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Choosing Privacy

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CHOOSING PRIVACY

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How does one balance national security and civil liberties when they are essentially incommensurable values? This Article seeks to answer that question by looking at both as a function of individual choice. We like national security in principle because it stops terrorists from taking away our choices—the choice to live, the choice to retain the integrity of our health, and the choice to act in the manner that we prefer. We like civil liberties because we want to be free from government interference when choosing the speech in which to engage, the religion we practice, and many other fundamental aspects of our lives. This Article argues that we should examine the ways in which national security measures create costs and benefits in the number and types of choices that we exercise. Applying this framework, many programs of the National Security Agency (NSA) and Transportation Security Agency (TSA) reduce our choices much more than they increase them. These programs should accordingly be modified or eliminated, and future programs should only be created and implemented if they increase the number and/or quality of choices that individuals have. The Article concludes with suggestions to advance this goal, including the potential privatization of the TSA and the imposition of greater liability for government actors who reduce choices by violating individuals' civil liberties.

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Introduction

The recent U.S. national election season and its aftermath have confirmed just how disparate the values are that individuals endorse across the country, whether it comes to economic policies, immigration, abortion, or any number of other issues. While rational discourse and education may bring some people's opinions closer to one another over time, certain disagreements are unlikely to be resolved because the assumptions underlying each competing view cannot be reconciled. The end result is one in which the vast majority of individuals are unhappy with the current state of politics and government.[1] The time has come for the political and legal systems to focus on operating inside a framework that is as value-neutral as possible, which this Article argues can occur by maximizing individuals' abilities to exercise their own choices. These choices can be as basic as that of cancer survivor Cathy Bossi not to show her prosthetic breast to a Transportation Security Agency (TSA) agent as a condition to board her flight,[2]

1. *See* Tammy Webber & Emily Swanson, *Americans May Be Happy with Their Friends and Finances, but the Federal Government Is Making Them See Red*, U.S. News & World Rep. (Apr. 18, 2016, 4:01 AM), http://www.usnews.com/news/politics/articles/2016-04-18/poll-americans-angry-with-federal-government-happy-at-home (finding that seventy-eight percent of Americans are unhappy with the way the federal government is working).

2. *See* Suzanne Choney, *TSA Forces Cancer Survivor to Show Prosthetic Breast*, NBCNews (Nov. 20, 2010, 11:51 AM), http://www.nbcnews.com/id/40278427/ns/travel-news/t/tsa-forces-cancer-survivor-show-prosthetic-breast/. The choice of others to live free from terrorism has to be weighed against that, but this Article will show

or the choice of every individual in the United States without a history of—or suspicion of current— criminal wrongdoing to use his or her phone, email, online chat, and Internet browsers free from the government supervision that Edward Snowden revealed.[3]

This Article examines some key privacy issues that our nation currently faces, and suggests that an emphasis on choice would provide the most value-neutral framework for resolving these problems. This Article then argues that, even accepting a degree of variability within the empirical data, the national security apparatus must be changed in ways that run exactly counter to current political trends. In a nutshell, we should make the level of individual choice the key operative value by which to measure the success or failure of particular data collection and use practices.

At the outset, it is worth briefly delineating the relationship between liberty, choice, and privacy. In essence, the ability to make choices is the central value of liberty. The terms "choice" and "liberty" are thus used virtually interchangeably throughout this Article. The decision to maintain privacy, meaning not to share certain pieces of information with other parties, is an important one that people make every day. Unsurprisingly, the level of privacy that governments have historically afforded their citizens has tended to correlate with the degree of other liberties available. Totalitarian governments need to maintain a tight grip on information about their citizens to be able to control them and nip in the bud elements of dissent. In George Orwell's dystopian novel *1984*, the utter lack of privacy caused by ubiquitous and permanent surveillance became coterminous with the loss of all liberty.[4] In short, the ability to choose is central to liberty, and the ability to choose privacy specifically in a plethora of situations—whether to express controversial opinions or engage in intimate behavior—is of crucial importance to many people.

In many respects, the ability to choose is, by definition, the most value-neutral measure one could use to gauge the effectiveness of a political and economic system. While this statement merits a fuller philosophical analysis that would risk overwhelming this Article, I

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that there is little reason to believe that the current state of TSA measures ensures that at a reasonable cost, if at all.

3. *See* Ewen MacAskill & Gabriel Dance, *NSA Files: Decoded*, GUARDIAN (Nov. 1, 2013), https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1.

4. *See generally* GEORGE ORWELL, 1984 (1949). The book sold out on Amazon the week after President Donald Trump's inauguration. Brooke Seipel, *"1984" Sells out on Amazon*, HILL (Jan. 26, 2017, 2:39 PM), http://thehill.com/blogs/in-the-know/in-the-know/316338-1984-sells-out-on-amazon.

will sketch here some of the basic ideas standing behind this assertion. In our pluralistic society, it is very difficult to select values to which everyone should aspire and to ground that decision in a framework that does not, in and of itself, rely on numerous assumptions (many of them culturally influenced or arbitrary in other ways). Providing high levels of choice in a society allows individuals to make their own decisions as to which values to pursue, whether based on the influence of religion, philosophical systems relying on non-divine sources, moral authority figures, personal experience, or a mix of foundations.[5]

Another reason to focus on the ability to choose is that, to the extent there is any coherent set of values in which our political system is rooted, the ability to choose already represents a recognized key value. This Article seeks to crystallize and operationalize a previously muddied conception of choice. As part of that endeavor, it analyzes what it is that we actually mean when we talk about trade-offs between national security and liberty, a dichotomy that is of the utmost importance in the context of privacy.[6] Implicitly, we care about national security because its absence may prevent us from being able to lead the kinds of lives that we desire. Terrorists want to limit our choices whenever they try to kill, maim, intimidate, and/or convert us (though not in that order).[7] It is because these options do not appeal to us that we place a premium on national security.

