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Monica G. Renna

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FIRE IN THE SKY: A CRITICAL LOOK AT ARMING PILOTS WITH HANDGUNS

MONICA G. RENNA*

I. INTRODUCTION

THE INDELIBLE image of firefighters raising the American flag amidst the rubble and destruction of the September 11, 2001 attacks has as much symbolic value as it does emotional impact. The flag stood as a testament to the human spirit, American patriotism, and the hope that good will eventually prevail over evil. In a time when nothing seemed certain and terror, violence, and war seemed inevitable, the flag stood as a statement that Americans would stand their ground and fight to defend their homeland. Although the last bulldozer has left "ground zero," citizens and the Government are still trying to reconstruct their shattered sense of national security. The new legislative framework that is emerging strongly reflects an emotionally charged stand-and-fight mentality. Nowhere is this philosophy more evident than in the provision to equip commercial airline pilots with firearms.

Immediately following the attacks, the Bush Administration announced its new-fangled and unyielding commitment to a "war on terrorism" and launched a series of legislative bills that focused on national defense and preventive measures. The first phase of the campaign was most apparent abroad as troops ar-

* B.A., 2001, English and Women's Studies, Summa Cum Laude, Phi Beta Kappa, Southern Methodist University; Candidate for Juris Doctor, 2004, Southern Methodist University Dedman School of Law. Prior to attending the Dedman School of Law at Southern Methodist University in Dallas, Texas, Monica Gabriella Renna, a member of Phi Beta Kappa, attended Yale University and graduated Summa Cum Laude from Southern Methodist University with a degree in English and Women's Studies. As a law student, she earned a position on the SMU Law Review, received recognition for her writings for the *Journal of Air Law and Commerce*, and served as tutor and mentor to incoming students. She will be moving to Los Angeles to practice law with Gibson Dunn and Crutcher upon graduation.

rived in Afghanistan, chased out the Taliban, and went cave by cave in search of Osama bin Laden. At home, however, Americans may not have realized that their own political landscape was changing almost as drastically as that of their Afghan counterparts.

Although politicians shared a palpable sense of the need to respond aggressively to the attacks, there was less accord on the methods by which the country should react. Starting at the source of the tragedy, it was clear that commercial aviation had been redefined from a target of terrorism to a weapon itself, and the Government would have to shift its policy to reflect the changing threat. A critical look at commercial airline and airport security revealed the abundant failures in procedure, technology, and personnel that allowed a small group of men with box cutters to devastate an entire country.

The first call to arm pilots came from Congress in November 2001, but when given the choice, lawmakers refused to answer the call. Despite its lack of initial legislative force, the proposal had an enormous impact by launching a year-long debate between self-proclaimed gun-toting patriots and concerned opposition including the Bush Administration, airlines, airline crews, and passengers. Intense lobbying by pilots' unions and groups such as the National Rifle Association (NRA) led large majorities of the House and Senate to the pass two similar bills aimed at arming pilots. The Senate bill was part of the larger Homeland Security Act, which President Bush signed into law on November 25, 2002.

Gun lobbyists and many pilots' associations have pushed hard for the right to allow pilots to carry guns for they worry that the lack of manpower and lag time associated with organizing and training air marshals will result in a crucial chink in the armor of air safety and national defense. They believe pilots must have a way to protect themselves and their passengers and prevent their planes from being used as weapons of mass destruction.

Opponents of the bill cite multiple complications with the implementation of the program and its maintenance. There are important safety concerns and unanswered questions including the effects of a stray bullet on the stability of the aircraft. Challengers to the bill worry about pilot error, unpredictability, and misjudgment. Legal scholars have raised eyebrows over liability issues and the immunity that the bill provides for airlines and pilots. Economists question the source of funding. Most importantly, passengers have wondered if it is really the job of a com-

mercial airline pilot to carry a deadly weapon onto a plane and be able to fire at will.

This paper examines the issues surrounding arming pilots and ultimately argues that it should not be part of America's defense against domestic terrorism. Like sticking a flag into the ground, sticking a gun into the hands of a pilot is a reaction to feelings of vulnerability and helplessness, and it satisfies a child-like need for comfort and security. While these feelings are a natural response to an event like September 11th, politics is not the arena in which they should be addressed, and legislation should not be used as a national pacifier. Taking an active stance against terrorism does not justify a codified transgression of ethics, nor does it mean abandoning civilized principles.

The reality of guns on planes is that they generate more danger and risk than benefits by creating a potentially deadly situation each time a gun is carried in the airport or onboard a plane. Although a pilot will rarely come face to face with a terrorist, guns will be a constant presence on flights everyday. If the uncertainty of human reaction to, individual judgment of, or fatigued pilots' perceptions of day-to-day flight emergencies does not cast a dark enough shadow on the idea, consider the unintended consequences that could result from a high-pressure terrorist hijacking. Copious problems exist with the operational details of the armament program as well. This paper briefly looks at the terrorism that serves as a catalyst for arming pilots, for it is important to understand the threat to which the Government is responding. Next, it explores the specific provisions of the House and Senate bills, including the Homeland Security Act that is now law, under the rubric of strategy and safety, cost, liability, policy, and ethics. It suggests a different hierarchy of safety priorities and equally effective non-lethal alternatives.

II. THE CHANGING THREAT OF TERROR AND THE ROLE OF AVIATION

The danger of terrorist activity on commercial airlines has been a reality since the early 1930s.¹ In the subsequent decades,

¹ See Dr. Douglas V. Johnson II & Colonel John R. Martin, *Terrorism Viewed Historically, Defeating Terrorism: Strategic Issues Analyses* (Jan. 2002), at <http://www.carlisle.army.mil/ssi/pubs/2002/terror/terror.pdf>; see also STEPHEN E. ATKINS, *TERRORISM* 33-65 (1992) (listing a chronology of terrorist events from 1894 to 1992); see generally, PETER ST. JOHN, *AIR PIRACY, AIRPORT SECURITY AND INTERNA-*

the domestic threat to aviation most commonly came in the form of foreign hijackers² who seized passenger jets and traded the hostages on board for money, prisoner release, a new destination, or most often, a chance to broadcast their political and underlying religious beliefs.³ The hostage planes merely served as a stage upon which the terrorists ran their show.⁴ They either chose to remain in the air until officials met their demands or landed the plane and sat on the runway, sometimes for weeks, until negotiators, desperate to avoid confrontation and loss of life, complied with their terms. Despite negotiators' best efforts to avoid violence or loss of life, several hijackings ended with both terrorists and innocent hostages dying. For the most part, though, passengers and crew members learned that if they remained quiet, stayed calm, and did what the hijackers instructed, they would eventually be released. On September 11, 2001, however, the mundane pattern and resulting complacency were shattered.

The attacks on the World Trade Center revealed a new breed of terrorists who did not fit the pattern and were not interested in negotiating. The September 11th attackers capitalized on the value of a domestic jumbo jet full of Americans, not as a bargaining chip, but "as a symbol, the destruction of which demonstrated Western vulnerability and [the terrorists'] skill in bringing attention to their cause and adulation from their constituencies."⁵ They were not following the pattern of using terrorism "as a means to an end" but using it as "an end unto itself."⁶ No political messages were announced nor demands made; they wanted to demoralize Americans, cause widespread panic, and underscore America's culpability.⁷ The perpetrators, members of the Al Qaeda⁸ network led by Osama bin Laden,

TIONAL TERRORISM: WINNING THE WAR AGAINST HIJACKERS (1991) (discussing historical evolution of airplane hijacking).

² STEPHEN E. ATKINS, TERRORISM 67-86 (1992) (providing biographical profiles of leading terrorists).

³ Phillip A. Karber, *Re-Constructing Global Aviation in an Era of the Civil Aircraft as a Weapon of Destruction*, 25 HARV. J.L. & PUB. POL'Y 781, 785 (2002).

⁴ See William Regis Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy*, 6 Westview Press (1982) (discussing terrorism as "theater").

⁵ Karber, *supra* note 3, at 786.

⁶ See Farrell, *supra* note 4.

⁷ *Id.* at 10.

