



Summer 2012

## The Bin Laden Exception

Erik Luna

Washington and Lee University School of Law, [lunae@wlu.edu](mailto:lunae@wlu.edu)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Erik Luna, *The Bin Laden Exception*, 106 Nw. U.L. Rev. 1489 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# HEINONLINE

Citation: 106 Nw. U. L. Rev. 1489 2012



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Thu Nov 14 14:13:40 2013

-- Your use of this HeinOnline PDF indicates your acceptance  
of HeinOnline's Terms and Conditions of the license  
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from  
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope  
of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0029-3571](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0029-3571)

# Colloquy Essays

## THE BIN LADEN EXCEPTION<sup>†</sup>

*Erik Luna*

**ABSTRACT**—Osama bin Laden’s demise provides an opportune moment to reevaluate the extraordinary measures taken by the U.S. government in the “war on terror,” with any reassessment incorporating the threat posed by al Qaeda and other terrorist organizations. Some modest analysis suggests that terrorism remains a miniscule risk for the average American, and it hardly poses an existential threat to the United States. Nonetheless, terrorism-related fears have distorted the people’s risk perception and facilitated dubious public policies, exemplified here by a series of programs implemented by the Transportation Security Administration (TSA). Among other things, this agency has adopted costly technology and intrusive pat downs to screen airline passengers with little evidence that the terrorist risk has been meaningfully and efficiently reduced as a result. The TSA regime also clashes with core constitutional values and decent understandings of the Fourth Amendment. To date, however, the courts have been deferential to the government. Although the decisions rehearse established exceptions, they are indicative of an entirely new constitutional exception grounded in irrational fears of terrorism.

**AUTHOR**—Sydney and Frances Lewis Professor of Law, Washington and Lee University School of Law.

---

<sup>†</sup> An earlier version of this Essay was published in the *Northwestern University Law Review Colloquy* on February 21, 2012, 106 NW. U. L. REV. COLLOQUY 230 (2012), <http://www.law.northwestern.edu/lawreview/colloquy/2012/3/LRColl2012n3Luna.pdf>.

INTRODUCTION.....	1490
I. TERRORISM AND RISK ANALYSIS.....	1493
II. THE TSA REGIME .....	1499
III. AIRPORT SECURITY AND THE FOURTH AMENDMENT .....	1504
CONCLUSION.....	1511

## INTRODUCTION

On the evening of May 1, 2011, the American people learned that the world's most wanted criminal—Osama bin Laden—had been killed in Pakistan during a covert operation by an elite U.S. military team.<sup>1</sup> The news triggered spontaneous gatherings and revelry across the country. For the millennium's new generation, bin Laden had been the embodiment of evil, an omnipresent bogeyman, and, for some, “the first person I was ever taught to hate.”<sup>2</sup> Many young Americans will not be able to recall life without a deep-seated fear of the terrorist leader and the organization he founded,<sup>3</sup> all against a national backdrop of the so-called “war on terror.” Bin Laden's death thus signaled the “end of an era” and progress “toward a safer, less violent world.”<sup>4</sup>

After emotions settled, however, thoughts turned to the ultimate impact of the operation that closed “the Bin Laden decade.”<sup>5</sup> The al Qaeda leader “really did a number on all of us,” wrote *New York Times* columnist Thomas Friedman.<sup>6</sup> “Who will tell the people how deep the hole is that Bin Laden helped each of us dig over the last decade—and who will tell the people how hard and how necessary it will be to climb out?”<sup>7</sup> The question appears ripe in light of statements made by top officials. Defense Secretary

---

<sup>1</sup> See, e.g., Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden Is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=1>.

<sup>2</sup> Ann O'Neill, *The 9/11 Generation's Bogeyman Is Gone*, CNN (May 5, 2011, 7:08 AM), <http://www.cnn.com/2011/LIVING/05/04/bin.laden.911.generation.react/index.html>.

<sup>3</sup> Established by bin Laden in the late 1980s, al Qaeda (“the base”) has served as an umbrella organization and virtual clearinghouse for Islamist terrorism aimed at Western nations and perceived apostate governments in the Middle East. Over the years, bin Laden and his henchmen would work with various organizations (e.g., Ansar al Islam) and direct “franchises” of al Qaeda (e.g., al Qaeda in Iraq).

<sup>4</sup> O'Neill, *supra* note 2 (internal quotation marks omitted).

<sup>5</sup> Thomas L. Friedman, *The Bin Laden Decade*, N.Y. TIMES (May 31, 2011), <http://www.nytimes.com/2011/06/01/opinion/01friedman.html?>; Michael Hastings, *My Decade of Bin Laden*, ROLLING STONE (May 8, 2011, 6:00 PM), <http://www.rollingstone.com/politics/news/my-decade-of-bin-laden-20110508>.

<sup>6</sup> Friedman, *supra* note 5.

<sup>7</sup> *Id.*

Leon Panetta claimed that the United States was “within reach of strategically defeating Al Qaeda.”<sup>8</sup> Shortly thereafter, President Barack Obama announced that “Al Qaeda is under more pressure than at any time since 9/11” and that “more than half of al Qaeda’s leadership” had been taken out.<sup>9</sup>

The time has come for a postmortem examination, so to speak, of the damage wrought during the decade of bin Laden. Some, like Friedman, have looked to the international consequences, including the perpetually troubled relationship among Israel, Muslim-majority nations, and the United States, which was undoubtedly worsened by 9/11 and its aftershock. This Essay contemplates an area of domestic concern that represents perhaps the most palpable effect of terrorism on the American citizenry: travel by plane. In an insightful piece, Professor Alexander Reinert analyzes Fourth Amendment doctrine as applied to airport security.<sup>10</sup> Here, I hope to complement this work by offering some context on terrorism, with the goal of prompting discussion as to whether bin Laden’s legacy will include yet another instance of constitutional exceptionalism.

By definition, exceptionalism is a comparative concept involving a contrast among sufficiently analogous sets of values and practices, where an apparent anomaly or special case is subject to descriptive and normative assessments.<sup>11</sup> For example, the idea of drug exceptionalism is premised upon the unique history and policy of prohibition and, in particular, the extraordinary treatment of drug crime by legislatures, law enforcement, and the courts.<sup>12</sup> The result is a sort of “drug exception” to the Constitution, where otherwise applicable constitutional rules do not seem to apply (or are watered down) in the government’s pursuit of contraband.<sup>13</sup> Since 9/11, however, the exceptionalism of America’s “war on drugs” has been outdone by the “war on terror.”

The very use of the term “war” in this context signifies the extraordinary nature of government efforts, providing a state-sponsored metaphor to emphasize the seriousness of the threat and the virtue of

---

<sup>8</sup> Elisabeth Bumiller, *Panetta Says Defeat of Al Qaeda Is “Within Reach,”* N.Y. TIMES, (July 9, 2011), <http://www.nytimes.com/2011/07/10/world/asia/10military.html?scp=1&sq=bumiller%20panetta%20says%20defeat%20of%20al%20qaeda%20is%20within%20reach&st=cse> (internal quotation mark omitted).

<sup>9</sup> Press Release, White House, Office of the Press Sec’y, Remarks by the President on the Way Forward in Afghanistan (June 22, 2011), available at <http://m.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan>.

<sup>10</sup> Alexander A. Reinert, *Revisiting “Special Needs” Theory Via Airport Searches*, 106 NW. U. L. REV. COLLOQUY 207 (2012).

<sup>11</sup> See, e.g., Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 753–54 (2002).

<sup>12</sup> See, e.g., *id.*

<sup>13</sup> See *id.* at 757–68.

official actions.<sup>14</sup> At times, the United States has been too heavy-handed—and occasionally ham-handed as well—in its approach to fighting terrorism, with important consequences for fundamental rights. The government has engaged in, inter alia: ethnic profiling and related abuses; extended, incommunicado detention and secret proceedings in immigration cases; “enhanced interrogation techniques” (a.k.a. torture) such as water-boarding; extraordinary rendition of detainees to foreign nations known for human rights abuses; mass wiretapping and data collection by the National Security Agency; the maintenance of a quasi-penal colony in Guantánamo Bay, Cuba; and extrajudicial targeted killings abroad, even of U.S. citizens.<sup>15</sup>

The full extent of government operations in the aftermath of 9/11 may never be known, especially since America’s antiterrorism and counterterrorism<sup>16</sup> efforts are shrouded in secrecy, with Freedom of Information Act (FOIA) requests and civil rights suits thwarted by official invocations of privilege over state secrets and matters of national security.<sup>17</sup> The government justified new policies on the basis of necessity, and the American public largely accepted this at face value.<sup>18</sup> In terms of economic costs, the past decade has occasioned a trillion-dollar increase in expenditures on homeland security alone.<sup>19</sup> Bin Laden’s death thus provides an auspicious moment for a levelheaded assessment of the government’s extraordinary actions in view of the threat posed by terrorism.

---

<sup>14</sup> Of course, the “war on terror” has involved nonmetaphorical, conventional warfare in Afghanistan and Iraq, which, in many ways, outstrips all other developments.

<sup>15</sup> See, e.g., WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 360–68 (2007); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 105–09 (2009); Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>.

<sup>16</sup> Antiterrorism is defined as “[d]efensive measures used to reduce the vulnerability of individuals and property to terrorist acts,” while counterterrorism is defined as “[a]ctions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks.” U.S. DEP’T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS 20, 76 (2012), available at [http://www.dtic.mil/doctrine/new\\_pubs/jpl\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jpl_02.pdf).

<sup>17</sup> See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302–13 (4th Cir. 2007) (dismissing a lawsuit regarding an “extraordinary rendition” program because of the state secrets privilege (internal quotation marks omitted)); *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (denying a FOIA request from public interest groups seeking information about detainees in wake of 9/11).

