

## **BODY SCANNER AS “HUMAN RIGHTS RISK”: THE CASE OF TERRORISM**

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### **ABSTRACT**

The threat of terrorism is pervasive; it extends well beyond our national borders. Innocent persons, travelers world-wide have been its victims. In the interest of protecting its people from terrorist attacks governments have enacted various security measures. The United States is among those nations that have employed full body scanners at its airports as such a measure. Although well –intentioned, the use of scanners has become controversial with respect to whether their use is commensurate with certain rights that individuals are guaranteed. This paper explores the issue of whether full body scanners violate travelers’ rights.

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## Introduction

The Oxford English Dictionary defines terrorism as the “systematic employment of violence and intimidation to coerce a government or a community into acceding to specific political demands.”<sup>1</sup> “Webster’s Dictionary defines terrorism as “the systematic use of terror, especially as a means of coercion.”<sup>2</sup> A verb for this noun is to “terrorize” which means to fill with terror or anxiety; it means also to coerce by threat or by violence. Another verb is to “terrify” that means to fill with terror; to make deeply afraid, or to menace, to threaten, to intimidate. It implies the notion of terror which is an intense, overpowering fear based on violence.

Title 22 of the U.S. Code, Section 2656f (d) defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”<sup>3</sup>

Terrorism is defined by the Federal Bureau of Investigation (FBI) as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian populations, or any segment thereof, in furtherance of political or social objectives.”<sup>4</sup> The latter two definitions are similar in that they hold in common the theme of force being used for the intended purpose of influencing or instigating action that is designed to further a political or social goal.<sup>5</sup>

Acts of terrorism perpetrated against citizens of the United States are all too familiar: The coordinated September 11, 2001 (9/11) attacks by Islamic militants belonging to al-Qaeda to strike the New York City and Washington, D.C. areas will long live in the memories of American citizens and citizens around the world in terms of the death and destruction they wrought. Since, other attempted attacks have been thwarted:

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<sup>1</sup> The New Shorter English Dictionary, 1993

<sup>2</sup> Merriam-Webster Dictionary:<http://www.merriamwebster.com/dictionary/terrorism> (accessed June 19, 2012)

<sup>3</sup> National Institute of Justice, U.S. Department of Justice, Office Justice Programs, *Terrorism: Impact of 9/11*. <http://www.nij.gov/topics/crime/terrorism/welcome.htm> (Accessed June 9, 2012).

<sup>4</sup> Idem.

<sup>5</sup> Idem.

American Airlines Flight 63 Shoe Bomber; Northwest Airlines Flight 253 Underwear Bomber.

The terrorist uses lethal force to coerce a community or a government to submit to his goals. This is a grave injustice as those who are victimized are innocent persons not deserving to be the scapegoats of terrorists; not only may they not be politicized, they may not even be politically savvy. Yet, they are the focus of terrorist attacks in the terrorist’s effort to pressure the elected leaders of their respective nations. Violence against innocents can never be justified.

*In the month following 9/11, I often heard demagogues on the radio say that psychologists ... who seek to understand the psychology behind religiously motivated violence simply want to “offer the terrorists therapy.”... It is a symptom of how fractious and volatile the discourse around terrorism-especially religious terrorism- has become that I must state the obvious and say as unequivocally as possible that, despite the fact that all religions of the world have done it, the use of violence against civilians and noncombatants, civilians going about their daily lives, and children can never be justified no matter how lofty or sacred the cause is held to be.<sup>6</sup>*

To slay someone is not totally prohibited. The Old Testament’s commandment “thou shalt not kill” is not a definitive injunction. Killing is not categorically wrong; there are instances such as rape or self-defense in which it can be justified. Self-defense is not a privilege; it is a natural right of any living being, especially, human beings. It is natural for people to defend themselves and their vital interests when under attack by foes.

Philosopher Stephen Nathanson maintains that the right to defend and protect one’s life is so fundamental that it “permits us to harm the attacker because the attacker is responsible for the threat against us. By initiating the attack, the assailant loses his immunity, and the victim gains a right to kill the attacker as a means of defense.”<sup>7</sup>

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<sup>6</sup> Jones, 2008, p. xviii

<sup>7</sup> Nathanson, 2012, p.176

Though fundamental, it is still a limited right; if you can protect yourself without harming your assailant, this must be done. Given that nations too have the right to defend themselves and their citizens, and a duty to prevent and protect its citizens against unjustified use of violence, this imperative extends to nations as well.

In the interest of protecting its citizens against the ongoing existing threat of future attacks, airport security relies heavily on full body scanners to detect destructive devices that terrorists might be carrying on their persons for the purpose of killing innocent travelers. Is the employment of these scanners in sync with human rights and protections or do they constitute a violation of rights?

