial profiling as permissible behavior and risks doing more harm than good in the effort to ensure aviation security.¹⁷⁰

1. Inadequate Training

As discussed above, critics have accused TSA’s weeklong Screening of Passengers by Observation Techniques (SPOT) Program, an existing system for training security officials to identify suspicious behavior, of being a grossly inadequate preparatory tool.¹⁷¹ The program is designed to teach security personnel to employ objective criteria to identify individuals who are trying to disguise their emotions.¹⁷² Under it, TSA officers compare the suspicious behavior indicators they observe in passengers against a list of approximately thirty behaviors that are assigned numerical scores.¹⁷³ When a passenger’s score exceeds a certain predetermined sum, that passenger is questioned by an officer.¹⁷⁴ If the conversation arouses further suspicion, as happens in approximately twenty percent of cases, the passenger is considered for a secondary search.¹⁷⁵

The SPOT training program entails a mere four days of classroom training on observation and questioning techniques and three days of “field practice” and prepares officers to look for suspicious behavioral

¹⁶⁹ *See id.*

¹⁷⁰ *See* Goldberg, *supra* note 25, at 103.

¹⁷¹ *See id.* Apart from the SPOT program, transportation security officers are required to complete a minimum of one hundred hours of training—forty hours of classroom training and sixty hours of on-the-job training to receive certification permitting them to administer the checkpoint screening process. *See* Mock, *supra* note 71, at 216–17. This certification allows TSA security personnel to conduct primary screening searches, the routine searches currently performed on all passengers regardless of the level of suspicion they arouse. *See id.* at 217. These routine searches entail the use of magnetometers (metal detectors) and baggage scanning machines that are employed at screening checkpoints. *See id.* at 217–18.

¹⁷² *See* Mock, *supra* note 71, at 218.

¹⁷³ *See id.* at 218–19.

¹⁷⁴ *See id.* at 219.

¹⁷⁵ *See* Goldberg, *supra* note 25, at 219. Whether a conversation arouses further suspicion is determined on a case-by-case basis by individual security officials employing the SPOT technique, meaning that this subjective standard has the potential to mask discriminatory conduct. *See id.*

indicators, such as “vocal timbre, gestures, and facial movements.”¹⁷⁶ TSA’s officials are required only to have a high school diploma and to pass a criminal background check.¹⁷⁷ However, longer training programs alone do not seem to be the answer, because human beings, not error-proof machines, are ultimately responsible for the profiling.¹⁷⁸ Even if the danger of racially-based motivations could be eliminated from behavioral profiling, “discriminatory determinations” may still lead security officials to identify “quirky” passengers as potential terrorist threats.¹⁷⁹

As some critics have warned, “[for terrorists],[l]earning to defeat poorly-trained screeners is a lot easier than learning to fly a jumbo jet.”¹⁸⁰ If the security measures that have thwarted all hijacking attempts at Ben-Gurion airport near Tel Aviv, Israel, are to be implemented in the United States, the type of individuals chosen as security officers will need to change.¹⁸¹ In Israel, most security officers are recruited from the military and are subjected to stringent tests to eliminate “all but those with above-average intelligence and particularly strong personality types.”¹⁸² Israeli airport security personnel are given nine weeks of behavior recognition training, but *all* departing passengers are interviewed, *all* passengers are subjected to one-on-one searches, and the behavioral profiling program is supplemented by other security measures, including an extensive sky marshal program.¹⁸³ Not surprisingly, a primary goal of this system is to eliminate potentially discriminatory judgment calls while ensuring universal safety.¹⁸⁴

¹⁷⁶ See Mock, *supra* note 71, at 218; Bernard E. Harcourt, *Search and Defend*, N.Y. TIMES, Aug. 25, 2006, at A21.

¹⁷⁷ See Harcourt, *supra* note 176.

