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Constituional Law: Airport Searches and the Exclusionary Rule--Valid Police Work or Prosecution by Windfall

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Picture Association to begin lobbying for the establishment of statewide obscenity criteria rather than a "crazy quilt" of conflicting county codes.[41]

Thus, while the instant case conforms to the Supreme Court's consistent refusal to extend first amendment protection to all forms of expression and provides a long-needed means of relieving the Court of its burden of independently determining factual issues in obscenity cases, it creates new problems concerning the identity of the community from which contemporary community standards are to be derived. These problems will be resolved only through protracted litigation if the Court does not see fit to define "community" clearly at its earliest opportunity.

SCOTT CROSS

CONSTITUTIONAL LAW: AIRPORT SEARCHES AND THE EXCLUSIONARY RULE – VALID POLICE WORK OR PROSECUTION BY WINDFALL?*

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

On May 19, 1971, defendant presented himself as a passenger at an airport boarding gate. Because defendant fit the Federal Aviation Authority (FAA) anti-skyjack "profile," the airline ticket agent detained him and summoned a United States deputy marshal. When defendant failed to produce satisfactory identification the marshal escorted him to a private office, where he first directed defendant to turn over his wallet, which contained identification in defendant's name. Since defendant appeared to be nervous, possibly under the influence of alcohol or drugs, and because there was a hard bulge in the pocket of his trousers the marshal, thinking the bulge might be a gun, ordered him to stand up and empty his pockets. Instead, defendant produced a plastic bag containing a white powder that proved to be cocaine. At trial in the United States Court for the Middle District of Florida for possession of narcotics, defendant was convicted after unsuccessfully contending that the seized

41. The publishing industry has formed a coalition for the purpose of providing legal defense funds for expected litigation. *Id.* Some of this concern could of course spring from the fact that the industry fears the more restrictive definition of obscenity enunciated in the instant decision. See note 3 *supra*.

*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the fall 1973 quarter.

drug should have been excluded as evidence. On appeal, the Fifth Circuit Court of Appeals affirmed the conviction and HELD, *inter alia,* contraband seized in an airport boarding-gate search for weapons is not subject to the exclusionary rule.[1]

Recent cases dealing with applicability of the exclusionary rule to contraband evidence seized in airport anti-skyjack searches have started with the proposition that the practical limitations of the airport context preclude procurement of a search warrant or establishment of probable cause,[2] ordinarily required to satisfy the fourth amendment protection against unreasonable searches and seizures.[3] There is likewise agreement with the notion advanced in *United States v. Moreno*[4] that the "sheer urgency" of the air piracy threat justifies imposition of limited search procedures with carefully circumscribed limitations for the protection of lives and property — a substantial government interest. Nearly all the courts[5] that have faced the problem of defining the constitutionally permissible scope of warrantless airport searches, and the concomitant question of the applicability of the exclusionary rule, have followed the lead of *United States v. Lopez,*[6] which employed the flexible standard of reasonableness set forth in *Terry v. Ohio,*[7] wherein the "stop and frisk"

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1. 482 F.2d 1272 (5th Cir. 1973). The court in the instant case also held that the constitutional validity of searches of passengers who present themselves for boarding an aircraft at airport boarding gates is to be measured by the standard developed in assessing the constitutionality of border searches — the criterion of "mere or unsupported suspicion." *Id.* at 1276. This novel holding is examined briefly in Alper, *Airline Searches: A Diminution of the Fourth Amendment,* 47 FLA. B.J. 707, 711 (1973). Illuminating commentary on the subject of border searches in general will be found in Note, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007 (1968).

2. United States v. Kroll, 351 F. Supp. 148, 151 (W.D. Mo. 1972), *aff'd,* 481 F.2d 884 (8th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971).

3. The full text of the amendment: "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 warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

4. 475 F.2d 44, 48-51 (5th Cir. 1973).

5. *E.g.,* United States v. Ruiz-Estrella, 481 F.2d 408 (5th Cir. 1973); United States v. Legato, 480 F.2d 408 (5th Cir. 1973); United States v. Moreno, 475 F.2d 44 (5th Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972); United States v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972), *aff'd,* 481 F.2d 884 (8th Cir. 1973). *Contra,* United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972), which insisted on a probable cause standard.

