

## SECURE MOBILITY AND THE RIGHT TO MOVEMENT

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Instead of discussing post 9/11 cases and practice, I am going to speak about the emerging strategic context in which this law is being developed, and one area of law being reshaped within that new framework: the law governing the global movement of people and an individual's right to movement. This field of law is notably underdeveloped, but it has become central to civil liberties and human rights concerns in the decade since 9/11. Only by understanding the new strategic environment we are confronting can we see how essential it is to re-focus on this dormant area of law.

A decade after 9/11, the present can be misread as a time when civil and human rights are diminishing in the United States. Although there have been setbacks in establishing domestic and international law relating to counter-terrorism, collective and individual freedoms are being defended more vigorously than ever. Concerns about human rights and civil liberties are moving to the center of the public debate. Their greater prominence reflects the degree to which human rights, democratic participation, and individual access to opportunity and economic well-being are becoming the basis for legitimacy for the United States, the West generally, and many other states.<sup>1</sup> To be able to reap the benefits of the freedoms won in the 20<sup>th</sup> century, which are still growing in states around the world, citizens must be fully assured of their democratic rights, collectively and individually. The authority and credibility of governments depends on successfully realizing, protecting, and even expanding these rights while sustaining effective security for their people. That security represents the vindication of a foundational right, the right to life.

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1. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002); PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (2008); Mr. Y, *A National Strategic Narrative*, WOODROW WILSON INT'L CTR. FOR SCHOLARS, 6-7 (2011), available at <http://www.wilsoncenter.org/events/docs/A%20National%20Strategic%20Narrative.pdf>.

The strategic truth that democratic freedom, human rights, and access to opportunity have become more important than ever applies specifically to rights surrounding the movement of people. This is because movement, within nations and globally, has become critical to individuals, families, societies, and economies. Two generations ago, international air travel was a rarity; now students expect to see the world or move to another country for work. Rural inhabitants are propelled toward cities and economic migrants move north to south and south to north, regardless of their legal status.<sup>2</sup> The availability of global travel is no longer a prize or a luxury; it is an assumption and an economic necessity.

Huge costs to economies and individuals ensue when the individual's ability to move is disrupted, whether by a 9/11 style attack or natural causes, such as a volcano in Iceland. Restrictions on the movement of people constrain markets and economies and therefore the prosperity of peoples. Loss of free movement also tears families apart, which can infect individuals and communities with instability, increasing suffering and diminishing achievements and productivity.

The law of human mobility today has yet to reflect the new reality that people's movement is as much economically compelled as it is personally chosen, and as much a matter of individual and family well-being as of individual satisfaction. This greater stake in movement for societies and individuals gives law, and law enforcement relating to mobility, constitutional and human rights resonance. Two principles should guide how we view travel, borders, and migration. First, secure movement channels should be sustained for all people willing to comply with globally recognized laws. The rule of law in global mobility channels is an international common good and the world's governments should collectively and nationally act to ensure it. Second, laws governing mobility should guarantee an individual's right to movement to the maximum possible extent. The right to movement is a fundamental constitutional liberty and human right. It must be re-examined, re-interpreted, and expanded in the context of deeper expectations of secure global movement.

A number of forces are driving the need for a reexamination of the law relating to the movement of people. Global terrorism and the response to it is the most prominent impetus for change. The 9/11 Commission highlighted the fact that mobility is a core logistical

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2. See, e.g., *News Analysis: Big Changes Sweep Rural China*, CHINA DAILY, Apr. 26, 2011, [http://www.chinadaily.com.cn/usa/china/2011-4/26/content\\_12398653.htm](http://www.chinadaily.com.cn/usa/china/2011-4/26/content_12398653.htm).

requirement and focus for global terrorist networks.<sup>3</sup> It found that al-Qaeda devoted significant resources in time and treasure determining how to insert agents into the United States and other target countries.<sup>4</sup> Its intelligence operations and tactical planning determined which operatives had access to what visas and therefore in what part of the world they could undertake a mission.<sup>5</sup> The organization maintained a passport issuance and travel services center in Kandahar, Afghanistan.<sup>6</sup> At the center, a manager would confiscate the passports of the trainees who came from overseas, sometimes alter them, and then redistribute the passports to operatives designated for terrorist missions.<sup>7</sup> Five of the original group of 9/11 conspirators could not obtain United States visas and one was turned away at Orlando by border officials.<sup>8</sup> Al Qaeda's methods of clandestine international travel are documented in the *9/11 Commission Report* and in much greater detail in the subsequently published *9/11 and Terrorist Travel*.<sup>9</sup>

