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All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky

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I. INTRODUCTION

THERE IS a crisis occurring in the skies over the United States, and indeed, the world. Cheaper air travel has re-

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sulted in a record number of air passengers,[1] which has in turn led to cramped conditions on board airplanes and poor treatment by airline employees.[2] As a consequence, airlines are reporting dramatic increases in the number of incidents involving unruly passengers—from verbal assaults to horrific violence.[3]

Many airlines have responded to this increase in violence, known as "air rage,"[4] by not only filing criminal charges through state and federal criminal systems,[5] but also by banning violent passengers from ever flying again.[6] In fact, an industrywide ban

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[1] *See* Suzi T. Collins & John Scott Hoff, *In-Flight Incivility Today: The Unruly Passenger*, 12 AIR AND SPACE LAW. 1 (1998); *U.S. FAA Annual Aviation Forecast Predicts Increase in Air Travel Demand*, AIRLINE INDUSTRY INFO., Mar. 26, 1999.

[2] *See* Joanna Weiss, *American Airlines Passenger Left Window Seat, Landed in Jail*, BOSTON GLOBE, August 11, 1999; *see also* 145 CONG. REC. S1325 (1999) (reporting a statement by Sen. Wyden to the Senate Committee on Commerce, Science and Transportation: "[W]hen people are treated like so many pieces of cargo, it's not surprising that some of them will lash out."). Congress has been considering a Passenger Bill of Rights (Airline Passenger Fairness Act) to try to alleviate the poor traveling conditions that many passengers face, and hopefully reduce incidents of air rage. *See id.*

[3] *See, e.g.*, Dan Reed, *The Latest Rage; Airlines are taking tough steps as they report seeing more passengers flying off handle*, FORT WORTH STAR-TELEGRAM, August 15, 1999, at B1; Laura Brown, *Fla. man arrested at Logan in 'air rage' incident*, BOSTON HERALD, August 14, 1999, at 5; Carolyn Kleiner, *Coffee, tea, or a jail term?*, U.S. NEWS & WORLD REPORT, November 16, 1998, at 81.

[4] "Air rage" defined:

> The term air rage has been coined to describe conduct occurring during air travel, which can fall anywhere on a behavioral continuum from socially offensive to criminal. Air rage describes intentional acts that are highly disproportionate to motivating factors, which endanger the flight crew and/or other passengers and potentially jeopardize the safety of the aircraft itself.

Nancy Lee Firak and Kimberly A. Schmaltz, *Air Rage: Choice of Law for Intentional Torts Occurring in Flight Over International Waters*, 63 ALB. L. REV. 1, 7 (1999). Air rage is also sometimes referred to as "sky rage" or "cabin fever." *Id.* at 8.

[5] Specifically, the Federal Aviation Act makes it a criminal offense for a person to assault or intimidate a member of the flight crew in a way that interferes with his or her ability to perform his or her duties. *See* 49 U.S.C. § 46504.

[6] *See, e.g., Controlling Unruly Fliers: Airlines Consider Blacklisting Troublemakers*, USA TODAY TRAVEL GUIDE (Nov. 3, 1998) <http://www.usatoday.com/life/travel/business/t1103uf.htm>; Julia Malone, *Airlines Faulted for Not Resolving Problems Before Passenger Rage Erupts*, AUSTIN AMERICAN-STATESMAN, August 18, 1999. Interestingly, U.S. airlines acknowledge privately that blacklisting could lead to legal problems, but neither they nor their trade association will comment publicly on the matter. *See Controlling Unruly Fliers: Airlines Consider Blacklisting Troublemakers*, USA TODAY TRAVEL GUIDE (Nov. 3, 1998) <http://www.usatoday.com/life/travel/business/t1103uf.htm>.

on passengers identified as unruly has even been proposed by the Secretary of Transportation.[7]

This comment will analyze the legal implications of outright bans instituted by airlines. The comment will begin with Section II identifying the problem now being faced in the sky. Section III will address the constitutional right to travel and how it affects bans on air travel. Section IV will consider specific provisions of the Federal Aviation Act and the requirements it imposes on airlines regarding denial of passage. Finally, Section V will discuss common carrier responsibilities and how they weigh into the picture.

II. THE PROBLEM OF UNRULY PASSENGERS

A. How Bad Is The Problem?

The problem of unruly passengers on airlines has received much attention in the general news media recently. The examples range from the mildly amusing to the truly outrageous:

A woman got into an argument with an American Airlines flight attendant about getting around the meal cart in the middle of the aisle in order to get back to her seat. The woman used "the f-word" and was subsequently banned from all future American Airlines flights.[8]

A 200-pound college football player on a cross-country US Airways flight began suffering delusions that he was Jesus Christ and attempted to enter the cockpit so that he could bless the pilots. In his attempt to get to the cockpit, he shoved one flight attendant to the floor and flung another across three seats, causing her to suffer internal bleeding, kidney and bladder trauma, spinal trauma, and bruises on her back and stomach. Three male passengers, who finally subdued the unruly passenger by tying him up, sustained bite wounds and cuts.[9]

An inebriated businessman on a United Airlines flight, when refused another drink, pulled down his pants and defecated on a food cart.[10]

A man on a Delta Airlines flight from Atlanta to England became enraged after a flight attendant determined that he had had enough to drink and refused to serve him. The passenger,

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[7] *See* Reed, *supra* note 3.

[8] *See* Weiss, *supra* note 2.

[9] *See* Elliot Neal Hester, *Flying in the Age of Air Rage*, Salon Travel (Sept. 7, 1999) <http://www.salon.com/travel/diary/hest/1999/09/07/rage/>.

[10] *See* Collins & Hoff, *supra* note 1, at 21.

who was nearly six-and-a-half feet tall, attacked two flight attendants, injuring one so severely that she could not return to work for months.[11]

A flight attendant and three crewmembers were injured when a female passenger became enraged when the flight attendant refused to serve her another sandwich.[12]

Two passengers on a Continental Airlines flight barged into the first-class cabin, tried to force open the door to the cockpit, and poured a pot of hot coffee over a flight attendant.[13]

A drunk passenger on a U.S. Air flight assaulted a flight attendant because she refused to serve him another drink. The passenger threatened to open the door and throw the flight attendant out of the airplane.[14]

Beyond the anecdotal evidence are telling statistics that illustrate the story just as vividly. In 1991 the Federal Aviation Administration (FAA) investigated 141 cases involving interference with airlines employees.[15] In 1997 that number jumped to 284 investigations,[16] and those statistics seem to understate the problem.

Problems on American Airlines have more than tripled since 1994, to 921 incidents in 1997.[17] Shelley Longmuir, Vice President of Government Affairs for United Airlines, testified before the House Subcommittee on Aviation that United alone had approximately 450 incidents involving unruly passengers in 1997.[18] Further, the Air Transport Association, the trade association for the major U.S. airlines, estimates that there were several thou-

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[11] *See* Reed, *supra* note 3.

[12] *See* Collins & Hoff, *supra* note 1, at 21.

[13] *See Woman Gets 2 Years for Belligerence on Airliner*, LOS ANGELES TIMES, June 30, 1998, at B4.

[14] *See* Collins & Hoff, *supra* note 1, at 21. This list of examples here is by no means exhaustive. *See* Collins & Hoff, *supra* note 1, at 21, for many more examples, some even more egregious than the ones listed here. *See also* B.J. Sigesmund, *Attacks Have Airlines Angry*, NEWSWEEK.COM (Nov. 7, 1998) <http://www.dailydavos.com/nw-srv/issue/19_98b/tnw/today/ps/ps01fr_1.htm>.

[15] *See* Andy Sher, *Frist Sponsors Unruly Airline Passengers Bill*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, May 30, 1999, at B7.

[16] *See id.*

[17] *See Seeing Red Over Air Rage (Mounting crackdown on unruly passengers)*, CONSUMER REP. TRAVEL LETTER, Feb. 1999, at 15. According to a spokesman for American Airlines, "It is increasing, and our attention to it is certainly increasing." Reed, *supra* note 3.

