AIRPORT ANTI-HIJACK SEARCHES AFTER SCHNECKLOTH: A QUESTION OF CONSENT OR COERCION

I. INTRODUCTION

Recently, in *Schneckloth v. Bustamonte*,[1] the Supreme Court undertook an extensive review of fourth amendment case law to determine precisely what the prosecution must demonstrate to establish a valid consent to search. The Court ultimately held that to justify search on the basis of the subject's consent, the prosecution must show that the consent was voluntarily given, but that proof of voluntariness does not require a showing that the subject knew of his right to refuse.[2] This holding has an immediate impact in the area of airport search cases in which the issue of consent appears frequently. Earlier airport cases have expansively applied the "stop and frisk" doctrine of *Terry v. Ohio*,[3] and *Schneckloth* suggests a further loosening of fourth amendment restraints. This note will first examine *Schneckloth's* possible erosive effects on fourth amendment protections in the context of the airport search. Thereafter, the note will suggest that *Schneckloth* is inapplicable in the context of an airport search, because of certain inherently coercive factors that distinguish the airport search from other search cases.

II. SCHNECKLOTH V. BUSTAMONTE

The defendant Bustamonte was a passenger in an automobile which had been stopped by police officers because of a faulty headlight. After requesting the six occupants of the car to step out, the officers asked a passenger, a brother of the car's owner who was not present, for permission to search the car. The man replied affirmatively and assisted in the search by opening the trunk. Several stolen checks were found stuffed under the rear seat, and as a result defendant Bustamonte was charged with possession of a check with intent to defraud. The checks were admitted as evidence in defendant's trial, and on the basis of them Bustamonte was convicted. The conviction was affirmed on appeal to the California District Court of Appeal, and a writ of habeas corpus sought by the defendant in the United States District Court for the Northern District of California was denied. On appeal, the Ninth Circuit vacated the order of the district court and remanded the case for further hearings on the question whether the defendant knew at the time of his consent to search that he had the right to refuse. The Ninth Circuit held that, absent proof by the prosecution that the defendant had knowledge of his right to refuse, the defen-

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[1] 412 U.S. 218 (1973), *rev'g* 448 F.2d 699 (9th Cir. 1971).

[2] *Id.* at 222.

[3] 392 U.S. 1 (1968).

dant's verbal expression of assent to the search would not have been sufficient to establish valid waiver of the constitutional right to refuse consent; absent this knowledge the search would be unlawful.[4]

The Supreme Court granted the state's petition for certiorari to determine whether the fourth and fourteenth amendments require proof of the knowledge of alternatives as demanded by the Ninth Circuit. In its decision, the Court reversed the Ninth Circuit and ruled, over vigorous dissent from three Justices,[5] that to establish effective consent to search the prosecution need not prove that the subject knew of his right to refuse or that he had been advised of his right to refuse. The Court chose to follow instead the rule in California state courts that advice to a suspect that consent to search may be refused is not a *sine qua non* of a voluntary search. Although knowledge of the right is a factor to be considered, "voluntariness" is a question of fact to be determined from all the circumstances surrounding the search, with careful scrutiny given to possible coercive factors, either express or implied.[6] Applying this test to the facts of the *Schneckloth* search, the Court found in the "congenial" atmosphere of that search no evidence of coercion sufficient to invalidate the search and require suppression of the evidence found therein.

The Court's rejection of the requirement of informed consent and its express refusal to extend to fourth amendment rights the requirements of "knowing and intelligent" waiver,[7] now well established for effective relinquishment of fifth and sixth amendment rights, is of great significance to fourth amendment law in general.[8] However, the merits of *Schneckloth* and its ultimate effect on the "knowing and intelligent" waiver standard are beyond the scope of this note. Inquiry is here confined to the impact of *Schneckloth* on airport search law.

Within one month after the *Schneckloth* decision, at least two courts reached divergent conclusions when applying *Schneckloth* in deciding appeals from convictions based on evidence discovered during anti-hijack

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[4] Bustamonte v. Schneckloth, 448 F.2d 699, 700 (9th Cir. 1971).

[5] In his dissent, Mr. Justice Brennan voiced his doubts and those of his fellow dissenters, Mr. Justice Douglas and Mr. Justice Marshall: "It wholly escapes me how our citizens can meaningfully be said to waive something so precious as a constitutional guarantee without ever being aware of its existence." 412 U.S. at 277.

[6] *Id.* at 227.

[7] Miranda v. Arizona, 384 U.S. 436 (1966).