That only holds up, however, as long as national security measures provide a greater number of choices than the alternative, i.e., having no national security measures at all. When we pit national security against liberty in deciding whether the government should implement a particular restrictive measure, what we really ask is: Will we have a greater ability to choose our destinies 1) with the restrictive measure that purports to decrease terrorists' ability to force certain

5. Using choice as the operative measure certainly does not resolve all problems. For example, choice is an arbitrary prior in its own right—albeit potentially the least charged one. Also, prioritizing choice leaves open difficult questions such as how people lose their choices (e.g., if gay marriage is legal, someone who finds this distasteful cannot choose to live in a society that disallows the practice). Hence, we should select choice with our eyes wide open as to its imperfections, but comforted in the fact that this selection will result in a relatively small number of priors on which the legal framework must rely compared to other systems. Relevantly, this Article uses a broad, dynamic definition of choice, seeking to maximize both the quantity and quality of choices over the long term, and thus does not conflict with welfarism. *See generally* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

6. *See, e.g.*, ADRIAN VERMEULE, THE CONSTITUTION OF RISK (2013); Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511 (2012).

7. *See generally* LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2007).

outcomes, or 2) without the measure and with an alleged marginally increased ability on the part of terrorists to force outcomes? Importantly, we must distinguish here between politically expedient activities that give the appearance of national security without actually increasing security from activities that actually do protect it (but may also intrude on individual liberties). In either case, one can apply a cost-benefit framework to analyze the likely outcome, with a focus on choice as the metric to use.[8] Notably, while it makes for a complex determination in some cases, this means taking into account not only people's short-term but also long-term choices. Even allowing for the serious empirical uncertainty surrounding some of these calculations, this Article will show how the benefits of certain national security programs clearly do not justify their costs.

Many people have a basic intuitive understanding that there are trade-offs between these different types of freedoms.[9] Only some, however, grasp that, unless pressured otherwise, politicians are influenced by factors far afield from those actually necessary to rationally balance national security against freedom. Indeed, politicians and their agents have a vested interest in overvaluing national security measures at the expense of other freedoms.[10] Politicians want to be able to say that they are "doing something" rather than nothing, even when that "something" is ineffective or risks violating civil liberties.[11] U.S. presidents have a particularly strong incentive to prevent terrorist attacks at any cost (including the cost to the freedom to choose that arises from privacy-restrictive measures and the like) or at least to be perceived as having tried absolutely everything to prevent them.[12] This

8. It makes no difference for the ultimate calculus and conclusions in this Article if it is framed as a cost-benefit or a cost-cost analysis.

9. How they would balance these values depends on a number of factors, and Americans' willingness to renounce civil liberties was higher right after 9/11 than it became in later years. *See* Carroll Doherty, *Balancing Act: National Security and Civil Liberties in Post-9/11 Era*, PEW RES. CTR.: FACT TANK (June 7, 2013), http://www.pewresearch.org/fact-tank/2013/06/07/balancing-act-national-security-and-civil-liberties-in-post-911-era/.

10. *See generally* JEFFREY KAHN, MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS (2014).

11. *See generally* Dan Reed, *The TSA's 95% Failure Rate: Be Careful What You Ask for When Demanding That Congress "Do Something,"* FORBES (June 8, 2015, 7:05 AM), http://www.forbes.com/sites/danielreed/2015/06/08/the-tsas-95-failure-rate-be-carefull-what-you-ask-for-when-demanding-that-congress-do-something/; Roberta Romano, *Regulating in the Dark* (Yale Law & Econ. Research Paper No. 442, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974148.

12. *See* Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313 (2016); *see also* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 16 (2012) (arguing that Barack Obama in part

has resulted, and will continue to result, in presidents taking measures that do not advance the public interest as measured by the metric of choice, a state of affairs that will only stop when voters or courts impose a shift in approach. This Article proposes a mix of measures—such as privatization of the TSA and legal containment of agencies including the National Security Agency (NSA)—as possible ways to combat the effects of the status quo.

Part I of this Article delineates the incommensurability problem and other issues that arise when balancing national securities and civil liberties. Part II describes the history of the national security apparatus as it grew in reaction to terrorist attacks and threats. Part III examines the possible wrinkles that could result from subjecting the national security apparatus to a cost-benefit analysis focused on choice, and sketches possible improvements to the apparatus. Part IV concludes.

I.
Privacy and National Security

A. The Problem of Privacy

One of the main issues that one encounters when seeking to weigh the benefits of government security programs against the erosion of the right to choose privacy is the nebulous nature of this right. This Article adopts a broad definition of privacy, which commonly includes "the quality or state of being apart from company or observation [or] freedom from unauthorized intrusion."[13] This Section discusses both informational privacy (having to do with the collection and dissemination of data) and decisional privacy (relating to freedom of government interference with personal and family decisions).[14] While at first glance constitutional law decisions fall into one or the other of these categories, the two are connected in that, for example, data collection increases the government's ability to interfere in individuals' decision making.