⁸ See generally Dr. Stephen Biddle, War Aims and War Termination, *Defeating Terrorism: Strategic Issues Analyses* (Jan. 2002), at <http://www.carlisle.army.mil/ssi/pubs/2002/terror/terror.pdf>.

harbor a deep hatred toward the West and believe that participation in such suicide missions will earn them honor, an eternal seat next to Allah, and a host of virgins.⁹ Social and religious scholars assert that they are part of "Islamism," a Jihad-based, xenophobic, extremist movement that is wholly intolerant of and profoundly hostile to religious pluralism of any kind.¹⁰ Even more frightening than their perverted fundamentalist beliefs and irrational personalities is the fact that they have the financial ability and global presence to successfully carry out such highly organized, extensively pre-meditated, and cunningly orchestrated attacks on United States soil. It is clear that the new wave of terrorism will continue to be a constant threat to Americans at home and abroad.

III. AMERICA REACTS TO TERROR WITH LEGISLATION

Still reeling from the shock and pain of September 11th, Americans looked to the Government for a response that would punish the enemy, restore a national sense of security, and ensure that such an event would not happen in the future. The Government had to respond with military and legislative force that was drastic enough to quench the public's immediate desire for retaliation and vindication, yet possessed the foresight of an even-handed, practical solution that would be effective in the long term. President Bush and his Administration asked for and received the authority to launch a highly publicized "war on terrorism"¹¹ and enforce an unprecedented body of legislation including the Aviation and Transportation Security Act of 2002,¹² the Arming Pilots Against Terrorism Act,¹³ and the Homeland Security Act of 2002.¹⁴ The three acts have two things in common: they recognize the need to block access to cockpit controls so a plane cannot be used as a weapon, and they call for a shift

⁹ See generally JOHN CLARK MEAD, *THE NEW WORLD WAR: A BEHIND THE SCENES LOOK AT WHY AND HOW MILITANT MUSLIMS PLAN TO DESTROY WESTERN CIVILIZATION* (2002).

¹⁰ See WILLIAM J. BENNET, *WHY WE FIGHT*, 76-101 (2002).

¹¹ See generally SUPERTERRORISM: POLICY RESPONSES 40-56 (Lawrence Freedman ed., Blackwell Publishing 2002) (discussing the Bush Administration's war on terrorism).

¹² Aviation and Transportation Security Act, Pub. L. No. 107-71, § 1447, 115 Stat. 597 (2002).

¹³ Arming Pilots Against Terrorism Act, H.R. 4635, 107th Cong. (2002) (enacted), available at <http://thomas.loc.gov> (hereinafter "APATA").

¹⁴ Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002) (enacted), available at <http://thomas.loc.gov>.

from a passive stance on security to a multi-level, "active defense" of the aircraft.¹⁵

A. AVIATION AND TRANSPORTATION SECURITY ACT

In November of 2001, Congress passed the first piece of legislation, which included physical measures to deter terrorists from gaining control of the plane. The Act began by creating a Transportation Security Administration that is part of the Department of Transportation and headed by the Undersecretary of Transportation for Security.¹⁶ The Undersecretary is charged with creating and implementing various aviation security programs immediately following the adoption of the Act.¹⁷ The Act called on Undersecretary Magaw to require airlines to fortify cockpit doors with heavy locks and stronger building materials¹⁸ and implement methods, such as video monitors that allow pilots to observe activity in the cabin and switches or other wireless devices that enable flight crews to discreetly notify the pilot of an emergency or security breach.¹⁹ The Act also authorized the Undersecretary to develop a program that would recruit, train, and provide weapons for air marshals. Air marshals would consist of undercover law enforcement officials of the Administration who would serve in teams of at least two per airplane.²⁰ They would fly alongside civilian passengers, and they would be authorized to carry weapons and use force when necessary.²¹ The third, and most controversial, provision of the Act authorized the Undersecretary to create a similar training and armament program for pilots who volunteered to carry firearms.²²

The Undersecretary had the choice of whether to implement the individual provisions of the Act, and at a Senate Commerce Committee hearing in May 2001, Undersecretary Magaw announced that pilots would not be allowed to carry guns into the

¹⁵ See Matthew L. Wald, *Nation Challenged: Airport Security; Screening of All Checked Bags Is to Start Today, but Safety Concerns Remain*, N.Y. TIMES, Jan. 18, 2002, at A11 (interviewing the head of the FAA).

¹⁶ ATSA § 101(a), (b). Note, President Bush elected John Magaw as Undersecretary of Transportation for Security.

¹⁷ ATSA § 101(d).

¹⁸ *Id.* § 104(a)(1)(B).

¹⁹ *Id.* § 104(b)(1), (3).

²⁰ *Id.* § 105(a)(1)-(4).

²¹ *Id.* § 105.

²² *Id.* § 128.

cockpit.²³ Undersecretary Magaw cited the need for pilots to concentrate on flying as the primary reason to prohibit arming pilots.²⁴ He stated that air marshals should be the only ones to carry firearms on board because they have special training to handle firearms, including how to fire them in tight spaces like the cabin, and training for the events that lead up to a crisis that calls for such force.²⁵ He suggested that, if need be, pilots could always use in-flight maneuvers to incapacitate hijackers and rely on cameras to monitor the results of their actions.²⁶ Both the Transportation Secretary, Norman Mineta, and Homeland Security Director, Tom Ridge, joined Undersecretary Magaw in opposition to arming pilots.²⁷ Ironically, in July 2001, just two months prior to the September 11th attacks, a forty-year-old Federal Aviation Administration (FAA) rule that allowed commercial pilots to carry guns was suddenly rescinded.²⁸ The FAA adopted the rule in 1961, shortly after the Cuban Missile Crisis, in an effort to avoid hijackings, but over the next four decades, not even one pilot on a single airline ever took advantage of the right to carry a gun, effectively rendering the law moot.²⁹

B. ARMING PILOTS AGAINST TERRORISM ACT

1. General Purpose

On July 10, 2002, the House voted by a veto-proof majority of 310-113 to pass the Arming Pilots Against Terrorism Act.³⁰ Unlike the Congressional Act presented in November 2001, this bill did not afford Undersecretary Magaw a choice of whether to arm pilots. Within two months of the bill's enactment, Undersecretary Magaw would have to establish a program to deputize volunteer pilots as "law enforcement officers to defend the flight

²³ Associated Press, *Government Says Pilots Won't Have Guns in Cockpits*, ABC News (May 21, 2002), available at <http://abcnews.go.com/section/us/dailynews/homefront020521.html>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Mary Winchester, *For 40 Years Pilots Had Right to Have Guns on Planes* (May 16, 2002), available at <http://www.geoffmetcalf.com/wwwboard/messages/2027.html>.

²⁹ *Id.*

³⁰ Leah G. Rothschild, *Outweighing Air Travel Safety for Pilots' Immunity*, ACCURACY IN MEDIA (July 23, 2002), available at <http://www.aim.org/publications/briefings/2002/jul 23.html>.

decks against attacks of criminal violence or air piracy.”³¹ In order to select, train, and deputize pilots in compliance with the broad mandate of the Act, Undersecretary Magaw would have to first create all of the procedural standards that make up the body of the program.³² The procedural issues include choosing the type of firearm and ammunition to be used by pilots, specific requirements for the training needed to qualify and re-qualify as federal flight deck officers, guidelines for storage of firearms on and between flights to ensure safety and accessibility, and guidelines for the transport of firearms between flights.³³ The Undersecretary must create the core protocol for an armed pilot carrying a gun in an airport and on a plane. That is, he must define what a pilot is allowed to do as well as what he is prohibited from doing under normal flight conditions, a terrorist situation, and any other breach of security that may occur. Moreover, he must define the division of responsibility between two onboard, armed pilots in the event of a security breach. He must also draft a procedure for interaction between armed pilots and armed air marshals in the event of a security breach, keeping in mind that pilots and air marshals must be careful not to ruin the air marshals’ anonymity.³⁴ One of the most difficult responsibilities Undersecretary Magaw would face is to establish a procedure “for ensuring that the firearm of a Federal flight deck officer does not leave the cockpit if there is a disturbance [on board].”³⁵ In other words, the House bill authorizes a pilot to carry a gun into the cockpit of the plane, but nowhere else. He is only to use the gun in defense of the cockpit. Thus, if a terrorist or group of terrorists were to present himself or themselves during a flight, the pilot must remain in the cockpit. Undersecretary Magaw has the seemingly impossible job of drafting rules that anticipate and control all of the possible reactions a pilot may have in such a situation. Equally puzzling is that the bill advocates pilots carrying guns within two months of its passage, but also orders a study of the likelihood that an errant bullet hitting the electrical system, another sensitive part of the plane, or the skin of the cabin will cause “catastrophic failure” of the aircraft.³⁶

³¹ APATA § 2(a).