6. 328 F. Supp. 1077 (E.D.N.Y. 1971).

7. 392 U.S. 1 (1968). In this case, in which defendant's conviction on a weapons possession charge was affirmed, a police officer with 30 years of experience became suspicious of several men walking back and forth in front of a store in a high-crime area. Fearing they were contemplating a robbery and that they were armed, he accosted them, took them into the store, and stood them against the wall. When a frisk of their outer clothing revealed guns, the policeman reached inside their coat pockets and seized the weapons. In deciding whether the officer's action met the reasonableness requirement, and consequently whether the exclusionary rule would be triggered to suppress the seized weapons, the Court estab-

exception to the fourth amendment requirements of probable cause and warrant was recognized.[8] Since the search in *Terry* was a protective search for weapons, *Lopez, Moreno,* and their companion cases found a parallel in the prophylactic detention of a small group of passengers in airport security searches aimed at discovering weapons or explosives that could be used in hijacking attempts.

Before reaching the question of the applicability of the exclusionary rule to contraband seized in airport searches, *Lopez, Moreno,* and their successors focused first on the reasonableness of the search itself. In making the determination, *Lopez* set up a continuum of increasing levels of probability that the detainee is a potential hijacker, corresponding to increasing intrusions of his personal privacy.[9] The airport security official begins with minimal information on which to base detention (for example, where the defendant fits the anti-skyjack "profile" and activates a magnetometer).[10] He gradually accumulates additional facts (such as lack of identification, nervousness or evasive behavior, prominent bulges in the detainee's clothing) to justify increased invasion of the individual's person and hand baggage until it is determined with certainty whether the detainee is a hijacker.[11] Like *Lopez, Moreno* insisted that as the level of intrusion increases, it must nonetheless be strictly circumscribed toward discovering "what was minimally necessary not only to insure the personal safety of the investigating officer, but also the *safety of* others."[12] Both cases and their companions, in assessing the reasonableness of the search at its inception and as it widens in scope, used a

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lished an objective test: whether the "articulable facts" available to the officer at the inception of the search would cause a reasonable man to believe the action taken was appropriate. A vague or "inarticulate hunch" would not be enough. 392 U.S. at 21. Since this test necessarily could not be stated in rigid terms, determinations would have to be made on a case-by-case basis, employing a balancing test. Thus, the degree of intrusion into the individual's privacy would be weighed against the probability of danger to the officer and others. The constitutionally permissible level of intrusion would be dictated by the extent of the potential harm. 392 U.S. at 29-30.

8. Several groups of exceptions to the warrant requirement have been judicially recognized in recent years. The first group includes instances where the evidence seized is in "plain view" (Harris v. United States, 390 U.S. 234 (1968)) or can easily be moved (Brinegar v. United States, 339 U.S. 160 (1949)) or destroyed (Schmerber v. California, 384 U.S. 757 (1966)). A second group includes searches incident to a valid arrest (Chimel v. California, 395 U.S. 752 (1969)) or where consent is given (McDonald v. United States, 307 F.2d 272 (10th Cir. 1962)). Other instances where warrantless searches are permitted are where the officer is in "hot pursuit" (Warden v. Hayden, 387 U.S. 294 (1967)), and border searches (*e.g.,* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966)).

9. 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971).

10. *Id.* at 1083-85. The constitutionality of use of the profile and magnetometer were discussed at length and upheld in this case. *See* Comment, *Searching for Hijackers: Constitutionality, Costs and Alternatives,* 40 U. CHI. L. REV. 383 (1973), for an exhaustive examination of this aspect of airport searches.

11. The continuum begins with little or no positive evidence that the detainee is potentially engaged in air piracy and extends to probable cause. 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971).