The right to privacy is never explicitly stated in the Constitution, but may nevertheless be rooted in several amendments.[15] At times,

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won his first presidential election by running against George W. Bush's national security platform, but then largely adopted it once in office).

13. *Privacy*, Merriam-Webster, https://www.merriam-webster.com/dictionary/privacy (last visited Nov. 9, 2017).

14. *See generally* Madeleine Schachter, Informational and Decisional Privacy (2003).

15. Kathleen Wallman, *The Tension Between Privacy and Security: An Analysis Based on Coase and Pigou*, 3 J. Telecomm. & High Tech. L. 397, 399–400 (2005) (discussing the amendments which seem to house privacy).

courts have held that the right does not actually exist due to this lack of specificity in the Constitution, but since *Roberson v. Rochester Folding Box Co.*—a case in which a young woman's portrait was used without consent in the ad of a flour company—courts have recognized a right to privacy in a number of forms and contexts.[16] In 1923, the Supreme Court held that a law that restricted which languages could be taught or used to teach subjects in school violated the right to privacy.[17] There, a teacher was instructing a student in a Lutheran school in German in violation of a law that prohibited the use of foreign languages as a medium of instruction or as a subject. In holding that the law violated due process, the Court implied that the right to choose one's occupation or any course of improvement, along with marriage, worship, and contract, all fell under the right to privacy and was exempt from being policed.[18]

The Court built on this decision in 1965, when it held in *Pierce v. Society of Sisters* that marriage and family planning fell firmly within the realm of privacy.[19] This holding was later addressed again most famously in *Roe v. Wade*, where the Court held that the right of a woman to terminate her pregnancy fell under the protection of the right to privacy.[20] These cases set the stage for the Court's 1997 decision in *Moore v. City of East Cleveland*, which extended the right to privacy to all people who choose to create a family, no matter how they may or may not be related.[21] This trend recently culminated in the Court's holding in *Obergefell v. Hodges* that the right to choose whom you marry, no matter that person's sex, is a matter of privacy, off limits to the government.[22]

Thus, the right to marry and the right to create a family are encapsulated by this nebulous idea of privacy, but what about other aspects? For example, what of the right to choose what you do in your own home? In *Stanley v. Georgia*, after searching the plaintiff's house, the police found what turned out to be an unlawfully possessed pornographic film.[23] The court held that such a search and seizure violated the right to privacy (the film was in a desk drawer, so it did

16. Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902).

17. Meyer v. Nebraska, 262 U.S. 390 (1923).

18. *Id.*

19. Griswold v. Connecticut, 381 U.S. 479 (1965).

20. Roe v. Wade, 410 U.S. 113 (1973).

21. 431 U.S. 494 (1977) (holding a law defining "family" based on narrow definition of related individuals for purposes of a housing ordinance unconstitutional).

22. 135 S. Ct. 2584 (2015).

23. Stanley v. Georgia, 394 U.S. 557 (1969).

not fall under the "open and obvious" exception).[24] Possibly most famously from recent cases, the Court struck down sodomy laws across the United States.[25] In these types of decisions, the Court sent a message that, provided it is not actually and justifiably criminal, what people do in their own homes generally falls under the umbrella of privacy. Indeed, consider how common the phrase "in the privacy of my own home" is in the American lexicon. This demonstrates that the idea of being exempt from invasion of privacy in one's home by the government and others is deeply ingrained in the American consciousness.[26]

Having the government intrude into the private affairs of an American who is not under suspicion of acting illegally is a touchy matter and a generally undesirable scenario. Such "private conduct" usually includes any action someone is taking or conversation someone is having that is not meant for the general public. However, the issue becomes murkier when we try to consider what is private in a modern-day context.[27] After all, we post to social media, give our credit card and other information to online retailers, and share our location via our smartphones.

Given the difficulties that the courts and our modern society have with defining what falls under the right to privacy and what is outside its scope, one may be tempted to throw one's hands up in the air at the thought of performing a meaningful cost-benefit analysis of the problem. Yet, if one considers privacy as a function of choice, it becomes much easier to submit to such analysis.

B. The Costs and Benefits of Security

There are two basic ways to define security: 1) what I will call "substantive security," wherein the chance of an incident happening is greatly lessened; and 2) "perceived security," whereby an event is not appreciably lessened by actions taken, but there is a perception of "security." When performing our cost-benefit analysis, the question becomes one of which types should count. While "perceived security"

24. *See id.*

25. Lawrence v. Texas, 539 U.S. 558 (2003).

26. While each of these cases dealt with a specific set of facts rather than a more general, amorphous right to privacy, National Security Agency (NSA) surveillance arguably crosses the threshold into surveillance in one's home via one's electronic devices, etc.

27. Wallman, *supra* note 15; *see also* Dennis D. Hirsch, *Privacy, Public Goods, and the Tragedy of the Commons: A Response to Professors Fairfield and Engel*, 65 DUKE L.J. 1007 (2016) (discussing whether conversations on platforms such as Facebook should fall under the right to privacy due to the public nature of the forum).

may provide the intangible benefit of "peace of mind"—a component of hedonic value—such security is useless when confronting a situation that it failed to negate. If one focuses on substantive security, while it is theoretically possible that the TSA has thwarted attacks, skepticism about effectiveness is warranted when the agency has a ninety-five percent fail rate when confronted with airport breach tests.[28] As to perceived security, close to three quarters of Americans consider the TSA either not very effective or not effective at all, so it is doubtful that most people obtain even minimal hedonic value from seeing the TSA in action or knowing it exists.[29]

Probably one of the better-known examples of applying a cost-benefit analysis to matters of the law or social justice can be found in Jeremy Bentham's *Panopticon Letters*.[30] While describing a circular building with "cells" on the outside walls and an "inspector's lodge" in the center, he discusses the benefits that society would derive from criminals being unable to tell if they are being watched at any given moment.[31] To him, the benefits to society far outweighed the costs to the prisoners' (or even hospital patients' and school children's) privacy.[32]

In a cost-benefit analysis, the benefits of various surveillance and security programs are balanced against the costs they impose on Americans and others, including the cost to privacy rights. This framework may be one of the most logical through which to assess our current situation—even given the issues presented by quantifying privacy in the equation—because there are very real and tangible costs to all security measures.