<sup>18</sup> See Luna, *supra* note 15, at 109–10.

<sup>19</sup> See John Mueller & Mark G. Stewart, *Does the United States Spend Too Much on Homeland Security?*, SLATE.COM (Sept. 7, 2011, 12:10 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2011/09/does\\_the\\_united\\_states\\_spend\\_too\\_much\\_on\\_homeland\\_security.html](http://www.slate.com/articles/news_and_politics/politics/2011/09/does_the_united_states_spend_too_much_on_homeland_security.html).

## I. TERRORISM AND RISK ANALYSIS

Of principal concern here is the true nature of the danger to the United States: Is the menace of terrorism *existential*, as many government officials have alleged, threatening the nation's very existence or at least jeopardizing the American way of life as we know it?<sup>20</sup> If so, one could rationalize otherwise forbidden actions as a means of domestic self-preservation, consistent with the axiom that the Constitution is not a suicide pact.<sup>21</sup> But if terrorism presents an unexceptional risk in terms of death and destruction, one would be hard pressed to justify wholesale deviations from constitutional principles—that is, unless the national compact binds weakly or not at all.

This analysis is enlightened by the tools of risk assessment, created by experts to evaluate assorted dangers to human life—from industrial accidents to nuclear power—by considering the likelihood and consequences of a given threat and comparing it to standard benchmarks. Based on the regulatory guidelines in various developed nations, there seems to be some agreement that a risk is unacceptable—and therefore may necessitate government action—if the annual fatality rate is greater than 1 in 10,000 or, in some cases, 1 in 100,000.<sup>22</sup> A risk is acceptable—requiring no further safety improvements—if the annual fatality rate is 1 in 1,000,000 (or sometimes 1 in 2,000,000).<sup>23</sup>

In a series of works, political scientist John Mueller and civil engineer Mark Stewart have applied risk assessment techniques to terrorism-related

---

<sup>20</sup> See, e.g., Luna, *supra* note 15, at 118–21; Jan Freeman, *Existentially Speaking*, BOSTON GLOBE (Feb. 4, 2007), [http://www.boston.com/news/globe/ideas/articles/2007/02/04/existentially\\_speaking](http://www.boston.com/news/globe/ideas/articles/2007/02/04/existentially_speaking); John Mueller & Mark G. Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFF. (Apr. 2, 2010), <http://www.foreignaffairs.com/articles/66186/john-mueller-and-mark-g-stewart/hardly-existential?page=show>; William Safire, *Existential*, N.Y. TIMES (Apr. 8, 2007), <http://www.nytimes.com/2007/04/08/magazine/08wwlnsafire.t.html>.

<sup>21</sup> Cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”). To be clear, this position is not being adopted here.

<sup>22</sup> See, e.g., Mueller & Stewart, *supra* note 20.

<sup>23</sup> See, e.g., *id.* (“Between these two ranges [i.e., acceptable and unacceptable risks] is an area in which risk might be considered ‘tolerable.’”). To be sure, these thresholds are not “magical” but are instead the result of America’s mesh of legislation, litigation, and administrative rulemaking, as well as the policy decisions of other nations. See, e.g., Tim Bedford, *As Low as Reasonably Practicable/As Low as Reasonably Achievable*, in *ENCYCLOPEDIA OF QUANTITATIVE RISK ANALYSIS AND ASSESSMENT* 38 (Edward L. Melnick & Brian S. Everitt eds., 2008) (describing the “as low as reasonably practicable” (ALARP) principle and its application in the United Kingdom); John D. Graham, *The Legacy of One in a Million*, *RISK IN PERSP.* (Harvard Ctr. for Risk Analysis, Cambridge, Mass.), Mar. 1993 (detailing history of “1 in 1,000,000” as a standard for *de minimis* risk).

issues,<sup>24</sup> including whether the threat of terrorism is, in fact, existential. For instance, in the United States, the dangers of cancer (1 in 540) and traffic accidents (1 in 8000) are within the unacceptable range of 1 in 10,000. By contrast, the annual fatality risk of modern terrorism is 1 in 3,500,000, making it a lesser threat than deer hunting accidents, home appliance malfunctions, or bathtub drownings.<sup>25</sup> To fall within the unacceptable range, the number of terrorist-related fatalities would have to increase exponentially, with America “experiencing attacks on the scale of 9/11 once a year, or 18 Oklahoma City bombings every year.”<sup>26</sup> For these and other reasons, the authors concluded that terrorism is hardly an existential threat that would justify costly government actions to further reduce the risk.

The analysis applies with full force to the realistic threats to domestic security posed by al Qaeda and other terrorist organizations, which largely involve bombings and shootings using conventional weapons.<sup>27</sup> Even though these acts are undoubtedly appalling, they can be classified as lethal but not altogether extraordinary *crimes*. Certainly, they are not dangers to America’s existence on par with a military invasion or an internal insurrection.<sup>28</sup> As for the presumably apocalyptic threat of a nuclear attack, the key question is one of likelihood. While it is not inconceivable that al Qaeda could obtain a nuclear weapon, several reports have concluded that the odds remain quite low due to, among other things, the difficulty of acquiring the necessary materials.<sup>29</sup> Even if the risk of nuclear attack were

---

<sup>24</sup> See, e.g., JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY (2011); Mueller & Stewart, *supra* note 20.

<sup>25</sup> See Mueller & Stewart, *supra* note 20.

<sup>26</sup> *Id.*

<sup>27</sup> NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, BACKGROUND REPORT: 9/11, TEN YEARS LATER 3 (2011), available at [http://www.start.umd.edu/start/announcements/BackgroundReport\\_10YearsSince9\\_11.pdf](http://www.start.umd.edu/start/announcements/BackgroundReport_10YearsSince9_11.pdf).

<sup>28</sup> See Luna, *supra* note 15, at 134–36.

<sup>29</sup> See FOURTH ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 21 (2002), available at <http://www.rand.org/content/dam/rand/www/external/nsrd/terpanel/terror4.pdf>; NAT’L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 61–62 (2008), available at [http://www.dni.gov/nic/PDF\\_2025/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf); U.S. DEP’T OF HOMELAND SEC., HOMELAND SECURITY THREAT ASSESSMENT: EVALUATING THREATS 2008–2013, at 5–6 (2008), available at <http://publicintelligence.info/DHS-Threats2008-2013.pdf>; see also DANIEL GARDNER, THE SCIENCE OF FEAR 252–58 (2008) (questioning the likelihood of terrorists obtaining weapons of mass destruction); JOHN MUELLER, ATOMIC OBSESSION: NUCLEAR ALARMISM FROM HIROSHIMA TO AL-QAEDA (2010) (challenging the alleged threat of nuclear annihilation and, in particular, the prospect of terrorists obtaining nuclear weapons). *But see* ROLF MOWATT-LARSEN, AL QAEDA WEAPONS OF MASS DESTRUCTION THREAT: HYPE OR REALITY? 7 (2010), available at <http://belfercenter.ksg.harvard.edu/files/al-qaeda-wmd-threat.pdf>.



viable, the appropriate policy stance would be to focus government efforts on that particular threat, not on all forms of terrorism.<sup>30</sup>

This understanding can help inform the topic of this Essay—the impact of terrorism on commercial air travel. In the wake of 9/11, one scholar calculated the risk to individual fliers:

[L]et us assume that each week one commercial aircraft were hijacked and crashed. What are the odds that a person who goes on one trip per month would be in that plane? There are currently about 18,000 commercial flights a day, and if that person's trip has four flights associated with it, the odds against that person's being on a crashed plane are about 135,000 to 1. If there were only one hijacked plane per month, the odds would be about 540,000 to 1.<sup>31</sup>

Even under these hyperbolic conditions, the theoretical risk to the individual flier is still just a fraction of the actual risk to the individual driver. The nation's failure to appreciate the relative risks—what Cass Sunstein calls “probability neglect”<sup>32</sup>—can have perverse consequences. One study estimated that around 1500 people died in the year after 9/11 because Americans moved from the safest form of travel (flying) to the most dangerous (driving) in order to avoid the fate of those who perished during the terrorist attacks.<sup>33</sup> A later study questioned these findings, only to offer another disturbing sequence of events: Instead of additional road miles, the increased fatalities resulted from heightened stress among people living in the Northeast, proximate to the site of the attacks, who used and abused drugs and alcohol at a higher rate after 9/11, thereby affecting road safety.<sup>34</sup> Either way, Americans were acting contrary to their individual and collective interests.

---

<sup>30</sup> See, e.g., Jeffrey Goldberg & Marc Ambinder, *The Ally from Hell*, ATLANTIC (Dec. 2011), <http://www.theatlantic.com/magazine/archive/2011/12/the-ally-from-hell/8730> (reporting on questions about the safety of Pakistan's nuclear arsenal).

<sup>31</sup> Michael L. Rothschild, *Terrorism and You—The Real Odds*, WASH. POST, Nov. 25, 2001, at B7; see also CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 97 (2005) (“[I]f it is estimated that the United States will suffer at least one terrorist attack each year with the same number of deaths as on September 11, the risk of death from terrorism is about .001 percent . . .”).

<sup>32</sup> See SUNSTEIN, *supra* note 31, at 65–88 (describing “probability neglect”); see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW 137–45 (2011) (discussing phenomena more generally).

<sup>33</sup> See Gerd Gigerenzer, *Out of the Frying Pan into the Fire: Behavioral Reactions to Terrorist Attacks*, 26 RISK ANALYSIS 347, 350 (2006); see also GARDNER, *supra* note 29, at 3; Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, *Driving Fatalities After 9/11: A Hidden Cost of Terrorism*, 41 APPLIED ECON. 1717, 1726 (2009) (estimating that about 2300 lives were lost because of travelers' response to 9/11).