¹⁷⁸ See Ravich, *supra* note 19, at 33. In contrast, the Israeli airline El Al, whose planes have never been hijacked, offers passengers the protection of officers recruited largely from the Israeli military. See Harcourt, *supra* note 176. These officers are subjected to stringent tests and undergo over two months of behavior recognition training. See *id.*

¹⁷⁹ See Ravich, *supra* note 19, at 33. As Professor Ravich astutely points out, “[n]aturally, not every passenger who is anxious about flying, with sweaty palms and nervous movements, is a terrorist.” *Id.*

¹⁸⁰ See Harcourt, *supra* note 176.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.* One-on-one searches of passengers by El Al officials have been reported to take an average of 57 minutes per person. See *id.*

¹⁸⁴ See *id.*

2. A Cover for Racism

Because behavioral profiling requires security officials to identify conduct that is perfectly natural in a variety of situations, those whose actions triggers scrutiny under this security method are prone to abuse by security officers based on “race-based preconceptions as to which racial groups are more likely to represent a ‘terrorist’ threat.”¹⁸⁵ Critics warn that security officials engaged in behavioral profiling will disproportionately scrutinize racial and ethnic minorities and ‘observe’ suspicious behavior where none actually exists, causing racially disparate impacts similar to those caused by racial profiling.¹⁸⁶ The brunt of this discrimination, critics warn, will be borne by those who are (or are perceived to be) Muslim, Arab and South Asian, wrongly reinforcing the idea that terrorist suspects *can* be successfully identified by their race, ethnicity or religion and reiterating prejudicial stereotypes in the mind of the public instead of devoting resources to “genuine threats to security.”¹⁸⁷

A prime example of the inappropriateness of behavioral profiling is the list of behaviors the Department of Homeland Security determined to be “indicative behaviors of suicide bombers.”¹⁸⁸ The list of behaviors—a list that fails to recognize legitimate motives for any of the described conduct—includes culturally and racially insensitive items such as “clothing is loose,” “clothing is out of sync with the weather,” “pale face from recent shaving of beard,” and “does not respond to authoritative voice commands or direct salutation from a distance” as well as statements that could easily apply to any traveler, such as “eyes appear to be focused and vigilant,” “suspect may be carrying heavy luggage, bag or wearing a backpack,” and “suspect is walking with deliberation but not running.”¹⁸⁹ Likewise, the item, “behavior is consistent

¹⁸⁵ See Ritchie & Mogul, *supra* note 19, at 217–18 (citing CTR. FOR HUM. RTS. & GLOBAL JUSTICE, IRREVERSIBLE CONSEQUENCES: RACIAL PROFILING AND LETHAL FORCE IN “THE WAR ON TERROR” 29–30 (2006), available at http://www.CHRGJ.org/docs/CHRGJ_Irreversible_Consequences.pdf).

¹⁸⁶ See Ritchie & Mogul, *supra* note 19, at 217–18.

¹⁸⁷ See CTR. FOR HUM. RTS. AND GLOBAL JUSTICE, *supra* note 185, at 30; Ritchie & Mogul, *supra* note 19, at 218–19.

¹⁸⁸ See Advisory, U.S. Dep’t of Homeland Sec., Maintaining Awareness Regarding Al-Qaeda’s Possible Threats to the Homeland (Sept. 4, 2003).

¹⁸⁹ See *id.* Ritchie and Mogul point out that many of these characteristics highlight cultural misunderstandings. See Ritchie & Mogul, *supra* note 19, at 218. For example, the reluctance to make eye contact and the general aversion of the eyes is a sign of respect among some Arabs. See *id.* Similarly, exhibitions of nervous behavior are not indicators of criminal intent or wrongdoing, but rather genuine displays of discomfort and fear stemming from previous experiences with authority figures both in their home countries and in

with no future, e.g., individual purchases one-way ticket or is unconcerned about receipts for purchases, or receiving change,” might have some correlation with the behavior of a terrorist; it could also apply to individuals who are wealthy, scatterbrained, or just in a hurry.¹⁹⁰

IV. THE CONSTITUTIONALLY-VIABLE, RACE-BLIND SOLUTION FOR AMERICAN AIRPORTS: A UNIVERSALLY STRINGENT PHYSICAL SECURITY PROGRAM

In an address on the future of air travel delivered at the October 29, 2001 *Freedom Versus Fear: The Future of Air Travel Conference*, Robert Crandall, former president and chairman of American Airlines declared, “You want to travel on the airline system? You give up your privacy. You don't want to give up your privacy? Don't fly. Your privacy isn't equal to the safety of the rest of us.”¹⁹¹ Like Professor Timothy M. Ravich, this author rejects the argument that commercial airline passengers must choose between security, liberty and privacy.¹⁹² Instead, a compromise must be reached and a new national aviation security system must be implemented.¹⁹³