As pointed out by John Mueller and Mark Stewart, even programs that would seem to carry little to no cost to the individual or the government have a price.[33] In their book, Mueller and Stewart point out that the New York City "See Something Say Something" campaign carries a price tag as related to the cost of manning the tip line,

28. *See* Tom Costello & M. Alex Johnson, *TSA Chief Out After Agents Fail 95 Percent of Airport Breach Tests*, NBCNEWS (June 1, 2015, 10:32 PM), http://www.nbcnews.com/news/us-news/investigation-breaches-us-airports-allowed-weapons-through-n367851.

29. *Survey: TSA Performing Poorly*, TRAVELMARKET (Oct. 5, 2015), http://www.travelmarketreport.com/articles/Survey-TSA-Performing-Poorly.

30. 4 JEREMY BENTHAM, *Panopticon; or, The Inspection-House*, *in* THE WORKS OF JEREMY BENTHAM 39 (John Bowring ed., 1843).

31. *Id.* at 41.

32. *Id.* at 43.

33. JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY (2011).

among other incidental costs.[34] Over 16,000 calls come in per year, or an average of forty-four calls per day.[35] However, the program has led to no known arrests of any terrorists.[36] As to the cost of the program, the government spends at least $2–3 million each year in promoting the campaign.[37] Since much of that money comes from federal grants, there is a strong argument that all Americans are paying the cost of New York's ineffective program.[38]

The hotline can be seen as actively encouraging New Yorkers to spy on and watch each other. That means that a New Yorker having a bad day and shouting into a phone might be seen as a threat by another New Yorker. The second New Yorker calls the hotline and reports the first. The first may be detained and questioned by investigators about what he assumed was a private call. Even if nothing comes of the complaint, there has still been an erosion of the first person's privacy.[39] Further, as noted above, there is the cost of manning the line, as well as the costs associated with call center maintenance, the phone line itself, etc.

The cost to choice becomes greater when we look at particular segments of the population, such as those who are native Arabic speakers and Muslims. When going through TSA lines, or traveling in general, the Muslim/Arabic population tends to be subjected to higher

34. *Id.* at 162.

35. *Id.*

36. *Id.* at 162; s*ee also* John Mueller, *A Scary Though: Do We Really Need "If You See Something, Say Something?*," CATO INST.: CATO AT LIBERTY (Jan. 24, 2012, 3:40 PM), https://www.cato.org/blog/scary-thought-do-we-really-need-you-see-something-say-something; William Neuman, *A Mystery Tally in New York's "See Something, Say Something" Posters*, N.Y. TIMES, Jan. 7, 2008, at B1; Bruce Schneier, *How Well "See Something, Say Something" Actually Works*, SCHNEIER ON SEC. (Jan. 8, 2008, 7:53 AM), https://www.schneier.com/blog/archives/2008/01/how_well_see_so.html.

37. *See* MUELLER & STEWART, *supra* note 33, at 162.

38. *Id.*

39. An event similar to this recently occurred in Ohio. Ahmed Al Menhali was visiting from the United Arab Emirates and was on his cell phone in a hotel lobby. A desk clerk noticed him in his traditional garb, hid in a back office, called her family, and told them a man was in the lobby who pledged allegiance to ISIS. The family reported this to the police and officers arrived within minutes. They ordered Al Menhali to get down and drop his phone, handcuffed him, and removed his wallet. They quickly determined that the accusations were false, but the man had to receive medical treatment for a panic attack and was taken away in an ambulance. He suffered a stroke and he was admitted to the hospital. Town officials and the hotel chain quickly apologized to the man. Emanuella Grinberg & Darius Johnson, *For Muslim Visitor, Ugly Encounter Leads to Apology*, CNN, http://www.cnn.com/2016/07/03/us/ohio-false-isis-report/ (last updated Jul. 5, 2016, 2:08 PM).

scrutiny.[40] The heightened awareness and perception of Muslim Americans as possible "terrorists" is so pervasive in American culture, it has been satirized in shows like *30 Rock*.[41] To these individuals, the costs to their privacy of increasing "security" have been far greater than to the average American.[42] Most recently, immigration officials have increased their interrogation of Muslim-Americans at the border, including by inquiring directly about their religious beliefs.[43] For a brief period of time, the U.S. government also banned laptops from being carried on board on flights between the United States and a number of Arabic countries, creating dubious security benefits and increased fire hazards.[44]

When doing a full cost-benefit analysis, there are certain steps that must be taken along the way. First, we should look to the cost of recovery from a terrorist event, as well as the cost of the event itself.[45] Next is an analysis of the likelihood of the event. Over the last fifteen

40. Kari Huus, *Muslim Travelers Say They're Still Saddled with 9/11 Baggage*, TODAY NEWS (Sep. 9, 2011).

41. *30 Rock: Somebody to Love* (NBC television broadcast Nov. 15, 2007) (Liz Lemon calls the Department of Homeland Security on her new stereotypically Muslim/Middle Eastern neighbor after she witnesses him acting oddly on a playground and he is unfriendly towards her. At the conclusion of the episode, we find out that he was on the playground because he was creating an audition tape for "The Amazing Race." The episode's theme is one of how pervasive Muslim/Arab fear is in today's society).