³² *Id.* § 2(b)(3).

³³ *Id.* § 2(b)(3)(A)-(D), (J).

³⁴ *Id.* § 2(b)(3)(F)-(L).

³⁵ *Id.* § 2(b)(3)(G).

³⁶ *Id.* § 2(b)(3)(E).

2. *Training, Qualification, and Duration of the Program*

In general, Undersecretary Magaw is instructed to base the requirements for training on standards applicable to air marshals.³⁷ A pilot must, at a minimum, achieve a certain level of proficiency with a firearm and be able to maintain exclusive control over it at all times, even when carrying out defensive maneuvers.³⁸ Theoretically, any pilot who volunteers and completes the training program is considered qualified; however, there is a maximum number of pilots that may be deputized. The number of pilots deputized and authorized to carry firearms "may not exceed two percent of the total number of pilots that are employed by air carriers . . . on the date of enactment."³⁹ The program is intended to be in effect for two years beginning on the date that the two-hundred-fiftieth pilot is deputized.⁴⁰ At the end of the two years, Undersecretary Magaw must determine whether the benefits of arming pilots outweigh the risks and choose to continue or terminate the program.⁴¹

3. *Cost and Liability*

The bill grants total immunity to air carriers from liability for damages in an action filed in federal or state court arising out of an armed pilot's use or failure to use a firearm.⁴² In contrast, the bill only partially shields pilots: an armed pilot shall not be liable for damages in any federal or state action arising from an act or omission unless he or she is guilty of gross negligence or willful misconduct.⁴³ When it comes to cost, the bill is less clear. One section orders Undersecretary Magaw to provide the training, supervision, and equipment necessary to carry out the program at no cost to participating pilots or the air carrier employing the pilot.⁴⁴ However, an estimate prepared by the Congressional Budget Office (CBO) stated that implementing the two-year program would cost about \$47 million over the 2003-2007 period, so the money will have to come from some-

³⁷ *Id.* § 2(c)(2)(A).

³⁸ *Id.* § 2(c)(2)(B).

³⁹ *Id.* § 2(d)(4).

⁴⁰ *Id.* § 2(i)(1).

⁴¹ *Id.* § 2(i)(2)-(4).

⁴² *Id.* § 2(h)(1).

⁴³ *Id.* § 2(h)(2).

⁴⁴ *Id.* § 2(c)(1).

where.⁴⁵ The CBO anticipated about 1,400 pilots being deputized and estimated that it would cost about \$8,000 per pilot annually.⁴⁶ Additionally, it would cost an extra \$500,000 each year to maintain a modest staff to manage the program.⁴⁷ It is important to note that the CBO could not provide exact figures for the cost to the private sector and the federal Government until the Undersecretary designed the specific requirements of the program.⁴⁸

C. HOMELAND SECURITY ACT

In September of 2002, the Senate passed a very similar bill to that of the House by an 87-6 majority vote.⁴⁹ Unlike the stand-alone bill passed by the House, however, the Senate's bill included the amendment of the mega-bill that would create a new Department of Homeland Security.⁵⁰ The bill incorporated the program to arm pilots and added a more extensive training program for flight attendants. It included specific language requiring comprehensive self-defense training for flight crew, including classroom, situational, and hands-on training.⁵¹ It also mandated the development of a wireless, hands-free way to communicate with the flight deck.⁵² The Bush Administration was initially opposed to the idea of arming pilots, but eventually weakened its position under intense lobbying.⁵³ In the twenty-four hours leading up to the Senate vote, the Administration announced it would support a test program that allowed 1,000 pilots to be armed.⁵⁴ Supporters of arming pilots were suspicious of the proposed test program, however, for they feared the

⁴⁵ Rachel Milberg, Congressional Budget Office Cost Estimate, *Arming Pilots Against Terrorism Act*, H.R. 4634, 107th Cong. (2002) (included in amendments).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Aviation Security Improvement Act, Pub. L. No. 101-674, § 2949, 104 Stat. 3075 (2002).

⁵⁰ Christopher M. Wright, *Regional Airline Group Fights 'Guns For Pilots' Bill*, 20 COMMUTER/REGIONAL AIRLINE NEWS, Iss. 36, Sept. 23, 2002.

⁵¹ Aviation Security Improvement Act, Pub. L. No. 101-674, §§ 2949, 501, 104 Stat. 3075 (2002).

⁵² *Id.* § 502.

⁵³ Alan Levin, *Plan to Arm Pilots Is Taking Off; Lobbying Blitz Pushes Idea of Guns in the Cockpit Over Airlines' Objections*, USA TODAY, Oct. 2, 2002.

⁵⁴ *Gun Owners Triumph in the Senate—Armed Pilots' Provision Passes Overwhelmingly*, GUN OWNERS OF AMERICA (Sept. 6, 2002), available at <http://www.gunowners.org/a090602.htm>.

Administration's test program would serve as a lesser substitute for the program in the Senate bill.⁵⁵ The Bush Administration seemed to do another about face when it released a letter, just as the debate in the Senate began, that outlined complications with arming pilots.⁵⁶

Proponents did not have to bite their collective nails for long. On November 25, 2002, President Bush confidently signed the Homeland Security Act into law, which included the joint House-Senate provision to arm pilots. After a simple review of the legislation, it is clear that President Bush has enacted legislation that fails to strike the delicate balance between emotion and reason and between the immediate reactions and long-term goals. More significantly, the President has authorized the program to arm pilots without thinking it through to the end. The legislation does not fully consider the inherent risks of the program it mandates.

IV. STRATEGY AND SAFETY

A. LISTEN TO THE EXPERTS

Many of the airline industry's most experienced and respected airline executives, safety experts, crews, and pilots think arming pilots is a strategy headed for disaster. The Air Transport Association, the Head of the Transportation Security Administration, James Loy, and twenty-one top airline executives (including American, United, Delta, Northwest, and Southwest)⁵⁷ tried to head off the bill's passage in the Senate.⁵⁸ In the same vein, the President and Chief Operating Officer of JetBlue Airways came out publicly in September and said, "[i]n an attempt to make America more safe, Congress has approved legislation that will make flying more dangerous."⁵⁹

The program fails to take into consideration the possible unintended consequences of having guns with pilots, guns in airport terminals, and guns on planes. First, there is the human factor. A look at the history of commercial aviation reveals that in spite of extensive flight training, most airplane crashes are

⁵⁵ *Id.* (quoting democratic Senator Barbara Boxer of California, "I very much [worry] that some kind of a test program is going to be put forward by the Administration as opposed to what we are doing").

⁵⁶ *Id.*

⁵⁷ Wright, *supra* note 50.

⁵⁸ *State of Play: Arming Aircrews*, 16 AIR SAFETY WEEK, Iss. 38, Oct. 7, 2002.

⁵⁹ *Id.*

due to pilot error: from 1992 through 2002, crew error accounted for 66 percent of commercial crashes.⁶⁰ This statistic demonstrates the need for pilots to concentrate on flying, as well as the undeniable risk that even the finest training and best intentions can be thwarted by human error. Furthermore, while armed pilots will undergo the requisite training program Undersecretary Magaw designs, there is no training that can ensure that pilots will not make mistakes regarding when and upon whom to fire. Pilots are not infallible, and a mistake in judgment could be fatal. A pilot could overact to a perceived security threat and wound or kill a passenger or crewmember.⁶¹ Furthermore, while U.S. aviation law states that a pilot's scheduled work time should not exceed eight hours for domestic flights and twelve hours for international flights, pilots may work more than sixteen hours straight due to flight extensions and delays.⁶² Fatigue and reduced oxygen can eschew perception and negatively affect reaction time, accuracy, and proper judgment. Consider also the recent reports of intoxicated pilots.⁶³

Aside from human error, there is no way to know how pilots will react in a crisis situation, even if they have training. In a terrorist situation, a pilot would be faced with a difficult decision of opening the cockpit door or landing the plane as soon as possible.⁶⁴ The President of the International Association of Flight Attendants questions whether pilots would breach protocol to try and save their crew and passengers, which could result

⁶⁰ M. Kristen Rand, *Anti-Terrorism, Pistol-Packing Pilots, Shootouts in the Sky Too Dangerous Pro or Con? The Authors Debate the Question: "Should Airline Pilots be Armed to Thwart Skyjackers?"*, CHARLESTON GAZETTE, Oct. 13, 2002.