[8] 412 U.S. at 241. Here the Supreme Court answered a question long-debated among the courts: whether the strict standards for waiver of fifth amendment rights required by *Miranda v. Arizona*, 384 U.S. 436 (1966), also requires warnings of fourth amendment rights before consent to search can be effective. State courts have been reluctant to require warnings. *See, e.g.*, People v. Tremayne, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971); State v. Forney, 181 Neb. 757, 760-61, 150 N.W. 2d 915, 917-18 (1967). The federal courts have been more willing to extend requirements of intelligently given consent to consent searches. *See, e.g.*, Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); Note, *Consent Searches: a Reappraisal after Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

searches. In one of these cases, *People v. Bleile*,[9] a California court of appeals cited *Schneckloth* as controlling on the question of consent; whereas, in the second case, *United States v. Ruiz-Estrella*,[10] the Second Circuit distinguished the airport situation from the *Schneckloth* search on the basis of possible coercion in the airport. It is submitted that from the standpoint of fourth amendment values the Second Circuit has reached the better result. However, before evaluating the distinction made in *Ruiz-Estella* it is necessary to explore two ways in which *Schneckloth*, as interpreted in *Bleile*, may impinge constitutional safeguards: one, as authority for rejecting the rule of *United States v. Meulener*[11] requiring advice to a subject before search that he has the right to avoid search by declining to board; and two, as support for relaxing the stringent requirements for meaningful consent which have developed in airport search law.

III. Impact of Schneckloth on Prior Airport Search Case Law

Factually, *People v. Bleile* follows a now familiar pattern. On May 26, 1972, the defendant attempted to board a flight from Los Angeles to San Francisco at Los Angeles International Airport. As he passed through the required magnetometer check[12] carrying a luggage bag, a positive reading alerted a United States marshal who was monitoring the machine. The marshal then asked the defendant to pass through the magnetometer without the bag. When the defendant did so, the magnetometer registered normal. The defendant, at the request of the marshal, then opened his luggage bag, revealing, among other items,[13] a yellow plastic bag containing marijuana. Marshal Nichols arrested Bleile, who was subsequently convicted of possession of marijuana. On appeal to the California Court of Appeals, the conviction was affirmed.

In his appeal, the defendant's sole contention was that the marijuana had been obtained through an illegal search and seizure, and that the trial court had therefore erred in denying his motion to suppress the evidence. Defendant objected to the search on several grounds,[14] but he relied heavily

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[9] 33 Cal. App. 3d 203, 108 Cal. Rptr. 682 (1973).

[10] 481 F.2d 723 (2d Cir. 1973).

[11] 351 F. Supp. 1284 (C.D. Cal. 1972).

[12] The magnetometer is a metal detection device through which passengers are required to pass and which is calibrated to detect a certain level of metal weight. United States v. Lopez, 328 F. Supp. 1077, 1085 (E.D.N.Y. 1971).

[13] Other items included a safety razor which was apparently the source of the high magnetometer reading. 33 Cal. App. 3d at 203, 108 Cal. Rptr. at 688.

[14] The defendant also argued that the search was impermissibly broad; that the plain smell of the marijuana was not the same as plain view; that the search should have been limited to a "pat-down" of the yellow laundry bag; and that the marshal should have walked with the laundry bag through the magnetometer to determine if it contained metal before opening it. All of these contentions were rejected. *Id.*

on the argument that the marshal had a duty to advise him, before opening the luggage bag, that he had the option either to consent to a search or leave without boarding the plane. In the absence of such advice, he argued, the search was impermissible: consent was invalid because he was unaware of his right to refuse; and the search was unreasonable because any danger of the defendant's hijacking the plane would have been alleviated by his declining to board. The *Bleile* court, relying on the *Schneckloth* rule that knowledge of the right to refuse is not a prerequisite to valid consent to search, rejected the defendant's argument[15] and thereby rejected the *Meulener* rule which requires advice that one may avoid a search by declining to board. Thus the question whether or not the *Bleile* court improperly extended *Schneckloth* in relying on that decision to reject the *Meulener* rule is presented.

A. Advice and Consent—Effect of Schneckloth on the Meulener Right-to-Refuse Rule.

To support his argument that he should have been advised of his right to avoid the search by declining to board, Bleile relied on a recent federal judicial rule in *United States v. Meulener*,[16] requiring such advice. In *Meulener*, the court granted the defendant's motion to suppress evidence of narcotics discovered during an anti-hijack search because he had not been given the opportunity to avoid the search by not boarding. When presented with this rule, the *Bleile* court rejected it as an outgrowth of the Ninth Circuit position—that consent to search is not voluntary unless it is proved that the defendant knew he had the right to refuse—which was overruled in *Schneckloth*. However, because the *Meulener* rule speaks not only to consent searches, but also to searches justified by the "stop and frisk" doctrine of *Terry*,[17] it should not be dismissed as a mere outgrowth of the Ninth Circuit consent rule. Furthermore, it is questionable whether *Schneckloth*, which involved only consent searches, should be applied to that branch of *Meulener* dealing with the reasonableness of a *Terry*-type search. Rather, that aspect of *Meulener* has independent precedential roots, and the question is whether these roots can sustain the rule's viability beyond *Schneckloth*.

The limited scope of this note precludes an extensive discussion of the fourth amendment questions raised by the *Terry* doctrine in the airport searches,[18] but a short resume is necessary to set the stage for *Meul-*

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[15] 33 Cal. App. 3d at 207, 108 Cal. Rptr. at 684.

[16] 351 F. Supp. 1284 (C.D. Cal. 1972).