Because today's airline security programs identify potential terrorists largely, if not entirely, based on passengers' racial, national, religious or ethnic origins, these programs are racially discriminatory and therefore unconstitutional.¹⁹⁴ Furthermore, the majority of TSA's security initiatives, past and present, contravene the Convention for the

the United States. *See id.* Still other behavioral profiles have been known to explicitly name Muslims as targets for suspicion. *See id.* As recently as October 4, 2007, the behavioral profile available on the Temple Terrace, Florida police department website explicitly referenced Muslim individuals in declaring it suspicious for an individual to “expend[] energy not to stand out as a Muslim, despite professed Islamic beliefs.” *See id.* at 218 & n.162. Perhaps because of the thoroughness of the 2007 report prepared for the U.N. Committee on the Elimination of Racial Discrimination the Temple Terrace police department has since revised its website. *See* Temple Terrace Police Department, Homeland Security Terrorist Indicators, <http://www.templeterrace.com/police/terrorist.htm> (last visited Oct. 19, 2009). As of October 19, 2009, the website's closest association between Muslims and terrorism is the inclusion of “Jihadist literature, terrorist training manuals, security plans, encoded materials, or instructions for the use of codes and ciphers in residence or vehicle” in its list of “Possible Indicators of Terrorist Activity.” *See id.*

¹⁹⁰ *See* Dep't of Homeland Sec., *supra* note 188.

¹⁹¹ *See* Ravich, *supra* note 19, at 5 & n.14.

¹⁹² *See id.* Professor Ravich, however, endorses an aviation security policy “in which profiling plays an integral and lawful role.” *See id.* at 5. This author disagrees that any level of racial profiling may be lawful. *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See* DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 174–75 (2006).

Elimination of Racial Discrimination as ratified by the U.S. government.¹⁹⁵ In situations where officials seek to identify terrorist threats but do not conduct investigations based on specific descriptions of suspects, the Fourth Amendment's protection against unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection demand that no distinctions be made among commercial airline travelers.¹⁹⁶ As dissenting Supreme Court Justice John Harlan wrote in *Plessy v. Ferguson*:

In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. . . . In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man . . . when his civil rights as guaranteed by the supreme law of the land are involved.¹⁹⁷

Rather than selectively using behavioral profiling or expensive computer programs (like CAPPs, CAPPs II, Registered Traveler and Secure Flight) that employ secret and possibly unconstitutional criteria to calculate the risk posed by particular passengers, the TSA should invest its resources in improving physical screening capabilities such as baggage screening technology and training security officials who can properly conduct one-on-one searches of all commercial airline passengers.¹⁹⁸ As one critic has argued,

If we want to change the system, a better idea would be to eliminate most carry-ons and emulate high-security prisons.

Sure, this would not be 100 percent foolproof. But, in combination with our sky marshal program, it would be far more likely to prevent future terrorist hijackings than giving a bunch of unqualified screeners a cursory education in face reading.¹⁹⁹

¹⁹⁵ See International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 78.

¹⁹⁶ See U.S. CONST. amends IV, XIV.

¹⁹⁷ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

¹⁹⁸ See Harcourt, *supra* note 176 at A21.

¹⁹⁹ See *id.* Harcourt reports that in his experience, most prisons operate in the same way: "[F]irst I check my briefcase, overcoat, belt, cell-phone and all unnecessary items at the reception. I then take everything out of my pockets—wallet, pen and paper. A guard conducts a thorough pat-down search and physically inspects my property and shoes. We're done in less than a minute." See *id.*

Fortunately, the Department of Homeland Security's Science and Technology Directorate ("the Directorate") has already begun to develop several new innovations to improve TSA's screening capabilities.²⁰⁰ Over the past year, the Directorate has developed a plethora of new screening and detection technologies in working towards its 2010 congressional deadline of screening 100% of cargo carried onto commercial airplanes.²⁰¹ Among other initiatives, a congressionally-directed Air Cargo Explosives Detection Pilot Program has been completed, a Digital Imaging and Communications for Security standard has been developed as the accepted imaging file format that will enable data exchanges between security screening equipment, the feasibility of creating a Magnetic Visibility program to identify the chemical contents of any liquid being carried through a security checkpoint has been confirmed, and homemade Explosives detection technologies and screening methods are in development.²⁰²