By September 12<sup>th</sup> government officials recognized that the importance of travel to al-Qaeda made countering terrorist mobility on a systematic basis an essential element of counterterrorism. Acting on this insight, the United States and its North American and European partners have made it much more difficult for terrorists to travel. Analysis of terrorist travel tactics such as the use of adulterated or counterfeit passports, has led to arrests of terrorists from Europe to Thailand. Many known terrorists have been precluded from travel to the United States and the risks have been greatly increased for unknown terrorists. By making it harder for terrorists to travel internationally, catastrophic attacks have been averted, most notably an attack on airplanes traveling from London to the United States.<sup>10</sup> At the same time as security officials were expanding their focus on the methods of terrorist travel,

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3. Also known as the National Commission on Terrorist Attacks upon the United States. Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 385 (July 22, 2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

4. *Id.* at 231-53.

5. *Id.* at 169.

6. *Id.*

7. *Id.*

8. *Id.* at 248.

9. Nat'l Comm'n on Terrorist Attacks Upon the United States, *9-11 and Terrorist Travel A Staff Report of the National Commission of Terrorist Attacks Upon the United States* (Aug. 21, 2004), available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrTrav\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf).

10. *Details Emerge on Alleged Plot to Bomb Airlines*, NBC NEWS, Aug. 10, 2006, [http://www.msnbc.msn.com/id/14278216/nw/world\\_new-terrorism/t/details-emerge-alleged-plot-bomb-airliners/](http://www.msnbc.msn.com/id/14278216/nw/world_new-terrorism/t/details-emerge-alleged-plot-bomb-airliners/).

the public and most policymakers conflated the problem of countering terrorist mobility with the problem of illegal labor migration, whether illegal border crossing or illegal migration through overstaying a visa or other means. The realities of global border crossing make this view unsustainable. There are approximately half a million people crossing a border at every hour of the day.<sup>11</sup> Lawful crossing back and forth over U.S. borders approach 500 million people a year.<sup>12</sup> Despite the billions of dollars in expenditures on border enforcement and the recent economic downturn, hundreds of thousands of illegal border crossings occur annually.<sup>13</sup> It is estimated that eleven million people with illegal immigration status live in the United States.<sup>14</sup> Communities and corporations alike find immigration laws and associated enforcement policies problematic. Not only is labor migration not orderly, it is too difficult to bring in high skilled labor, obtain a specialized visa, or shepherd close relatives through the legal immigration process. New state level enforcement initiatives are compounding the confusion and collateral harm.

The improvements to security resulting from counterterrorism aimed at detecting and deterring terrorist mobility have dramatically changed the experience of travel, border crossing, and immigration, well beyond increasing risks for terrorists. Rather than being as targeted as possible on terrorists, new security measures sweep in everyone moving across borders, largely indiscriminately. A number of the new security practices have proved harmful to individuals, especially Arab Americans, Muslims, and migrants from Mexico. We have ended up with a seemingly unsolvable conundrum—policymakers and security officials view each person entering the country as a potential terrorist, while only a tiny fraction of travelers are terrorists or supporters of terrorism. Moreover, terrorists cross either way across the border and operate from within countries, including the United States.

The sometimes intolerable treatment of people—U.S. travelers, tourists, business visitors, students, and immigrants—results from a combination of ill-considered immigration laws, overinclusive security practices, and misguided enforcement and border agency cultures. Not only are there individual violations of rights, the fundamental legal

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11. SUSAN GINSBURG, *SECURING HUMAN MOBILITY IN THE AGE OF RISK, NEW CHALLENGES FOR TRAVEL, MIGRATION, AND BORDERS* 12 (2010).

12. *Id.*

13. *Id.* at 10.

14. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, DEP'T OF HOMELAND SECURITY 1 (2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

norms and strategic model are wrong. It should not be acceptable to respond to a tourist's overstaying by shackling the person and placing her in jail when she arrives at a United States port of entry. Border and immigration officials I talk with often acknowledge that there are inexcusable excesses. Treating tourists as if they were terrorists is not an added deterrent for terrorists. Border inspections that cause a great writer like the Canadian citizen of Parsi origin, Rohinton Mistry, to cancel his book tour in the United States are more than regrettable.<sup>15</sup> They reduce the impetus to cooperate among citizens whose vigilance is an essential element of civil security.

Policymakers today rely on an outdated paradigm: that border security and immigration enforcement together supply the solution to countering terrorist and criminal mobility. Most security policies, and more importantly all of the politics relating to the movement of people, focus on securing the border and enforcing immigration laws. In Washington and on the campaign trail, politicians continue to assent to the proposition that there can be no reform of immigration laws until border security is achieved. Rights will continue to be violated at borders and in the immigration process, without effective legal recourse, until this outdated border security paradigm is modified.

Ultimately, a more viable strategic framework will be adopted. Few in a position of national security authority believe we can establish complete border security in the sense of a WWI style defense line at an acceptable cost. Moreover, the phrase "border security" implies territorial defense, the repelling of armed invaders, and the general exclusion of foreigners, but the United States is not anticipating an attack by foreign armies. Border security generally refers to national borders, but the global nature of terrorist mobility—with terrorist movement from the United States to foreign training sites, or from distant locations to the United States and other countries important to the United States—makes purely national solutions impossible. Instead, in order to secure the entire chain of global movement of people and protect United States citizens and interests, the United States has to work with governments of other states through which terrorists and legitimate travelers move. Travel, border crossing, and business statistics show that there are simply too many law abiding people for whom global mobility is too important to make the historical paradigm of border security and immigration enforcement a viable approach to today's challenges.

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15. *Author Cancels US Tour Over 'Profiling'*, BBC NEWS, Nov. 3, 2002, <http://news.bbc.co.uk/2/hi/entertainment/2392847.stm>.

Given these transformational realities, we need to reformulate how we view risks associated with people's global and domestic movement and adopt legal strategies that conform to that new vision. Our goal ought to be twofold. First, we should seek to establish and sustain the rule of law in the global mobility channels people seek to use, including transportation systems, travel channels, and movement, travel and migration rules. This will increase the amount of freedom of movement for legitimate travelers. The premise that the rule of law should obtain in global travel channels implies a political and legal consensus about who is allowed to travel and who is restricted from travel and on what terms. It implies agreement on how to manage the sometimes precipitous movement of large numbers of people for economic or other reasons, and equally implies consensus on the law and practice of restricting the movement of terrorists, criminals, and human right violators. Secondly, our goal should be to define the right to movement so as to maximize individual access to mobility.

In order to achieve these two goals, it makes more sense to formulate the policy purpose as *securing the movement of people* or *securing human mobility*, replacing the dated dual paradigm of border security and immigration enforcement.<sup>16</sup> Securing the movement of people is comparable to securing financial flows, energy flows, and cyberspace. This does not mean that border security and immigration enforcement are unimportant. But they are not the primary means of responding to terrorism or other contemporary security needs; stretching them to try to cover those needs is resulting in weaknesses and in excesses.

These generalities about principles and goals translate into specific and pressing legal issues which matter in any assessment of the impact of 9/11 on civil liberties a decade after the attacks. If establishing the rule of law in travel channels is important, then a bundle of new policy and legal goals follow. Anti-corruption campaigns must encompass prosecuting and preventing corruption in the government offices that control movement, including visa and passport offices, customs and immigration agencies, and the border patrol. Prevention and prosecution of human smuggling that supports human trafficking or terrorist movements has to supplant exclusive concentration on screening and patrol at borders. The law of travel bans, including means of challenging them, needs to be developed in order to secure worldwide human mobility. Advocates and academic commentators have devoted much attention to financial bans, but I was unable to surface a single law review article on the subject of

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16. SUSAN GINSBURG, *SECURING HUMAN MOBILITY IN THE AGE OF RISK: NEW CHALLENGES FOR TRAVEL, MIGRATION, AND BORDERS* (2010).

travel bans. The topic deserves more scrutiny: travel bans help sustain the rule of law, including democratic and human rights, in world travel channels, but they may also completely vitiate an individual's right to movement without legal recourse.