[18] *Problem Airline Passengers; Limiting Carry-on Baggage Before the Subcomm. On Aviation* (June 11, 1998) (statement of Shelley Longmuir, Vice President of Government Affairs for United Airlines, Inc.).

sand incidents involving unruly passengers on major U.S. airlines in 1997.[19]

The problem of unruly passengers has even become so great that Lloyds of London has created an insurance policy to provide coverage to airlines for the costs of air rage incidents, such as having to divert aircraft to other airports and compensating employees and passengers for injuries and economic losses stemming from the incidents.[20]

B. Reaction By The Airlines and The Federal Government

The source of this increase in problems in the sky is the subject of much discussion. It seems that each group has its own agenda and, consequently, points a finger at a different problem. For instance, a former airline executive who is now the president of the International Airline Passengers Association blames the problem on unions, saying that unionized flight attendants don't take pride in their work, looking at it as "just a job" due to the fact that they have "union protection."[21] Mothers Against Drunk Drivers places the blame squarely on airline alcohol policies.[22] At the same time, some take the view that airlines are inflating the whole problem of air rage in order to divert attention away from the lack of service and crowded conditions on airplanes today.[23] Some people at the airlines even point to themselves. For example, a captain at a major U.S. airline says: "What's happening is the industry's own fault. We've got to treat passengers with respect. We've made air travel a very unpleasant experience. It's a service industry, but airlines are trying to make passengers airline-compliant, when they

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[19] *See Seeing Red Over Air Rage, supra* note 17. In Britain, air rage incidents that resulted in arrest more than doubled from 1998 to 1999. *See* Mark Hodson, *Busier Skies Are Safer*, Sunday Times (London), Jan. 30, 2000. Airlines and airports are in a quandary, though. While they need to highlight the incidents that do occur in order to get support for action by the government, they risk scaring off passengers if the public begins to identify a particular airline or airport as especially dangerous. *See, e.g.*, J.M. Lawrence, *Teen Charged with Being Unruly on Hub-N.Y. Jet*, Boston Herald, Dec. 13, 1999, at 19 (reporting four air rage arrests in three weeks at Boston's Logan Airport, but noting that airport officials emphasize the tens of millions of passengers flying from Logan each year and the rarity of air rage incidents at the airport).

[20] *See* Carolyn Aldred, *Airlines Looking At Ways to Quell Air Rage Risks*, Business Insurance, Jan. 3, 2000, at 17.

[21] *See* Julie Carr Smyth, *Air Rage—A Real Threat or Smoke Screen For the Airlines?*, Austin American Statesman, Jan. 2, 2000, at E1.

[22] *See id.*

[23] *See id.*

should be making the airline passenger-compliant."[24] Psychologist Nathan Pollack suggests that the powerlessness that people experience in their work leads to dangerous frustration.[25] And interestingly, some have even pointed to a lack of oxygen as the culprit.[26]

Whatever the cause may be, this rise in unruly behavior has led to actions by the airlines and law enforcement authorities. Federal regulations prohibit a person from "assault[ing], threaten[ing], intimidat[ing], or interfere[ing] with a crewmember in the performance of the crewmember's duties aboard an aircraft . . . ."[27]

Stiff penalties already exist for problem passengers.[28] Passengers who engage in unruly behavior can be imprisoned for up to 20 years and receive fines of up to $250,000.[29] Unruly passengers are also being made to reimburse airlines for extra costs incurred due to unruly incidents, such as the costs associated with making unscheduled stops in order to deplane unruly passengers.[30] These costs can sometimes be exorbitant, though, so collecting anything can be costly to the airlines as well. In Canada, unruly passengers who endanger the safety of a flight can be sentenced to life imprisonment.[31]

In addition, the airline industry is working closely with the federal government to combat the problem. Efforts are underway "to elevate the priority of aviation crimes, particularly with respect to prosecuting passengers that interfere with crew members."[32] Airlines are working with the Department of Justice to coordinate federal, state, and local government responses to in-

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[24] *See* Francis Fiorino, *Passengers Who Carry 'Surly Bonds of Earth' Aloft*, AVIATION WK. & SPACE TECH., Dec. 28, 1998, at 123.

[25] *See Phone Calls and Driving Don't Mix*, TORONTO STAR, Feb. 3, 2000.

[26] *See Are Unruly Passengers Oxygen-Deprived?*, AIR SAFETY WEEK, Nov. 22, 1999.

[27] 14 C.F.R. § 121.580 (1999).

[28] One passenger, it seems, received the stiffest penalty of all after punching a pilot and trying to choke a flight attendant. A doctor on board the flight injected this unruly passenger with a tranquilizer. The passenger died shortly thereafter, due to the tranquilizer reacting with other drugs or alcohol that the man had been taking. *See Passenger Injected with Tranquilizers Dies on Airplane*, ST. LOUIS POST-DISPATCH, Dec. 6, 1998, at B7.

[29] *See* Benjamin Pimentel, *New Federal Campaign Concentrates on Drunk Airline Passengers*, SAN FRANCISCO CHRONICLE, Nov. 18, 1997, at A22; *see also* Kleiner, *supra* note 3.

[30] *See* Kleiner, *supra* note 3.

[31] *See Battles in the Sky Under Discussion Committee Looks at Ways to Combat Air Rage*, EDMONTON SUN, Jan. 17, 2000, at 15.

[32] *See Problem Airline Passengers*, *supra* note 18.

cidents and to compile a prosecution manual that will discuss and speed up prosecution of these incidents.[33] Furthermore, American Airlines has begun issuing written notices to unruly passengers, warning them that they may be in violation of federal law and directing them to cease their behavior immediately.[34]

Beyond these penalties, some airlines have resorted to banning unruly passengers from future flights.[35] British Airways and Virgin Atlantic Airways are advocating a system that would create a worldwide blacklist, banning unruly passengers from future flights.[36] In the United States, United's Vice-President for Government Affairs said as much while testifying to Congress: "[L]et me be very clear: United intends to see that abusive passengers who remain a threat to employees or fellow passengers are prohibited from flying United . . . [T]hey are no longer welcome on our airline."[37]

Other airlines are following suit. For example, American Airlines petitioned the U.S. Attorney General's Office and the Department of Transportation to prosecute unruly passengers.[38] American spokesman John Hotard said: "The customer is not always right, and there are some we do not want on our airplanes."[39]

Northwest Airlines, in instituting a ban against one man who assaulted a pilot at a ticket counter, informed other airlines of

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[33] *See id.*

[34] *See Seeing Red Over Air Rage*, *supra* note 17. "The process is similar to a soccer referee handing a 'yellow card' to a player, warning that one more infraction will lead to disqualification." Reed, *supra* note 3. On international flights (but not domestic ones), the pilot of the airplane has the right to lock unruly passengers in the lavatory until the plane lands. *See* Steven A. Mirmina, *Aviation Safety and Security – Legal Developments*, 63 J. AIR L. & COM. 547, 561 (1998).

[35] *See* Lee Rood, *Rage Takes to the Skies: Passengers and Airlines Get Ugly with Each Other*, DES MOINES REGISTER, Aug. 1, 1999, at 1.

[36] *See World News Roundup*, AVIATION WK. & SPACE TECH., Nov. 9, 1998, at 31; *see also Airlines May Blacklist Violent Passengers For Life*, L.A. TIMES, Nov. 3, 1998, at C3. This blacklisting does not seem to be working, however. *See* Richard Thomas, *How We Broke Branson's 'Air Rage' Ban*, OBSERVER, Nov. 15, 1998, at 12.

[37] *See Problem Airline Passengers*, *supra* note 18.

[38] *See Seeing Red Over Air Rage*, *supra* note 17.

[39] *Id.*; *see also* Weiss, *supra* note 2 (reporting American's lifetime ban of a passenger due to her using expletives toward a flight attendant); Malone, *supra* note 6 (quoting an American Airlines spokesman acknowledging American's imposition of lifetime bans on unruly passengers).

its actions against the man.[40] Continental Airlines banned a passenger who attacked and broke the neck of a gate agent in Newark, and Continental's CEO has expressed a desire that the passenger never be allowed to fly on any airline again.[41]

The federal government is getting in on the action as well. Legislation was introduced in late spring of 1999 to institute a one-year ban on unruly passengers, which will be imposed by the Secretary of Transportation.[42] Some have suggested that the ban be forever.[43] This comment focuses on the legal implications of such bans.

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[40] *See* Collins & Hoff, *supra* note 1, at 23. By November 1998, Northwest had banned three passengers for punching people. *See Controlling Unruly Fliers*, *supra* note 6.

[41] *See Unruly Passengers Challenge Airlines*, AVIATION WK. & SPACE TECH., Oct. 25, 1999, at 60.