42. This is only compounded by security measures specifically targeting Muslims and Muslim countries, such as President Trump's recent executive order banning immigration from seven Muslim-majority countries. *Trump's Executive Order on Immigration, Annotated*, NPR (Jan. 31, 2017, 10:46 AM), http://www.npr.org/2017/01/31/512439121/trumps-executive-order-on-immigration-annotated. The order was successfully challenged in court and later modified, with litigation still continuing across multiple cases. For a summary and updates on the legal landscape in that area, see Quinta Jurecic et al., *Litigation Documents & Resources Related to Trump Executive Order on Immigration,* LAWFARE, https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration (last visited Aug. 15, 2017).

43. *See* Emma Graham-Harrison, *US Border Agents Ask Muhammad Ali's Son: "Are You a Muslim?,"* GUARDIAN (Feb. 25, 2017, 12:19 PM), https://www.theguardian.com/us-news/2017/feb/25/muhammad-ali-son-detained-questioned-us-border-control.

44. *See* Reuters, *US Ends Controversial Laptop Ban on Flights from Middle East*, GUARDIAN (July 20, 2017, 2:30 PM), https://www.theguardian.com/us-news/2017/jul/20/us-ends-laptop-ban-flights-middle-east. For a cost-benefit analysis of the policy, see Cassandra Burke Robertson & Irina D. Manta, *Why Banning Laptops from Airplane Cabins Doesn't Make Sense*, SCI. AM. (May 17, 2017), https://www.scientificamerican.com/article/why-banning-laptops-from-airplane-cabins-doesn-rsquo-t-make-sense/ (noting that placing laptops in checked luggage increases the risk of undetected cargo fires when the laptop batteries malfunction).

45. *Balancing the Cost and Benefits of Countermeasures,* SEARCHSECURITY [hereinafter *Balancing Costs and Benefits*], http://searchsecurity.techtarget.com/feature/Balancing-the-cost-and-benefits-of-countermeasures (last visited Nov. 9, 2017).

years, there have been very few verified major acts of international terrorism on U.S. shores. Most instances of terrorism in the U.S. after 9/11—a small number however counted—appear to have arisen from self-radicalization that is generally difficult to detect.[46]

Next is the determination of "loss per risk."[47] This can include things like the cost of human life, lost revenues, cost to rebuild, etc. We then take this cost, figure out the "cost per incident" by factoring in the likelihood of an incident occurring, and we have the cost of a terrorist incident. We can then look at what we lose in terms of our rights and see if we can balance the costs.

For example, let us consider the "no-fly" list.[48] One can look at the costs to the individual who is stranded abroad, including housing and the attempt to litigate a case in the United States while she is trapped in another country—all these go contrary to the choices that said individual would make.[49] We add to that any costs such as those to her business while the issue is litigated.[50] Now, we can balance that against the cost and likelihood should she actually be a (successful) terrorist. We can even assume that the government was correct in identifying this individual as a potential terrorist. In any balancing test of this sort, it is highly unlikely that the government will get even a zero-sum situation. In a true cost-benefit test, it is very likely that the final accounting will uncover that the government has disproportionately burdened the person trapped overseas relative to the risk that she is in fact a terrorist. Finally, there is the risk that by taking these measures, the government is actually creating terrorists. As with the other tests, a pure cost-benefit test struggles to capture the nuances of each individual situation. Often this test is critiqued for its inability to take into account morality and more ephemeral factors. However, the cost-benefit model is so attractive because it is relatively easily adaptable to most situations, and as stated at the beginning of this Article, value pluralism suggests staying away from particular systems of morality in the calculus beyond the endorsement of choice.

It is worth mentioning here that one cannot necessarily assume that the government will conduct an appropriate cost-benefit analysis.

46. *US Terrorist Attacks Fast Facts*, CNN, http://www.cnn.com/2013/04/18/us/u-s-terrorist-attacks-fast-facts/index.html (last updated Nov. 1, 2017, 8:21 AM).

47. *Balancing Costs and Benefits*, *supra* note 45.

48. The "No-Fly" list keeps track of individuals that the American government wishes to prevent from boarding commercial planes that fly in, into, or out of the United States. *What is the TSA No Fly List?*, NO FLY LIST CHECK, http://www.noflylistcheck.org/what-is-the-tsa-no-fly-list (last visited Dec. 15, 2017).

49. Manta & Robertson, *supra* note 12, at 1329.

50. *Id.*

In an ideal world, a politician would take action based on what she perceives to be some combination of the desires and best interests of the people she represents. However, it is very difficult for anyone, especially everyday citizens, to stop politicians who take problematic actions in the context of national security, and politicians know this. The threat to withdraw one's vote from a politician is a weak one at best.[51] At times there may not be a much better alternative candidate to choose in an election, whether on a given issue or on all issues in the aggregate. Further complicating the matter is the fact that there are people who do not have an actual say in the government—those who due to past actions, age, or current status are unable to vote, but may still be victimized by government policies.[52]

To make the most sensible decisions under a cost-benefit analysis, one also needs to know and account for all the factors relevant to any security scheme. The government, however, has tended to surround these types of schemes with secrecy—at least when it did not outright lie about what was occurring.[53] As discussed in earlier work, the "no-fly" list has consistently been shrouded in secrecy (and remains that way, though to a lesser extent).[54] Even now, it is astoundingly difficult to receive the information needed to contest one's name being placed on the list.[55] From a utilitarian perspective, the issue of the government "going dark" is generally negative.[56] To conduct a proper cost-benefit analysis and be able to draw meaningful comparisons, furthermore, it is best to deal with commensurable values.