Besides a right to self-defense, there are certain other human rights that we are guaranteed *visa v* the U.N's Universal Declaration of Human Rights, the U.S. Patriot Act and the U.S. Constitution. The use of body scanners at airports raises the question of whether their use is consistent with the rights and protections that these documents guarantee or whether their use constitutes a violation of rights.

*What rights are we guaranteed?* The preamble to the Universal Declaration of Human Rights (1948) states that the foundation of freedom, justice and peace in the world is the recognition of the inherent dignity and equal and inalienable rights of all members of the human family and that Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

*Article 1. All human beings are born free and equal in dignity and rights.*

*Article 3. Everyone has the **right to life, liberty and security of person.***

*Article 5. No one shall be subjected to torture or to cruel, inhuman or **degrading treatment** or punishment.*

*Article 12. No one shall be subjected to **arbitrary interference with his privacy...***

Regarding these and other rights, the declaration states that “nothing in this declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein ( Article 30). In short, every person has a right to life, security of person, privacy and must not be subjected to degrading treatment.”<sup>8</sup>

The United States of America’s Patriot Act (H.R.3162)(2001) acronym for: Uniting and Strengthening America by Providing Appropriate Tools required to Intercept and Obstruct Terrorism signed into law by former President George W. Bush (October 26, 2001) designed to help law enforcement agencies to gather information so as to curtail the activities of terrorists cells within the USA. It states:

SEC.102. Sense of Congress Condemning Discrimination Against Arab and Muslim Americans.

(b) Sense of Congress-It is the sense of Congress that-

(1) **The civil rights and civil liberties of all Americans**, including Arab Americans, Muslim Americans from South Asia, **must be protected**, and that **every effort must be taken to preserve their safety; ...**<sup>9</sup>

And, the Constitution of the United States:

Amendment IV: 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 (Ratified 1791).

Amendment XIV: No state shall “deprive any person of life, liberty, or property, without due process of law;” Although no section of the Constitution specifically guarantees a right to privacy, the contention is that its design and wording is suggestive

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<sup>8</sup> Universal Declaration of Human Rights-United Nations.[www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/)(Accessed June 11,2012).

<sup>9</sup> USA Patriot Act. Library of Congress. [hdl.loc.gov](http://hdl.loc.gov)) THOMAS Home) Bills, Resolutions (Accessed June 11, 2012).

of this being the intention of the country's founders. In fact, the right to liberty is said to include a right to **privacy** (Ratified 1868).

Collectively, rights and protections guaranteed by the above mentioned documents are: the right to life, security of person (secure meaning safe) and secure against unreasonable searches, privacy, and the right not to be subjected to degrading treatment.

Of concern is whether the use of body scanners is consistent with the rights and protections that these documents guarantee. Post 9/11 TSA (Transportation Security Administration) has authorized the use of body scanners in the interest of promoting airport security in order to keep travelers safe. Questions that arise in this regard are first, whether this technology is effective. Does it secure the safety of travelers? If it doesn't, it should not be employed and other issues such as privacy and whether its use is degrading become moot issues. Second, it must be asked whether the technology that body scanners employ pose health risks. If the answer is in the affirmative, this would constitute a violation of the right to security or safety of one's person as health is central to personhood.

Are body scanners then, effective? Do they keep air travelers more secure (i.e. are they any more effective than less invasive methods such as metal detectors?). Inconclusive evidence pervades the question of the effectiveness of body scanners. The Underwear Bomber (Umar Farouk Abdulmutallab), the twenty-seven year old Nigerian who tried to blow up a flight from Amsterdam to Detroit, Christmas 2009 is a case in point. It is disputable or unclear whether the scanner would have detected the plastic explosives that he had hidden in his underwear. The Government Accountability Office (GOA) has said that "it remains unclear whether the AIT would have been able to detect the weapon that Mr. Abdulmutallab used in his attempted attack."<sup>10</sup>

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<sup>10</sup> U.S. Government Accountability Office (GOA).GAO-10-484T, Aviation Security: TSA Is Increasing Procurement and Deployment of the Advanced Imaging Technology,p.8.<http://www.gao.gov/assets/130/124209.html>

Yet, others, the Transportation Security Administration (TSA) and Peter Kant (Executive Vice President of Rapiscan Systems), for example, maintain that the explosives would have been detected.<sup>11</sup>