<sup>34</sup> See Jenny C. Su et al., *Driving Under the Influence (of Stress): Evidence of a Regional Increase in Impaired Driving and Traffic Fatalities After the September 11 Terrorist Attacks*, 20 PSYCHOL. SCI. 59, 64 (2009); see also *infra* note 71 and accompanying text (discussing reduction in demand for short-haul flights). Another example of perverse collective public behavior in response to fears of terrorism was the use of prescription antibiotics to treat anthrax (e.g., ciprofloxacin), which was unnecessary and even harmful due to adverse reactions and increased antibiotic resistance. See, e.g., U.S. Food & Drug

Of course, people are not always *rational*, as the term is understood in the classical microeconomic model.<sup>35</sup> Fear and other intensely negative emotions can sway public policy by distorting people's perception of risk and evaluation of potential responses.<sup>36</sup> In particular, low-probability events perceived as catastrophic, uncontrollable, and distributively inequitable—a so-called “dread risk,”<sup>37</sup> such as the danger associated with nuclear power—engender higher levels of fear than threats that are, in truth, more likely and more lethal. Humans typically assess risks based on mental associations mediated by the heuristic of availability, and the more horrific the image, the greater the associated risk. Media coverage can amplify images and related risk perception, at times fostering mistaken beliefs that a consensus has been reached on the nature of a threat, the need for action, and the propriety of the chosen response. Unsurprisingly, political actors have been inclined to exploit (or at least not question) instances of public emotionalism out of concern for their own electoral self-interests.

A number of factors—psychological, social, institutional, even evolutionary<sup>38</sup>—may contribute to an “availability cascade,” where a sequence of events transforms the expressed perceptions of individuals into public panic and political rabble-rousing.<sup>39</sup> Recently, Daniel Kahneman described the implications for terrorism-related issues:

In today's world, terrorists are the most significant practitioners of the art of inducing availability cascades. With a few horrible exceptions such as 9/11, the number of casualties from terror attacks is very small relative to other causes of death. Even in countries that have been targets of intensive terror campaigns, such as Israel, the weekly number of casualties almost never came close to the number of traffic deaths. The difference is in the availability of the two risks, the ease and the frequency with which they come to mind. Gruesome images, endlessly repeated in the media, cause everyone to be on edge.<sup>40</sup>

---

Admin., *Information on Cipro (Ciprofloxacin Hydrochloride) for Inhalation Anthrax for Consumers: Questions and Answers*, FDA.GOV (Nov. 14, 2001), <http://www.fda.gov/Drugs/EmergencyPreparedness/BioterrorismDrugPreparedness/ucm130711.htm> (“Random prescribing and extensive use of Cipro could speed up the development of drug-resistant organisms, and the usefulness of Cipro as an antibiotic may be lost.”).

<sup>35</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3–4 (8th ed. 2011).

<sup>36</sup> See Luna, *supra* note 15, at 81–86; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 22–28, 32–34 (2010). See generally SUNSTEIN, *supra* note 31, at 89–106 (describing social propagation and impact of fear); Paul Slovic, *Perception of Risk*, 236 SCIENCE 280 (1987) (sketching the study and implications of risk perception).

<sup>37</sup> See, e.g., Slovic, *supra* note 36, at 282–83 (discussing the “dread risk” factor).

<sup>38</sup> See Gigerenzer, *supra* note 33, at 348.

<sup>39</sup> See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999) (describing the concept of availability cascades).

<sup>40</sup> KAHNEMAN, *supra* note 32, at 144.

The phenomenon tends to undermine sound public policy, understood as decisionmaking that includes an informed grading of risks and cost-benefit analysis of possible options, all within the structural limitations of government and with due respect for individual rights. If nothing else, good policymaking does not propagate the illusion of enhanced security, nor does it divert attention and resources from those risks that can be meaningfully reduced. Instead, it focuses efforts on actually increasing public safety with some degree of efficiency. In a modern constitutional democracy, sound policy would also respect the fundamental rights of individuals in recognition that safeguarding civil liberties is both a principal objective of a written constitution and in the long-term interests of society.<sup>41</sup>

Today, public perception of terrorism and the post-9/11 governmental reaction are prime examples of public policy driven by fear rather than rational decisionmaking. As both a word and a concept, “terrorism” evokes intense, tragic images that tend to preclude rational risk assessments based on the available information.<sup>42</sup> The resulting fear is exacerbated by the stochastic nature of terrorism, the terrorists’ use of indiscriminate lethal weapons, and their willingness to target civilians who lack meaningful control over the risk of attack.<sup>43</sup> As mentioned above, the federal government has responded with unprecedented policies and practices, in terms of the resources expended and the infringements on individual rights.

To be sure, al Qaeda’s threat has not disappeared, as duly noted by President Obama, his national security team, and prominent foreign leaders.<sup>44</sup> Interpol still considers al Qaeda the world’s biggest terrorist security threat, with direct affiliates and allied groups spread across the globe. Not so long ago, London was reported as a possible target for a “dirty bomb” (i.e., a conventional explosive mixed with radioactive material).<sup>45</sup> On this side of the Atlantic, national security experts and law enforcement officials warned of an attack in the United States on or around the ten-year anniversary of 9/11. Thankfully, these threats never materialized. Yet even if they had, this would still not justify perforce the suspension of individual rights and the implementation of an antiliberal

---

<sup>41</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

<sup>42</sup> SUNSTEIN, *supra* note 31, at 40.

<sup>43</sup> See Ben Sheppard, *Mitigating Terror and Avoidance Behavior Through the Risk Perception Matrix to Augment Resilience*, 8 J. HOMELAND SECURITY & EMERGENCY MGMT. 1, 3–4 (2011).

<sup>44</sup> See, e.g., Prime Minister David Cameron, Statement to the House of Commons on the Death of Osama Bin Laden and Wider Counter-Terrorism Issues (May 3, 2011), available at <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=591331982>.

<sup>45</sup> Duncan Gardham, *Nuclear Terror Risk to Britain from al-Qaeda*, TELEGRAPH (Mar. 22, 2010, 10:20 PM), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7500719/Nuclear-terror-risk-to-Britain-from-al-Qaeda.html>; *Interpol Says al Qaeda Remains Biggest Global Threat*, REUTERS CAN. (June 7, 2011, 12:31 AM), <http://ca.reuters.com/article/topNews/idCATRE7560RE20110607>.

program of state surveillance and control. Again, the critical issues for risk analysis are those of scale and probability, which affect any meaningful assessment of costs and benefits and thus sound policymaking.<sup>46</sup>

While al Qaeda undoubtedly remains a menace, it has been weakened in recent times and does not present an existential threat to the United States.<sup>47</sup> The Obama Administration seemed to admit as much in its guidelines on commemorating the ten-year anniversary of 9/11: Although terrorists “still have the ability to inflict harm, . . . Al Qaeda and its adherents have become increasingly irrelevant.”<sup>48</sup> Since 9/11, the capture or killing of key figures in al Qaeda operations—including, of course, bin Laden himself—has substantially downsized the threat posed by the organization.<sup>49</sup> Al Qaeda is thus a fundamentalist group in decline, still bent on wreaking havoc and using fear as a political tool, but incapable of achieving its goals,<sup>50</sup> at least directly. Instead, the real “existential” threat to

---

<sup>46</sup> *But cf.* William A. Niskanen, *Benefit/Cost Analysis in the Balance*, 19 REGULATION 65, 65–66 (1996) (reviewing RISKS, COSTS, AND LIVES SAVED (Robert W. Hahn ed., 1996) and agreeing with one contributor’s bottom line: “The time has come to purge the utilitarian foundation from benefit/cost analysis. This means identifying the tool as a decision analysis rather than a means for prescribing optimal decisions.” (internal quotation marks omitted)).

<sup>47</sup> Perhaps al Qaeda never was, nor could be, an existential threat. *See, e.g.*, Gene Healy, *Al Qaeda Was Never an “Existential Threat,”* WASH. EXAMINER (Sept. 12, 2011, 8:05 PM), <http://washingtonexaminer.com/opinion/columnists/2011/09/al-qaeda-was-never-existential-threat>; Glenn L. Carle, *Overstating Our Fears*, WASH. POST (July 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/11/AR2008071102710.html>.

<sup>48</sup> Thom Shanker & Eric Schmitt, *White House Issues Guides on Sept. 11 Observances*, N.Y. TIMES (Aug. 29, 2011), <http://www.nytimes.com/2011/08/30/us/politics/30terror.html?pagewanted=all> (internal quotation marks omitted).

<sup>49</sup> *See, e.g.*, Alison Fitzgerald, *Bin Laden Death Means Most Sept. 11 Terror Conspirators Killed or Captured*, BLOOMBERG (May 3, 2011, 11:01 PM), <http://www.bloomberg.com/news/2011-05-04/bin-laden-death-means-most-sept-11-terror-conspirators-killed-or-captured.html>; Agence France-Presse, *Al-Qaeda Leaders Who Have Been Killed or Captured*, ABS-CBN NEWS (May 2, 2011, 9:37 PM), <http://www.abs-cbnnews.com/global-filipino/world/05/02/11/al-qaeda-leaders-who-have-been-killed-or-captured>; Tom A. Peter, *Killing of Al Qaeda’s No. 2 a Hammer Blow to Weakening Group*, CHRISTIAN SCI. MONITOR (Aug. 28, 2011), <http://www.csmonitor.com/World/terrorism-security/2011/0828/Killing-of-Al-Qaeda-s-No.-2-a-hammer-blow-to-weakening-group-VIDEO>.