[42] *See* S. 1139, 106th Cong. (1999) (proposing the one year ban and providing for a $25,000 fine to airlines if they provide travel to a banned passenger); *see also* Sher, *supra* note 15; Richard Powelson, *Frist Chalked Up String of Small Victories*, KNOXVILLE NEWS-SENTINEL, Jan. 9, 2000, at H2 (noting the bipartisan effort of Sen. Bill Frist of Tennessee and Sen. Harry Reid of Nevada to impose air travel bans on unruly passengers). In the words of Sen. Reid:

> We need not only to punish passengers who threaten the safety of [other] passengers. We also need to give airlines the power to prevent particularly violent or disruptive passengers from committing similar acts in the future. When someone drives in an unsafe manner on our roads, local police have the power to fine them. When that someone commits the same offenses repeatedly, or drives in a way that is especially dangerous, local authorities have the power to revoke or suspend their driver's licenses—to take those drivers off the road. I think we need to do something similar with air travelers who commit particularly dangerous acts, or who insist on repeatedly disrupting airline flight crews. We need them off of our airlines, so that they do not have the opportunity to jeopardize the lives of other passengers in the future. . . . When we . . . get . . . on an airplane, we should be able to sit back and relax, confident in the knowledge that [airline personnel] can perform the jobs they were trained to do without interference by unreasonable or violent passengers. We should also be able to board an airline secure in the knowledge that the man or woman sitting in the seat next to us, doesn't have an extensive history of violent or disruptive behavior on airplanes. We should also have the security of knowing that if a passenger does choose to commit a particularly unruly or violent act that threatens the safety of other passengers or the flight crew, that passenger won't be able to get on another airplane tomorrow and do the same thing to another unsuspecting planeload of passengers.

145 CONG. REC. S 6050 (daily ed. May 26, 1999) (statement of Sen. Reid).

[43] *See* Reed, *supra* note 3. "If enacted, such a ban would amount to blacklisting people who have lost control in the air or at airports." *Id.*

III. THE CONSTITUTIONAL RIGHT TO TRAVEL

A. History and Significance of the Right

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution."[44] This constitutional right to travel was first recognized in *Crandall v. Rule 10.2.1(c) Nevada*,[45] in which the state of Nevada levied a tax of $1.00 on all passengers[46] leaving the state.[47] The Supreme Court found that there did indeed exist a constitutional right to travel, and the tax was struck down.[48] The Court observed:

> [I]t may be said that a tax of one dollar for passing through the State of Nevada, by stage coach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.[49]

The Court later noted the "large social values" of the freedom to travel:

> Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life – marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe

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[44] United States v. Guest, 383 U.S. 745, 758 (1966); *see also* Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (noting that the Constitution does not explicitly mention the right to travel because such "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."); Cramer v. Skinner, 931 F.2d 1020, 1029 (5th Cir. 1991) ("Although no clause in the Constitution specifically provides a right to interstate travel, the Supreme Court has inferred this right from various constitutional provisions and from the structure of the federal system itself."); Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

[45] 73 U.S. 35 (1867).

[46] Stagecoach and railroad passengers. *See id.* at 46.

[47] *See id.*

[48] *See id.* at 44-45.

[49] *Id.* at 46.

> and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.[50]

Justice Douglas, dissenting in *Zemel v. Rusk*, further stated the importance of the right to travel:

> The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press . . . The ability to understand this pluralistic world, filled with clashing ideologies, is a *prerequisite* of citizenship if we and the other peoples of the world are to avoid the nuclear holocaust.[51]

B. Implicating the Right

"A . . . law implicates the right to travel when it actually deters such travel, [or] when impeding travel is its primary objective . . . ."[52] A law that does implicate the right to travel is subject to strict scrutiny by the courts.[53] A compelling state interest must be shown in order to justify laws that burden the right to travel.[54] And even if there is a legitimate and substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[55]

1. Are Bans Sufficiently Restrictive?

The issue thus turns on whether passenger bans are instituted with the objective of impeding travel or if deterrence of travel results. Case law lends little directly in this area, but there are several circuit cases that address this issue indirectly.

The Fifth Circuit has held that "[m]inor restrictions on travel simply do not amount to the denial of a fundamental right

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[50] Kent v. Dulles, 357 U.S. at 126-27 (citation omitted).
[51] 381 U.S. 1, 24 (Douglas, J., dissenting) (emphasis added).
[52] Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986).
[53] *See id.*
[54] *See id.* at 905, n4.
[55] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

. . . ."[56] In *Cramer*, however, the court was taking on the issue of flight restrictions at Love Field under the Wright Amendment.[57] The court looked at whether the restrictions deterred passengers from travelling by air.[58] The focus of the court was the language of *Soto-Lopez*.[59] The court stated that the statute's history[60] showed that its purpose was not to impede travel but rather to carry out an agreement between neighboring cities, Dallas and Fort Worth.[61] Since the restrictions did not actually impede travel, due to the availability of another airport nearby[62] and the ability of the passenger to travel anywhere from Love Field by taking a second flight, the court held that there was no infringement on the right to travel.[63] The court specifically noted that the restriction did not deter the passenger from traveling by air, but instead merely restricted the distance a passenger could fly from one particular airport.[64] The court stated that "[i]f every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue."[65] The court continued here contrasting minor restrictions from major restrictions. A complete ban on air travel would most definitely be a major restriction in the court's eyes, and thus be subject to constitutional attack. One could make a strong argument that the court implied that a restriction that completely barred travel by air would violate the right to travel.

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[56] Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991).

[57] *Id.* The amendment "prohibits airlines from offering single ticket interstate service from Love Field except to the four states contiguous to Texas . . . ." *Id.* at 1023. Passengers departing from Love Field who want to continue on outside of that area must purchase a separate ticket and change planes, and they are not allowed to check baggage for the entire journey. *See id.*

[58] *See id.* at 1031.

[59] *See id.*

[60] *I.e.*, the legislative history of the Wright Amendment, or the "Love Field amendment," as the court refers to it.

[61] "The Love Field amendment carries out the agreement between Dallas and Fort Worth that ended the competition between those cities for the area's principal airport." *Cramer*, 931 F.2d at 1031. The court continued: "Congress enacted the Love Field amendment incident to its legitimate regulation of interstate airline service and pursuant to its rational decision to maintain the agreement between Dallas and Fort Worth." *Id.* at 1032.

[62] Dallas-Fort Worth International Airport (DFW), which is 18 miles from the center of Dallas and only 12 miles from Love Field. *See Cramer*, 931 F.2d at 1023.

[63] *See id.* at 1031.

[64] *See id.*

[65] *Id.*

Another Fifth Circuit case contains language that might be used against an argument that a ban on passengers would be a violation of the constitutional right to travel. In *City of Houston v. FAA* the court stated that there is no constitutional right to the most convenient form of travel.[66] That statement, however, was made in the context of a claim regarding a perimeter rule from a certain airport (similar to the Wright Amendment restrictions on Love Field).[67] A complete ban on air travel is obviously much more prohibitive than the restrictions discussed in these cases. The Fifth Circuit would apparently agree, conceding that a ban on using a particular airport "might well give rise to a constitutional claim."[68]

The District of Columbia Circuit considered the Wright Amendment issue, too, and reached the same conclusion.[69] In a case that was "virtually identical"[70] to *Cramer*, that circuit, as the Fifth had, relied on the language of *Soto-Lopez*, examining the statute at issue and looking to see if its primary objective was to impede travel or if it actually deterred travel.[71] This court found that the purpose of the Wright Amendment was actually to encourage interstate travel by channeling passengers through the new airport, DFW.[72] As to whether the Wright Amendment actually deterred travel, the court found any interference, which the court described as having to drive six more miles past Love Field to DFW, to be merely "trivial."[73] Again, though, that inconvenience is quite trivial, and incomparable to the situation in which a passenger is banned from all air travel.

The Ninth Circuit recently had occasion to visit the right to travel issue in *Miller v. Reed*.[74] That case dealt with an individual who had been denied a driver's license by the state of California

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[66] 679 F.2d 1184, 1198 (5th Cir. 1982).

[67] The rule at issue in this case prohibited nonstop flights between Washington National Airport and any other airport more than 1000 miles away. *See id.* at 1187. When the court held that there is no right to the most convenient form of travel, it was speaking of the inconvenience of either using another airport in the Washington, D.C. metropolitan area (such as Dulles) or by using National Airport but having to make a stopover rather than flying nonstop. *See id.*

[68] *Id.* at 1192.

[69] *See* Kansas v. United States, 16 F.3d 436 (D.C. Cir. 1994).

[70] *Id.* at 439.

[71] *See id.* at 441.

[72] *See id.* at 441-42.

[73] *Id.* at 442.

[74] 176 F.3d 1202 (9th Cir. 1999).

and claimed that that the denial violated his right to travel.[75] This court also focused on the language of *Soto-Lopez*, and found that the primary objective of requiring a driver's social security number was not to impede interstate travel.[76] Instead, the plaintiff argued that denying him a driver's license deprived him of an essential mode of transportation.[77] The court, relying on Ninth Circuit precedent,[78] held that "burdens on a single mode of transportation do not implicate the right to interstate travel."[79] Its holding should be construed narrowly, though, since it also quoted a Supreme Court of Rhode Island case which differentiated denial of a driver's license from being "prevented from traveling . . . by common carrier."[80] In the case of an individual being banned from an airline or from all air travel, common carrier implications do come into play. This differentiation by the Supreme Court of Rhode Island and the Ninth Circuit suggest that bans on travel by common carriers would involve right to travel issues. See Section V, *infra*, for a discussion of the duties of common carriers. Also, "[t]he reality of modern life is such that air travel is often the only viable means of travel,"[81] so one might argue that banning a single form of

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[75] *See id.* Miller refused to supply his social security number on his driver's license renewal form, as required under California law. *See id.* at 1204. His refusal was based on his religious beliefs. *See id.*

[76] *See id.* at 1205. The purpose of the statute was "to aid the state in the identification and collection of child support obligations, tax obligations, and delinquent fines, bail, or parking penalties." *Id.* at 1204. The court noted that Miller had no children and had no outstanding child support obligations, taxes, fines, bail, or parking penalties, thus dismissing the possibility that his refusal to provide his social security number was somehow related to his trying to evade one of the enumerated obligations. *See id.* at 1204.