Unfortunately, there is no way to tell for sure as Abdulmutallab did not go through a scanner; he went through a metal detector instead. After extensive testing, Germany will not employ body scanners maintaining that too many false alarms make them ineffective. John Verdi, counsel for the Electronic Privacy information Center, who opposes scanners on privacy grounds maintains that “when they can’t distinguish between body sweat and explosives or the pleats in a traveler’s pants and an underwear bomb,” they aren’t making anyone any safer.<sup>12</sup>

The claim that there are false alarms, perhaps even many, however, does not negate the fact that real alarms are being caught as well. The very fact that there are also true alarms cannot be dismissed and the extent to which these alarms exist, travelers are to that extent made safer. Additionally, despite their limitations, the very fact that scanners are able to detect contraband that metal detectors clearly cannot detect makes body scanners evidentially more effective than other security methods. However, like any security measure, they are not fool proof; they are not magic bullets. Still, in conjunction with other devices, they make the traveler safer.

Does the technology that body scanners employ pose health risks? Two types of body scanners are in use and need to be evaluated separately in terms of their health risks since each employs a different technology. First, there is the backscatter machine from Rapiscan System’s that uses X-rays there by emitting X-ray like iodizing radiation. Second, there is the millimeter-wave scanner (MMS) from L-3 Communications which

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<sup>11</sup> CBS Evening News, Ex-TSA Chief: Full-Body Scanners Would Have Caught New Underwear Bomb (May 8, 2012 6:40PM). [http://www.cbsnews.com/8301-18563\\_162-57430451/ex-tsa-chief-full-body-scanners-woul...](http://www.cbsnews.com/8301-18563_162-57430451/ex-tsa-chief-full-body-scanners-woul...) (Accessed June 7, 2012). See also: Mandell, Nina, TSA Blog Rejects Claims That Scanners Don’t Work, N.Y. Daily News (March 8, 2012).[http://articles.nydailynews.com/2012-03-08/news/31137664\\_1\\_tsa-blog-body-scanners-tsa](http://articles.nydailynews.com/2012-03-08/news/31137664_1_tsa-blog-body-scanners-tsa) (Accessed June 19, 2012). See also Peter Kant as reported in ABC Blotter, U.S. Airport Full Body Scanners Too Unreliable to use, Germany Says (September 1, 2011) <http://abcnews.go.com?Blotter/us-airport-full-body-scanners-unreliable-germany/story?id=...> (Accessed June 19, 2012).

<sup>12</sup> Simons, Abby. Body Scanners Land at MSP. Star Tribune (Minneapolis, Minn.): September 23, 2010. <http://search.proquest.com>. (Accessed May 9, 2012). See also: WWSB ABC 7 MySuncoast Florida. Airport Body Scanner Effectiveness

uses radio waves rather than X-rays thereby emitting what is said to be a less potent kind of radiation, namely, terahertz or millimeter waves (MMW). The TPA maintains that both are safe.

Back scatter X-ray technology uses low- energy X-rays; rather than penetrating the rays are scattered or reflected from the skin and so, are said to be harmless unlike medical X-rays that use higher- energy X-rays that do penetrate; they penetrate clothing but not the skin.

Although admittedly, in high doses the X-ray radiation can cause cell changes which can result in cancer, the TSA is quick to cite studies that purport that the dose that the scanner emits is equivalent to the same amount of radiation a passenger is exposed to when in flight at normal flight altitudes for three minutes which is negligible.<sup>13</sup> The Department of Homeland Security Inspector General reported that the extremely low dose that a scanner emits is safe; to exceed annual dose limits one would have to be scanned forty-seven times a day for a period of one year. One backscatter scan is equivalent 5 microrem (urem) as compared to 10,000 microrem of a chest X-ray. A negligible individual dose has been defined by the NCRD as 1 millirem (mre) per year where 1 microrem is 1/1,000 of a millirem.<sup>(14)</sup> The FDA claims that the risk of cancer from x-ray scanners is approximately 1 in 400 million. The TSA maintains that the millimeter scanners pose no health risks at all because of the less potent radiation it emits.

Given the state of the evidence regarding health concerns, it can be safely said that health risks to the infrequent flyer are miniscule. But what about risks to frequent flyers, pilots, flight crews, or anyone else who regularly needs to pass through airport security? Although risk to these persons may be slightly higher (1%), this amounts to merely a slightly increased lifetime risk which like the risk to the infrequent flyer may be regarded as negligible.<sup>15</sup>

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<sup>13</sup> Arbogast, Charles Rex, AP. *Gov't: Airport Body Scanners' Radiation Not a Health Threat*. USA Today (November 18, 2010). [http://www.usatoday.com/yourlife/health/medical/cancer/2010-11-18-scanner-radiation\\_N.h...](http://www.usatoday.com/yourlife/health/medical/cancer/2010-11-18-scanner-radiation_N.h...) (Accessed May 3, 2012)).