[17] 392 U.S. 1 (1968), upholding a "pat down" search for weapons by a police officer who has reason to believe that the subject is an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual.

[18] For general discussion of fourth amendment questions raised by F.A.A. passenger and luggage search procedures see Note, *Airport Security Searches & The Fourth Amendment*, 71

ener's role. Briefly, under the fourth amendment's prohibition against "unreasonable searches and seizures,"[19] it is well settled that a search conducted without a warrant issued upon probable cause is per se unreasonable, and this rule is subject only to a few specifically established and well-delineated exceptions. These exceptions include a search conducted with the subject's consent and a search for weapons based on a reasonable fear for the safety either of the officer conducting the search or of others.[20] This latter exception, commonly referred to as the "stop and frisk" rationale of *Terry* has been the governmental justification for many of the airport searches, and decisions concerning the validity of these searches have turned on the question whether there was a reasonable fear that the passenger might be carrying weapons or explosives. A search conducted after the passenger met the F.A.A. hijacker "profile"[21] and also registered a high reading on the magnetometer was held constitutionally permissible.[22] Later, a frisk justified by the magnetometer reading alone was upheld.[23] Further, a prospective passenger's nervous behavior, his use of four different names, and a bulge in his pocket were also found to be sufficient justification for search.[24] And more recently, the *Terry* doctrine, originally intended primarily for the protection of the officer, was extended to include protection of bystanders in the airport although the officer had no reasonable fear of danger to himself.[25] In this incremental stretching of *Terry* a significant problem is the absence of any limit on the focus of the search. Most of the criminal evidence discovered relates not to hijacking but to other offenses, principally narcotics violations.[26] Since the general law of search and seizure

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COLUM. L. REV. 1039 (1971); Note, *The Antiskyjack System: A Matter of Search or Seizure*, 48 NOTRE DAME LAW. 1261 (1973); Note, *Searching for Hijackers: Constitutionality, Costs & Alternatives*, 40 U. CHI. L. REV. 383 (1973) Note, *Airport Freight and Passenger Searches: Application of Fouth Amendment Standards*, 14 WM. & MARY L. REV. 953 (1973).

[19] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . and no warrant shall issue, but upon probable cause. . . . U.S. CONST. amend. IV.

[20] Scheckloth v. Bustamonte, 412 U.S. 218, 219 (1973), *rev'g* 488 F.2d 699 (9th Cir. 1971).

[21] The "profile" was developed by a governmental task force which used statistical, sociological and psychological data to isolate certain characteristics which set hijackers apart from the rest of the air traveling public. When a passenger is observed to fit these characteristics, he is focused upon by the air line. United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971).

[22] United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (profile and magnetometer sufficient to justify search; however, evidence suppressed on appeal because air line official had altered criteria of the "profile").

[23] United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972).

[24] United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1971).

[25] United States v. Moreno, 475 F.2d 44 (5th Cir. 1973); *see* companion casenote, 34 Ohio St. L.J. 896 (1973).

[26] "It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in

permits the use of evidence in a subsequent criminal prosecution even though that evidence was not the object of the search,[27] airport searches have been the source of many governmental windfalls.

Cases following *Terry* have produced no easy formula for determining when a given situation will meet the required "specific and articulable facts which, taken together with the rational inferences from these facts, reasonably warrant the intrusion."[28] The only discernible trend is a tendency by the courts to dilute the standards needed for justification.[29] Indeed, in an often quoted passage, Judge Friendly said that, given the risk of hijacking, the "danger alone meets the test of reasonableness," and he would have no difficulty sustaining a search that was based on nothing more than the trained intuition of an air line ticket agent or a marshal.[30]

Because there is no easy test for reasonableness, courts are faced, on a case by case basis, with new and bizarre fact situations forcing determinations of reasonableness turning on factual minutiae. For example, a crucial question in a recent case was whether the search of one end of an envelope with a bulge "approximately one-fourth inch thick and two inches across" was reasonable in a search for possible explosives.[31] The Eighth Circuit found this search to be impermissible and reversed the conviction for possession of the amphetamines and one marijuana cigarette found therein. However, if the bulge had been four inches wide instead of two, the court might have found the search reasonable and the evidence admissible. Walking this "two inch" wide line between valid and invalid searches demands almost superhuman judicial surefootedness.

To assure against a misstep, the *Meulener* rule offers a sensible guide. Instead of seeking the elusive key to what *is* reasonable, *Meulener* addresses the question of what is *not* reasonable, thus clearly delineating at least one boundary:

> While there is a governmental interest justifying a search in the case of passengers who actually board the plane, there is no such interest with respect to persons who merely appear at the boarding gate and choose not

order to keep the bombs from exploding." United States v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring). In this regard see N.Y. TIMES, Nov. 2, 1971, at 1, col. 4, for report from federal officers that of 1500 air traveler arrests in the previous year, 400 were for narcotics violations, 400 for illegal aliens, and 300 for trying to board with weapons. *See* Comment, *Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356 (1972).