[77] *See* 176 F.3d at 1205.

[78] *See* Monarch Travel Servs. Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552, 554 (9th Cir. 1972). *Miller* quotes this case: "A rich man can choose to drive a limousine; a poor man may have to walk. The poor man's lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional." 176 F.3d at 1205-06. That case, though, dealt with the issue of cost and affordability. It did not consider industry or government sanctioned bans on travel.

[79] *Miller*, 176 F.3d at 1205. The court also cited the *City of Houston v. FAA* case discussed and distinguished above. *See id.* at 1206. Although this court mentions the right to interstate travel, there is a recognized right to *intrastate* travel as well. *See generally* Gregory J. Mode, Comment, *Wisconsin, A Constitutional Right to Intrastate Travel, and Anti-Cruising Ordinances*, 78 MARQ. L. REV. 735 (1995) (discussing how the right has been addressed by the Supreme Court and the split among the circuit courts).

[80] *Id.* at 1206 (quoting Berberian v. Petit, 374 A.2d 791 (1977)).

[81] Katherine Warner, Comment, *You Can't Get There From Here: Travel Restrictions and the Airlines*, 58 J. AIR L. & COM. 345, 348 (1992).

travel, namely air travel, does constitute a sufficient impediment on the right to travel.

It is important to remember the language, excerpted above, used by the Court in *Crandall*: "one or more States covering the only *practicable* routes of travel from the east to the west, or from the north to the south, may totally *prevent or seriously burden* all transportation of passengers . . . ."[82] One could most definitely make a strong case that in today's lightening-quick world, air transportation is the only "practicable" route of travel if one is to actively participate in society. One could similarly conclude that a ban on air travel "seriously burdens" transportation to passengers against whom a ban is enforced. Significant precedent exists, it would seem, to support this argument.

Using the standard established by the line of cases just discussed, it appears that passenger bans would rise to the level required by the courts. An outright ban on passengers is obviously imposed with the objective of impeding travel, and it in fact does deter travel for those passengers who have received a ban. Thus, banning passengers from air travel seems to implicate the Constitution.

2. *Are Airlines State Actors?*

The nature of any ban, or more precisely, who imposes a ban on a passenger, may affect its constitutionality. Specifically, for constitutional claims to stand, the illegal action must be taken by a state actor or "under color of state law."[83]

The question, then, would be whether airlines, in imposing or enforcing bans on passengers, could be considered state actors. According to the Supreme Court, "there is 'state action' whenever the 'State has so far insinuated itself into a position of interdependence [with the otherwise "private" person whose conduct is allegedly violative of a constitutional provision] . . .

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[82] *Crandall*, 73 U.S. at 46 (emphasis added).

[83] *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); United States v. Guest, 383 U.S. 745 (1966). The Court in *Guest* held that to constitute state action, "the involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the [Constitution] even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Id.* at 755-56.

that it must be recognized as a joint participant in the challenged activity."[84]

The Ninth Circuit has held that a search by an airline employee pursuant to government regulations is performed under color of state law. In *United States v. Davis,* a TWA employee found a loaded revolver in a passenger's baggage while conducting a search of carry-on baggage.[85] The court held "that the United States was sufficiently implicated in this airport screening search . . . ."[86] The court stated:

> The search . . . was part of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers. The major governmental effort to meet the threat of hijacking began in late 1968, when hijacking of commercial aircraft reached serious proportions, and intensified steadily thereafter. Various techniques . . . have been a part of that effort. *At no time since late 1968 could activities of this kind at the nation's airports have been described accurately as "an independent investigation by the carrier for its own purposes . . . .*"[87]

The federal statute that allows airlines to refuse to transport passengers[88] was one of these "various techniques" employed as part of the anti-hijacking effort and, thus, by the words of the *Davis* court, involves the government as well. As the court stated,

> [E]ven if the governmental involvement . . . could be characterized accurately as mere "encouragement" or as "peripheral, or . . . one of several cooperative forces leading to the [alleged] constitutional violation," that involvement would nevertheless be "significant" for [constitutional] purposes. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "pri-

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[84] United States v. Price, 383 U.S. 787, 794-95 n.7 (1966) (citation omitted). As will be seen in the cases presented below, state action also encompasses federal action. *See, e.g.*, United States v. Davis, 482 F.2d 893, 897 n.3 (9th Cir. 1973) ("The government has suggested no reason why the rules applied in distinguishing private action from action by a state under the Fourteenth Amendment should not also be applicable in distinguishing private action from action by the United States . . . ."). *See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Butz v. Economou, 438 U.S. 478, 504 (1978) ("[It would be] untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

[85] 482 F.2d 893 (9th Cir. 1973).

[86] *Id.* at 895.

[87] *Id.* at 897 (emphasis added).

[88] *See* 49 U.S.C. § 44902(b).

vate" persons or entities that is prohibited to the government itself.[89]

Another Ninth Circuit opinion issued shortly thereafter clarified the reasoning in *Davis*: "[S]ince the search was conducted as part of the [airline security program]" it involved state action.[90] The search of a passenger's bag by an airline employee in that case was held not to be under color of state law because the employee was not inspecting the bag pursuant to the airline's inspection procedure but rather to satisfy his own curiosity.[91] Presumably, then, if the airline employee had been inspecting the bag pursuant to airline procedure, which is regulated by the FAA, he would have been acting under color of state law. As discussed in Section III, *infra*, an airline's denial of passage to an individual is governed by FAA regulations as well, so any action by the airlines in this area implicitly involves the government.[92] The significance of this regulation by the federal government was noted by the Supreme Court: "Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."[93]

A more recent Ninth Circuit case may be more telling: "[t]he government policy doesn't have to be formal, but it does have to compel the challenged action."[94] What constitutes compulsion then, may become very important. In this Ninth Circuit case, Mathis, an employee of a contractor at a nuclear power plant was barred from the plant after an undercover agent of the power plant reported that Mathis had agreed to sell marijuana.[95]

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[89] *Davis*, 482 F.2d at 904 (alteration in original) (quoting United States v. Guest, 383 U.S. 745, 755-756 (1966)).

[90] United States v. Ogden, 485 F.2d 536, 538 (9th Cir. 1973).

[91] *See id.* at 539.

[92] The involvement of the federal government in the actions of airlines has been recognized by the courts: "Congress intended boarding procedures—including the decision to eject passengers during boarding—to remain the province of the agency regulating interstate carriers." Hirsch v. American Airlines, 608 N.Y.S.2d 606, 608 (1993) (citing O'Carroll v. American Airlines, 863 F.2d 11, 12-13 (5th Cir. 1989)). This states, explicitly, that the federal government is in control of the situation, and any action by an airline is through the authority and supervision of the FAA.

[93] Schaeffer v. Cavallero, 29 F. Supp. 2d 184, 186 n.2 (S.D.N.Y. 1998) (quoting Northwest Airlines Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

[94] Mathis v. Pacific Gas & Elec. Co., 75 F.3d 498, 503 n.2 (9th Cir. 1996).

[95] *Id.* at 501.

The power plant was a private entity, but Mathis claimed that "its acts were imbued with governmental authority" because, *inter alia*, it acted under the policies of the Nuclear Regulatory Commission (NRC), a public agency.[96] The court held that to prove federal action Mathis would need to show that the power plant barred him pursuant to an NRC "standard of decision for the exclusion of illegal drug users from protected areas,"[97] as opposed to merely showing that the power plant "was aware of a generalized federal concern with drug use at nuclear power plants . . . ."[98]

Certainly airlines, in banning passengers pursuant to the current law, are basing their decisions on "a standard of decision" promulgated by the government; the Federal Aviation Act (FAA) specifically spells out when a passenger may be excluded.[99] And the proposed legislation discussed in Section II, *supra*, providing for a federal ban of passengers and fines for any airline that provides transportation to a banned passenger, would undeniably be acting under compulsion of the federal government under any definition of compulsion.