<sup>50</sup> *See, e.g.*, HUMAN SECURITY REPORT PROJECT, HUMAN SECURITY BRIEF 2007, at 5 (2008), available at <http://www.hsrgroup.org/docs/Publications/HSB2007/2007HumanSecurityBrief-FullText.pdf>; BRIAN MICHAEL JENKINS, STRAY DOGS AND VIRTUAL ARMIES: RADICALIZATION AND RECRUITMENT TO JIHADIST TERRORISM IN THE UNITED STATES SINCE 9/11, at 1 (2011), available at [http://www.rand.org/pubs/occasional\\_papers/2011/RAND\\_OP343.pdf](http://www.rand.org/pubs/occasional_papers/2011/RAND_OP343.pdf) (“[D]espite al Qaeda’s intensive online recruiting campaign [for homegrown jihadists], their numbers remain small, their determination limp, and their competence poor.”); NAT’L INTELLIGENCE COUNCIL, *supra* note 29, at 69–70 (concluding that al Qaeda may “decay sooner than many people think” and “support for terrorist networks in the Muslim world appears to be declining”); Scott Shane, *Rethinking Our Terrorist Fears*, N.Y. TIMES (Sept. 26, 2009), <http://www.nytimes.com/2009/09/27/weekinreview/27shane.html?pagewanted=all> (noting that terrorism experts believe al Qaeda and its jihadist agenda are in decline in the Muslim world).

the United States—the one that endangers the American way of life and the nation’s particular form of constitutional governance—is not al Qaeda itself, but the political reactions to al Qaeda that trade fundamental liberties for the pretense of greater security.

## II. THE TSA REGIME

Turning again to the topic of airport security, the search-and-seizure regime adopted by the Transportation Security Administration (TSA)<sup>51</sup> provides a poignant example of irrational policy responses to improbable future terrorist attacks. As an initial matter, many experts anticipate that the next organized plot against America will involve something other than commercial aircraft, such as coordinated bombings in public places.<sup>52</sup> For the sake of argument, though, let us assume that al Qaeda still seeks to use its single most successful *modus operandi*—keeping in mind that 9/11 could and should have been prevented by government officials (i.e., it was not inevitable under the then-existing legal regime<sup>53</sup>), and that the TSA’s actions could, at best, merely decrease the likelihood of an already minute chance of another 9/11-type event.

The question is whether the threat of aircraft terrorism and the presumed risk reduction justify the TSA regime and its infringement upon individual rights. The most controversial development within this regime has been described by one policy expert as a “strip/grope” procedure.<sup>54</sup> It begins with the TSA’s use of “Advanced Imaging Technology” (AIT), which is supposed to screen for both metallic and nonmetallic threats such as explosives and other weapons. But as passengers pass through a booth that uses either millimeter wave or backscatter technology, far more is revealed than guns and bombs.<sup>55</sup> These “porno scans” or “strip-search

---

<sup>51</sup> Little more than a month after 9/11, Congress established the Transportation Security Administration (TSA), which assumed responsibility for civil aviation security previously held by the Federal Aviation Administration (FAA). See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001) (codified at 49 U.S.C. § 114). Although the TSA was originally part of the U.S. Department of Transportation, it was relocated within the newly established Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. 107-296, § 403, 116 Stat. 2135, 2178 (2002) (codified at 6 U.S.C. § 203).

<sup>52</sup> Cf. John Arquilla, *The Coming Swarm*, N.Y. TIMES (Feb. 14, 2009), <http://www.nytimes.com/2009/02/15/opinion/15arquilla.html?scp=1&sq=John%20Arquilla%20The%20Coming%20Swarm&st=cse> (describing the emergence of “a new ‘Mumbai model’ of swarming, smaller-scale terrorist violence”).

<sup>53</sup> See Luna, *supra* note 15, at 115.

<sup>54</sup> Jim Harper, *Legislation to Protect the Rights of Travelers*, CATO INST. (Mar. 30, 2011), [http://www.cato.org/pub\\_display.php?pub\\_id=12924](http://www.cato.org/pub_display.php?pub_id=12924) (internal quotation marks omitted).

<sup>55</sup> For what it is worth, here are pictures provided by the government as to “what TSA sees”: [http://www.tsa.gov/graphics/images/approach/mmw\\_large.jpg](http://www.tsa.gov/graphics/images/approach/mmw_large.jpg) (millimeter wave technology); [http://www.tsa.gov/graphics/images/approach/backscatter\\_large.jpg](http://www.tsa.gov/graphics/images/approach/backscatter_large.jpg) (backscatter technology). Far racier images are available on the Internet.

machines,” as critics have labeled them, create full body images of passengers.<sup>56</sup>

Some travelers may have no problem with their bodies being exposed in this manner (might exhibitionists and flashers even enjoy it?).<sup>57</sup> However, heavy criticism from across society suggests that many people object to the computer-generated outlines of their naked physiques, which detail breasts, buttocks, genitals, and other curves and crevices.<sup>58</sup> These are the precise body parts that one intentionally covers for reasons of personal privacy, social etiquette, and, not least of all, criminal liability for indecent exposure. In an earlier era, these types of pictures might have been held obscene under First Amendment doctrine; today, the images are part of the TSA’s imposition on travelers, giving a new meaning to the term “federal mandate.”

The technology is coupled with enhanced frisks that might be hard to differentiate from an assaultive grope. Professor Reinert notes several reported abuses, like a sixty-one-year-old bladder cancer survivor who was subjected to such a violent frisk that his urostomy bag broke, leaving him covered in his own urine.<sup>59</sup> Other troubling stories include an eight-month-old baby frisked by TSA agents and a ninety-five-year-old woman who was forced to remove her adult diaper.<sup>60</sup> Some have claimed that TSA agents employ enhanced frisks in a punitive fashion, reserving them for individuals who object to being scanned by the new imaging machines.<sup>61</sup> Indeed, the

<sup>56</sup> See Harper, *supra* note 54; Andrew Kreig, *Terror and the TSA*, HUFFINGTON POST (Nov. 20, 2010, 5:16 PM), [http://www.huffingtonpost.com/andrew-kreig/terror-tsa\\_b\\_786434.html](http://www.huffingtonpost.com/andrew-kreig/terror-tsa_b_786434.html).

<sup>57</sup> *But see infra* note 87 (discussing naked protests).

<sup>58</sup> Apparently, the imaging technology can also detect a woman’s sanitary napkin. Joe Sharkey, *Screening Protests Grow as Holiday Crunch Looms*, N.Y. TIMES (Nov. 15, 2010), [http://www.nytimes.com/2010/11/16/business/16road.html?\\_r=1&sq=sharkey](http://www.nytimes.com/2010/11/16/business/16road.html?_r=1&sq=sharkey).

<sup>59</sup> Reinert, *supra* note 10, at 211. Similar stories involve mistreatment of breast cancer survivors. See, e.g., *Breast Cancer Survivor Lori Dorn Says She Endured “Humiliating” Pat-Down at JFK*, CBS NEW YORK (Oct. 4, 2011, 9:00 PM), <http://newyork.cbslocal.com/2011/10/04/breast-cancer-survivor-lori-dorn-says-she-endured-humiliating-patdown-at-jfk>; Brad Hyatt & Molly Grantham, *After Removing Prosthetic Breast, Flight Attendant Says TSA Goes “Too Far,”* WBTW 3 NEWS (Dec. 10, 2010, 11:19 PM), <http://www.wbtv.com/Global/story.asp?S=13534628>.

<sup>60</sup> Joy Jernigan, *Baby Receives Pat-Down at Kansas City Airport*, MSNBC (May 11, 2011, 9:59 AM), <http://www.msnbc.msn.com/id/42978267/ns/travel-news/t/baby-receives-pat-down-kansas-city-airport>; *TSA Stands by Officers After Pat-Down of Elderly Woman in Florida*, CNN (June 26, 2011), [http://articles.cnn.com/2011-06-26/us/florida.tsa.incident\\_1\\_pat-down-tsa-pat-downs-tsa-officer?\\_s=PM:US](http://articles.cnn.com/2011-06-26/us/florida.tsa.incident_1_pat-down-tsa-pat-downs-tsa-officer?_s=PM:US). After initially claiming that “screening procedures were followed,” TSA officials apologized for strip searches of two ailing, elderly women at JFK International Airport. Rich Schapiro, *TSA Admits Strip Search Screwup*, N.Y. DAILY NEWS (Jan. 18, 2012), [http://articles.nydailynews.com/2012-01-18/news/30641168\\_1\\_tsa-agent-screeners-markey](http://articles.nydailynews.com/2012-01-18/news/30641168_1_tsa-agent-screeners-markey) (internal quotation marks omitted).

<sup>61</sup> Charlie Leocha, *TSA Admits to Punishing Travelers*, CONSUMER TRAVELER (Aug. 24, 2010), <http://www.consumertraveler.com/today/tsa-admits-to-punishing-travelers>. As an aside, the TSA detained U.S. Senator Rand Paul for two hours after he set off a scanner alarm and refused a full body pat-down. See, e.g., Matthew Boyle, *Rand Paul on TSA Detainment: “I Was Barked at, ‘Do Not Leave*

TSA appears to encourage heavier scrutiny of those who dispute the agency's authority.