[27] "But, as always, the self-discovered crime, and that, really, is what airport surveillance elicits, does not attract immunity because it falls into police hands as an unsought by-product of privileged activities." United States v. Mitchell, 352 F. Supp. 38, 43 (E.D.N.Y. 1972). *See* Harris v. United States, 331 U.S. 145, 155 (1947); United States v. Teller, 397 F.2d 494, 497 (7th Cir. 1968).

[28] 392 U.S. at 21.

[29] *See, generally*, Note, *Antiskyjack System: A Matter of Search or Seizure*, 488 NOTRE DAME LAW. 1261 (1973).

[30] United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972).

[31] United States v. Kroll, 481 F.2d 884 (8th Cir. 1973).

> to board, and accordingly a physical search of one's person and luggage is held to be impermissible under these circumstances.[32]

If it is the threat of hijacking and that threat alone which justifies the search, removal of the threat obviates the justification. If the passenger declines to board, he no longer presents a threat; consequently further search of the non-boarding passenger without warrant, consent, or arrest would be unlawful.

The *Bleile* court in rejecting the foregoing contention denied that the governmental interest is satisfied by permitting the "suspect" to leave the boarding area rather than submit to search. The court suggested that the passenger may go to the boarding area of another flight where security officers might be less vigilant. Further, the passenger "may still represent an extreme danger to persons and property inside the terminal."[33] The implications of this reasoning are unmistakable: the exigencies of air piracy which permit search before boarding would also justify search of anyone within the terminal.

There is little in the case law to support such a widening of the zone of danger to include the terminal itself. Even Judge Friendly, for whom "danger alone" would be proof of reasonableness, insisted that the passenger should be given advance warning of the search so that he could avoid it by choosing not to travel by air. Similarly, Judge Mansfield voiced his concern over any attempt at "punching a hole in the fourth amendment" in order to protect against air piracy, and suggested that airline officials in addition to the screening methods already used could further protect themselves by refusing passage to a suspected hijacker.[34] Moreover, in *United States v. Clark*,[35] Judge Mansfield, in the majority opinion, cited *Meulener* as support for his ruling that the search of the defendant's bag could be justified only upon a showing that the defendant was aware that he had the right to refuse to be searched if he chose not to board.

The contrast between the Second Circuit's approval and the *Bleile* court's rejection of *Meulener* reflects the current unsettled question of the viability of the *Meulener* rule. Its proponents see the rule as a "judicious procedure"[36] to assure a meaningful consent, while its opponents usually base their disapproval on either the impracticality of warnings in the airport search situation or the possibility that such a requirement will impede the search for hijackers. For example, one critic of the *Meulener* right-to-refuse rule foresaw the *Bleile* court's contention that if the passenger

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[32] 351 F. Supp. at 1290.

[33] 33 Cal. App. 3d at 208, 108 Cal. Rptr. at 685.

[34] United States v. Bell, 464 F.2d 667, 676 (2d Cir. 1972).

[35] 475 F.2d 240, 247 (2d Cir. 1973). Conviction of passenger for possession of cocaine was reversed on the ground that excluding him from a hearing dealing with the secret F.A.A. profile was a violation of his sixth amendment right to public trial.

[36] 6 IND. L. REV. 828 (1973).

declined to board he might still be considered sufficiently dangerous to justify a frisk.[37] In response to this argument, it is submitted that, although the passenger may still be dangerous, the reasonableness of the danger once the passenger has refused to board should be measured by normal *Terry* standards rather than by the diluted standards which have evolved for anti-hijack searches. The fourth amendment rights of a prospective passenger who chooses not to board should be co-extensive with those of anyone else in the air terminal and, for that matter, with those of anyone on the street.

The most ominous assault on the right-to-refuse rule was expressed by a California state court in *People v. Smith*,[38] in which the court suggested that a reasonable inference of danger could be drawn from the passenger's attempt to leave the boarding area after an announcement that all carry-on luggage would be inspected.[39] As pointed out by a recent commentator, this holding raises "grave constitutional questions because the subject's decision to exercise a constitutional right should not provide justification for an invasion of that right."[40]

Further disapproval of the *Meulener* rule was expressed by the Fifth Circuit in *United States v. Skipwith*.[41] Both the majority, which confirmed the defendant's conviction for possession of cocaine, and the dissent, which wanted to limit the use of evidence discovered in airport searches to that which was the object of the search,[42] expressly disapproved the rule announced in *Meulener*, apparently fearing that it would hamper police activities by reinforcing the exclusionary rule. The Second Circuit, on the other hand, in *Ruiz-Estrella*,[43] decided the same week as *Skipwith*, twice cited *Meulener* with approval—once on the issue of valid consent and once on the issue of whether the danger justified the search.[44]

Thus, just as the California Court of Appeals differs with the federal district court, so the Second Circuit disagrees with the Fifth Circuit on the necessity for advising the prospective passenger that he has the right to refuse search by declining to board. Since these cases were all decided after the *Schneckloth* decision, it is apparent that the decision has not written so clear an epitaph to *Meulener* as was read by the *Bleile* court.