<sup>14</sup> Health Physics Society (HPS). *X-Ray Security Screening of People*. HPS. Public (2010). <http://hps.org/documents/wholebodyscanners.pdf>. (Accessed June 5, 2012).

<sup>15</sup> Arbogast, Idem



Yet, despite evidence that should put to rest health concerns, still these concerns persist. Passing through backscatter scanners instills in some flyers, frequent and infrequent, uneasiness and even fear when, seemingly, the only thing to fear here is fear itself. Perhaps the European Union made a wise policy decision when in November 2011 it ruled that X-ray body scanners would be banned from use at all its European airports and that millimeter scanners would be employed at all airports instead.<sup>16</sup>

This decision was based on the rationale that unlike backscatter scanners, millimeter scanners simply do not raise any health concerns. The TSA has not followed suit.

Apparently, in addition to the confidence that the TSA places in the safety of backscatter scanners, economic concerns have also deterred the TSA from adopting a policy similar to the European Union's; the sole use of millimeter scanners would eliminate competition and in effect drive up the cost of the machines.<sup>17</sup> Either the TSA needs to embark on some educational program designed to boost the traveler's level of confidence in the safety of scanners to overcome whatever uneasiness and/or fear the traveler may have or do a cost/benefit analysis to determine whether all things considered that it might be cost effective to follow the European model.

Instead, by way of addressing the uneasiness/ fear on part of those who still have health reservations and possibly other reservations regarding scanners, TSA regulations permit these persons to opt out of body scanners in favor of some other form of security check, namely, a pat down search.

Let's make a couple of presumptions and in light of them see whether any viable conclusions can be drawn regarding the use of scanners. First, let's presume that we are able to put to rest any and all health concerns thereby alleviating any fear and/or uneasiness on part of travelers in being scanned. Presume also that there are limitations to what body scanners (backscatter and MMS) can detect; they may not be

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<sup>16</sup> DiSalvo, David. *Europe Bans Airport Body Scanners For "Health and Safety" Concerns*. Forbes: Pharmacy & Healthcare (November 15, 2011). <http://www.forbes.com/sites/daviddisalvo/2011/11/15/europe-bans-airport-body-scanners/> (Accessed May 23, 2012).

<sup>17</sup> Kemmick, Ed. *New Body Scanners Installed at Billings Airport*. The Billings Gazette- Montana & Wyoming (March 13, 2012). <http://billingsgazette.com/news/local/newbody-scanners-installed-at-billings-airport/article...> (Accessed May 3, 2012).

able to detect low density items (e.g. fine powder, many liquids or thin plastics) such as the Underwear Bomber's explosive but they can detect nonmetallic devices such as the Glock advanced synthetic polymer pistol and dense explosives. Everyone would agree that there is no way to eliminate every threat to air or any other kind of travel; the traveler can never be said to be absolutely safe.

This, however, must be viewed in a sobering light: apart from eventual death, there are no absolutes in life. This doesn't mean that travelers cannot be made safer. This in itself is a desirable goal and in so far as body scanners can satisfy this limited end, they must be said to be to that extent effective. Unfortunately, even though body scanners pose negligible health risks, the issue of potential health risks can be a sham argument used by opponents of scanners as they would object to scanners even if technology was to become so advanced as to have eliminated any and all health threats.

Keeping the above in mind, do body scanners violate any rights that are guaranteed in the United Nations Declaration of Human Rights, the U.S.A. Patriot Act and in the United States Constitution?

The right to life is the supreme right of all human persons; it is in essence the foundation of all other human rights: the right to security of person, the right to privacy, the right not to be subjected to degrading treatment among others. Being rational autonomous beings, human persons are said to have intrinsic worth and dignity and so should be treated in certain ways and not in others. In fact, the notions of intrinsic worth and human dignity may be said to be the basis for having any rights at all. It is by virtue of the inherent value of the human person that we acknowledge the most basic human right, the right to life: Every person has a right to life and so, one's life may not be taken away unjustly. Protection of this right entails the right to security of one's person. Further, it is essential that individuals not be subjected to procedures or measures that may compromise their dignity, dehumanize them or treat them with a lack of respect (i.e. procedures that constitute degrading treatment).

The purpose of body scanners is to provide security to the traveler's very person to protect their basic right to life against unjust attempts to take it away. Since body scanners are to some extent effective, it must be acknowledged that they do enhance a

person’s right to security of person understanding this right to mean the right of being kept safe from possible danger to one’s person. Terrorists pose potential peril to travelers; the extent to which body scanners are able to detect the intended means of destruction, they safeguard passengers; they preserve the physical integrity of the human person and in effect the fundamental right to life itself.