Rather than spending millions of tax dollars on programs that profile and inadvertently discriminate against minority passengers, the TSA should concentrate on the continued development and expansion of these and other physical security initiatives.²⁰³ To encourage the TSA to develop the necessary technology, binding federal legislation should be passed to prohibit, monitor and provide redress for unconstitutional racial profiling in airports.²⁰⁴ If the implementation of advanced technology security programs forces airports to spend more time and human capital on screening passengers, so be it: not only does this approach avoid unconstitutional scrutinizing of those who fit into protected class categories, but this method will enable TSA to identify individuals like Richard Reid, John Walker Lindh, and Marwan al-Shehhi (those intending to commit acts of terror) as well as individuals like Jeffrey Goldberg and Nathaniel Heatwole (those merely seeking to underscore the inadequacies of existing national security measures).²⁰⁵

²⁰⁰ See *Science and Technology Research and Transitioning Products Into Use: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 111th Cong. D1238 (2009) (testimony of Bradley I. Buswell, Acting Under Secretary, Science and Technology Directorate).

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See Ritchie & Mogul, *supra* note 19, at 205.

²⁰⁵ See AMNESTY INT'L USA, *supra* note 25, at ix-x, 25; Goldberg, *supra* note 25, at 100; Victoria Griffith et al., *How the Hijackers Went Unnoticed*, FINANCIAL TIMES LONDON, Nov. 29, 2001, <http://specials.ft.com/attackonterrorism/FT3L4J6UMUC.html>. Marwan al-Shehhi was the twenty-three year old pilot who crashed United Airlines flight 175 into the second World Trade Center tower on September 11, 2001. See Victoria Griffith et al., *supra*.

Critics of this method are likely to argue that such an elaborate, “Big Brother”—style physical security system is untenably expensive and even unnecessary since the overwhelming majority of airline passengers are not terrorists.²⁰⁶ Significantly more frightening, however, are the warnings of some critics of the current security regime that TSA will soon develop variations of existing behavioral and computerized profiling programs and regularly apply them to other, non-aviation forms of travel.²⁰⁷ This fear is not unfounded, as the TSA’s complete objective is to ensure the security of all U.S. transportation systems, including city mass transit systems, trains, railroads, busses and airports.²⁰⁸ In addition, the argument that a universally stringent physical security system does not offer the least intrusive means of ensuring public aviation safety is misguided, because it measures “least restrictive” by the number of people searched and not the disparity in treatment between those searched and not searched.²⁰⁹ Finally, those who opposed CAPPS II’s use of personal data originally supplied to airlines for reasons unrelated to terrorism should be pleased to note that an enhanced, advanced physical security system requires no special data because it presumes that each passenger is equally capable, if not of acting as a terrorist, then of being targeted by one as a “bomb mule.”²¹⁰

Rather than spending millions of dollars on computerized security clearance systems that terrorists will strive to avoid with fake IDs, fake boarding passes and Registered Traveler cards, federal funding should be used to buttress intelligence and emergency response programs and to design an efficient way to search and X-ray every individual passenger’s person and belongings in an expedient but effective manner.²¹¹ Larger waiting rooms and a longer check-in process, as well as a veritable obstacle course of bomb-sniffing dogs, trace detectors, high-tech body scanners and thousands of new TSA baggage screeners will likely

²⁰⁶ See Ravich, *supra* note 19, at 7.

²⁰⁷ See, e.g., *Secure Flight & Registered Traveler*, *supra* note 28 (testimony of Sparapani) (warning that the ACLU suspects that “TSA will soon begin to apply the Secure Flight concept to those who travel by train, interstate bus, boat and ferry”).

²⁰⁸ See TSA, *supra* note 20.

²⁰⁹ See BRASCH, *supra* note 18, at 12. *But see* Mark V. Tushnet, *Emergencies and the Idea of Constitutionalism*, in *AT WAR WITH CIVIL LIBERTIES AND CIVIL RIGHTS* 177, 177 (Thomas E. Baker & John F. Stack, Jr. eds., 2006) (suggesting that “a race-based classification system that would be unconstitutional during peacetime might be constitutional during wartime—not because the constitutional standards differ, but because their rational application leads to different results”).