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[37] Note, *Searching for Hijackers: Constitutionality, Costs, & Alternatives*, 40 U. CHI. L. REV. 383, 407 n. 162 (1973).

[38] 29 Cal. App. 3d 106, 105 Cal. Rptr. 280 (1972). Report withdrawn by order of the California Supreme Court.

[39] *Id.* at 111.

[40] Note, *Airport Freight and Passenger Searches: Application of Fourth Amendment Standards*, 14 WM. & MARY L. REV. 953 (1973).

[41] 42 U.S.L.W. 2019 (5th Cir. Jun. 14, 1973).

[42] "I feel that . . . viable use (I am not speaking of mere confiscation) should not be made of proceeds toward which the search was not, and could not have been independently, directed." *Id.*

[43] 481 F.2d 723 (2d Cir. 1973).

[44] *Id.* at 727, 730.

Indeed, the *Schneckloth* definition of consent bears little relevance to the *Meulener* rule when *Meulener* is viewed in the context of search based on reasonableness. Therefore, since *Schneckloth* has not settled the issue of *Meulener*, the conflict remains to be resolved.[45]

B. *Effect of Schneckloth on Requirements for "True" Consent Search in the Airport.*

If the search to which the passenger must submit is reasonable because of the hijacking danger, his "consent" to the search is not the kind of consent involved in a "true" consent search in which there is no alternative justification for search. Consent in the "true" sense is a relinquishment of fourth amendment rights and has traditionally been regarded as the weakest possible basis for search.[46] Consequently, when dealing with cases involving the airport context courts have generally been wary of searches which the government has tried to justify solely on the basis of consent.

In most air search cases in which consent was an issue, the question arose, as in *Bleile*, only as an alternative ground for search.[47] In these, the court rejected the consent theory, but upheld the search on grounds of reasonableness under *Terry*. In a few instances, the government tried to justify the search on a theory of implied consent based on the passenger's

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[45] Title II of the Air Transportation Security Act of 1973, currently awaiting consideration in the House of Representatives, contains a requirement, specifically added to Senate Bill #39 by the Senate Commerce Committee prior to introduction on February 2, 1973, that the prospective passenger before being searched must be informed of his right to refuse search by choosing not to board. In its report, the Senate Commerce Committee, echoing *Meulener*, declared that the only purpose for inspection of passengers and luggage is to insure that dangerous weapons will not be carried aboard the aircraft; therefore refusal of passage satisfies this purpose as effectively as does the search. The Bill, passed by the Senate on February 2, 1973, prescribes procedures to be followed in passenger inspection and contains the following provision: "If consent for such a search is denied, such person shall be denied boarding and shall forfeit his opportunity to be transported in air transportation."

Further, the Committee in its recommendation that appropriate notices be provided at airports advising passengers of the procedures to be followed and of the passenger's right to refuse search, noted that such advice "will go a long way in diminishing legal challenges to the security program and will provide further safeguards to individual liberties and freedoms." Title II, Air Transportation Security Act of 1973 would provide the following procedures for screening passengers and carry-on possessions for unauthorized weapons.

> Only passengers who activate positive response from from the weapons detecting device to be subject to search. But before any physical search or frisk of the individual is conducted he must be given the opportunity to remove from his person clothing or other belongings any items which might have activated the detection device. If at this time, the person still evokes a positive response from the device, then and only then is he subject to search or frisk, but only if he voluntarily consents. If such consent is denied, the individual shall forfeit his opportunity on that occasion to be transported, and the air carrier shall deny his passage. S. Rep. No. 93-13, 93rd Cong. 1st Sess. (1973).

[46] People v. Erdman, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972).

[47] *See, e.g.*, United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972).

willingness to proceed to the boarding area despite the presence of posters warning of the search;[48] however the implied consent theory has been uniformly unsuccessful as justification for search. In short, courts have been reluctant to justify airport searches solely on the basis of consent, either express or implied. Apparently this distrust of the consent search stems either from a judicial respect for fourth amendment guarantees or from the common sense presumption that a person does not "voluntarily" consent to a search which he knows will reveal incriminating evidence.

Although no case was found to date in which consent alone was sufficient to justify search, *Schneckloth*, as interpreted in *Bleile*, clearly suggests that in future cases, the subject's uninformed submission will be sufficient ground for lawful search even without the alternative justification offered by the government in *Bleile*; i.e., the reasonable fear of hijacking based on a high magnetometer reading. For example, a traveler in the airport who neither met the "profile" nor activated the magnetometer could be approached by a marshal and asked for his bag. The passenger unaware of his right to refuse, may simply hand over his luggage thereby "consenting" to an unreasonable search and waiving his constitutional immunity without being aware of its existence. In the context of this type of search, the *Schneckloth* rule, that knowledge of alternatives is not a prerequisite to consent, threatens to weaken the strict requirements for consent which have been developed in airport search law.