A district court from Colorado has also spoken on the compulsion issue.[100] The court in *United States v. Andrews* held, in a search context, that an airline must be under "statutory compulsion" in order for "the requisite governmental participation necessary to invoke constitutional protection" to be present.[101] The relevant regulatory statute in this area is 49 U.S.C. § 44902, aptly titled "Refusal to transport passengers and property."[102] That section of the statute sets out when an airline either must or may refuse service to a passenger. Certain instances require an airline to refuse to transport a person, but denying transport to a previously unruly passenger falls under the "permissive" portion of the statute, meaning that an airline is not required to refuse to transport but may choose to do so.[103] Thus, the FAA and the airlines will probably claim that banning unruly passengers is

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96 *Id.*

97 *Id.* at 502 (quoting Mathis v. Pacific Gas & Elec. Co., 891 F.2d 1429, 1434 (9th Cir. 1989)).

98 *Id.*

99 *See* Section IV, *infra*, for discussion of the Federal Aviation Act and the standard it sets out for allowing an airline to refuse to provide transportation to a passenger.

100 *See* United States v. Andrews, 474 F. Supp. 456 (D. Colo. 1979).

101 *Id.* at 460.

102 49 U.S.C. § 44902 (1994).

103 *Id.*

not compelled by FAA regulations,[104] but rather the airlines' desire, and in fact, need, to ensure the safety of their passengers and flights. Again though, as noted above, the parameters of what constitutes compulsion thus becomes very important in assessing whether the requisite federal action is present.

It is important to note that in *Andrews* the court was speaking in the specific context of a search engaged in by an airline as a "unilateral desire to aid in the enforcement of the law" by looking for narcotics.[105] The court was differentiating from the situation where the airline was engaging in a search under the security program of the Federal Aviation Administration.[106] Thus, the reasoning of the court in this case would likely not be applicable in a situation where an airline refuses transportation to a passenger for safety reasons, which is a direct interest of the FAA.[107]

The Ninth Circuit in *Mathis* mentioned another way of establishing state action.[108] The joint action theory attributes to the state actions of private persons who are willful participants in joint action with state officials. "A private person is liable under this theory . . . only if the particular actions challenged are inextricably intertwined with those of the government."[109] To show this in an airline situation, a passenger would have to show that the airline's "official character is such as to lend the weight of the State to his decisions."[110] A passenger might be able to show state action under this theory by focusing on the purpose and effect of teh implementation of the statute that allows airlines to refuse to transport passengers in certain instances, and showing how the FAA and the airlines work together to achieve this result.

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[104] Under the current law. If the proposed legislation referred to in Section II, *supra*, is passed, the banning of unruly passengers would not be permissive; it would be mandatory.

[105] *Andrews*, 474 F. Supp. at 461 (citation omitted).

[106] *See id.*

[107] See Section IV, *infra*, for further discussion of the statutory responsibilities of airlines.

[108] 75 F.3d at 503.

[109] *Id.* (citation omitted).

[110] *Id.* at 504 n.3 (quoting *Lugar*, 457 U.S. at 937). The passenger essentially would need to show that the airline was "jointly engaged with state officials in the prohibited action." *Id.* at 504 n.4 (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

The District of Columbia Circuit has held that an airline "is not transformed into a government actor by regulation."[111] That case, *Anderson*, dealt with a seating policy of USAir (and specifically not an FAA policy), which forbade blind passengers from sitting in an emergency exit row.[112] The court actually gave the issue little consideration and summarized, "USAir has not undertaken to perform a service for the government or entered into a symbiotic relationship with the government. The requisite interdependence is not reached here."[113]

It is important to note that while the court did not find action taken under color of state law in *Anderson*, it focused solely on the airline's seating policy and whether it derived from federal involvement in the airline industry. The court noted that since the blind passenger was only refused service in two of twenty-two seats on the aircraft, his right to travel was not violated.[114] One could argue that the court implies, then, that if the passenger had been denied travel altogether, there would have been a violation of that right. This may go to show the restrictiveness that the court sees in outright bans, as discussed above.

Going back to the government compulsion that both *Mathis* and *Andrews* spoke of, the Ninth Circuit, albeit in an earlier case, but perhaps one more similar in principle to the present discussion, held otherwise. In *Culbertson v. Leland* the court heard a case dealing with an Arizona statue that allowed innkeepers to seize, without notice or judicial procedure, the personal property of a lodger who doesn't pay rent.[115] The case involved a couple living in a room at a hotel.[116] The couple fell one week behind on their rent, and the hotel manager evicted them and seized their personal possessions in the room as security for the unpaid rent.[117] At no time was the manager an official of the State of Arizona, nor did she ever seek nor receive assistance from any state officials.[118] The evicted couple challenged the

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[111] Anderson v. USAIR, Inc., 818 F.2d 49, 56 (D.C. Cir. 1987).

[112] *Id.* at 51.

[113] *Id.* at 56.

[114] *See id.*

[115] 528 F.2d 426, 427 (9th Cir. 1975).

[116] *See id.*

[117] *See id.*

[118] *See id.* The court did note that a member of the Phoenix police department informed the hotel manager that she had the right to seize her tenant's personal property, but the court did not place any importance on this fact. *See id.*

manager's actions on due process grounds.[119] The court focused on the rights that the actor would have at common law, specifically noting that the statute conferred a right not normally available to the hotel manager at common law.[120] Similarly, common carriers under the common law had a duty to provide transportation to those who presented themselves.[121] The court in *Culbertson* held that the hotel manager's actions constituted state action and was a violation of the guests' due process.[122]

While the above discussion demonstrates that there might be some question as to bans instituted by airlines, government-sanctioned bans would be considered state action and thus subject to constitutional claims. For instance, even if airlines would not be considered as acting under color of state law due to the "permissive" refusal aspect of denying passage to persons whom the airlines feel might be "inimical to safety,"[123] the actions by the Secretary of Transportation to institute a one-year ban on unruly passengers would most certainly implicate constitutional concerns, since the government would then be directly and irrefutably involved in the action.[124] This might be an important point for the airline industry and the Department of Transportation to consider when crafting their strategy on how to implement bans.

It is worthwhile to note that even if state action is found, courts may still defer to governmental interests in cases dealing with safety on flights. In a criminal case, the Fifth Circuit re-

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[119] *See Culbertson*, 528 F.2d at 428. *See* Subsection 3, *infra*, for a discussion of procedural due process.

[120] *See id.* at 429.

[121] See Section V, *infra* for a discussion of the duties of a common carrier.

[122] *See Culbertson*, 528 F.2d at 432; *see also* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (holding that a Texas landlord's lien statute which gave the authority that was normally a function of the state (or, as in our discussion, the FAA—keeping the skies safe from hijackers and other malcontents did constitute state action)). The *Hall* court held that a landlady seizing a television set in order to satisfy her claim for unpaid rent was indistinguishable from that of executing a judgment, which was normally reserved for government officials. As such, her actions constituted state action. *See id.* at 438-440. *Cf.* Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975).

[123] 49 U.S.C. § 44902(b).

[124] For instance, in *Davis* the Ninth Circuit found that the institution of security measures in airports involved the FAA and the airlines working together to put the security measures into operation, and as such, sufficient governmental involvement was present, even if the security measures were actually undertaken solely by airline personnel. 482 F.2d at 899.

jected a First Amendment freedom of speech defense in a case where the defendants refused to turn off their "boombox," even after being instructed by the airline crew to turn it off because it might interfere with the navigational system of the aircraft.[125] The court, using the familiar "yelling fire in a theater" analogy, upheld limitations on the speech as permissible,[126] due to safety considerations. This may not be a very close case, conceptually speaking, with outright bans on passengers, though, as this infringement on passenger rights was rationalized in the name of immediate safety concerns, while outright bans may not be as easily linked to similar concerns.

3. Procedural Due Process Concerns

If it can be established that the constitutional right to travel is implicated in the situation where passengers are banned from air travel[127] and that there is sufficient state action, a passenger must receive procedural due process before he or she can be deprived of that right. A similarity can be drawn between the blacklisting of unruly passengers and the infliction of additional punishment on criminals who fall under certain classifications due to their crimes. The similarity is in the procedural due process concerns of each.

In *Pennsylvania v. Williams*, a convicted child molester challenged the state's sexual predator law, which exacted "enhanced punishment of sexually violent predators."[128] The issue in that case was whether the method by which offenders were designated as sexually violent predators was constitutional.[129] The challenged law required persons convicted of certain offenses to go before a review board, which would determine if the offender was a sexually violent predator.[130] The presumption was that the offender was a sexual violent predator; the burden was on him to rebut the presumption with clear and convincing evidence.[131] The court in *Williams* noted:

> [T]he determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified [predicate] of-

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125 *See* United States v. Hicks, 980 F.2d 963, 965 (5th Cir. 1992).

126 *See id.* at 971.