⁶¹ *Arming Pilots Would Send Wrong Message*, AVIATION WEEK & SPACE TECH., available at http://www.aviationnow.com/content/publication/awst/20011022/avi_vie2.htm (last visited Oct. 27, 2003) (interviewing veteran airline captain Roger Waldman).

⁶² Tom Harris, *How Airline Crews Work*, available at <http://travel.howstuffworks.com/airline-crew4.htm> (last visited Nov. 10, 2003).

⁶³ See Dennis Powell et al., *Pilot Had Arrest Record: Pilot Charged with Trying to Fly Drunk Has Arrest Record*, ABC News (July 2, 2002), available at http://abcnews.go.com/dailynews1020702pilot_record.html; see also Lyle Prouse: *Pilots and Drinking* (CNN television broadcast, July 3, 2002), available at <http://www.cnn.com/2002/TRAVEL/NEWS/07/03/drunkepilot.cnn/index.html> (recounting Paula Zahn's interview with pilot Prouse, who was arrested twelve years ago for flying while intoxicated and served time in federal prison).

⁶⁴ See *Up in Arms: Should Commercial Airline Pilots Be Armed?*, CURRENT EVENTS, Oct. 4, 2002; see also J. VAN DER DENNEN & V. FALGER, SOCIO-BIOLOGY AND CONFLICT: EVOLUTIONARY PERSPECTIVES ON COMPETITION, COOPERATION, VIOLENCE, AND WARFARE 123-131 (1990) (discussing loyalty and aggression in human groups and territoriality and threat perceptions in urban humans).

in a misfire in the cabin or the terrorists taking control of the gun.⁶⁵ Moreover, crews may be tempted to open the cockpit door to access the pilots and their guns for help.⁶⁶

Secondly, the program does not factor in the inherent risks associated with guns. Handguns have proven to be a high-risk home-defense tool, and in many civilian and police instances, guns have caused much more harm than good. For example, FBI statistics reflect that for every person who uses a handgun to kill a criminal in self-defense, 109 people have died because of handguns.⁶⁷ More importantly, police statistics involving highly trained and experienced officers show that 21 percent of officers are shot with their own weapons. Surprisingly, even veteran officers have only an 18 percent to 22 percent hit ratio in armed confrontations.⁶⁸ This translates into a much more frightening statistic when guns are fired at 35,000 feet in the narrow confines of an airplane cabin. Even if pilots were able to maintain the highly trained officers' hit rate, that would mean 78 percent to 82 percent of the time a gun is fired, it would pierce some part of the plane, a passenger, or a crew member.⁶⁹ In addition, the risk of accidental discharge always exists.

The effects of a stray bullet on the integrity of the plane are still not fully understood, and it seems imprudent and irresponsible to allow the pilot program to begin without fully knowing the risks. Many supporters of arming pilots argue that it is simply "a myth that an airplane will rapidly depressurize and crash if a bullet pierces the fuselage."⁷⁰ Design experts at Boeing Company, a major supplier of commercial jets, however, warn that if a bullet were to break a passenger window, "unbelted travelers near the area would be in danger—and pilots would have to immediately decrease altitude to regulate the pressure inside

⁶⁵ See Dave Marash, *Armed and Protective: Idea of Giving Airline Crews Weapons Takes Flight*, ABC News (Aug. 4, 2002), available at http://abcnews.go.com/sections/nightline/Nightline/n020731_cockpitguns.html.

⁶⁶ *Id.*

⁶⁷ Rand, *supra* note 60.

⁶⁸ *Id.*; see also Rothschild, *supra* note 30, available at [http://www.aim.org/publications/briefings/2002/jul 23.html](http://www.aim.org/publications/briefings/2002/jul%2023.html) (discussing statistics from study by the Violence Policy Center).

⁶⁹ Rand, *supra* note 60.

⁷⁰ Jennifer Oldham, *Pilots Ramp Up Campaign to Allow Guns in Cockpit*, GEOCRAWLER: THE KNOWLEDGE ARCHIVE (May 28, 2002), available at www.geocrawler.com/mail/msg-raw.php3?msg_id=8780438 (quoting Captain Dennis J. Dolan, who flies 737-800s for Delta).

the aircraft.”⁷¹ In a letter to lawmakers, the Air Transport Association and twenty-one airline chief executives also voiced their concerns about the effects of bullets on pressurized cabin and cautioned that possible firings into instrument panels had not been adequately studied.⁷² Most significantly, the Homeland Security Department is not, itself, convinced that a bullet would not cause fatal damage to a plane. Along with the pilot program, a study will be conducted on various safety consequences of a gun being fired in a plane during flight. While it may not cause the plane to immediately crash, the direct risks to passengers mentioned by Boeing experts and overall risks to the stability of the plane are severe enough to think twice before arming pilots.

There is a third concern with logistics of carrying and transporting guns in airports and on planes. For years, airport security has been designed to keep dangerous weapons out of secured terminals and introducing thousands of lethal weapons into the system seems counterproductive.⁷³ This raises several important questions. What procedure should be followed if a firearm is suddenly missing? Should the airport freeze all flights, evacuate the terminals, and search person-by-person? At what point can activities resume? What if the weapon is never found? These are difficult strategic questions to answer, but very important ones given statistics such as the following: between October 1999 and August 2001, the U.S. Department of Justice reported its agencies had 775 firearms lost or stolen.⁷⁴

The storage of guns further complicates the issue. On the plane, guns would have to be secured in lock boxes, to which only pilots have access, while still allowing quick and easy access in case of emergency. Alternatively, pilots could wear holsters and carry the weapons on their person at all times. Each option has major drawbacks. Lock boxes would have to be installed in every commercial cockpit, which would take time and cost more money, time being a primary motivating factor in the justification for arming pilots. If pilots carry the weapons, they would have to leave them in the cockpit if they were to get up and exit for any reason, such as using the restroom. This leaves a gun sitting alone in the cockpit or a co-pilot, who could already have

⁷¹ *Id.* (quoting Liz Verdier of Boeing Company).

⁷² Wright, *supra* note 50.

⁷³ Rand, *supra* note 60.

⁷⁴ *Id.*

his own gun, holding the absent pilot's gun and still flying the plane. Also, there is a question of whether pilots will take the guns home with them or check them at the airport. Pilots' families may object to having guns in the home and there are far-reaching safety and liability issues tied to this option as well. The alternative requires equipping all airports with secured storage facilities and possibly personnel to monitor the firearm arsenal at all times.

B. IF AIR MARSHALS, WHY NOT PILOTS?

Much of the language in the provision to arm pilots mirrors that of the air marshal program. Undersecretary Magaw is instructed to base the pilot training program and certification standards on those of air marshals. Some may ask why air marshals cannot be used to justify arming pilots, after all, they are both carrying guns onto planes. The answer involves a fundamental aspect of basic social theory: organizations and specialization.⁷⁵ Organizations, such as the U.S. Government, are formed to accomplish large-scale objectives that would otherwise be unattainable on an individual level.⁷⁶ The Government subdivides itself into smaller organizations such as the Transportation Security Administration. Once divided into sub-units, the success of an organization hinges on specialization.⁷⁷ Specialization means that tasks are "assigned to each position as official duties," and the "clear-cut division of labor" results in "expertness" among individuals.⁷⁸ Studies have repeatedly shown that success depends on the "one-thing-at-a-time approach."⁷⁹ Furthermore, reliable performance of tasks calls for clear standard operating procedures that produce specific actions and avoid uncertainty.⁸⁰ The idea of arming pilots and the legislation that outlines their standard operating procedures violates the basic tenants of organizational social theory. In the hierarchy of official duties, a pilot's job is clear: he must focus his full attention during take-off, landing, and any time in between on flying the plane. This is a task that requires a high level of knowledge,

⁷⁵ See generally WILLIAM REGIS FARRELL, *THE U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY* 69-118 (1982).

⁷⁶ *Id.* at 20.

⁷⁷ *Id.*

⁷⁸ *Id.* at 21 (explaining the findings of studies by German sociologist Max Weber).

⁷⁹ *Id.* at 25.

⁸⁰ *Id.* at 26-27.

skill, concentration, and quick decision-making.⁸¹ A pilot cannot afford to be distracted or have his attention diverted from flying, nor should he have to choose between his duties as a pilot and his duties as a federal law enforcement officer.⁸² This confusion of duties would undermine the efficiency and success of the given objective, which is to fly the plane safely and respond effectively to a terrorist or non-terrorist based situation. It is important to remember the invaluable lesson learned from September 11th: a pilot is already in charge of, trained and practiced in, and responsible for the ultimate weapon – the airplane itself. Moreover, the broad legislative mandate that serves as the operating directions for the program cannot result in specific actions and actually produces more unknown factors than it eliminates.