To support his argument that he had not voluntarily consented to search, the defendant in *Bleile* relied on the same line of cases that supported the defendant's arguments in *Schneckloth*. This line of cases from the Ninth Circuit supports the doctrine that consent to search is not voluntary unless the prosecution can show that the subject knew of his right to refuse consent.[49] The Ninth Circuit premised its theory on a Supreme Court ruling that consent to search is a waiver of a constitutional right and that waiver in this context means an "intentional relinquishment of a known right or privilege."[50] To this premise, the Ninth Circuit added: (1) the waiver of a constitutional right must be a knowing and intelligent relinquishment of *that* right; and (2) the consent must reflect an "understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld."[51] By insisting upon a knowing and intelligent consent, this line of cases diverged

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[48] United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); People v. Erdman, 69 Misc. 2d 103, 329 N.Y.S.2d 654 (Sup. Ct. 1972). Signs posted by F.A.A. warned that it is illegal to carry weapons on board aircraft and that passengers and baggage are subject to search.

[49] Schoepflin v. United States, 391 F.2d 390, 398-99 (9th Cir. 1968); Bustamonte v. Schneckloth, 448 F.2d 699, 700 (9th Cir. 1971), *rev'd*, 412 U.S. 218 (1973).

[50] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[51] Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966).

from the majority view that the government need only show that the consent was voluntary and free from coercion or duress, either physical or psychological.[52]

Even though the requirement of such an informed consent is not a majority view in general search and seizure law, this requirement was recognized outside the Ninth Circuit particularly in the case law and literature involving airport searches. In *United States v. Lopez*,[53] most often cited on the issue of consent, the Second Circuit rejected the government's contention that the defendant had consented to a search simply because he had not resisted when asked by the marshals to accompany them to a private area for search. "Such conduct," said the court, "by one who may think himself in custody (although actual custodial detention was not established) hardly amounts to an 'unequivocal specific, and intelligently given consent.' "[54] Although *Lopez* did not expressly require *Miranda*-type warnings before search, the court cited a note in the text of the opinion, in which the authors recommend detailed procedures analogous to the *Miranda* warnings prior to consent searches.[55] The district court in California cited *Lopez* when it issued the *Meulener* rule that prior to search the subject must be advised of his right to avoid the search by not boarding.

Relying on the *Meulener* rule, Bleile argued that without the prescribed advice, the search of his hand luggage could not be justified on the basis of consent. The California court rejected this argument and stated that the rule had been expressly disapproved by the Supreme Court in *Schneckloth*. The Court there indicated a preference for the California rule, pointing to the near impossibility of meeting the prosecutorial burden of affirmative proof of knowledge demanded by the Ninth Circuit. To impose upon the government the burden of proving the content of a person's subjective understanding would raise doubt as to whether consent searches could continue to be conducted.[56] Further, although the Court itself recognized that *Miranda*-type warnings would go far in proving that the subject knew of his right, the Court refused to require such warnings, declaring that it would be "thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[57]

Even assuming that detailed warnings are impracticable in the airport,

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[52] Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); United States v. Fike, 449 F.2d 191 (5th Cir. 1971).

[53] 328 F. Supp. 1077 (E.D.N.Y. 1971).

[54] *Id.* at 1093.

[55] People v. Tremayne, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971); Note, *Consent Searches: a Reappraisal after Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

[56] "Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 230 (1973).

[57] *Id.* at 231.

it is submitted that the simple requirements of the *Meulener* rule plus a statement warning the passenger that any evidence of illegal activity may be used against him and reminding him also that his protection from search is constitutionally based could be implemented without impairing the efficiency of either the search or air travel. Since most passengers arrive at boarding gates prior to boarding time, the warnings could be given them during the waiting period before the search process begins. The little time to be lost in administering the advice would be far outweighed by the assurances of meaningful consent to be gained through the advice.

Another problem involving meaningful consent, raised in *Schneckloth* but not in *Bleile*, is the question whether affirmative proof by the defendant that he did *not* know of his right to refuse would nullify the consent. The implication of *Bleile* is that it would not. This difficult question was posed by Justice Marshall in his dissent in *Schneckloth* in which he suggested that the majority was apparently deciding that even if the defendant could convince the trier of fact that he did not know of his right to refuse, the search would nevertheless be constitutional.[58] *Bleile* does nothing to allay Mr. Justice Marshall's concern; indeed, it goes far toward vindicating his rueful prediction that the holding in *Schneckloth* will confine the protection of the fourth amendment to the "sophisticated, the knowledgeable and the few." At the moment of request for an otherwise unreasonable search, the only shield the fourth amendment provides the citizen is the right to refuse. If through lack of knowledge of the right, he is unable to make effective use of that shield, his fourth amendment protection is meaningless. Surely, knowledge of the fourth amendment is not a prerequisite to the enjoyment of its protection. Unfortunately, the implication of *Bleile* is that the passenger must pay for his ignorance with a forfeiture of his fourth amendment guarantees. And in this context, *Bleile* points toward a stretching of the consent exception to include searches which even after *Schneckloth* should be invalidated by the test of voluntary consent.