C. Incommensurability

Two things are incommensurable when there is no standard measure to which both can be submitted. One good example of this is

51. *See, e.g.*, ILYA SOMIN, DEMOCRACY AND THE POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013); *see also* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007).

52. *See, e.g.*, Thor Benson, *The Great Election Con: Six Million Disenfranchised Prisoners and Ex-Convicts Deserve a Right to Vote*, SALON (Oct. 23, 2016, 10:00 AM), http://www.salon.com/2016/10/23/the-great-election-con-six-million-disenfranchised-prisoners-and-ex-convicts-deserve-a-right-to-vote/.

53. *See, e.g.*, Brian Fung, *Darrell Issa: James Clapper Lied to Congress About NSA and Should Be Fired*, WASH. POST (Jan. 27, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/01/27/darrell-issa-james-clapper-lied-to-congress-about-nsa-and-should-be-fired/.

54. Manta & Robertson, *supra* note 12, at 1315.

55. *Id.*

56. Casey Hldak, *Rubridger's "*The Snowden Leaks and the Public*" and Mill's* Utilitarianism*: An Analysis of the Utilitarian Concern of "Going Dark*,*"* 7 STANCE 29 (Apr. 2014).

found in the law of property and easements. When a person is granted an easement on a piece of property, there is a certain detriment to the servient estate in terms of loss of value to that land. There is an equal gain to the property of the dominant estate in terms of value. The question viewed outside of any human factors is easily broken down into monetary terms. When granting the easement, in theory the servient estate will be compensated in some way by the dominant estate in monetary terms. In this way we measure the value of the easement by how much it negatively affects the price of the servient estate and increases the value of the dominant estate.

However, let us change the facts slightly. Assume the dominant estate is built on land that was purchased by a child who built a house to have an ailing parent nearby. In this case, the easement granted to the parent possibly means substantially more to the child than its monetary value would. In fact, the child is unlikely even to be thinking in monetary terms and is instead assessing the situation in terms of sentimental value. The child has the peace of mind that should something happen to the parent, she is close by and can respond quickly. She is able to check in on her parent daily, and if emergency services should be needed, the child knows that the EMTs have access to the parent via the easement. In this way, the value of the easement to the child is more emotional than monetary. The parent in the dominant estate knows that he is being provided for in his old age. Further, since he has a separate home, he is able to be more independent, coming and going as he pleases. He does not have to move to a nursing home immediately or employ assisted care, and he can possibly receive home healthcare. In this scenario, the granting of the easement is personally important to the parent and would be hard to quantify in purely monetary terms based on the value it provides and what it represents emotionally.

Because the emotional reasons would be hard to quantify in monetary terms, the value of the easement from a purely market-value-based point of view versus the value of the easement from a personal point of view can be said to be incommensurate. There is no one standard by which we can accurately measure and compare both. As elaborated in his work on incommensurability and cost-benefit analysis, Professor Adler states,

> [W]e might say that "incommensurability" in one sense means the absence of a *scaling procedure*: a procedure for choice between options that (1) assigns numbers to options in some fashion, and (2)

> directs the agent to choose the option with the highest (or lowest) number.[57]

Earlier, I discussed the difference between substantive security and perceived security and how they fit into a cost-benefit analysis. According to Professor Adler, cost-benefit analysis tends to run into more difficulties when attempting to evaluate perceived security benefits due to the inability to accurately assign a value to what he refers to as a "moral" factor.[58] Further, when a person tries to break the personal value of an intangible asset down to a monetary number, there is a great risk of either overestimating or underestimating the value.[59] As pointed out by Jonathan Aldred, however, it is possible to find a non-monetary middle ground when weighing different values against each other.[60]

In his work on government policy, Professor Warner argues that not only does having a reason for a policy matter, but incommensurability does as well.[61] Specifically, he looks to legitimacy in government and government policy-making. For our purposes, let us consider the PATRIOT Act.[62] In the aftermath of September 11, the PATRIOT Act was signed into law even though most of the people who signed it did not read it.[63] For Warner, the elected officials who voted for the bill should be held to task and forced to explain why they did so. The fact that one person gives an answer of national security while another states that he was afraid he would lose his seat if he did not sign it presents no problem to Warner. The two values are different and incommensurate, since one cannot say that one representative's reason is really better than the other's for voting for a bill.[64] However, both

57. Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1383–84 (1998).

58. *Id.* at 1408. This idea comes through with Professor Adler discussing a situation in which a person was faced with saving an endangered species or not. The person, who for a classic cost-benefit analysis should be motivated purely by money, is likely to place at least some value on what they believe is moral or what society believes is moral. This leads to problems with applying cost-benefit analysis when discussing security, particularly in the larger context of the American public.

59. *Id.*

60. Jonathan Aldred, *Cost-Benefit Analysis, Incommensurability, and Rough Equality*, 11 ENVTL. VALUES 27, 29 (2002).

61. Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287 (1998).