²¹⁰ See Ravich, *supra* note 19, at 15 (discussing the improper use of expensive, secret computerized security profiles).

²¹¹ See Goldberg, *supra* note 25, at 103.

be required to implement this policy.²¹² Increasing security precautions in this way could be massively expensive.²¹³ Nevertheless, having to be at the airport for an extra hour or two before one's flight is a small price to pay in exchange for protecting not only all travelers' physical safety, but also each passenger's constitutionally guaranteed civil rights.²¹⁴

CONCLUSION

Racial profiling, or indicia of it, is unconstitutional and often ineffective in eliminating the threat of terrorist attacks on commercial aircraft. In fact, the use of racial profiling to detect terrorists hinders the anti-terrorist effort more than it bolsters it: profiling serves to "divert[] precious anti-terrorism resources, alienate[] potential allies in the anti-terrorism struggle, and is inconsistent with cherished notions of freedom and equality" because it is contrary to basic rights guaranteed by the U.S. Constitution.²¹⁵ As others have suggested, the ability to travel by airplane is not a right, but rather a privilege.²¹⁶ Those who would prefer not to have their things and their person carefully examined are

²¹² See *id.* at 103–04.

²¹³ See Harcourt, *supra* note 176, at A21. Groups of concerned citizens, such as the nearly 24,000-member Coalition for Airline Passenger's Bill of Rights, have formed to petition Congress to pass legislation to protect airline passengers. See Flyersrights.org, About Us, <http://flyersrights.org/about.php> (last visited Nov. 19, 2009). FlyersRights.org was founded by Executive Director Kate Hammi, one of hundreds of passengers who was stranded on a plane for hours in December 2006. See *id.* An online petition currently featured by the Coalition on the flyersrights.org website proclaims, "[p]lease support the greatly needed Airline Passenger Bill Of Rights. We are committed to solutions for promoting airline passenger policies that forward first and foremost the safety of all passengers while not imposing unrealistic economic burdens that adversely affect airline profitability or create exorbitant ticket price increase." See Flyersrights.org, Airline Passenger Bill of Rights, at <http://www.petitiononline.com/airline/petition.html> (last visited Nov. 19, 2009). As of November 19, 2009, the petition had 27,071 signatures. See *id.* The organization takes some credit for the introduction by Senator Barbara Boxer and Representative Michael Thompson of Passenger Bill of Rights legislation in their respective houses. See Flyersrights.org, Who We Are/About the Issue, at <http://flyersrights.org/> (last visited Nov. 19, 2009). Four airline passenger rights bills are currently pending in Congress. See Airline Passenger Bill of Rights Act of 2009, S. 213, 111th Cong. (2009); Airline Passenger Bill of Rights Act of 2009, H.R. 624, 111th Cong. (2009); FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. (2009); FAA Air Transportation Modernization and Safety Improvement Act, S. 1451, 111th Cong. (2009).

²¹⁴ But see Ravich, *supra* note 20, at 56–57.

²¹⁵ See LCCREF, *supra* note 19, at 21.

²¹⁶ See Ravich, *supra* note 19, at 5 n.15 (citing the reasoning of a former president and chairman of American Airlines).

of course free to travel by other means.²¹⁷ In the meantime, uniform screening of airline passengers achieves several goals. First, it eliminates the discrepancy in the way TSA treats individuals in light of their cultural, ethnic and religious backgrounds. Second, it provides for 'equal scrutiny' and thus ensures equal protection. Third, it prevents the possibility that unsuspecting passengers whose profiles fail to trigger a match with the government's No Fly and selectee lists under Secure Flight will board flights while unknowingly carrying ticking explosive devices.

Decades ago, security experts realized that profiling is less effective than consistent, uniform X-raying of each passenger's luggage, suggesting that a combination of X-raying and the development of more advanced screening devices would bring the government significantly closer to developing an aviation security system that is both effective *and* constitutionally sound. Even if it is not mandated by the government, TSA can and should establish a universal, race-blind approach and corresponding procedures to establish airline security programs that can simultaneously eliminate threats to aviation security without infringing on travelers' constitutional rights.²¹⁸

Achieving security for all commercial airline passengers while refusing to compromise on travelers' civil liberties? Nothing could be more patriotic.

²¹⁷ See *id.*

²¹⁸ See *id.* at 10 (citing Nojeim, *supra* note 121, at 6).