IV. Voluntary Consent and Coercion in the Airport

In contrast to the *Bleile* court's reading of *Schneckloth* is the Second Circuit's refusal to accept *Schneckloth* as controlling in a similar air search case. In *United States v. Ruiz-Estrella*,[59] conviction was based on the seizure of a shotgun from the shopping bag of a would-be air line passenger who had been identified as an F.A.A. "profile selectee" by an airline ticket agent. A uniformed sky marshal was advised of the profile selection and directed the subject into a stairwell at the end of the boarding ramp. After

[58] *Id.* at 285.

[59] 481 F.2d 723 (2d Cir. 1973).

closing the door behind them, the marshal either "asked" or "told"[60] the subject to hand over the shopping bag for search. The defendant silently complied, and a shotgun was found which was later admitted into evidence in the trial and conviction of the defendant for firearms possession. On appeal, the government attempted to justify the search on alternate theories: (1) the search was justified by the danger alone;[61] or (2) the passenger had consented to the search. Neither of these theories was successful. The first was rejected by the court on the ground that the search was not reasonable, and the second on the theory that the defendant's "consent" was ineffective because of the government's failure to prove that consent was voluntary. Interestingly, in support of its second theory the government relied on the *Schneckloth* rule, as it had in *Bleile*; however, the Second Circuit declined to interpret *Schneckloth* as the *Bleile* court had. Noting that the Supreme Court had drawn a distinction in *Schneckloth* between the "congenial" atmosphere surrounding the search of the auto on the highway and the coercive atmosphere of custody, Judge Smith stated:

> The Supreme Court stressed that the environment in which the consent took place was not inherently coercive, being a far cry from custodial "interrogation in some remote station house." In contrast the closed stairwell of the airport comes much closer to a traditional custodial situation. . . . Further, the facts here do not amount to a showing that he, appellant, was aware that he had the right to refuse to be searched if he should choose not to board the aircraft. . . . The record makes it quite clear that neither the ticket agent, the boarding agent nor the sky marshal made Ruiz-Estrella aware of any such option.[62]

Clearly, the Second Circuit differs with the *Bleile* court in its reading of *Schneckloth* on the question of what constitutes consent in the airport search. The key difference seems to be the Second Circuit's appreciation of the coercive nature of the search and the possibility that a passenger, when singled out and confronted with a marshal's request for search, will simply acquiesce if he is unaware of his right to refuse. For the Second Circuit, such acquiescence is not consent and will not justify a search without warrant or probable cause.[63] Whereas the *Bleile* court read *Schneckloth* as freeing the prosecution from the necessity of proving knowledge of the right to refuse consent as an essential part of its burden in establishing consent, *Ruiz-Estrella* interpreted *Schneckloth* in terms of the one element

[60] "Whether we adopt the theory that appellant was told 'he would have to go through a baggage search' (as LaSota, the marshal) stated on direct), or that he was 'asked to submit to such a search' (as was testified on cross), is of little moment. . . . The fact that a suspect . . . hands over his bag in such circumstances will not support the inference of freely given consent." *Id.* at 728.

[61] The "danger alone" theory was rejected on the ground that the defendant, except for meeting the profile, had done nothing that could be construed as dangerous nor had he passed through or activated the magnetometer. *Id.* at 729.

[62] *Id.* at 728.

[63] *Id.*

which the state must establish—freedom from coercion. On the question of waiver of the fourth amendment rights by consent, the Second Circuit has simply shifted the focus from the question of informed consent emphasized in fifth and sixth amendment cases to the traditional question of uncoerced consent. Unlike *Bleile*, the *Ruiz-Estrella* decision anticipates no quantitative alteration in the government's burden as a result of *Schneckloth*, but merely a shift in emphasis.

Hopefully, in future airport search cases, thoughtful courts will, like the Second Circuit direct attention to the compelling and coercive atmosphere of the search.[64] Indeed, the modern airport search bears little resemblance to the consent searches depicted in *Schneckloth* as normally occurring on the highway, or in the subject's office or home, and under "informal and unstructured conditions."[65] Air travel by its very nature demands that the would-be passenger surrender effective control of his person and belongings. From the time he enters the terminal, his actions are directed by the voice of uniformed authority, which urges submission to the established regimen as he is led through the preliminary steps to flight. Given the passive state of the traveler and his conditioning to follow any directive in the multi-staged process necessary to air travel, any official request for search no matter how courteous, may be interpreted as just another in a series of commands.

In order that the passenger might distinguish the request from an order, a warning should accompany the request, advising the passenger that he has a constitutional right not to be searched and further that any evidence of illegal activity found during the search, whether or not related to hijacking, can be admitted as evidence against him. Admittedly, the Supreme Court in *Schneckloth* rejected such *Miranda*-type warnings as not practicable; however, the *Schneckloth* search as it was pictured by the Court can be distinguished from the airport search on the basis of the inherently compelling pressures of the airport and the possibility that the passenger when approached by the marshal may believe himself in custody.[66] Although *Schneckloth* rejects knowledge as a prerequisite to consent, the Court retains the requirement of freedom from coercion, and warnings may well be the only way to assure meeting the latter requirement. Even though warnings are not necessary to establish informed consent, a reminder of fourth amendment protections may be necessary to provide the traveler with the constitutional "backbone" he needs to resist official coercion in the airport.