Pursuant to the behavior detection program known as SPOT (Screening Passengers by Observation Technique), TSA agents are instructed to look for "behavioral indicators" of stress, fear, or deception.<sup>62</sup> Of the seventy indicators, perhaps the most vexing and legally questionable basis for enhanced scrutiny is when the passenger is "[v]ery arrogant and expresses contempt against airport passenger procedures."<sup>63</sup> If nothing else, this could induce complaisance among passengers who may submit when faced with questionable TSA conduct in hopes of avoiding more intense inspections or just to get the whole thing over with. Allegations of racial discrimination have dogged the SPOT program as well,<sup>64</sup> including claims that the program "has become a magnet for racial profiling, targeting not only Middle Easterners but also blacks, Hispanics and other minorities."<sup>65</sup>

Given the foregoing, an authoritarian strip-or-grope procedure is hard to justify, keeping in mind that the appropriate baseline is not a securityless,

---

*the Cubicle!*," DAILY CALLER (Jan. 23, 2012, 3:24 PM), <http://dailycaller.com/2012/01/23/rand-paul-on-tsa-detainment-i-was-barked-at-do-not-leave-the-cubicle>. In theory, at least, Senator Paul's detention could have violated the Speech or Debate Clause of the Constitution. See U.S. CONST. art. I, § 6, cl. 1.

<sup>62</sup> Mike M. Ahlers & Jeanne Meserve, *TSA Security Looks at People Who Complain About . . . TSA Security*, CNN (Apr. 15, 2011, 12:57 PM), <http://www.cnn.com/2011/TRAVEL/04/15/tsa.screeners.complain/index.html?iref=allsearch>.

<sup>63</sup> *Id.* (internal quotation marks omitted). For all the flying public knows, criticism of TSA agents could result in one's inclusion on the federal government's "no-fly list," which would lead to delays and even detention during subsequent journeys through airport security. As outlandish as this seems, it must be remembered that the no-fly list doubled in size over the past year, with about 1000 changes made to the government's watch list each day. Eileen Sullivan, *U.S. No-Fly List Doubles in One Year*, HUFFINGTON POST (Feb. 2, 2012, 4:53 PM), [http://www.huffingtonpost.com/2012/02/02/no-fly-list-doubles\\_n\\_1249014.html](http://www.huffingtonpost.com/2012/02/02/no-fly-list-doubles_n_1249014.html). Compare Peter Eisler, *Terrorist Watch List Hits 1 Million*, USA TODAY (Mar. 10, 2009, 11:06 PM), [http://www.usatoday.com/news/washington/2009-03-10-watchlist\\_N.htm](http://www.usatoday.com/news/washington/2009-03-10-watchlist_N.htm) (reporting that the watch list had grown to one million names), with *Myth Buster: TSA's Watch List Is More than One Million People Strong*, TRANSP. SECURITY ADMIN., [http://www.tsa.gov/approach/mythbusters/tsa\\_watch\\_list.shtm](http://www.tsa.gov/approach/mythbusters/tsa_watch_list.shtm) (last visited July 7, 2012) (disputing report). Among others, Senator Ted Kennedy was on the list, as well as Nelson Mandela, whose name was only removed by an Act of Congress. Jon Hilkevitch, *New Airport Security Rules to Require More Personal Information*, CHI. TRIB. (Mar. 9, 2009), [http://articles.chicagotribune.com/2009-03-09/news/0903080245\\_1\\_no-fly-lists-personal-data-passengers;Mandela Off U.S. Terrorism Watch List, CNN \(July 1, 2008\), \[http://articles.cnn.com/2008-07-01/world/mandela.watch\\\_1\\\_president-mandela-apartheid-anc?\\\_s=PM:WORLD\]\(http://articles.cnn.com/2008-07-01/world/mandela.watch\_1\_president-mandela-apartheid-anc?\_s=PM:WORLD\).](http://articles.chicagotribune.com/2009-03-09/news/0903080245_1_no-fly-lists-personal-data-passengers;Mandela%20Off%20U.S.%20Terrorism%20Watch%20List)

<sup>64</sup> See Joe Davidson, *Lawmaker Challenges TSA on Claims of Ethnic Profiling*, WASH. POST (Nov. 28, 2011), [http://www.washingtonpost.com/politics/lawmaker-challenges-tsa-on-claims-of-ethnic-profiling/2011/11/28/gIQAtOiO6N\\_story.html](http://www.washingtonpost.com/politics/lawmaker-challenges-tsa-on-claims-of-ethnic-profiling/2011/11/28/gIQAtOiO6N_story.html); Bart Jansen, *Next Layer of Air Security: Chat-Downs on Top of Pat-Downs?*, USA TODAY (Oct. 14, 2011, 11:53 AM), <http://travel.usatoday.com/flights/post/2011/10/next-layer-of-air-security-chat-downs-on-top-of-pat-downs/553721/1>.

<sup>65</sup> Michael S. Schmidt & Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. TIMES (Aug. 11, 2012), [http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?\\_r=2&pagewanted=all; see also infra notes 108-14 and accompanying text](http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?_r=2&pagewanted=all;see%20also%20infra%20notes%20108-14%20and%20accompanying%20text).

walk-straight-onto-the-plane approach, but instead the pre-9/11 status quo<sup>66</sup> or some other less intrusive, less expensive arrangement.<sup>67</sup> From an economic perspective, the TSA spent nearly \$57 billion on aviation security in the agency's first decade.<sup>68</sup> During this time, the number of TSA employees nearly quadrupled and vast sums were paid for new technology, some of which failed miserably, such as the now-mothballed machines called "puffers."<sup>69</sup> Don't forget the consumption of the travelling public's

---

<sup>66</sup> The pre-9/11 techniques included requiring passengers to pass through a magnetometer, x-raying their baggage and, if necessary, subjecting them to a sweep by a handheld metal detector or even a light pat down. *See, e.g.*, *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1242–43 (9th Cir. 1989) (describing the history and public expectations of standard airport screening, as well as an unconstitutional expansion of that process).

<sup>67</sup> To its credit, the TSA unveiled new software for AIT machines that does not produce detailed images of an individual passenger's body. Press Release, Transp. Sec. Admin., TSA Takes Next Steps to Further Enhance Passenger Privacy (July 20, 2011), available at <http://www.tsa.gov/press/releases/2011/0720.shtm>.

The new software automatically detects potential threats and indicates their location on a generic, computer-generated outline of a person that appears on a monitor attached to the AIT unit. As with the current version of AIT, if a potential threat is detected, the area will require additional screening. If no potential threats are detected, an "OK" appears on the monitor with no outline, and the passenger is cleared.

*Id.* However, some claim that the new software has a "uniformly high false alarm rate." Susan Stellan, *Bomb Plot Raises Questions About Airport Security*, N.Y. TIMES (May 14, 2012), <http://www.nytimes.com/2012/05/15/business/plot-raises-questions-about-airport-security.html?pagewanted=all> (quoting Congressman Peter DeFazio) (internal quotation marks omitted). Moreover, a change in software does not address concerns about abusive pat downs, ineffective and racially discriminatory "chat downs," or the expansion of TSA checkpoints and searches to other forms of mass transportation. *See, e.g.*, Brian Bennett, *TSA Screenings Aren't Just for Airports Anymore*, L.A. TIMES (Dec. 20, 2011), <http://articles.latimes.com/2011/dec/20/nation/la-na-terror-checkpoints-20111220>; Jansen, *supra* note 64. Ultimately, the constitutional damage may already have been done by judicial acceptance of the TSA's post-9/11 regime. *See infra* notes 96–97, 103–18 and accompanying text.

<sup>68</sup> *See* JOINT MAJORITY STAFF REPORT, A DECADE LATER: A CALL FOR TSA REFORM 3, 7 (Nov. 6, 2011) [hereinafter CALL FOR TSA REFORM], available at [http://republicans.transportation.house.gov/Media/file/112th/Aviation/2011-11-16-TSA\\_Reform\\_Report.pdf](http://republicans.transportation.house.gov/Media/file/112th/Aviation/2011-11-16-TSA_Reform_Report.pdf); *see also* Garrick Blalock, Vrinda Kadiyali & Daniel H. Simon, *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 J.L. & ECON. 731, 751 (2007) (noting that total cost for TSA's first two years of operations was approximately \$11.5 billion).

<sup>69</sup> *See, e.g.*, CALL FOR TSA REFORM, *supra* note 68, at 3, 7; Lauren Fox, *TSA Puts Millions of Dollars of Equipment in Storage House*, U.S. NEWS & WORLD REP. (May 9, 2012), <http://www.usnews.com/news/articles/2012/05/09/tsa-puts-millions-of-dollars-of-equipment-in-storage> (internal quotation marks omitted). The "Explosive Trace Detection Portals" (i.e., puffers) released small puffs of air on passengers standing in a booth, with the goal of dislodging and then detecting any trace explosive particles. "From 2004 to 2006, TSA spent more than \$30 million to procure and deploy Explosive Trace Detection Portals," one congressional report noted. The agency "belatedly discovered the puffers were unable to detect explosives in an operational environment" and eventually "stored this ineffective technology for upwards of four years at taxpayer expense prior to disposition in 2009 and 2010." JOINT MAJORITY STAFF REPORT, AIRPORT INSECURITY: TSA'S FAILURE TO COST-EFFECTIVELY PROCURE, DEPLOY AND WAREHOUSE ITS SCREENING TECHNOLOGIES 6 (May 9, 2012) [hereinafter AIRPORT INSECURITY], available at <http://oversight.house.gov/wp-content/uploads/2012/05/5-9-2012-Joint-TSA-Staff-Report-FINAL.pdf>.



valuable time—about \$9.4 billion in 2004, for instance<sup>70</sup>—and the loss associated with people selecting different modes of transportation. The burden imposed by the TSA’s regime may be sufficient for some travelers to opt for the roads over short-haul flights, which a trio of Cornell economists estimated to cost the airline industry over \$1 billion in reduced demand.<sup>71</sup>

Set against the cost side of the liberty/security ledger is the marginal utility of the current regime. Several government reviews have expressed misgivings about the TSA’s expenditures and performance. Apparently, the agency did little in the way of risk and cost–benefit analyses, exacerbated by its failure to solicit public input on new technology.<sup>72</sup> One congressional report described the TSA as “an enormous, inflexible and distracted bureaucracy,” which received performance results that “do not reflect a good return on this taxpayer investment.”<sup>73</sup> Despite the massive influx of resources and the multiplied presence of security agents, classified test results showed that performance outcomes “changed very little since the creation of the TSA.”<sup>74</sup>

---

<sup>70</sup> See Gregory F. Treverton et al., *The Costs of Responding to the Terrorist Threats: The U.S. Case, in* TERRORISM, ECONOMIC DEVELOPMENT, AND POLITICAL OPENNESS 48, 75–76 (Philip Keefer & Norman Loayza eds., 2008).