62. 50 U.S.C. § 1861 (2001).

63. Manta & Robertson, *supra* note 12. This is certainly part of a larger problem, and Hanah Volokh has argued that legislators should be required to read bills. *See* Hanah M. Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135 (2011).

64. Warner, *supra* note 61, at 1294.

reasons are valid to each individual, respectively, and that is what matters.

Is this truly the case, though? Should we be comfortable with such incommensurability in a national security context? Professor Chapman would seem to disagree.[65] For him, the representatives as a whole should find common ground in values. The values should then be ranked and categorized. After reasoned discussion and debate, assuming a bill meets all the criteria of the values expressed, it should be passed. In this way he hopes to minimize incommensurability when the government is discussing policy. He notes that this is what the law does already to handle plurality in the judiciary.[66]

As can be seen, there are major hurdles to overcome when dealing with incommensurability and government security programs. For our purposes, we worry about the trade-off between privacy and security. Both of these can be seen as incommensurate values. After all, Americans and others greatly value their privacy, holding it almost sacrosanct. On the other hand, we all want to be secure in our daily lives. How can the government measure one against the other? The idea of incommensurability rears its head.

I do not believe that the values of privacy and security are completely incommensurable. While it might be difficult to place a monetary value on both, we can find a middle ground. If we discard programs that clearly do not increase our security but do greatly infringe on our privacy, then we satisfy basic cost-benefit analysis without running into incommensurability problems. Analyzing how programs deny choices in what information to share and with whom it is shared allows one to see the most egregious violators. To decide whether to retain them, one can examine these programs' effectiveness at keeping society safe, as well as the likelihood of something happening if they are ended.

D. The Importance of Choice

The value of choice in modern society cannot be overstated. Our society defines people by the choices they make. Even seemingly innocuous choices such as what covers we put on our smartphones have entire articles devoted to them and what these choices may say about us.[67] More importantly, as mentioned in the Introduction, the abun-

65. Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487, 1489–90 (1998).

66. *Id.*

67. The list of such articles is far too voluminous to detail, but some examples include Avery Matera, *What Your Phone Case Says About You*, GLAMOUR (Jan. 23,

dance or lack of choice is a relatively value-neutral measure. In this way, we can also overcome the problems associated with cost-benefit analysis and incommensurability. Take the following example: Often when we visit websites for various products, we are met with a pop-up window asking for an email address. Usually, this is simply a request to enroll in an email list for the website. However, from time to time, the website *requires* one's email address to simply browse products.[68] How can we then compare the utility of the request for one's email between the two?

In the first case, you have true choice of whether you share your email or not. If you should choose to share your email information, the site can then send you a newsletter and advertisements based around its products. You have the ultimate choice about how much information you share with the website and for what purposes. Further, if you opt not to share your email address, you could later decide to enroll in the email list, usually through an option on the website or just by reloading the page. This model will tend to offer the most choice between utility and privacy.[69] If you find the website and information useful, you will likely enroll in the email list.

In the second case, the website forces you to register with your email address when you attempt to access the site. Thus, before you have had the chance to evaluate the website and decide on its utility, the site asks you to share personal, private information. While you still have some ability to choose (by simply leaving the website immediately), the ability is significantly lessened here without an obvious corresponding increase in utility. You might have gone to the site due to a particularly interesting advertisement, but after browsing the site for a bit, discovered it was too expensive or the item you saw in the advertisement was the only item you wanted to purchase. The ability to choose is reduced from four basic options in the first situation (enroll immediately, browse the site and later enroll, browse the site and do not enroll, leave the site) to two in the second situation (enroll immediately or leave the site.)

2016, 9:37 AM), https://www.glamour.com/story/what-your-phone-case-says-about-you and Rebecca Greenfield, *What Your iPhone 5 Case Says About You*, ATLANTIC (Sept. 21, 2012), https://www.theatlantic.com/technology/archive/2012/09/what-your-iphone-5-case-says-about-you/323357/.

68. For an example of the former, see BLUE APRON, http://www.blueapron.com; for an example of the latter, see TOUCH OF MODERN, http://touchofmodern.com.

69. The exception would be if the website somehow manages to provide less utility as a result than in the email model described next in the Article.

If we apply cost-benefit analysis to the two different types of sites, we might not get an accurate picture of the value of each site to society as a whole. For example, assume the following rules:

- Each email is worth $5.00 to the website.
- If a consumer leaves a website without giving her email, the website suffers no detriment.
- If a consumer gives her email to a website and finds the information that she subsequently receives useful, she suffers no detriment.
- If a consumer gives her email to a website and does not find the information that she subsequently receives useful, she suffers a detriment of $5.00.[70]

Assume one hundred people visit both types of websites. In the first situation, which allows browsing even without sharing an email, people can make a decision about the value of the information presented as opposed to the value of maintaining privacy by refusing to disclose their email addresses. Assume fifty people enroll in the email list. All fifty find the site's information useful and so suffer no detriment. In the second situation, which requires enrollment to browse, assume seventy-five people enroll. Of the seventy-five, twenty-five decide the site has no value after gaining access. Thus, those twenty-five suffer a detriment. So we have the following formula:

- 50 enrollments*$5.00= $250.00 (no detriment)
- 75 enrollments*$5.00 with a detriment of 25 unsubscribing individuals*$5.00= $250.00.