127 *I.e.*, a constitutional right has been established.

128 733 A.2d 593, 596 (Pa. 1999), *cert. denied*, 120 S. Ct. 792 (2000).

129 *See id.*

130 *See id.*

131 *See id.*

> fenses . . . . Specifically, the court is faced with factually determining whether the convicted offender is a person who [fits the definition of asexually violent predator: one who] "due to a mental abnormality or personality disorder is likely to engage in predatory sexually violent offenses."[132]

Because the issue of classifying an offender as a sexually violent predator was a separate factual one than that of the underlying offense, leading to additional punishment, and the burden on that issue was on the offender, the court found that the offender was not afforded due process under the Fourteenth Amendment and struck down the law.[133]

This is comparable to the blacklisted passenger situation, where an airline or the federal government might attempt to ban a passenger from flying for a year, or flying ever again, based on an incident in the past, which may or may not have involved criminal charges, and without giving the passenger so much as a hearing on the matter. In essence, the airline or the federal government would be making a determination as to whether the passenger "is, or might be, inimical to safety"[134] in the future. This would clearly be a separate factual issue than that of the passenger being unruly in one past incident. So it would appear that an airline or the federal government, by placing the passenger on a blacklist and refusing to serve that passenger in the future (i.e., inflicting additional punishment) without some sort of hearing where the party implementing the ban has the burden of persuasion, would violate the due process requirements to which these passengers are constitutionally entitled.[135]

4. *Are Bans Too Broad Of A Remedy?*

Even if it were found that bans serve a legitimate and substantial government purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when

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[132] *Id.* at 601.

[133] *See id.* at 608; *see also* Specht v. Patterson, 386 U.S. 605 (1967); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (holding that a sex offender registration law inflicting additional punishment and placing the burden of persuasion on the offender violated the due process requirements of the registrant).

[134] 49 U.S.C. § 44902. See discussion at Section IV, *infra* regarding this wording, which refers to the circumstances in which an airline may refuse service to a passenger under federal law.

[135] See notes 116-21, *supra* and accompanying text discussing the *Culbertson* case, which expressed due process concerns (the case is discussed above in a state action context, but it is relevant here as well for its due process considerations).

the end can be more narrowly achieved."[136] The bans must not invade the area of protected freedoms by sweeping too broadly unnecessarily.[137] This means that the courts should look to see if any there are any "less drastic"[138] means of achieving the objective of the bans.[139] Since these bans are only in their infant stages and only a few have been implemented so far, perhaps this exercise would serve the airlines as well: they could find a more effective solution that might not be subject to being overturned by the courts and still provide them with the safety assurance that they seem to be looking for. Additionally, as Congress considers the proposed legislation discussed above, it must also consider whether "less drastic" means exist, lest the legislation be thrown out once it reaches the courts.

IV. REGULATION BY THE FAA

Besides constitutional questions regarding bans on passengers, airlines are regulated by the Federal Aviation Administration (FAA), so questions arise based on that regulation by the FAA as to an airline's ability to refuse service to a passenger. *Kent v. Dulles* states that the "[f]reedom to travel is, indeed, an important aspect of the citizen's 'liberty.'"[140] "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated," that delegated power should be construed narrowly.[141] As noted above, the federal government has dictated when an airline may or must refuse service to a passenger.[142] Specifically, an airline "may refuse to transport a passenger . . . the carrier decides is, or might be, inimical to safety."[143]

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[136] Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[137] *See* NAACP v. Alabama, 377 U.S. 288 (1964).

[138] *Aptheker*, 378 U.S. at 512.

[139] Assuming, of course, that the objectives of the bans are found to be constitutional.

[140] 357 U.S. at 127.

[141] *Id.* at 129 (citations omitted).

[142] "Refusing to let ticketed passengers board a plane when others in the same situation are allowed transportation clearly denies access to the 'public right of freedom of transit' through navigable airspace and contravenes the statutory purposes of the Federal Aviation Act." Mason v. Belieu, 543 F.2d 215 (D.C. Cir. 1976) (citation omitted) (speaking in the context of a section of the FAA which prohibits treating passengers differently from one another).

[143] 49 U.S.C. § 44902.

That phrase has been the subject of much litigation. The question comes down to how much discretion does an airline have?

A. An Airline's Discretion

While the discretion given to airlines in refusing transportation to a passenger for safety reasons is "decidedly expansive, it is not unfettered."[144] And if an airline's refusal of transportation is "arbitrary and capricious," the refusal can give rise to a claim by the offended passenger for damages.[145] The Fourth Circuit discussed the discretion given to airlines:

> Air travel in modern society presents formidable safety and security concerns and often passengers with criminal intentions are the source of that threat. Federal law - in conjunction with its broad preemption of state-law claims related to airlines' services - appropriately grants airlines latitude in making decisions necessary to safeguard passengers from potential security threats.[146]

In one of the few cases to actually deal with a situation involving unruly passengers, two intoxicated passengers were loud and boisterous, asking the flight attendant for liquor immediately after boarding and telling the pilot that he would help him fly the plane.[147] The passengers also used obscene language. When an irregularity was found regarding their tickets, the passengers refused to leave the plane. The passengers were finally forced to deplane and were charged with disorderly conduct and taken into police custody. At trial, the jury awarded one of the passengers over a quarter of a million dollars in damages.[148] The Fifth Circuit vacated that judgment, however, since the passenger only sued the airline for state law claims. The court ruled that state law claims in this area are preempted by the Airline Deregulation Act.[149]

Another case, from the Fourth Circuit, was also dismissed at the summary judgment level due to preemption.[150] That case

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[144] O'Carroll v. American Airlines, 863 F.2d 11, 12 (5th Cir. 1989).

[145] Schaeffer v. Cavallero, 54 F. Supp. 2d 350, 352 (S.D.N.Y. 1999).

[146] Smith v. Comair, 134 F.3d 254, 258 (4th Cir. 1998).

[147] *See O'Carroll*, 863 F.3d at 12.

[148] *See id.*

[149] *See id.* at 12-14. The Airline Deregulation Act prohibits states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

[150] *See* Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998).

involved a man denied transportation because he breached security measures by the airline. The court held that "airlines' boarding practices" are an "area of unique federal concern."[151] Many other courts have held, however, that outrageous behavior by airlines in removing a passenger can subject the airlines to state law claims (thus, state law claims not preempted by the FAA).[152]

In another case, *Cordero v. CIA Mexicana De Aviacion, S.A.*,[153] a passenger became loud and directed insults toward the pilot when the airplane made an unscheduled stop to pick up additional passengers.[154] At the unscheduled stop, airline ground personnel informed a passenger, who protested his innocence and stated that the crew had identified the wrong passenger, that he would not be allowed to continue on the flight due to his insulting the pilot and crew.[155] The passenger sued. The jury in *Cordero* found for the plaintiff, but the district court entered a judgment notwithstanding the verdict.[156] The Ninth Circuit reversed and reinstated the jury verdict.[157] The court found that although the statute

> empowers an air carrier to refuse passage, we do not think that it renders immune from liability a carrier whose decision to deny passage is unreasonably or irrationally formed. While . . . air safety is a paramount concern of air carriers and of the public generally, we do not believe that requiring carriers to act reasonably in formulating opinions to deny passage undercuts this concern.[158]

The court noted a Second Circuit decision that set out a test to determine the reasonableness of an airline's decision:

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[151] *Id.* at 258-59.

[152] *See* Peterson v. Continental Airlines, 970 F. Supp. 246 (S.D.N.Y. 1997). Even the *Smith* court held that if a passenger were detained without some safety or security justification, a claim against the offending airline would not be preempted. 134 F.3d at 259.

[153] 681 F.2d 669 (9th Cir. 1982).

[154] *See id.* at 670.

[155] *See id.* At trial, a flight attendant testified that upon deplaning, the passenger had uttered an obscenity and raised his arm in a threatening way toward her. *See id.* at 671. The passenger presented the testimony of another passenger who disputed the flight attendant's account, claiming no such conduct had occurred. *See id.*

[156] *Id.*

[157] *See id.*

[158] *Id.* at 671.

> The test of whether or not the airline properly exercised its power under [49 U.S.C. § 44902] to refuse passage to an applicant or ticketholder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.[159]

The *Cordero* court concluded its description of the reasonableness test as follows:

> The reasonableness of the carrier's opinion . . . is to be tested on the information available to the airline at the moment a decision is required. There is correspondingly no duty to conduct an in-depth investigation into a ticket-holder's potentially dangerous proclivities. We believe this facet of the test provides a reasonable balance between safety concerns and the right[s] of passengers.[160]

This test, of course, just makes everything hazier.