<sup>71</sup> See Blalock, Kadiyali & Simon, *supra* note 68, at 733, 751–53.

<sup>72</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, HOMELAND SECURITY: DHS AND TSA FACE CHALLENGES OVERSEEING ACQUISITION OF SCREENING TECHNOLOGIES 1 (2012), available at <http://www.gao.gov/assets/600/590729.pdf> (“In recent years, we have reported that DHS has experienced challenges in managing its multibillion-dollar acquisition efforts, including implementing technologies that did not meet intended requirements and were not appropriately tested and evaluated, and has not consistently included completed analyses of costs and benefits before technologies were implemented.”); *infra* note 98 (noting TSA’s failure to conduct notice-and-comment rulemaking).

<sup>73</sup> CALL FOR TSA REFORM, *supra* note 68, at 2, 3.

<sup>74</sup> *Id.*; see also Grant Stinchfield, *TSA Source: Armed Agent Slips Past DFW Body Scanner*, NBC 5 DALLAS-FORT WORTH (Feb. 21, 2011, 7:28 PM), <http://www.nbcdfw.com/news/local/TSA-Agent-Slips-Through-DFW-Body-Scanner-With-a-Gun-116497568.html>. According to government documents released in 2011, more than 25,000 security breaches had occurred at U.S. airports during the TSA’s first decade. Of those breaches, “[m]ore than 14,000 were people entering ‘limited-access’ areas by going through airport doors or passageways without permission, or unauthorized people going from airport buildings to planes.” Gary Stoller, *Airport Security Breaches Since 2001 Raise Alarms*, USA TODAY (July 13, 2011, 12:37 PM), <http://travel.usatoday.com/flights/story/2011/07/Airport-security-breaches-since-2001-raise-alarms/49326312/1>. Another 6000 security breaches involved TSA screeners who failed to screen, or improperly screened, a passenger, his or her carry-on items, or both.

In 2006, tests by the TSA showed that security screeners at Los Angeles International Airport and Chicago’s O’Hare International Airport failed to find fake bombs hidden on undercover agents posing as passengers in more than 60% of tests, according to a classified report . . . . In 2003, five undercover Department of Homeland Security agents posing as passengers carried weapons undetected through several security checkpoints at Boston’s Logan International Airport.

*Id.* In response, a TSA spokesman claimed that the current regime provides “the most stringent level of checked baggage security in the world,” emphasizing that the number of breaches was a fraction of one percent of the total number of fliers. *Id.* (internal quotation marks omitted). Although the latter point

Indeed, the Government Accountability Office (GAO) found that at least sixteen known terrorists had traveled on two dozen different occasions even though the SPOT program was in effect at the relevant airports.<sup>75</sup> According to the GAO, it also “remains unclear whether the AIT would have been able to detect the weapon” used by Umar Farouk Abdulmutallab, the so-called “Underwear Bomber,” who attempted to detonate explosives hidden in his underwear while on board a flight from Amsterdam to Detroit.<sup>76</sup> More recently, some experts doubted that TSA technology and screeners could detect the latest version of an underwear bomb, uncovered by the CIA and foreign allies.<sup>77</sup> The fact is that in the decade since its creation, the TSA has not caught a single terrorist or foiled a terrorist plot.<sup>78</sup>

### III. AIRPORT SECURITY AND THE FOURTH AMENDMENT

The preceding does not take into account the diminution of individual rights as a result of the TSA regime,<sup>79</sup> a real loss but one complicated by questions of comparability and commensurability.<sup>80</sup> For now, it is enough to

demonstrates a welcome appreciation of relative risk, the spokesman’s comments missed the ultimate issue: whether 25,000 breaches is an improvement over alternative regimes, and if so, whether this improvement is worth its cost. *Cf. id.* (quoting chairman of the House Subcommittee on National Security, Homeland Defense and Foreign Operations as saying, “There’s not much to suggest that airports are more secure than years ago” (internal quotation mark omitted)).

<sup>75</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA IS TAKING STEPS TO VALIDATE THE SCIENCE UNDERLYING ITS PASSENGER BEHAVIOR DETECTION PROGRAM, BUT EFFORTS MAY NOT BE COMPREHENSIVE 7–8 (2011), available at <http://www.gao.gov/new.items/d11461t.pdf>.

<sup>76</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA IS INCREASING PROCUREMENT AND DEPLOYMENT OF THE ADVANCED IMAGING TECHNOLOGY, BUT CHALLENGES TO THIS EFFORT AND OTHER AREAS OF AVIATION SECURITY REMAIN 9 (2010), available at <http://www.gao.gov/new.items/d10484t.pdf>.

Failing to learn from its failed procurement of “puffers,” and in the wake of the Christmas Day Bomber, TSA rushed to install 500 Advanced Imaging Technology devices, without clear evidence of effectiveness, at a cost of more than \$122 million. Despite lingering passenger health concerns and uncertainty that AIT would have detected the weapon used in the December 2009 Underwear Bomber incident, TSA planned to increase its deployment of AITs from 878 to 1,800 by the end of FY 2014. GAO has estimated increases in staffing costs alone, due to doubling the number of AITs that TSA plans to deploy, could add up to \$2.4 billion over the expected service life of the AITs.

AIRPORT INSECURITY, *supra* note 69, at 6 (footnotes omitted).

<sup>77</sup> See, e.g., Josh Margolin, *Undie Bomb Is Hide & Eek!*, N.Y. POST (May 9, 2012, 3:24 AM), [http://www.nypost.com/p/news/international/undie\\_bomb\\_is\\_hide\\_eek\\_Ney39AYuR4i1DXcwcqgWrO](http://www.nypost.com/p/news/international/undie_bomb_is_hide_eek_Ney39AYuR4i1DXcwcqgWrO).

<sup>78</sup> See, e.g., Charles Leocha, *TSA Executive Admits Not a Single Terrorist-Related Arrest Has Resulted From Whole-Body Scanners*, TSA NEWS (May 17, 2012), <http://tsanewsblog.com/3160/news/tsa-executive-admits-not-a-single-terrorist-related-arrest-has-resulted-from-whole-body-scanners/>.

<sup>79</sup> Some are also concerned about the potential health dangers from being exposed to full-body x-ray scanners. See, e.g., Roni Caryn Rabin, *X-Ray Scans at Airports Leave Lingering Worries*, N.Y. TIMES (Aug. 6, 2012, 5:26 PM), <http://well.blogs.nytimes.com/2012/08/06/x-ray-scans-at-airports-leave-lingering-worries/>.

<sup>80</sup> These issues are beyond the limited scope of this Essay. See generally INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Virgílio Afonso da Silva,

say that the regime treats law-abiding citizens as inmates<sup>81</sup> and strikes directly at core constitutional values—basic freedom of bodily autonomy and privacy, and perhaps equal protection of the law—thereby imposing genuine costs on the traveling public. The regime’s excesses also undermine a basic component of the rule of law: freedom from government caprice and vindictiveness. The “right to defy submissiveness”<sup>82</sup> is infrequently exercised by travelers hoping to avoid the ire of a TSA agent, who at times appears as the spitting image of the petty tyrant to whom the Bill of Rights is addressed.<sup>83</sup>

As a doctrinal matter, the current regime clashes with decent understandings of the Fourth Amendment. By this, I mean interpretations that take seriously the presumptive requirements of judicial authorization and individualized suspicion for government searches and seizures,<sup>84</sup> and therefore do not reduce the constitutional provision to a paper right. As mentioned in the introduction, Professor Reinert’s piece provides a useful review of this legal doctrine. In particular, I agree with much of his analysis regarding three rubrics for evaluating the TSA regime: consent,

---

*Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273 (2011); Matthew Adler, Symposium, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169 (1998).

<sup>81</sup> See, e.g., Harper, *supra* note 54 (“The search that American travelers undergo at the airport is as intimate as what prisoners in American jail cells get.”).

<sup>82</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

<sup>83</sup> See, e.g., Joe Sharkey, *In Body Scans, Less Attitude Please*, N.Y. TIMES (June 21, 2010), [http://www.nytimes.com/2010/06/22/business/22road.html?\\_r=1](http://www.nytimes.com/2010/06/22/business/22road.html?_r=1) (describing concerns about authoritarian behavior of TSA employees). One protesting passenger wrote the words of the Fourth Amendment across his chest, and when he was subjected to an enhanced secondary screening, he revealed the constitutional text to TSA agents. It seems the agents did not find this funny; they radioed the police and had the passenger arrested. In 2011, the passenger’s civil rights suit was dismissed in U.S. district court. See *Tobey v. Napolitano*, 808 F. Supp. 2d 830 (E.D. Va. 2011). By contrast, an Oregon state court acquitted a man charged with indecent exposure after he stripped naked at Portland International Airport.