Air marshals, however, have the elite training and singularity of duty to safely monitor the cabin and effectively deal with any security breach that may occur. Air marshals, seated among passengers, have the distinct advantage of knowing what is going on in the cabin at all times, unlike pilots who are segregated in the cockpit. Furthermore, many air marshals have police or military backgrounds, including FBI and DEA,⁸³ and every air marshal is required to complete an advanced marksmanship skills test. The test is timed and requires them to be able to fire rapidly and accurately at multiple short-range targets. Air marshals will have more time than pilots to train in crisis-response, handling firearms, and self-defense because it is their only job. FAA spokesman Hank Price explains that air marshal training can be accelerated or specialized based on what the recruit already knows.⁸⁴ They also have the time and resources to focus on anti-terror training, which experts say requires a different set of skills such as knowing specific techniques to subdue terrorists and assist hostages.⁸⁵ The head of the Airline Transport Association,

⁸¹ Tom Harris, *How Airline Crews Work*, available at <http://travel.howstuffworks.com/airline-crew4.htm> (last visited Nov. 10, 2003) (discussing the details of a pilot's duties while flying a plane).

⁸² Elliot Hester, *Pilot Shouldn't Double as Security Guard*, THE PLAIN DEALER, Sept. 29, 2002, at K7.

⁸³ CNN, *Volunteers Lining Up To Be Federal Marshals* (Sept. 26, 2001), available at <http://www.cnn.com/2001/TRAVEL/NEWS/09/26/rec.air.marshals/index.html> cnn.com/travel.

⁸⁴ *Id.*

⁸⁵ See BENJAMIN NETANYAHU, FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT DOMESTIC AND INTERNATIONAL TERRORISTS 144-46 (1995) (discussing training special forces to fight terrorism).

Carol Hallett, believes the “wisest investment in [improving] security” is hiring more air marshals because they are trained to provide “professional protection.”⁸⁶ Likewise, the president of the International Association of Flight Attendants feels that having a gun in the cockpit is useless without crucial “defensive capabilities in the cabin” such as air marshals.⁸⁷

The primary criticism of air marshals is that it will take too long to train and schedule enough of them to meet the demand of all the commercial airlines. The air marshal program, however, has been operating since 1970 and had over 2,000 marshals in the sky per day at its operational peak.⁸⁸ Since then, numbers have dwindled, but there has been a dramatic surge in volunteers and applicants for the program since September 11th.⁸⁹ The Department of Transportation’s website has received over 5.3 million hits and reports over 150,000 applications have been downloaded in 2002.⁹⁰ The fact that most commercial airlines have reduced their overall number of flights due to financial concerns coupled with the increase in applicants means that supplying enough air marshals to meet the demand will not be a problem. Thus, it is merely an issue of training the eager recruits, and Secretary of Transportation Norman Mineta notes that the federal program is graduating 50 air marshals a day.⁹¹ The pilot program, in stark contrast, has not even been created yet by Undersecretary Magaw, and once it is, the pilots will still have to be trained, and planes and terminals will have to be outfitted with the proper equipment. It seems as though it will take just as long, if not longer, to arm pilots. Plus, the pilot program limits the number of armed pilots, and the program itself could be discontinued after two years. Instead, the money and manpower could be invested in the well-established air marshal program that accomplishes the same objective more safely.

⁸⁶ See Marash, *supra* note 65.

⁸⁷ *Id.*

⁸⁸ CNN, *Job Seekers High on Air Marshal Openings* (Oct. 26, 2001), available at <http://www.cnn.com/2001/TRAVEL/NEWS/10/26/gen.air-marshals/index.html>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

C. THINKING OUTSIDE THE LOCK BOX

1. *Cabin Safety*

Although some studies correlate another terrorist attack on an airplane with an estimated low likelihood,⁹² senior administrative officials like Defense Secretary Donald Rumsfeld and Secretary of Homeland Security Tom Ridge have repeatedly warned the public that another terrorist attack is a matter of when and not if.⁹³ Because there is no way to know when or in what form the terrorists will come, better intelligence, safety measures, personnel, and prevention are needed across the board in airline security. Given the airline industry's long history of lax and ineffective security, it is naïve to think that such a flawed system will be improved by such a quick fix.⁹⁴ President Eisenhower once remarked that "organization cannot make a genius out of an incompetent . . . and disorganization . . . [will lead to] inefficiency and can easily lead to disaster."⁹⁵ In other words, the Government cannot just make cosmetic or superficial changes to an incompetent commercial airline security system and expect them to be effective. Changes in safety and procedure must come from the inside out, and they must start at the beginning of a long chain of events that begins at an airport terminal and ends at the cockpit of a plane. To their credit, the three pieces of legislation discussed earlier incorporate security measures designed to "thwart potential hijackers" before they ever board the plane.⁹⁶ For example, airport screeners are now federal employees subject to background checks, an armed officer must be present at each security checkpoint, and there are more stringent procedures for screening passengers as well as checked and carry-on luggage.⁹⁷ Checked luggage is now screened for explosives and carry on luggage is x-rayed and searched for various traditional and non-traditional items that could be used as a

⁹² See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 6, Table 1-1 (2002).

⁹³ SUPERTERRORISM: POLICY RESPONSES 41 (Lawrence Freedman ed., Blackwell Publishing 2002).

⁹⁴ See *supra* note 61, available at http://www.aviationnow.com/content/publication/awst/20011022/avi_vie2.htm.

⁹⁵ DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 1953-1956: THE WHITE HOUSE YEARS 114 (1963).

⁹⁶ Hester, *supra* note 82 (quoting Werner Shubert, spokesman for the Swedish Pilots' Association).

⁹⁷ See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 64 (2002).

weapon. Luggage screening is the kind of effective preventive measure that keeps weapons and bombs out of the cabin and hull of the plane, thereby anticipating terrorist methods and robbing terrorists of their tools. There remains, however, the critical issue of flight deck safety. The value of specially trained air marshals has already been discussed. The money, time, and attention that will go into the program to arm pilots could also be better spent on things like installing deadbolt locks onto cockpit doors, making cockpit doors bullet-proof, making cockpit doors that give pilots a one-way-see-through capability, installing hidden cabin surveillance cameras with flight deck monitors, and giving the flight crew a covert way to communicate with one another.⁹⁸ For anyone who thinks these measures would be too costly or take too long to install, he or she can look to JetBlue Airways, a popular commercial national airline. Within weeks of September 11th, JetBlue had already outfitted its entire fleet with "bulletproof cockpit doors, locked with titanium dead bolts . . . [and] began installing cabin surveillance cameras to help protect [its] flight attendants and customers while allowing [its] pilots to monitor the cabin."⁹⁹

2. *Flight Crew*

Flight attendants need the tools necessary to defend themselves, their passengers, and the cockpit, considering they would be the first ones to encounter terrorist or other security threats.¹⁰⁰ The cabin should be the locus of defense, for a terrorist or any one else must first subdue or at least get past the passengers and crew to even get to the cockpit. Dawn Deeks, spokeswoman for the Association of Flight Attendants, which represents over 50,000 flight attendants, warns they are "no more prepared to defend [themselves] and [their] passengers than [they] were on the morning of September 11."¹⁰¹ Funding and training needs to focus on an extensive self-defense and

⁹⁸ See *supra* note 61, available at http://www.aviationnow.com/content/publication/awst/20011022/avi_vie2.htm.

⁹⁹ Dave Barger, *No Guns in Flight*, N.Y. TIMES, Sept. 17, 2002, at A1 (quoting representative of JetBlue Airways).

¹⁰⁰ See generally Tom Harris, *How Airline Crews Work*, available at <http://travel.howstuffworks.com/airline-crew4.htm> (last visited Nov. 10, 2003) (providing an explanation of flight crew and flight attendant qualification, training, and official duties while on board an aircraft and during flight).

¹⁰¹ Associated Press, *Flight Attendants Want Better Self-Defense Training*, ABC News (Sept. 5, 2001), available at <http://abcnews.go.com/us/DailyNews/homefront020905.html>.

counter-terrorism program. For example, Northwest Airlines agreed to pay flight attendants to take a voluntary eight-hour self-defense course from an Israeli security firm.¹⁰² The Homeland Security Act does include a broad mandate for extra flight crew training, but flight attendants around the country have voiced concern that the “government’s training requirements [are not] comprehensive enough to give flight attendants confidence that they could protect themselves.”¹⁰³ Once again, the pilot program’s allotted financial and energy resources could be better distributed to improving the defensive capabilities of those in the cabin since the cabin would be the first site of any problem.