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[64] Consider the Orwellian atmosphere achieved by planners of the Tampa International Airport through the use of directions given by recorded voices from unseen sources.

[65] 412 U.S. at 232.

[66] The majority in *Schneckloth* expressly noted that "the present case does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent." *Id.* at 247 n. 36.

V. CONCLUSION

Before *Schneckloth*, there was implict in much of the case law and literature involving air search an underlying assumption that the waiver of fourth amendment rights must meet the same strict standards of "knowing and intelligent" waiver currently required for effective relinquishment of fifth and sixth amendment rights. Therefore, when courts were faced with an attempt to justify a search on the basis of consent, a heavy burden was usually placed upon the government to demonstrate not only that the consent was uncoerced but also that it resulted from some kind of meaningful choice. The implicit assumption that consent must be "knowing" to be valid became for the Ninth Circuit and the *Meulener* court an express requirement. In *Schneckloth*, however, the Supreme Court's refusal to extend the "knowing and intelligent" waiver standard to fourth amendment rights undercuts the assumption supporting that express requirement, thus removing the element of knowledge from the prosecutorial burden of proving voluntary consent. The *Bleile* decision is one unhappy but foreseeable consequence of *Schneckloth*. By requiring no proof that the defendant knew of his right to refuse search while at the same time ignoring the compelling and coercive atmosphere of the airport, *Bleile* clearly points to a relaxation and lowering of the standards previously set by most courts for valid consent to airport searches. Further, the dubious use of *Schneckloth* to negate the sensible requirements of the *Meulener* rule, would eliminate this one well-articulated barrier to further expansion of the *Terry* "reasonable fear" exception—the fear is not reasonable and the search not justifiable if the passenger declines to board the aircraft. The possible extension of *Terry*, implicit in *Bleile*, to justify search of the non-boarding passengers, combined with the lowering of standards for "consent" searches can only mean that for thousands of Americans every day, the price of admission to the airport may be the loss of much of their fourth amendment protection.

Fortunately, *Bleile* is only one case. And as the Second Circuit's decision in *Ruiz-Estrella* indicates, there are persuasive arguments for refusing to read *Schneckloth* as the *Bleile* court did. Instead of interpreting *Schneckloth* as an absolute lowering of consent standards, the Second Circuit correctly shifted the focus from the question of informed consent to a careful scrutiny of possible coercive factors in the airport. Finding that official coercion can exist when an individual is singled out for closer scrutiny, the Second Circuit rejected the government's argument that the defendant had consented to the search, and without alternative justification for search as there was in *Bleile*, the evidence was suppressed. The recognition by thoughtful courts of compelling factors in the airport plus a lingering distrust of uninformed waiver of constitutional protection should

mitigate the threat to fourth amendment safeguards implicit in the *Bleile* reading of *Schneckloth*.

However, if courts are indifferent to the coercive atmosphere of the airport search, it remains arguable that searches conducted pursuant to consent as it is defined by *Schneckloth* should still not be permitted in the airport situation. The Supreme Court's definition of consent provides at worst a trap for the constitutionally ignorant and at best a murky test for "voluntariness" as unwieldy as the obscure test for reasonableness under *Terry*. To the extent that abuse of consent, after *Schneckloth*, is possible, the question is whether there is sufficient value in the consent search to sustain its use.

To support the governmental need for consent searches the Supreme Court stated that:

> in stiuations where the police have some evidence of illicit activity, a search authorized by valid consent may be the only means of obtaining reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable.[67]

This rationale will not support consent alone as a basis for anti-hijack searches in the airport, since either of the situations described by the Court —evidence of illicit activity or probable cause to arrest—would more than meet the relaxed "reasonable fear" standards of *Terry* as it has been applied in air search law. The government would not need consent in those situations. Moreover, since the F.A.A. anti-hijack screening system has been held constitutionally permissible, and the government has conceded that no flight fully protected by the anti-hijacking system had been hijacked,[68] there appears to be little justification for the government's resorting to consent as a basis for search, so long as hijack deterrence is truly the purpose of the search. Since the government has been able to justify its anti-hijack searches on other grounds and those searches have proved to be effective when properly applied, there is no compelling governmental interest sufficient to outweigh the possible invasion of the passenger's fourth amendment rights through the use of the consent search. In short, if the government has a legitimate reason for requesting consent, it does not need consent; and if it has no legitimate reason for the search, the fourth amendment was intended to stand squarely between the government and the citizen. At the moment of request, given the threat of official coercion and the possibility of the passenger's ignorance, his fourth amendment shield may fall too easily.

The unconstitutionality of a search conducted solely on the basis of

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[67] *Id.* at 227.

[68] United States v. Bell, 464 F.2d 667, 676 (2d Cir. 1972).

consent under these circumstances is foreshadowed by Justice Stewart's words in the majority opinion of *Schneckloth.*:

> [The] Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."[69]

Jeannie Y. Teteris

[69] 412 U.S. at 228.