The bearded tech consultant was dressed in work pants and slacks when he showed up at PDX for a flight to San Jose for business . . . . He testified that he refused to go through a full-body scanner at the security gate, and instead chose to receive a pat down and metal detector screening. After the pat down, the TSA agents detected the presence of nitrates on his clothes. [The defendant] got fed up and said he disrobed both in protest and to prove that he wasn’t carrying a bomb.

Philip Caulfield, *Man Who Stripped Naked at TSA Checkpoint Acquitted*, N.Y. DAILY NEWS (July 19, 2012), [http://articles.nydailynews.com/2012-07-19/news/32751341\\_1\\_john-e-brennan-tsa-agents-full-body-scanner](http://articles.nydailynews.com/2012-07-19/news/32751341_1_john-e-brennan-tsa-agents-full-body-scanner). Relying upon a 1985 appellate decision, the trial judge concluded that the nudity law at issue did not apply in cases of protest. “It is the speech itself that the state is seeking to punish, and that it cannot do,” the judge held. Aimee Green, *Portland’s Airport Stripper John Brennan Convinces Judge Nudity Was Protest Against TSA*, THE OREGONIAN (July 18, 2012, 7:22 PM), [http://www.oregonlive.com/portland/index.ssf/2012/07/portlands\\_airport\\_stripper\\_joh.html](http://www.oregonlive.com/portland/index.ssf/2012/07/portlands_airport_stripper_joh.html) (internal quotation marks omitted).

<sup>84</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Jones v. United States*, 357 U.S. 493, 499 (1958).

reasonableness balancing, and “special needs.” Any number of points might be added to the mix, but here are just a few thoughts for further discussion:

- Today, commercial air travel is ubiquitous in the United States, with over 600 million passengers taking more than 9 million flights each year.<sup>85</sup> Flying by plane is not merely a luxury, and it certainly is not some type of government privilege. Instead, commercial flight is a major vehicle of business, and at times it is a necessity of modern life.<sup>86</sup> Without returning to the idea of Constitution-free zones or adopting a conception of the Fourth Amendment sealed in pre-twentieth-century amber, a passenger cannot be said to shed his rights simply by choosing to travel by plane.<sup>87</sup>
- The notion that a passenger implicitly consents to *any* TSA search by entering the security queue is no truer than the idea that someone implicitly consents to government eavesdropping by using a cell phone, for example, or that people implicitly consent to the rummaging of their cars and the contents simply by getting behind the wheel.<sup>88</sup> The scope of consent obviously matters a great deal in the analysis. It is one thing to x-ray a handbag or backpack, a routine process in various contexts beyond airport security (e.g., entering a courthouse). But it is quite another matter to create images of a passenger’s nude body, which would seem to be the kind of intrusive search that requires individualized suspicion and possibly judicial approval.<sup>89</sup> In considering this issue, public knowledge of the TSA program and any conditioning of the traveler’s expectations should be largely irrelevant. To hold otherwise would mean that the government

---

<sup>85</sup> *TranStats*, RITA, <http://www.transtats.bts.gov> (last visited July 7, 2012).

<sup>86</sup> See, e.g., Charisse Jones, *Sour Economy Gives Rise to Extreme Commuters*, USA TODAY, (Aug. 16, 2012, 5:57 PM), <http://travel.usatoday.com/news/story/2012-08-16/Sour-economy-gives-rise-to-extreme-commuters/57099694/1>.

<sup>87</sup> Cf. *Katz*, 389 U.S. at 351–52 (rejecting the notion of “constitutionally protected area[s]” as a talismanic solution to Fourth Amendment issues, noting that the defendant did not “shed his right to [exclude the uninvited ear] simply because he made his calls from a place where he might be seen,” and holding that a narrower interpretation would “ignore the vital role that the public telephone has come to play in private communication” (internal quotation marks omitted)).

<sup>88</sup> Cf. *United States v. Albarado*, 495 F.2d 799, 806–07 (2d Cir. 1974) (“To make one choose between flying to one’s destination and exercising one’s constitutional right [to waive consent] appears to us . . . in many situations a form of coercion, however subtle.”); *id.* at 807 n.14 (“[I]f the government were to announce that hereafter all telephones would be tapped, perhaps to counter an outbreak of political kidnappings, it would not justify, even after public knowledge of the wiretapping plan, the proposition that anyone using a telephone consented to being tapped.”); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) (“Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent to the search when to do otherwise would have meant foregoing the constitutional right to travel.”).

<sup>89</sup> See Reinert, *supra* note 10, at 223–224.

could bolster the case for upholding a search regime by simply announcing it to the public.<sup>90</sup>

- In theory, airport security measures might be checked by the type of balancing approach adopted in *Terry v. Ohio*<sup>91</sup> or by the special needs doctrine that *Terry* helped inspire. But in practice, the all-things-considered weighing process seems to begin with a heavy thumb on the government side of the scale. As detailed elsewhere, the constant pressure of law enforcement has mostly eviscerated whatever safeguards *Terry* might have provided. Today, it stands for the proposition that officers may stop any person at any time, based on legally valid but often trifling offenses, for which the unspoken goal is uncovering contraband.<sup>92</sup> For its part, the special needs test is so malleable it nearly licenses a judicial adhocery, as seen in the hodgepodge of court decisions pointing in various directions.<sup>93</sup> To this day, an obscure line distinguishes the “special needs” of law enforcement from those needs that are merely “normal.” It also remains curious (to me, at least) that a state actor’s inability to meet the requirements of the Fourth Amendment provides an argument *in favor* of dispensing with those requirements.<sup>94</sup>

With these and other considerations in mind, Professor Reinert is spot-on when he says that the TSA’s new regime is “difficult to square with fundamental Fourth Amendment principles.”<sup>95</sup> He is also correct that the courts will feel obliged to uphold the regime—maybe out of deference to the post-9/11 Executive Branch or simply to avoid the appearance of impeding antiterrorism efforts—regrettably, distorting search and seizure doctrine along the way. In its 2011 decision in *Electronic Privacy Information Center (EPIC) v. Department of Homeland Security*, the D.C. Circuit held that the use of AIT scanners did not violate the Fourth Amendment.<sup>96</sup> The court characterized passenger screening as an

<sup>90</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

<sup>91</sup> 392 U.S. 1, 20–21 (1968).

<sup>92</sup> Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 CATO SUP. CT. REV. 133, 140; see also Report of Jeffrey Fagan, Ph.D. at 2, *Floyd v. City of New York*, No. 08 Civ. 01034 (SAS) (S.D.N.Y. Oct. 15, 2010), available at [http://ccrjustice.org/files/Expert\\_Report\\_JeffreyFagan.pdf](http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf) (finding that the New York City Police Department employs *Terry* stops in a racially discriminatory manner).

<sup>93</sup> See, e.g., Erik Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 876–88 (1999); cf. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) (arguing that the special needs doctrine turns search and seizure law into a “patchwork quilt”).

<sup>94</sup> See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *O’Connor v. Ortega*, 480 U.S. 709, 724–25 (1987).

<sup>95</sup> Reinert, *supra* note 10, at 209.

<sup>96</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011). Several challenges to the use of AIT scanners (as well as aggressive pat downs) have been dismissed pursuant to

administrative search, which only requires that the governmental interest in safety outweigh the passenger's interest in privacy. "That balance clearly favors the Government here," the panel concluded, noting that the AIT scanners can detect nonmetallic explosives, the images produced are "distort[ed]" and immediately deleted, and passengers may choose to be frisked instead.<sup>97</sup> The opinion's terse analysis of a highly contentious issue in a high-profile case speaks volumes about the level of deference that the TSA will receive from the courts.<sup>98</sup>

As such, Professor Reinert's instinct—preventing gratuitous damage to the Fourth Amendment—is laudable. Moreover, his proposed doctrinal limitation is quite attractive, calling for the suppression of evidence found during special needs searches in ensuing prosecutions unrelated to the special need itself.<sup>99</sup> For instance, a bag of marijuana uncovered during the TSA screening process would be excluded from a subsequent drug case. Actually, I would prefer to apply this doctrinal move more generally as a (partial) solution to the most problematic forms of pretextual investigations, such as exploiting minor infractions (e.g., most traffic stops) to detain people and search for more serious but unrelated offenses (e.g., scouring a vehicle to find illegal drugs).

Unfortunately, these types of proposals face significant hurdles in existing case law.<sup>100</sup> Professor Reinert notes that the Supreme Court has not decided the question of "whether an administrative search regime that routinely generated evidence for prosecution could be upheld under 'special needs.'"<sup>101</sup> A negative answer might force some courts to invoke other doctrines, including those supposedly more disruptive of search and seizure law (i.e., consent and reasonableness balancing). This is not just idle speculation. Far from broadening the Fourth Amendment exclusionary rule,

49 U.S.C. § 46110 (2006), which provides federal appellate courts exclusive jurisdiction to review TSA orders. See *Corbett v. United States*, 458 F. App'x 866, 869–71 (11th Cir. 2012); *Roberts v. Napolitano*, 798 F. Supp. 2d 7, 10–11 (D.D.C. 2011).

<sup>97</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>98</sup> Because the court found that "the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking," it remanded the matter to the TSA with the expectation that the agency would act "promptly" to address the defect in rule promulgation. *Id.* at 8. Apparently, the TSA still has not begun the rulemaking process, leading the plaintiffs to petition the D.C. Circuit for a writ of mandamus. See *In re Elec. Privacy Info. Ctr.*, No. 12-1307 (Aug. 1 2012) (ordering government to respond to plaintiffs' petition).

<sup>99</sup> See Reinert, *supra* note 10, at 220–25.