3. *Non-Lethal Weapons*

Not arming pilots does not mean there should be no weapons at all on board. Taser guns, commonly called “stun” guns are a viable alternative. Taser guns fire a 50,000-volt electric shock¹⁰⁴ for five seconds at a time that will completely disable a person from a range of up to fifteen feet, without a lethal effect.¹⁰⁵ Once incapacitated, flight crew or air marshals can use proper restraints such as handcuffs to ensure the attacker remains subdued. Most notably, the electric shock that taser guns deliver poses no threat to other passengers or crew, nor can it cause any harm to the aircraft. Many airline and military experts agree that taser guns could “easily be made standard throughout the industry and become part of the aircraft minimum equipment.”¹⁰⁶ United Airlines has illustrated that taser guns can be quickly and easily incorporated into flight deck security. In 2001, United Airlines began installing taser guns in electronically coded lock boxes in more than 500 of its airplanes and ordered training for both pilots and flight attendants.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Id.* (quoting Mollie Reiley, union trustee representing over 8,500 flight attendants).

¹⁰⁴ *Mesa Air Planning To Arm Pilots with Stun Guns*, AIRWISE NEWS (Oct. 24, 2002), at <http://news.airwise.com/stories/2001/10/1003948743.html>.

¹⁰⁵ Mike Cronin, *ALPA Testifies in Favor of Armed Pilots*, Report of Security Hearings Held in the House and Senate (Sept. 28, 2001), at www.capapilots.org/securityhearings092801.htm.

¹⁰⁶ See *supra* note 61, available at http://www.aviationnow.com/content/publication/awst/20011022/avi_vie2.htm.

¹⁰⁷ David Carpenter, *United Airlines Plans to Arm Pilots With Stun Guns*, NORTH COUNTRY TIMES, Nov. 16, 2001, available at <http://www.nctimes.com/articles/2001/11/16/export23388.txt>.

Lawmakers, however, have ignored the high value and low risk of taser guns.

V. FINANCING

The most recent cost estimate of arming pilots, provided by the Congressional Budget Office (CBO) for the Department of Homeland Security was \$47 million over 2003-2007. However, no one can really know how much funding will be needed until Undersecretary Magaw creates the specific program. The CBO's preliminary estimate seems especially modest compared to the \$250 million projected by James Loy, acting head of the Transportation Security Administration and the \$100 million estimate by the Air Line Pilot Association, the nation's largest pilots union.¹⁰⁸ Given the war in Iraq, the languishing status of the airline industry, and the fact that the Transportation Security Administration has said it "cannot meet congressionally mandated security deadlines without additional funding," policymakers must spend their money and manpower wisely.¹⁰⁹ Policymakers must avoid excessive costs in achieving any given level of protection against terrorism,¹¹⁰ and the \$47 million or much more that it will take to arm pilots could be spent more wisely. The Homeland Security Act has already stipulated that the private sector will not be called on to contribute to the cost of the program. Thus, it seems the main source of funding will be tax dollars.¹¹¹ Since the public will be paying the bill, it is important to note that many public opinion polls and airport surveys reveal that as much as 67 percent of passengers are against arming pilots, and many of those have expressed deep concern about the consequences.¹¹²

VI. LIABILITY

Despite the severity of the intended and unintended consequences of arming pilots, the Homeland Security Act sets a legal liability standard that provides substantial immunity for airlines

¹⁰⁸ Levin, *supra* note 53.

¹⁰⁹ *Id.*

¹¹⁰ See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 79 (2002).

¹¹¹ *Id.* at 140, 145 (outlining director of Homeland Security Tom Ridge's proposed funding for aviation security in 2003 quoted at \$4.8 billion, a tripling of the 2002 budget and an increase of \$2.2 billion even taking into account post-September 11 supplemental appropriations).

¹¹² See *supra* note 64.

and pilots but little recourse for any victims. Commercial airlines will enjoy total federal and state court immunity from an armed pilot's use or failure to use a firearm, and pilots will receive the same immunity unless they engage in gross negligence or willful misconduct.¹¹³ The inadequacy of such a liability system is threefold. First, the subjective nature of gross negligence results in an ad hoc analysis of pilot's conduct, which provides little guidance for pilots and little grounds for any cause of action. Second, a blanket standard of immunity is inappropriate given the wide spectrum of events to which it will be applied. Third, there is no guidance for awarding damages.

The following discussion on the issues surrounding liability will focus on pilots, as opposed to the airlines, for two reasons. One, commercial airline carriers are given total immunity, which eliminates any debate about the legal liability standard being applied. Two, airline carriers do not have a choice in whether or not to participate in the program to arm pilots. The Homeland Security Act clearly states that airlines must allow any pilot who wants to volunteer for the program to do so, and if he qualifies as a federal law enforcement officer, allow him to carry a gun.¹¹⁴ Thus, because airlines are not given a choice in the matter, they should not be held liable for the conduct of their armed pilots.

A. GROSS NEGLIGENCE: A SLIPPERY STANDARD

Courts across the country have struggled with the definition of gross negligence.¹¹⁵ The authors of *Prosser and Keeton on the Law of Torts*, a leading authority on tort law, states that gross negligence is "so nebulous" as to have "no generally accepted meaning."¹¹⁶ Similarly, the Mississippi Supreme Court has said "there is no precise definition of gross negligence."¹¹⁷ When forced to commit to a definition, courts have created a variety of phrases: "want of even slight care and diligence,"¹¹⁸ "extreme

¹¹³ APATA § 2(h)(1) & (2).

¹¹⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, § 2, 116 Stat. 2135 (2002).

¹¹⁵ See *Jones v. Texaco, Inc.*, 945 F. Supp. 1037, 1048 (S.D. Tex. 1996); see also *FDIC v. Gravee*, 966 F. Supp. 622, 636 (N.D. Ill. 1997).

¹¹⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34 (5th ed. 1984).

¹¹⁷ *McTeer v. Warsi*, 1999 WL 33537210, at *2 (N.D. Miss. 1999).

¹¹⁸ *State v. Vinzant*, 7 So. 917, 922 (La. 1942).

departure from ordinary care or the want of even scant care,”¹¹⁹ “an act or omission done with conscious indifference to harmful consequences,”¹²⁰ and “consciously indifferent [conduct] . . . [that] create[s] an extreme degree of risk.”¹²¹ It is apparent from the examples that gross negligence, no matter how it is phrased, requires a slightly higher degree of culpability or intent than ordinary negligence, which involves merely not using reasonable care.¹²² Gross negligence seems to fall somewhere between ordinary negligence and willful misconduct (the other standard for pilot culpability), and it is customarily a question of fact for the jury to decide.¹²³ Ordinary negligence, the basis for gross negligence, is problematic, for it requires some “norm” for the appropriate degree of precaution – an objectively reasonable response of a reasonably prudent person.¹²⁴ There is really no way, however, to determine how a reasonable person would respond to a terrorist attack on an airplane. Although some sort of government regulatory standard could try to establish the theoretical norm,¹²⁵ it would most likely not hold up to reality, and the Homeland Security Act makes no attempt to establish such a norm. Thus, if reasonable conduct or care cannot be established, how will juries be able to tell if a pilot’s actions deviate so severely from that reasonable care standard as to justify a finding of gross negligence? More importantly, pilots cannot know in advance what actions for which they will and will not be held accountable. While this slippery standard may be tolerable in a common tort setting, the lack of a precise definition becomes unacceptable when applied to pilots choosing whether or not to fire their guns.

B. THE LIABILITY STANDARD: ONE SIZE DOES NOT FIT ALL

A terrorist attack is unlike any other non-terrorist security breach that may occur, and therefore requires a different stan-

¹¹⁹ *Ambrose v. New Orleans Police Dep’t & Ambulance Serv.*, 639 So.2d 216, 220 (La. 1994).

¹²⁰ *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1250 (10th Cir. 2000).

¹²¹ *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 21-22 (Tex. 1994).

¹²² See *Schultz v. Northeast Ill. Reg’l Commuter R.R. Corp.*, 775 N.E.2d 964, 979 (Ill. 2002) (defining ordinary negligence as “the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do . . . under the circumstances”).