B. WHAT IS REASONABLE?[161]

In *Schaeffer*, a flight attendant informed a passenger that he was not allowed to bring on two pieces of carry-on luggage.[162] The passenger, an attorney, "vigorously protested, asserting his alleged knowledge of airline regulations and procedures."[163] The passenger finally relented and turned over one bag, but

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[159] *Id.* at 672 (citing Williams v. Trans World Airlines, 509 F.2d 942 (2d Cir. 1975)).

[160] *Cordero*, 681 F.2d at 672. I would argue, though, that some courts have gone too far with this discretion afforded to airlines. For instance, the court in *Adamsons v. American Airlines*, 444 N.E.2d 21 (N.Y. 1982), ruled that an airline had not abused its discretion when it refused transportation to a passenger who looked physically ill and was in a wheelchair. The airline did not even bother to investigate the matter to see if safety might be a concern. *See id.* at 47-49. Instead it made its decision to refuse transportation based on appearances. *See id.* The court ruled that this was not abusive, that an airline is protected as long as it exercises "good faith." *Id.* at 47. But is there really good faith if an airline won't even look into a matter? And airlines will be opening a legal can of worms if they start basing decisions on appearances.

[161] Conversely, what is "arbitrary and capricious?" *See supra* text accompanying note 110. "Arbitrary and capricious" is defined as "willful and unreasonable action without consideration or in disregard of facts . . . ." BLACK'S LAW DICTIONARY 105 (6th Ed. 1990). Of course, classifying something as reasonable if it is not arbitrary and capricious in effect, then, means that something is reasonable if it is not unreasonable.

[162] 54 F. Supp. 2d 350, 351 (S.D.N.Y. 1999).

[163] *Id.*

when he did not receive a receipt for the bag, he "so vociferously pursued his demand for the receipt" that he was asked to deplane.[164] He refused to leave the plane and had to be physically removed by the police.[165] While the case settled during trial,[166] the trial court, in denying summary judgment, stated that sufficient evidence existed that the airline, in violation of § 44902, made its

> decision to remove him simply [to] retaliat[e] for his verbal protestation. While an airline enjoys broad discretion in deciding whether to refuse passage, the decision to exclude a vociferous but peaceful passenger who limits himself to complaining of the airline's treatment may in some circumstances constitute an abuse of that discretion.[167]

In fact, in a clarifying ruling after the trial,[168] the court held that the passenger had presented no evidence of a retaliatory motive on the airline's part.[169] The court did note, however, in denying the defendant's motion for judgment as a matter of law, that an airline would be acting in an arbitrary and capricious manner, again, in violation of § 44902, if it based its decision that a passenger might be a safety risk purely on his raising his voice and being "generally quarrelsome."[170] The court, while acknowledging the discretion given to airlines in this area, held that:

> to say that any time an impolite or unpleasant passenger debates a non-safety issue with an airline employee in a boisterous or abusive manner he automatically poses a potential threat to safety would be in effect to set no meaningful limits to the carrier's exercise of its discretion and thus to eliminate the statutory standard altogether. Where no safety issue is reasonably implicated, even grouches have a right to gripe without being grounded.[171]

In the Second Circuit case referred to above, *Williams*, TWA denied passage on the basis of F.B.I. reports that the ticketholder was schizophrenic and should be considered armed and

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164 *Id.*

165 *See id.*

166 *See id.*

167 Schaeffer v. Cavallero, 29 F. Supp. 2d 184, 186 (S.D.N.Y. 1998).

168 The case settled after the completion of the plaintiff's case at trial. *See Schaeffer*, 54 F. Supp. 2d at 351.

169 *See id.*

170 *Id.*

171 *Id.* at 352.

dangerous.[172] The court held that the airline could reasonably take the F.B.I. report at face value.[173] The court took care to note that the report relied on was from an official government police agency.[174] There was also a concern for immediate safety. This is quite different from a situation where an airline is relying on a report from another airline (in the case of an industrywide ban) or even if the unruly act occurred in the past on that particular airline.

The *Williams* court noted that Congress enacted the Federal Aviation Act to meet the "serious problem" of hijacking.[175] But perhaps this purpose has become outdated, since it now appears that this "serious problem" is not much of a problem anymore. Hijackings are on the decline.[176] In fact, in recent years there have been no hijacking incidents in any part of North America.[177] This original purpose of the Federal Aviation Act, and the uses it is being put to today, should be examined care-

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[172] *Williams*, 509 F.2d at 948.

[173] *See id.*

[174] Interestingly, in a 1983 case which has received a great deal of attention from other courts, the discretion the district court gave to the airline was very broad indeed. *See* Zervigon v. Peidmont Aviation, Inc., 558 F. Supp. 1305 (S.D.N.Y. 1983). In that case, a passenger overheard a group of passengers speaking in Spanish. That passenger thought that the group's comments were a bit odd, and she told her husband. Her husband told another passenger, and that passenger told the captain. Like the children's game of telephone, by the time the comments had been translated into English and then communicated three levels away, the comments went from "when we get to the capital . . . they [will] ask us for our experience on this flight" to a comment that the passengers were going to hijack the plane from New York to Cuba. *Id.* at 1306-07. In light of a previous experience on the flight (a flight attendant had been assaulted by a passenger purportedly with the group of passengers in question) the captain forced that group to deplane. The court stated that "there can be no doubt that as a matter of law the captain's decision was reasonable and appropriate." *Id.* at 1307. The court, in a questionable decision, held that it is not arbitrary and capricious for the captain to rely on third hand knowledge of a comment made in a different language. Surely in this type of situation it would not be too much to ask of the captain and the airline to do a bit of investigation before removing passengers from a plane.

[175] *Id.* at 946; *see also* United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

[176] *See* Helen Connell, *Flight and Fear, From Kitty Hawk to Kandahar*, LONDON FREE PRESS, Dec. 29, 1999, at A12.

[177] *See* Chris Yates, *Asia Tops Poor Results*, JANE'S AIRPORT REV., July 1, 1998, at 33. This is significant, especially in light of the past. "Between 1961 and 1968, hijackings of United States aircraft averaged about one per year. In 1968, however, the number rose to 18. In 1969, there were 40 attempted hijackings of United States aircraft, 33 successful." *Davis*, 482 F.2d at 898 (citing McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972)).

fully by the courts when deciding whether an airline has the right under the FAA to deny passage to an individual.

A federal district court in New York also noted this focus of the law on hijacking and terrorism.[178] In that case, a passenger was observed by the flight crew as acting very nervous, repeatedly going to the lavatory, and muttering about the Germans having killed Jews and his desire to kill Jews.[179] The court noted that the captain of the plane met with "all available safety personnel" in order to evaluate the risk.[180] The captain and the security personnel then decided to remove the passenger because they determined that based on the observed conduct, the passenger likely posed a risk to the flight.[181] The court held that the fact that later the man was found not to be carrying any explosives and that his checked baggage was not harmful was beside the point: the airline acted reasonably in the face of immediate danger.[182]

Again though, one can make an argument that this is very different from the case where a passenger has "misbehaved" in the past and is forever banned from future flights on that particular airline, or even on all airlines. How can an airline claim that one incident, possibly not even criminal, determines the risk level of a passenger for the rest of his life? This would seemingly be an egregious abuse of discretion.

The whole point here is that the courts are truly all over the place on what constitutes action by the airlines that falls under its statutory authority under the FAA allowing the refusal of transportation to passengers. What some see as reasonable others see as arbitrary and capricious. But those situations, which the courts struggle with, all deal with immediate issues of safety that the airlines must consider. They do not deal with an airline trying to ban a passenger based on past incidents. It would definitely seem that if the courts struggle over whether a passenger is an immediate risk to safety, they would be much more inclined to see a ban as arbitrary and capricious, and they would be much more willing to curtail the broad discretion given to airlines, given the fact that a ban would be handed out more for punishment purposes rather than due to immediate safety concerns.

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178 *See* Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197, 201 (E.D.N.Y. 1994).
179 *See id.* at 198.
180 *Id.* at 202.
181 *See id.* at 199.
182 *See id.* at 202.

V. DUTIES OF A COMMON CARRIER

Notwithstanding the constitutional and federal considerations discussed above, airlines also fall under the common law[183] as common carriers.[184] Thus, we need to consider the duties that common carriers have as such in order to fully analyze the legal implications of banning passengers from air travel.