<sup>100</sup> See, e.g., *Whren v. United States*, 517 U.S. 806, 811–12 (1996) (refusing to invalidate a traffic stop as a pretextual investigation); *United States v. McCarty*, 648 F.3d 820, 830–31 (9th Cir. 2011); *United States v. Marquez*, 410 F.3d 612, 617 (9th Cir. 2005) ("The mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable, *post facto.*"); 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.6(h) 5 (4th ed. 2004).

<sup>101</sup> Reinert, *supra* note 10, at 228 n.109.

the Roberts Court has chipped away at the rule with the apparent goal of eliminating it altogether.<sup>102</sup>

Given post-9/11 terrorism anxieties, it is unsurprising that anti-exclusionary rule sentiments are particularly powerful in the context of airport security. For example, two recent appellate court decisions—one federal (*United States v. McCarty*) and the other state (*Higerd v. State*)—upheld TSA searches that uncovered evidence of child pornography in checked baggage.<sup>103</sup> In each case, agents opened the baggage and removed a folder containing documents, which they then inspected, supposedly looking for thin, flat charges known as “sheet explosives.” Photographs found in the respective folders served as the basis for subsequent criminal prosecutions. Both appellate decisions agreed that the agents had conducted an administrative search that requires neither a warrant nor individualized suspicion, because it was “no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives” and was “confined in good faith to that purpose.”<sup>104</sup>

The Ninth Circuit’s *McCarty* decision has troubles on several fronts. The appellate panel undertook a very un-appellate-like parsing of the record, scrutinizing the district court’s assessments of witness credibility, not affording deference to a trial judge’s factual findings, and even (lightly) reprimanding the lower court colleague.<sup>105</sup> More importantly, the decision allows TSA agents to search any and all items in passenger baggage based on the sweeping claim that explosives “may be disguised as a simple piece of paper or cardboard, and may be hidden in just about anything, including a laptop, book, magazine, deck of cards, or packet of photographs.”<sup>106</sup> Worse yet, evidence of an agent’s ulterior motive—for instance, searching a

---

<sup>102</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2427–29 (2011); *Herring v. United States*, 555 U.S. 135, 139–48 (2009); *Hudson v. Michigan*, 547 U.S. 586, 590–94 (2006). *But see* *United States v. Jones*, 132 S. Ct. 945 (2012) (affirming reversal of conviction due to Fourth Amendment protection of property, not privacy).

<sup>103</sup> See *McCarty*, 648 F.3d at 823–24; *Higerd v. State*, 54 So. 3d 513, 515 (Fla. Dist. Ct. App. 2010).

<sup>104</sup> *McCarty*, 648 F.3d at 831 (quoting *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en banc) (internal quotation mark omitted)); *accord Higerd*, 54 So. 3d at 517.

<sup>105</sup> See *McCarty*, 648 F.3d at 832–38.

<sup>106</sup> *Id.* at 825; see also *United States v. Rosales*, No. 10-CR-0339 (PJS/JJK), 2011 WL 6004026, at \*1–2 (D. Minn. Nov. 30, 2011) (upholding search of envelope). *But see, e.g.,* *United States v. Fulgham*, No. C 12-124 CW, 2012 WL 2598546 (N.D. Cal. July 5, 2012) (granting suppression motion). As an aside, several TSA employees have been caught stealing money and property from luggage, with one supervisor receiving kickbacks from his subordinate’s crimes. Logan Burruss, *TSA Officers Arrested After Allegedly Stealing \$40,000*, CNN (Feb. 17, 2011, 3:46 AM), <http://edition.cnn.com/2011/CRIME/02/16/new.york.tsa.arrests>; *Newark TSA Officer Pleads Guilty to Theft from Passengers*, REUTERS (Feb. 14, 2011, 5:27 PM), <http://www.reuters.com/article/2011/02/14/us-airport-bribes-idUSTRE71D72V20110214>; *TSA Agents Arrested in Case of Missing Cash at Airport*, REUTERS (Feb. 16, 2011, 7:38 PM), <http://www.reuters.com/article/2011/02/17/us-airport-theft-idUSTRE71G08120110217>.

bag for contraband unrelated to terrorist threats—may be disregarded so long as the TSA’s “programmatically motive” is airline safety.<sup>107</sup>

Unscrutinized discretion in government enforcement can be susceptible to racial and ethnic prejudice, as has been the case with pretextual stops on the streets and highways (and at airports, too).<sup>108</sup> In August 2012, the *New York Times* reported that TSA agents at Boston’s Logan International Airport were targeting travelers on the basis of race or ethnicity, apparently believing that minorities were more likely to possess illegal drugs, to have outstanding warrants for their arrest, or to be in violation of immigration laws. Several agents claimed that the stops were viewed as a means to pad the statistics, showing policymakers the SPOT program was effective.<sup>109</sup>

[P]assengers who fit certain profiles—Hispanics traveling to Miami, for instance, or blacks wearing baseball caps backward—are much more likely to be stopped, searched and questioned for “suspicious” behavior. “They just pull aside anyone who they don’t like the way they look—if they are black and have expensive clothes or jewelry, or if they are Hispanic,” said one white officer, who [spoke] on the condition of anonymity.<sup>110</sup>

The allegations mirror those of minority motorists and pedestrians who long claimed to be victims of racial profiling, a phenomenon that was eventually acknowledged and condemned by the political class.<sup>111</sup> After the *Times* article ran, the TSA also criticized racial profiling as ineffective and intolerable, announcing that an internal investigation was underway and ordering special training for all agents in Boston and managers elsewhere.<sup>112</sup> In time, a fair and full inquiry may prove the accusations to be unfounded. Or maybe the TSA’s “refresher course” will do the trick, reinforcing the agency’s professed intolerance for racial profiling by its employees.<sup>113</sup> Regardless, the story serves as a reminder of the potential problems of enforcement discretion without meaningful oversight, such as government agents who can detain and search an individual “whenever they do not like the cut of his jib.”<sup>114</sup>

---

<sup>107</sup> See *McCarty*, 648 F.3d at 832.

<sup>108</sup> See, e.g., Luna, *supra* note 11, at 766–68 (describing “drug courier” profile used at airports).

<sup>109</sup> Schmidt & Lichtblau, *supra* note 65.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Erik Luna, *Foreword: The New Face of Racial Profiling*, 2004 UTAH L. REV. 905, 905–07.

<sup>112</sup> See, e.g., Michael S. Schmidt, *Mandatory Class for Airport Officers Accused of Profiling*, N.Y. TIMES (Aug. 17, 2012), <http://www.nytimes.com/2012/08/18/us/mandatory-class-for-airport-officers-accused-of-profiling.html>.

<sup>113</sup> *Id.* (quoting DHS statement) (internal quotation mark omitted).

<sup>114</sup> *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Douglas, J., dissenting).



## CONCLUSION

In July 2012, a federal trial judge provided a bit of good news for those concerned that the war on terror has become an all-purpose excuse for government intrusions. After TSA agents identified a suspicious object in a checked bag, a law enforcement officer examined a DVD player that contained tiny cylindrical items. “From my training and experience, I recognized that the solid mass was not an explosive but possibly some type of contraband being concealed,” the officer wrote in a contemporaneous report.<sup>115</sup> The DVD player was then cracked open, revealing pills that were subsequently determined to be the illegal drug Ecstasy. At a suppression hearing two years later, the officer contradicted his incident report and claimed that at the time of the search he had not ruled out the possibility that the pills could be a threat to airline safety. This was too much for the trial judge. If the officer believed the mass was an explosive, “he would not have said otherwise in his report,” the judge wrote in excluding evidence from trial.<sup>116</sup> The officer’s assertions at the suppression hearing were especially implausible given that “he opened up the DVD player without taking any safety precautions or utilizing the bomb-sniffing dog that he testified was at the screening area.”<sup>117</sup>

Unfortunately, this ruling is likely to stand as an outlier, with cases such as *EPIC* and *McCarty* foreshadowing judicial acquiescence to the entire TSA search regime and all the figurative baggage it carries, so long as agents do not reveal their actual motives. Along these lines, the state court decision in *Higerd* may be the most telling. After accepting the predictable arguments in favor of the search in question, the court offered an alternative rationale to deny the suppression motion: The damning evidence was admissible pursuant to the “good faith exception” to the warrant requirement based on the assumption that a reasonably well-trained TSA agent would not have known the search was illegal.<sup>118</sup> This claim fits uncomfortably with the refusal to inquire into an agent’s actual motives for conducting a search, but it does demonstrate a readiness to find constitutional exceptions for post-9/11 airport security and, more generally, antiterrorism measures designed to prevent another attack.

In the end, I would prefer some honesty. What is at play here is not good faith or some other recognized exception, such as consent or special needs. The otherwise applicable legal requirements are set aside, not pursuant to a reasoned assessment of the risks, costs, and benefits, but due

---

<sup>115</sup> *United States v. Fulgham*, No. C 12-124 CW, 2012 WL 2598546, at \*1 (N.D. Cal. July 5, 2012) (internal quotation marks omitted).

<sup>116</sup> *Id.* at 4.

<sup>117</sup> *Id.*

<sup>118</sup> *Higerd v. State*, 54 So. 3d 513, 519 (Fla. Dist. Ct. App. 2010) (citing *Herring v. United States*, 555 U.S. 135 (2009)).

to an abiding fear of al Qaeda and its now-deceased kingpin. Let's call it what it is: the Bin Laden Exception to the Fourth Amendment. Perhaps putting a name on a legal dodge might inspire second thoughts about the developing doctrine and, more generally, the wisdom of spending vast sums and disregarding basic principles for the sake of one bad man and his outlaw organization.