¹²³ *Albright v. Abington Mem’l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997).

¹²⁴ See MICHAEL E. O’HANLON ET AL., *PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS* 134 (2002).

¹²⁵ *Id.*

dard to which pilots are held accountable. Both on the ground and in-flight, armed pilots will have to choose, when faced with what seems like a security breach, whether or not to use their firearm.¹²⁶ Under a real terrorist situation, the current standard of gross negligence seems fitting. Understandably, pilots and juries will have a lot of leeway to determine whether the pilot acted appropriately given the likely extraordinary and terrifying circumstances. Terrorism, however, is not the only emergency an armed pilot will face; in fact, it is highly unlikely. A more common situation may include a drunken passenger, a case of air rage, a suicidal passenger, a fight between passengers, or a clash between a passenger and a flight attendant. While such incidences can be very stressful and unpleasant, they do not rise to the level of a terrorist attack. It is possible to imagine what a reasonably prudent person would do under similar circumstances.¹²⁷ Ideally, a separate, ordinary negligence standard could be applied to non-terrorist situations. Ordinary negligence, requiring a lower threshold than gross negligence, would be beneficial for two reasons. One, armed pilots would be motivated to act with greater care and prudence when assessing a situation and choosing to involve themselves. Two, in the case of accidental shootings or pilots' misjudgment of appropriate force, victims are more likely to receive compensation, for it is not likely that commercial airline pilots will engage in the wanton or willful disregard of caution or care that is required for gross negligence. The two levels of liability may prove to be impossible in practice, though, because a pilot may not be able to tell ahead of time who is a terrorist or what acts are terrorist-based, and, therefore, which standard to use.¹²⁸

There are countless examples of accidental shootings and police, military, and innocent civilians being wounded or killed by friendly fire¹²⁹ that illustrate the tragic results of an incorrect

¹²⁶ Note, although the enacted law states pilots are only to use their firearms in defense of the cockpit, it has already been discussed that there is no way to predict whether they will follow that rule in a crisis situation.

¹²⁷ See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 133 (2002) (suggesting the "feasibility of a negligence" standard).

¹²⁸ *Cockpit Intruder Returned to Miami*, WPVI.COM (Feb. 8, 2002), available at http://abclocal.go.com/wpvi/news/02082002_nw_intruderreturns.html (describing event involving agitated passenger who stormed the cockpit door and tried to kick it down).

¹²⁹ See Micheal Eugene Mullen, *American Friendly Fire Notebook*, The American War Library (Nov. 11, 1996), at www.members.aol.com/amerwar/ff/ff.htm (list-

assumption or misreading of the situation when guns are involved and the difficulty in applying a blanket standard of liability. Two notable incidents serve as a good comparison for the unpredictability in applying law to such situations. The first incident involves four policemen of the New York Special Crimes Unit shooting an unarmed street vendor named Amadou Diallo in February 1999.¹³⁰ The policemen thought Diallo was a serial rapist they had been looking for and believed he was going for a gun when really he was reaching for his beeper.¹³¹ Although the police were incorrect on both counts, they fired 41 times and hit Diallo with 19 bullets. The police were charged with intentional second-degree murder, second-degree murder with depraved indifference for human life, and reckless endangerment.¹³² All four officers were found innocent by an NYPD investigative panel that decided the officers did not violate any procedural guidelines.¹³³ An \$81 million lawsuit by Diallo's family against the officers is still pending.¹³⁴ The Diallo example illustrates how easily a case of mistaken identity or misinterpretation of action can occur and instantly turn deadly. Pilots could be in very similar circumstances in terminals or on airplanes, especially if they are coming out of the confines of the cabin to respond to a perceived security breach. It is important to note that the Diallo verdict was met with political protest and indignation, especially by minority communities who believed the police officers' actions were motivated by racial and ethnic bias.¹³⁵ Security measures enacted by legislators and taken by individuals since September 11 have raised similar controversy over racial profiling and ethnic prejudice. Pilots' action or inaction

ing the American War Library's best estimates on friendly fire casualties, both fatal and non-fatal, based on historic War Department, Department of the Navy and Department of Defense casualty reports" for World War II, Korea, Vietnam, and the Persian Gulf).

¹³⁰ Bryan Robinson, *Diallo Officers' Self-Defense Case Hinges on Light and Autopsy Evidence*, COURT TV ONLINE (Feb. 4, 2000), at http://www.courttv.com/national/diallo/012800_background_ctv.html (discussing detailed background of the incidents surrounding the shooting).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Amadou Diallo: A Timeline, Crime and Punishment (Apr. 29, 2001), at <http://crime.about.com/library/blfiles/bldiallo.htm> (providing detailed chronology of events surrounding the trial of the policeman involved in the Diallo shooting).

¹³⁴ *Id.*

¹³⁵ *Id.*

will likely be subject to the same scrutiny and could cause similar political fallout.¹³⁶

The other example involves two American soldiers in Afghanistan accidentally releasing a bomb onto Canadian officers, killing four and wounding more.¹³⁷ Just after 2 a.m. on April 17, 2002, the Americans mistook muzzle flashes on the ground from a Canadian training operation for enemy fire.¹³⁸ The officers blamed heavy fog, flying in a volatile territory, and army-administered amphetamines as contributing factors to their error in judgment.¹³⁹ They were charged with involuntary manslaughter, assault, and dereliction of duties in addition to facing a court martial.¹⁴⁰ Despite the conditions, the officers were held liable for their mistake. The American officers are living proof that even highly trained, elite fighter pilots can make devastating mistakes. Unlike the Diallo officers, however, they were found to have violated procedure. The two incidents show the difficulties courts and juries will face in applying consistent liability standards to judgment calls by armed officers in crisis situations and in determining the appropriate punishment.

C. DAMAGES: HOW OFTEN AND HOW BIG

Even if a pilot is found to be grossly negligent or guilty of willful misconduct, it will be very difficult for a jury to fairly assess damages. Because armed pilots are a new phenomenon, many liability cases for events arising out of a pilot's use or failure to use his firearm will be a case of first impression.¹⁴¹ Juries will have little precedent on which to base damages, which could result in inconsistent jury awards. Pilots may be lulled into a false sense of security regarding their behavior if a series of juries finds no liability or awards very little in damages. However, a trend of large jury awards may discourage pilots from acting altogether—an equally undesirable outcome.¹⁴² After juries decide when to award damages, they must determine how much.

¹³⁶ *Id.*

¹³⁷ See *Deadly Error in Afghanistan*, N.Y. TIMES (Apr. 19, 2002), available at www.warchronicle.com/terrorwar/soldierstories/canadian.htm.

¹³⁸ *Id.*

¹³⁹ Jeff Franks, *U.S. Pilots Apologize for Bombing Canadians* (Jan. 23, 2003), available at <http://news.findlaw.com>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See generally THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter Huber & Robert Litan, eds., Brookings 1991).

Will losses be limited to those who were killed on the plane, or will it extend to those on the ground or in buildings?¹⁴³ A commercial pilot may have the assets to cover an accidental injury or shooting, but what if he is found liable for catastrophic damages? Will juries, courts, and the legislature simply allow hundreds of victims to go uncompensated? Aside from compensatory damages, juries may feel a pilot's conduct merits punitive (exemplary) damages; however, some courts feel that gross negligence does not carry enough malice or culpable intent to warrant punitive damages.¹⁴⁴ Punitive damages¹⁴⁵ are levied against a defendant to punish the defendant for "outrageous, malicious, or otherwise morally culpable conduct," and to deter the defendant and others from committing the same or similar acts in the future.¹⁴⁶ Juries may feel pressured to find the slightly more serious "willful misconduct" as a basis of liability to avoid the cap on punitive damages. Distorted verdicts will undermine airline safety jurisprudence and send a dangerous message to jurors everywhere.

VII. POLICY AND ETHICS

The Homeland Security Act and its controversial provision to arm pilots have been heavily criticized as bad policy. Many airline industry commentators thought it was too contentious and would take weeks to pass,¹⁴⁷ and several military experts caution against such "out-of-the-box-thinking."¹⁴⁸ One often highlighted shortcoming of arming pilots is that it focuses too heavily on the recurrence of an airline attack like those of September 11th, rather than on "reducing vulnerability" of airlines more "comprehensively."¹⁴⁹ The theory behind the legisla-

¹⁴³ See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 134 (2002).

¹⁴⁴ See *Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp. 2d 678, 682-83 (N.D. Tex. 1998).