Do they, however, violate the right not to suffer degrading treatment and the right to privacy? Are these searches unreasonable? First, the right not to be subjected to degrading treatment: Body scanners produce a highly realistic image of one’s nude form, that is, details of one’s naked body that includes genitalia. Hence, it has been referred to as a “digital strip search.” Is this digital search more or less invasive than a pat-down search? Does the use of body scanners constitute degrading treatment?

Medical doctors or physicians are likewise concerned with the well-being of the human person; MDs for patients; the TSA for travelers. When the physician asks that we remove our clothes, no one objects to this “nudity reality” (i.e. nude body) and the doctor’s hands on examination. Why? Because we recognize that it is done in the interest of securing one’s body against disease and subsequent death. Why then, is there objection to “virtual nudity” (i.e. nude form of the body) when the TSA asks that we go through a body scanner? Both the MD’s and the TSA’s intentions are much the same, namely, the security of the human person, protection of human life against harm and, indeed, the scanner’s examination is a lot less invasive than a pat down. Viewed in this light, in term of its intention, the body scanner cannot be said to be degrading. Rather than showing any disrespect for the human person, it shows the greatest respect; it is in so many words saying that the human person has inherent worth and so, has a right to life and must be protected in having it.

Second, is the question of body scanners being an invasion of the right to privacy. Does the use of scanners constitute an invasion of this right? Privacy must always be a matter of concern.

Congress requesting that the TSA seek ways of improving body scanners to make them even less intrusive and the evolving new technology that has led to a scanner that is less revealing is evidence that it is. Currently being tested is a new scanner, which

shows only a stick figure of a person focusing on only things that appear suspicious and so, is very limited and specific in nature. Additionally, in 2012 the TSA introduced a new body-imaging scanner. Unlike the first generation of body scanners, still mainly in use, this new generation scanner does not create a graphic image of the body of the person being scanned.

Rather, it produces a computer generated image that is the same for all passengers. The image has been described as looking like Gumby but with fewer features than even those of Gumby as the image produced is rather bland outline of the body. Unlike other scanners, the images are simply incapable of being stored or transmitted. As of March 2012 the scanner was already in operation at Bozeman and was being installed at Billings-Logan and soon would be in place at airports in other of Montana's cities: Missoula, Kalipell and Helena.

But what can be said of the scanners that are currently mostly in use, the backscatter and millimeter scanners in regards to privacy? The process for the passenger is relatively simple. The passenger passes through what resembles a metal cabinet containing a screen. Within seconds (approximately 15), the scanner penetrates the clothes taking a relatively clear image of the person's body in search of concealed weapons and/or explosives. The resultant images are then viewed. They are viewed only by federal screeners in a separate room; screeners never see the actual passengers; the face of the traveler is blurred; images are not stored for any future use rather they are deleted immediately after the image is examined; cell phones, cameras and other electronic equipment that might give pause are not permitted in the screening room. These measures have been enacted to insure privacy. Although *prima facie* they are sufficient to guarantee one's right to privacy, again, like anything in life, even here there are no absolutes. Human fallibility which includes moral fallibility precludes us from being able to maintain that there could never be an invasion of an individual's right to privacy. At best, we might be able to say that privacy invasion is highly improbable. However, this being said, even if it could be argued that body scanners do violate the right to privacy, this invasion can turn out to be a moot issue if this right should conflict with some other more important right.

A candidate for this more important right is the right to life of others; the right to life of others would seem to trump any individual’s right to privacy; that is, in times of conflict, the right to life takes precedence. Regarding the matter of unreasonable searches, when viewed in terms of all of what has been said, body scanners do not fall into the category of unreasonable searches and, consequently, do not even violate an individual’s right of security of person against unreasonable searches.

### **Conclusion**

Clearly, individuals and nations have the right of self-defense against those who attempt to do injury or harm to them. Terrorists are intent on inflicting such harm on travelers. As a defensive measure in the effort to thwart terrorist attacks, airports have installed and make use of full body scanners.

Controversy, however, surrounds these scanners in term of whether they jeopardize rights and protections of those rights that are guaranteed via the Universal Declaration of Human Rights, the USA Patriot Act and the Constitution of the United States. Exploration of this issue has revealed that scanners do not constitute a violation of the traveler’s rights and do not compromise the integrity of these documents.

### **Disclosure statement**

No potential conflict of interest was reported by the authors.

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