None of the three authorities applying travel bans, the United Nations Security Council, the United States government, and the European Union, are adequately transparent in how they operate. In the United States, the existence of the travel ban program is unclassified but further description is largely classified. While some facts can be gleaned from media sources, we do not know enough about the criteria for banning individuals from international movement and the process by which those determinations are made. This level of secrecy is unnecessary and counterproductive. Domestic and international law aimed at precluding or regulating the uncontrolled or mass movement of people is also in need of re-thinking. Large scale movement of people can be everything from labor migration at our southwest border, to Zimbabweans escaping dictatorship and poverty by crossing into South Africa, or the Mariel boat lift from Cuba, during which the Castro government released large numbers of criminals from prison and enabled them to migrate to Florida.

The right to movement is enshrined in the Universal Declaration of Human Rights<sup>17</sup> and the International Covenant on Civil and Political Rights.<sup>18</sup> Historically, these provisions have been primarily interpreted to ensure a citizen's ability to *depart* from their home countries. The international community insisted on this right in response to the practice of the Soviet Union, its satellites, and other countries prohibiting their citizens from exiting their own countries and traveling freely. But the right to movement bears reconsideration and amplification in an era where democracy and the ability to depart are much more widespread. The right to leave when completely unfettered can lead to wholesale violation of other peoples' laws. This is contrary to the idea that the rule of law should govern mobility channels in a way that fosters the common good of all people. National laws and international agreements need to catch up with the economic and social realities of travel and migration in order for regulation to maximize people's free movement within a legal framework.

The most troubling threat to an individual's right to movement arises in the context of counterterrorism investigations. In an increasing number

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17. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217 (III), at Art. 13 (1) (Dec. 10, 1948).

18. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 14668.

of cases, United States authorities have attempted to preclude a citizen from returning home on the grounds that they pose a threat to aviation safety. The American Civil Liberties Union has undertaken some of these no-fly list cases in Washington State.<sup>19</sup> Similar cases have occurred in Canada.<sup>20</sup> We can expect other efforts to bar citizens from traveling out of the United States, as occurred during the Cold War.

Most commonly, these no-fly list cases are being litigated based on constitutional due process claims.<sup>21</sup> The cases call for addressing the question how the right to movement enshrined in international human rights law relates to the constitution.<sup>22</sup> One law professor has come up with a persuasive constitutional interpretation relevant to this question. Jeffrey Kahn at Southern Methodist Law School states that a fundamental right to movement inheres in the Citizenship Clause of the Fourteenth Amendment.<sup>23</sup> This claim would clarify what is at stake in these cases and offer an avenue to challenge the practice.

There are barriers to seeing international movement pathways as a global common good subject to the jointly upheld rule of law. These include a prevailing view of sovereignty, national defense, and civil liberties inadequate to meet today's challenges. Understanding the right to movement as a source of rights and of responsibilities is also inhibited by seeing this right only in the historical terms of the right to depart one's own country. The lack of legal, economic alternatives for labor migrants stands in the way of recognizing that a government's practice of directly or indirectly sending citizens across borders in violation of the receiving country's laws is unsustainable practically, politically, and legally.

Addressing the issues arising from the law of movement is critical to advancing civil liberties and human rights in our time. Yet the right to movement is almost completely overlooked by the legal community. I'd like to end by asking the law students here today to take on the problems of how to achieve the rule of law in mobility channels and how to expand the individual right to movement as critical topics in need of what Jeffrey Rosen this morning called *constitutional imagination*.

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19. See, e.g., *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

20. See Weseley Wark, *Passenger Protect is Checking You Out: Canada's No-Fly List May Keep Us Safer When We Travel, but the Potential for Error or Abuse in the System is High*, OTTAWA CITIZEN (Canada), Jan. 19, 2007, at A13, available at 2007 WLNR 28636179.

21. See *Green*, 351 F. Supp. 2d at 1122.

22. See *id.*

23. Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271, 329-32 (2008).



Thank you for the opportunity to participate in this landmark conference.