12. 475 F.2d 44, 47 (5th Cir. 1973) (emphasis added).

balancing test derived from *Terry*, weighing the need to thwart air piracy, with its attendant risk to hundreds of lives and millions of dollars worth of property, against the degree of intrusion into individual privacy.[13] Despite the urgency of the hijacking situation, however, an intrusion by a marshal that exceeds the scope of a weapons search is unjustified; hence evidence seized in such an excessive search would not be admissible.[14]

In cases where the airport search in question reveals weapons or explosives, thereby unveiling a potential skyjack threat, the stepwise progression of objective facts linked with increased degrees of intrusion would establish a neat, factual continuum with procedural checkpoints, reducing judicial determination of the applicability of the excusionary rule to a mechanical operation. Problems arise, however, because searches aimed at halting air pirates turn up narcotics more frequently than weapons.[15] Although the factual matrices of no two cases are exactly alike, it is not difficult to pair factually similar cases that reach opposite conclusions as to the admissibility of seized contraband.[16] Thus, the *Lopez* court justified the seizure and subsequent admission of drugs contained in a box that created a bulge inside defendant's coat as resulting from a search that was "almost an exact model" of the procedure sanctioned in *Terry*.[17] On the other hand, the court in *United States v. Kroll*[18] rejected the seizure and subsequent admission of drugs, which created a bulge in an envelope in defendant's briefcase, relying on the caveat in *Sibron v. New York*,[19] that "a search which is reasonable at its inception may yet violate the Fourth Amendment by virtue of its intolerable intensity and scope."[20]

A parallel line of reasoning that also creates conflict among the courts is the notion that contraband discovered in the course of an airport security search amounts to evidence of a crime being committed in the inspecting officer's presence. Hence the *Moreno* court found no difficulty in refusing to apply the exclusionary rule to the unexpected fruit of a search for weapons that otherwise meets the reasonableness requirement: the officer is not required to

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13. *See, e.g.*, United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Legato, 430 F.2d 408 (5th Cir. 1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir. 1972).

14. United States v. Lopez, 328 F. Supp. 1077, 1098 (E.D.N.Y. 1971).

15. One study covering the period October 15, 1969 to December 14, 1971, showed 538 narcotics arrests and 338 concealed firearms (and other deadly weapons) arrests as a result of the Marshals Service Air Piracy Program. The Marshals Service (a branch of the United States Department of Justice) claimed to have aborted 15 hijackings during this period. Comment, *Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356 n.3 (1972).

16. *Compare* United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), *with* United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972).

17. The *Lopez* court ignored the fact that the *Terry* search resulted in seizure of weapons, towards which the search was directed, and not drugs. 328 F. Supp. 1077, 1098 (E.D.N.Y. 1971) (evidence suppressed on other grounds).

18. 351 F. Supp. 148 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884 (8th Cir. 1973).

19. 392 U.S. 40 (1968). This case was a companion to Terry v. Ohio, 392 U.S. 1 (1968).

20. 351 F. Supp. 148, 153 (W.D. Mo. 1972).

"shrug his shoulders" and permit the suspect to escape.[21] But this justification for admission of evidence seized in an airport search is balanced by the admonition of the court in *United States v. Ruiz-Estrella*[22] that searches may not be retrospectively justified by what they turn up.[23]

Regardless of the particular reasoning relied on by courts considering the applicability of the exclusionary rule to contraband seized in airport searches, the invariable preliminary focus has been on the reasonableness of the search itself. The finding of reasonableness (or lack thereof) based on "articulable facts" thus dictates whether the exclusionary rule will operate; if the search is carefully limited and does not widen into a general exploratory search for evidence of any kind of criminal activity, the evidence seized will be admitted.[24] As a result, courts purporting to apply the *Terry* rule have subjected those in the class of non-hijackers to a species of constitutional Russian roulette; as often as not, non-hijackers who would otherwise be entitled to the protection of the warrant and probable cause requirements, though involved in other crimes (such as possession of narcotics) find themselves caught and convicted by a procedure specifically directed toward the detection and detention of potential hijackers.[25] In spite of this anomaly, however, the courts

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21. 475 F.2d 44, 50 (1972), *citing* Adams v. Williams, 407 U.S. 143 (1972); *accord,* United States v. Lopez, 328 F. Supp. 1077, 1098 (E.D.N.Y. 1971).

22. 481 F.2d 723 (2d Cir. 1973). In this case an airport search, which disclosed a gun, was held constitutionally impermissible.