The proposition that common carriers have a duty to serve goes back over 400 years.[185] The American courts quickly adopted the idea as well. Justice Joseph Story stated that a common carrier's duty "to carry passengers whenever they offer themselves and are ready to pay for their transportation . . . results from their setting themselves up, like innkeepers, farriers, and other carriers, for common public employment."[186] Extending this to contract law, "[w]hen the carrier holds itself out as open to serve the public, it presents an offer that is accepted the moment a passenger tenders the usual fare, and the contract is breached if the carrier refuses to serve the passenger."[187]

The courts have recognized this duty that airlines have as common carriers. In *Austin v. Delta Air Lines*, a prospective pas-

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[183] The issue of the Airline Deregulation Act, which exempts airlines from state common law actions in many circumstances, is hotly debated and litigated. It is also beyond the scope of this comment. Many courts have whittled down the impact of and protection afforded by the Airline Deregulation Act, so this discussion of common carrier liability, as well as liability having to do with other areas of state common law, has increasing relevance. *See, e.g.*, Salley v. TransWorld Airlines, Inc., 723 F. Supp. 1164 (E.D. La. 1989); Newman v. American Airlines, Inc., 176 F.3d 1128 (9th Cir. 1999).

[184] Generally, airlines, which cater to the public and undertake to transport for hire all persons who present themselves for passage, have been held to be common carriers. *See* Annotation, *Air Carrier as Common Or Private Carrier, and Resulting Duties as to Passenger's Safety*, 73 A.L.R.2d 346 (1997). The fact that an airline may sell a ticket to a passenger that specifically disavows its being a common carrier has no bearing on the situation. *See id.*

[185] *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1304 (1996).

[186] *Id.* at 1313 (quoting Joseph Story, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (1832)) (stating that the phrase "common public employment" means holding oneself out as ready to serve whoever seeks to employ you). In addition, William Jones stated that the obligation of the common carrier rests on the common law, and not the fact that the "carrier received a franchise or license from the government." *Id.* at 1495 n. 97 (citing William Jones, AN ESSAY ON THE LAW OF BAILMENT (1836 edition) (first published 1781). Thus, this duty of an airline, or other common carrier, does not depend on any recognition by the federal government.

[187] *Id.* at 1314. "A common carrier may make what contract he will as to his compensation; but a tender of his usual, or of a reasonable compensation, obliges him to carry. . . ." *Id.* (citation omitted).

senger presented himself at the Delta ticket counter and requested a ticket.[188] He was denied a ticket, being informed that he was not in proper condition to travel.[189] Delta defended itself by claiming that the plaintiff appeared to be in a condition in which he would be unable to care for himself in case of emergency.[190] The court in that case recognized the discretion that airlines have in refusing passage to a prospective passenger.[191] The court discussed at length the duty of common carriers. It quoted an early case from Massachusetts:

> A common carrier is bound to care for all who have become its passengers. For that reason not only is it not bound to accept, but it is under obligation to refuse to accept as a passenger . . . one who because of intoxication or for any other reason would be offensive to other passengers.[192]

Similarly, a New York court in 1831 applied the duty of a common carrier to railroads: "The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained if they should refuse to transport an individual . . . without any reasonable excuse . . . ."[193]

The Court of Appeals of the State of Kentucky adapted common carrier liability to airlines early in the development of air travel.[194] It noted the differences between air travel and other forms of travel, and the special considerations demanded relating to travel by air.[195] Specifically, the court spoke of "reasonable discretion . . . if exercised in good faith and on reasonable grounds."[196] This, of course, sounds very similar to the language the courts have adopted in interpreting the Federal Aviation Act, as noted in Section IV, *supra.* More recent courts have made this same observation. In *Cordero,* the court, in setting out the reasonableness requirement, noted its consistency with the common law rule that:

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[188] 246 So. 2d 894 (La. Ct. App. 1971).

[189] *See id.* at 895.

[190] *See id.*

[191] *See id.*

[192] *Id.* at 896 (quoting Holton v. Boston Elevated Ry., 21 N.E.2d 251 (1939)).

[193] Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 44, 74-75 (N.Y. Ch. 1831), *quoted in* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property,* 90 NW. U. L. REV. 1283, 1318-19 (1996).

[194] *See* Casteel v. American Airways, 88 S.W.2d 976 (Ky. Ct. App. 1935).

[195] *See id.*

[196] *Id.*

> where a carrier has reasonable cause to believe and does believe, that the safety or convenience of its passengers will be endangered by a person who presents himself for transportation, it may refuse to accept such person for transportation and is not bound to wait until events have justified its belief.[197]

Similarly, the Second Circuit has held that "[a] common carrier such as an airline generally owes its passengers a duty of reasonable care under the circumstances."[198] The court continued, "This duty requires the common carrier to exercise care 'which a reasonably prudent carrier of passengers would exercise under the same circumstances, in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated.'"[199]

This duty has been held to be fairly broad. For instance, in *Pittman v. Grayson*, the Second Circuit agreed with the district court, which held that an airline, as a common carrier, had a duty to transport "anyone who sought passage and was not free to refuse" to transport passengers even upon receiving an oral report that a court order prohibited the passengers from leaving.[200] It was not reasonable for the airline to rely on an oral report of a court order—the duty was so strong that it could not be relieved absent some more "authenticated type of notice."[201]

As noted in Section III, *supra*, the Ninth Circuit, in a very recent case, explicitly recognized that common carriers arguments have special considerations.[202] While that court stated that burdens on a single mode of transportation do not raise right to interstate travel concerns, the court was speaking only in the context of the right to have a driver's license.[203] The court differentiated the case of a person being prevented from traveling by common carrier,[204] thus implicitly stating that being prevented from the right to interstate travel by common carrier does implicate the constitutional right to travel.

Also related to the consideration of constitutional issues in Section III, the Supreme Court has held that "[m]isuse of

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[197] *Cordero*, 681 F.2d at 672 n.3 (quoting 14 AM. JUR. 2D *Carriers* § 865); Williams v. Trans World Airlines, 509 F.2d 942, 948 n.10 (2d Cir. 1975) (quoting same).

[198] Curley v. AMR Corp., 153 F.3d 5, 17 (2d Cir. 1998).

[199] *Id.* at 18 (citation omitted).

[200] 149 F.3d 111, 118 (2d Cir. 1998).

[201] *Id.* at 123-124.

[202] *See* Miller v. Reed, 176 F.3d 1202 (1999).

[203] *See id.* at 1205-06.

[204] *See id.* at 1206.

power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[205] Tying together Sections III, IV, and V, *supra*, one might argue that but for the authority of permissive refusal given by the government to the airlines,[206] airlines would be compelled under their duty as a common carrier to provide passage to all persons who pay the required fare. Thus, this power is "made possible only because the [airline] is clothed with the authority of state law," and it is therefore performed under the color of state law and must be analyzed, as discussed in Section III, *infra*, under a constitutional light.

VI. CONCLUSION

Security in the air is important to all: passengers, airlines, and society in general. But airlines and federal and state legislative bodies must ensure that individual rights are not trampled in this search for safety. As illustrated above, the constitutional right to travel must be carefully evaluated when considering the blacklisting and banning of unruly passengers, especially in light of the recent involvement of government officials in the banning effort.

Having established the constitutional right, finding state action becomes important. The current statutory authorization allowing airlines to refuse to provide transportation to passengers likely involves enough action by the government to establish that the actions taken by airlines in banning a passenger, or developing a blacklist and banning those on the blacklist, are taken under the color of state law. Without a doubt, if the proposed legislation currently in Congress, which would provide for a federally-enforced ban and civil penalties for airlines violating the bans by providing transportation to banned passengers, passes, there will be no problem whatsoever, by any test, in finding state action.

If we have a constitutional right and we have state action, we must be concerned that any person is afforded due process before that right can be deprived. Certainly unilateral determinations by the airlines, which seem to be occurring presently, will not suffice. If Congress does pass the proposed legislation,

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[205] United States v. Classic, 313 U.S. 299, 325-26 (1941).

[206] *See* 49 U.S.C. § 44902.

procedural mechanisms must be put into place in order to protect the rights of passengers.

Beyond that, even without the proposed legislation, airlines, passengers, and, eventually, courts, must assess the power of the airlines to ban passengers under the Federal Aviation Act. This precise issue has not been addressed by the courts, and judging by the different interpretations taken of the Federal Aviation Act, it is a good bet that the courts will be all over the place on the issue of banning passengers from air transportation as well. This area surely seems to be a future source of much litigation.

All of this should be considered while remembering what airlines are at their most basic level: common carriers. That designation brings with it certain duties and responsibilities that should not be forgotten just because the industry is so heavily regulated by the federal government.

Perhaps most important of all, maybe the airlines should look more closely at the causes of air rage, and instead of reacting to air rage with bans that would hurt everyone (lowering the revenues of the airlines and the ability of passengers to travel), try to make the skies safer by taking measures to snuff out air rage before it starts.[207]

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[207] "The best solution to air rage is prevention." Nancy Lee Firak and Kimberly A. Schmaltz, *Air Rage: Choice of Law for Intentional Torts Occurring in Flights Over International Waters*, 63 ALB. L. REV. 1, 15 (1999). Although this may be a statement of the obvious, quite often the obvious is unfortunately overlooked.