¹⁴⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1994) (defining "exemplary damages" as "any damages awarded as a penalty or by way of punishment," which includes punitive damages).

¹⁴⁶ *Owens Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40-41 (Tex. 1998).

¹⁴⁷ Wright, *supra* note 50.

¹⁴⁸ Dr. Marybeth Peterson Ulrich & Dr. Conrad C. Crane, Potential Changes in U.S. Civil-Military Relations, *DEFEATING TERRORISM: STRATEGIC ISSUES ANALYSES* 59 (Jan. 2002), available at <http://www.carlisle.army.mil/ssi/pubs/2002/terror/terror.pdf>.

¹⁴⁹ See MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 2 (2002).

tion is reactive as opposed to proactive. Reactive policy "concentrates on the 'last war' rather than the possible next one."¹⁵⁰ In other words, current policy has airlines merely adjusting to what terrorists have already done, which keeps airlines always one step behind the terrorists. While it is undeniably important to reinforce potential targets against future attacks for purposes of both deterrence and minimizing the effects of an attack,¹⁵¹ it is more important to adopt a more proactive policy that pools and analyzes intelligence sources and employs preemptive measures that stop terrorism from happening in the first place.¹⁵²

In addition to being merely "consequence management,"¹⁵³ the program to arm pilots is problematic because it is a very visible measure of force. Pilots carrying guns in airports and onto flights everyday creates a "para-military civil defense force"¹⁵⁴ and pseudo-police state to which Americans are not accustomed. Dr. Leonard Wong, formerly of the Program Analysis and Evaluation Directorate for the U.S. Military and currently of the Strategic Studies Institute, points out that "Americans want the security, but an overt military [type] presence goes against the American way of life. Planning should take place now on shifting to a domestic security posture that produces a minimal signature."¹⁵⁵ While the idea of pilots with guns may be reassuring in theory, the sight of them is likely to make many passengers uneasy. It is comforting to imagine a strong, brave pilot brandishing a handgun in defense of his cockpit, but what passengers would really see is a middle-aged pilot, someone's dad, husband, or even grandfather, carrying a gun to work everyday, carrying a gun into the restaurant at an airport terminal, and onto the plane, as well as being asked to shoot anyone who presents a serious threat. Such images are not as easy to live with. Dr. Wong also notes that as time passes, and the "images of

¹⁵⁰ *Id.*

¹⁵¹ BENJAMIN NETANYAHU, *FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT DOMESTIC AND INTERNATIONAL TERRORISTS* 27 (1995).

¹⁵² *Id.* at 27-28.

¹⁵³ Lieutenant Colonel Antuilo J. Echevarria, *Homeland Security Issues: A Strategic Perspective*, *DEFEATING TERRORISM: STRATEGIC ISSUES ANALYSES* 34 (Jan. 2002), *available at* <http://www.carlisle.army.mil/ssi/pubs/2002/terror/terror.pdf>.

¹⁵⁴ *Id.* at 36.

¹⁵⁵ Dr. Leonard Wong, *Maintaining Public Support for Military Operations*, *DEFEATING TERRORISM: STRATEGIC ISSUES ANALYSES* 69 (Jan. 2002), *available at* <http://www.carlisle.army.mil/ssi/pubs/2002/terror/terror.pdf>.

collapsing towers and [the] burning Pentagon wear off,"¹⁵⁶ it will be harder to justify such an overt display of force.

Few critics have talked about the ethical implications of placing the onerous burden on pilots to choose whether or not to carry a gun. Of course the program should not be mandatory given the volatile personal, social, and political issues surrounding guns; however, even a pilot in a voluntary program faces a difficult personal and professional dilemma. A pilot's private feelings about guns and potentially being called on to shoot and/or kill could drastically conflict with his desire to serve his country, and his airline, and protect his airplane and passengers. Co-workers may treat a fellow pilot who chooses not to carry a gun differently or negatively. Moreover, a social stigma may be attached to pilots who refuse to participate in the armament program. They could be labeled as traitors or their patriotism could be called into question.

Take for example, the recent incident in July 2002 at Los Angeles International Airport. A man carrying a knife and two handguns opened fire at the El Al Airline ticket counter killing two and wounding four others.¹⁵⁷ If an armed pilot had been in the terminal, would he have chosen to get involved? Officially, it is not clear whether he would be obligated to use his gun or if such a situation exceeds his scope of authority. The legal difference would bear upon post-incident liability for the pilot, the airport, and anyone else directly involved. More importantly, however, is the personal choice the pilot would have to make in such critical circumstances. If he decides to shoot and does so accurately, he has just shot a man, which can have serious and long-term emotional effects on him and his family. If he misses, he may either hit an innocent bystander or attract the gunman's unwanted attention and become a target himself. Alternatively, if he does not act, he could suffer tremendous personal guilt and public persecution for not using his weapon. If a pilot, who chooses not to be armed, were present, he could also be blamed for what he could have done had he only had a gun. The Los Angeles gunman example illustrates how carrying a gun changes the pilot's role in security and in the eyes of the public.

Another seldom talked about ethical predicament that may arise is the public's right to know if their plane's pilots are carry-

¹⁵⁶ *Id.* at 68.

¹⁵⁷ Charles Feldman, *Los Angeles Airport Shooting Kills 3*, CNN News (July 5, 2002), available at <http://www.cnn.com/2002/US/07/04/la.airport.shooting>.

ing firearms.¹⁵⁸ Some passengers may not want to know if their pilots are armed, while others may insist on it. Passengers may even vow to only fly on planes with armed pilots, or they could refuse to fly on such planes. The airlines would then face a scheduling nightmare of having to make reservations according to passengers' gun preferences. Either way, how would pilots go about announcing whether or not they are armed? Imagine the following hypothetical announcement:

Good afternoon. This is your captain speaking, with just a little flight information. Coming up on your left, we're going to be catching a glimpse of the Grand Canyon, and on the right you'll be able to see the Hoover Dam in just a few minutes. We're flying at an altitude of 37,000 feet and our airspeed is 400 miles an hour. Couple little facts here. I'm packing a Colt King Cobra. That's a .357-caliber firearm with a black rubber grip and a six-inch barrel. Also, the co-pilot is carrying a [Berretta] custom defense pistol with all the bells and whistles you'd expect from a custom gun of that kind, with an alloy frame and bevel treatment on the entire gun. Our chief flight attendant Roger, has a Ruger Bearcat, a .22 with a hand-fluted cylinder. All three capable of piercing body armor at a distance of up to 27 feet and can put a hole in human bone and flesh the size of the Grand Canyon which, by the way, is coming up on the left hand side of the plane, so just sit back and relax and enjoy the rest of the flight.¹⁵⁹

This announcement may seem a little extreme, but it highlights the problem of passenger notification that all airlines will eventually face.

If airlines choose to inform passengers, they will have to decide how much information to release and in what form. For example, will merely the general guidelines and requirements of the federal flight deck officer-training program be posted for the public or will more specific information such as pilots' individual test scores or firing statistics be provided? Will notice of training include background information such as marital arts, pertinent skills, or prior military experience? Knowing the details may undermine the public's confidence in their pilots and the program if training standards or pilot performance is lower than expected. However, keeping the public in the dark may raise suspicion and foster doubts as well. In addition to content, airlines will also have to decide how accessible the information they do provide will be. They could provide notice through in-

¹⁵⁸ See *supra* note 58.

¹⁵⁹ *Id.*

direct sources like the Internet or passenger hotlines or more directly and conveniently through posted signs in the airport, on airplanes, or even in leaflets in each passenger's seat pocket. It will be challenging for airlines to balance passenger interests with the costs of providing information as well as issues of confidentiality, safety, and consumer confidence.

IX. CONCLUSION

When viewed through the lenses of safety, strategy, economics, liability, policy, and ethics, the legislative mandate to arm pilots clearly emerges as too unpredictable, too dangerous, and too costly to be worthwhile or operative. The only value it has is based in emotion, but Americans must be careful to not allow the emotionalism of tragedy to trump the greater power of intellect in pursuit of a comprehensive and long-range plan of defense. Given the logistical, diplomatic, economic, and informational obstacles that the United States faces in defeating not only Al Qaeda, but terrorism in general, arming pilots would be an imprudent misuse of human capital and financial resources. Besides the budgetary expense, the devastating impact it will have on personal lives, national morale, and homeland defense if proven unsuccessful could cost America the war on terrorism.