23. *Id.* at 729, *citing* Beck v. Ohio, 379 U.S. 89 (1964). Justice Fortas stated this caveat in a different context (hot pursuit) in his concurring opinion in Warden v. Hayden, 387 U.S. 294 (1967), when he warned that there must be a nexus between the crime (committed or potential) and the anticipated fruits of a warrantless search; if the evidence seized is unrelated to the purpose for which the warrantless search is commenced, it must be suppressed. 387 U.S. at 310 (Fortas, J., concurring).

24. Terry v. Ohio, 392 U.S. 1 (1968).

25. The difficulty the courts have encountered in determining whether the airport search in a given case meets the reasonableness standard of *Terry* is magnified by a host of subsidiary issues outside the specific ambit of the present discussion. One major problem is that of implied consent to airport searches, which has been argued to exist by virtue of signs posted in airport boarding areas warning that passengers are subject to search, or by "general knowledge" from widespread publicity. This argument was rejected by the court in United States v. Meulener, 351 F. Supp. 1284, 1287-88 (N.D. Cal. 1972), but accepted in the principal case, 482 F.2d 1272, 1274 (5th Cir. 1973). Intertwined with the consent problem is the concept of a tradeoff of the constitutional protection from unreasonable search and seizure for the constitutional right to travel. United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971). *See also* Comment, *supra* note 10.

Another problem is illustrated by the emphasis in *Lopez* and *Moreno* on the safety of "others" in the justification of the officer's protective weapons search, derived from *Terry*. However, in *Terry* "others" referred to sidewalk bystanders who were vulnerable to immediate violence in a street encounter between policeman and suspect; in *Lopez, Moreno* and other skyjack cases, the "others" were the passengers and crew of an airplane waiting outside the airport building. Since extensive airport searches following initial detention and questioning nearly always take place in a custodial atmosphere well removed from the airplane, these searches are a spatial step removed from the factual context of *Terry*. Comment, *supra* note 15, at 363. Still another difficulty in assessing the reasonableness of an airport search is that anti-skyjack security personnel may understandably bring preconceived notions to bear on

until the instant case avoided direct and independent consideration of the applicability of the exclusionary rule to suppress contraband seized in an anti-skyjack search regardless of the reasonableness of the search itself.

In rejecting defendant's contention, in the instant case, that the seized cocaine should have been excluded because the search was not and could not have been conducted for the purpose of discovering illicit drugs, the court concluded the sole purpose of the exclusionary rule is deterrence, not benefit for the accused.[26] As a deterrent, the rule has been the subject of controversy and doubt. Although the *Terry* court recognized deterrence as a primary *raison d'etre* of the exclusionary rule,[27] it noted, as did the court in the instant case,[28] that in many situations police will act in knowing violation of fourth amendment commands, preferring to forestall or abort criminal acts with no intention of formal arrest or prosecution.[29] By this reasoning the court in the instant case rejected the argument that application of the exclusionary rule would lessen the likelihood of pretextual airport security searches secretly aimed at uncovering contraband,[30] since the argument is purely speculative and has no basis in fact [31] or legal precedent.[32] However, while the court relied on Professor Wright's observation that the rule "cannot be proved" to have a deterrent effect,[33] it ignored the logic of the alternative conclusion — the impossibility of proving the rule would not have deterrent value.

A more serious flaw in the court's consideration of the purpose of the exclusionary rule is that it rejected without discussion[34] the second basis for the rule: enforcement of the fourth amendment rights of the individual citizen, a purpose whose validity is recognized with "little quarrel" by Professor Wright[35] as well as by the *Terry* court.[36] This second justification for the rule, which shifts the focus from the police officer to the individual, draws sustenance from a notion of judicial integrity; that is, the courts will not countenance unreasonable encroachment by the police on the privacy of the indi-

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their observations of passengers' appearance, gestures, and behavior. Acts or conduct that otherwise would be regarded as neutral may, in the eyes of an anti-skyjack marshal, signal danger. United States v. Kroll, 351 F. Supp. 148, 153-55 (W.D. Mo. 1972), *aff'd*, 481 F.2d 884, 887 (8th Cir. 1973). *Cf.* United States v. Ruiz-Estrella, 481 F.2d 723, 729 (2d Cir. 1973).

26. 482 F.2d 1272, 1277 (5th Cir. 1973).

27. 392 U.S. 1, 12 (1968).

28. 482 F.2d 1272, 1278 (5th Cir. 1973).

29. Examples include intervention in domestic quarrels, dragnet searches of teenagers based on tips of impending gang wars, and harassing prostitutes to drive them away. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 18-56 (1967), *cited in* Terry v. Ohio, 392 U.S. 1, 13 n.9 (1968).

30. 482 F.2d 1272, 1278-79 (5th Cir. 1973).

31. *See generally* Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEXAS L. REV. 736, 738 (1972).

32. 482 F.2d 1272, 1278 n.7 (5th Cir. 1973).

33. Wright, *supra* note 31, at 741.

34. 482 F.2d 1272, 1277 (5th Cir. 1973).

35. Wright, *supra* note 31, at 738.

36. Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

vidual as guaranteed by the fourth amendment.[37] This reasoning is premised on the idea that the amendment provides affirmative protection for individual privacy as well as its negative function of deterring police excesses; even if deterrence does not work and the individual is arrested and brought to trial, the exclusionary rule serves as *a posteriori* vindication of his fourth amendment rights by suppressing illegally obtained evidence. The court in the instant case based its rejection of this purpose of the exclusionary rule on the assumption that the fourth amendment protects the citizen from unreasonable searches but does not create any right to be free from criminal prosecution.[38] If the individual were to suffer only the same intrusion as other passengers, then the search would be reasonable[39] and the evidence properly admitted as the product of "valid police work."[40] This reasoning contradicts the court's earlier acknowledgment that the fourth amendment protects the *individual* from unreasonable searches leading to prosecution[41] and utterly ignores the caveat of the dissent that the warrantless search in question could not have been independently directed toward the seizure of contraband.[42] In dismissing protection of the individual as a basis for the exclusionary rule, the court in the instant case refused to accept a principle recognized by federal courts since *Mapp v. Ohio*,[43] and best expressed by the Ninth Circuit in *Cipres v. United States*:[44] "the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen."[45]

The court in the instant case based its rejection of application of the exclusionary rule on the additional ground that, despite the absence of any overt criminal activity by the defendant, which could have justified a search,[46] the fruit of a legally conducted search,[47] even if unrelated to the purpose for

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37. *Id.*
38. 482 F.2d 1272, 1278 (5th Cir. 1973).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1280.
43. 367 U.S. 643 (1961).
44. 343 F.2d 95 (9th Cir. 1965).
45. *Id.* at 98 (dictum).
46. 482 F.2d 1272, 1278 (5th Cir. 1973).
47. Before considering the principal issue in the instant case, the court used the balancing test derived from *Terry* as employed by *Lopez, Moreno,* and other airport search cases, in determining whether the seizure of contraband from defendant met the reasonableness requirement. Finding that an overwhelming governmental interest in thwarting air piracy outweighed the level of personal intrusion in this anti-skyjack search, the court pointed to three factors in mitigation of the seriousness of the invasion of personal privacy: (1) the absence of any stigma being attached to personal searches at a known airport checkpoint; (2) the fact that the passenger voluntarily came to the boarding gate; and (3) the remote likelihood of abuse by officials, since airport searches are supervised and take place not far from the scrutiny of the traveling public. 482 F.2d 1272, 1275-76 (5th Cir. 1973). Accordingly, the court did not move on to an examination of the "articulable facts" in justification of the inception and extension of the search. Had it done so it would have found that the cumula-

which the search was conducted, does not constitute a windfall for the government. The government, according to the court's reasoning, has no duty to apprehend a contraband smuggler in accordance with a set of game rules; all that matters after the person is apprehended is that his search have been "legally conducted."[48] Even assuming the search was legal, this argument is not persuasive. The warrantless search derives its reasonableness, hence its legality, from the exigency of detecting weapons and detaining hijackers; it simply does not follow that evidence unrelated to the crime of hijacking, which is discovered in the course of such a search, cannot properly be classified as a "windfall." To conclude retrospectively that evidence thus seized results from valid police work sets a precedent expressly warned against by concurring Judge Mansfield in *United States v. Bell*,[49] to the effect that high crime rates could thus be used to justify warrantless searches of persons and homes based solely on the "trained intuition" of the police, paving the way for serious abuses of fourth amendment protection. Finally, the unavoidable result of the argument is to come full circle and, in effect, sanction the pretextual airport search, which the court claims it refuses to condone.[50]

Dissenting Judge Aldrich agreed that the hazard of air piracy justified the search in the instant case,[51] and he carefully limited his advocacy of a narrow extension of the exclusionary rule to the suppression of evidence of the seized contraband at trial. Confiscation of the illicit materials in airport searches would still be permitted.[52] However, where the special circumstances of the threat of hijacking dictate lowering ordinary fourth amendment protections in the anti-skyjack search, the dissent pointed to the need for corresponding special safeguards to protect the individual from abuses by inspecting officials.[53] Further, the need of the government to thwart hijackers furnishes no justification for it to receive a "windfall"[54] where the circumstances that led to the non-hijacker's arrest were not of his own making. The dissent could

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tive facts tending to fulfill the reasonableness requirement for the warrantless search in the present case contain gaps that tend to place it at the boarder line of the *Terry* and *Lopez* standards. Between defendant's "selection" from the profile, the ensuing doubt about his identity, and the search at the security office, no magnetometer test was administered, no patdown of his outer clothing conducted, and no *Miranda* warning given, unlike United States v. Bell, 464 F.2d 667 (2d Cir. 1972) and United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972). Rather, defendant was summarily ordered to empty his pockets. Furthermore, the search took place in the custodial atmosphere of a private office removed from the "scrutiny of the traveling public" and from the street confrontation context of *Terry*. Finally, the *Terry* caveat against "inarticulate hunches" seems to collide with the testimony of the detaining marshal, who was "inclined to believe" defendant had a gun in his pocket. Thus, the court's assumption that the contraband was seized in a "concededly valid search" is open to question.

48. 484 F.2d 1272, 1278 (5th Cir. 1973).
49. 464 F.2d 667, 675-76 (2d Cir. 1972) (Mansfield, J., concurring).
50. 482 F.2d 1272, 1279 (5th Cir. 1973).
51. *Id.* at 1280.
52. *Id.*
53. *Id.* at 1281.
54. *Id.* at 1280.

have taken the next logical step to conclude that even if the exclusionary rule is triggered to suppress contraband seized in airport searches, the government nonetheless receives a dual "windfall": removal of contraband from the flow of illicit drug traffic, and identification of a potential "pusher" against whom the government's enormous powers of surveillance and investigation can subsequently be brought to bear.

In recalling the *Terry* caveat that the purpose of this kind of limited search is the discovery of weapons and not evidence of a crime,[55] the dissent paralleled Justice Jackson's forceful illustration in *Brinegar v. United States*[56] of the need to limit introduction of evidence seized in an otherwise impermissible search to fruits directly related to the exceptional circumstances that justified the search at its inception. The persuasive force of the dissent, with which concurring Judge Simpson agreed in substance,[57] rests ultimately on the simple fact that the search in the instant case could not have been independently directed toward the discovery of contraband;[58] under nearly any other circumstances, the exclusionary rule would automatically operate in the absence of probable cause and warrant.

In rejecting application of the exclusionary rule to contraband seized in airport security searches, the instant case was thus incorrectly decided. The majority opinion expressed concern about the "societal cost" of adoption of the narrow extension of the rule advanced by the dissent, in that a significant number of crimes would go unpunished.[59] Since the protection of probable cause and warrant are unquestioned in the context of non-airport searches, however, this concern would seem unfounded. The exclusionary rule would place the government under no greater burden in the detection and arrest of smugglers in the airport than in the street or in the home. The skyjack "exception" to the fourth amendment can be justified with reference to those in the class of hijackers; however, as the airport search cases demonstrate, the problem with airport anti-hijack searches is that they select law violators in general and not just potential hijackers.[60] Allowing non-hijackers the protection of the exclusionary rule would not disturb the purpose of warrantless air-

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55. *Id., citing* Adams v. Williams, 407 U.S. 143, 146 (1972).

56. 338 U.S. 160 (1949). "If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I would candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." *Id.* at 183 (Jackson, J., dissenting).

57. This created a "substantive" majority in favor of the application of the exclusionary rule in the instant case. 482 F.2d 1272, 1279 (5th Cir. 1973).

58. *Id.* at 1280.

59. *Id.* at 1279.

60. Comment, *supra* note 16, at 365.