Looking at the pure numbers, both options seem to be equal for society as a whole. The option of forcing people to share an email to view a website actually works out better for the website owner, while having minimal impact on societal good. Of course, this runs into the problem mentioned earlier with cost-benefit analysis in that it cannot measure certain factors such as morality and personal value. On the other hand, let us look at each website as a function of choice.

In the first instance, one is given four basic choices: 1) enroll in the email list immediately; 2) peruse the website but do not enroll in the email list; 3) peruse the website and then enroll in the email list; 4) leave the website immediately. In the second instance, one is given two choices: 1) enroll in the website; 2) leave the website.[71] Both

70. This loss, or at least a partial loss, can occur even if she unsubscribes at a later point.

71. Again, enrolling and leaving might come at some cost.

websites provide about the same amount of utility, but as can be seen, one's choices are more limited by the second kind of website over the first. Thus, in a choice-based analysis, the second type of website is likely more of a detriment to society as a whole.

While there are several methods from which one can choose to evaluate our current system of national security, I believe that doing so through a framework of the ability to choose will present the most value-neutral measure upon which to make our judgments. In this case, I am speaking of simply the availability of choices without attempting to assign a cultural or political value to the choices themselves. The utility of doing so, if not already apparent, will hopefully be clear after the following example.

Consider a field of 1.5 acres. The field is clear of obstructions and is in a somewhat rural area. There is housing around it, but it is not a densely populated area. The zoning board must decide how this field will be used. The options are to use it as a park, for housing, or for farmland. The zoning board is made up of three different people:

- One is a former farmer from Tennessee
- One is a former developer from Manhattan
- The last is a former environmental activist from California.

The board meets and decides to make a value-based judgment. The issue we now run into is whose values should prevail? The farmer from Tennessee is likely to value using the land for planting over the other two uses. He grew up in rural Anderson County in east Tennessee on a cattle farm. Since neither the county nor the neighboring city is currently experiencing a housing shortage, even though the city is growing at an accelerated rate, he is sure that the loss of 1.5 acres to farming will not injure the city. As for reserving it as a park, the state already has national parks and the city has its own. There is no real need for a county park, and besides, the land is especially fertile. The yield of the land could be sold at the local farmer's market by the purchaser, helping the local economy (admittedly in a very minor way, but helping nonetheless). As he values using the land to provide food and produce over (in his view) unneeded housing and parks, he votes to zone the land as farmland.

The developer is next to speak and cast his vote. For him, he looks at the city and sees that it is growing at an alarming rate. The city public transportation authority has already begun talking to county commissioners about expanding service out into the county. Because the city is currently growing faster than its existing infrastructure can support, he sees people beginning to leave, looking for property outside of the city. For him, the field is most valuable as a

housing project. This could be for high-income or low-income use, or a mixture of both. The housing will bring people, which will bring commerce. It will help alleviate the problems that the city is facing, even if only marginally, and could potentially be a source of taxes and other revenue for the county. There are already local farmers in the area and both the city and state have parks nearby as well. Since these are not uses on which he places a high value, he votes that the land should be used for housing.

For the environmental activist from California, there are few things more valuable than green spaces. He looks to the city and sees that while there are *some* parks, there are not a large number. Most of the parks in the city are small and barely large enough to count as a dog park, much less large enough for a person to relax and spend a pleasant afternoon. The state parks in the area are nice, but many are relatively inaccessible to most people living in the county. The area has plenty of farmland, and while the city is growing more quickly than its infrastructure can accommodate, the council is already taking steps to correct any problems. In fact, *because* the city is growing so fast and has such poor access to parks, he believes that it is imperative that this land be converted into a park. This way, when the city bulldozes the few parks it has for housing, which is inevitable in his mind, the city residents will have somewhere to come on the weekend and enjoy nature. Since he does not see the need for more farmland or housing and values a pristine environment above all, he casts his vote for a park.

If a political scientist tried to decide the value of the different choices and who was right or wrong, she would be up a creek without a paddle. How does she decide that one person's values are "more correct" than another's? None of the decisions result in a major detriment to any particular group and (for our purposes at least) the decisions provide roughly the same benefit to society as a whole. Any comparison she makes will likely be relatively arbitrary and of little value to herself or others trying to untie this Gordian knot.

On the other hand, if we simply concern ourselves with maximizing the amount of choice, we do not have to give as much weight to personal preferences and biases. While 1.5 acres is not enough to support three different zones, it might support, for instance, a small park and a condominium. So if instead of asking the zoning board to decide on how the land should be zoned, providing more options mostly

removes value judgments from the whole enterprise.[72] The political scientist can write a report on how having two zones available will bring the greatest benefit to society. Since the decision is now about how many options one has for using the land rather than choosing one way the land will be used, personal values and morals are, if not removed, at least more remote from the overall decision.

In general, it is accepted that people are allowed to pursue what they will within the confines of the law. The more choices or opportunities we have, the greater our chances to find what not only motivates us, but makes us happy and content in life. If we are given a high level of freedom of choice, we can decide what we value, and then act accordingly. As a result, measuring security against the backdrop of the number of choices it will provide is a sound method to determine the efficacy of our current national security scheme.[73]

In the criminal system, we frame guilt or innocence as a function of choice. For example, in New York as in many states, someone who kills another person while under duress can raise this as a defense to a murder charge.[74] In giving this defense credence, society recognizes that, at times, a person may have his ability to choose taken from him by another. And if this is the case, since the person did not *choose* to murder in the traditional sense, he should be found innocent of the crime. In other words, we place a premium on the idea of choice in the law, a value that is also reflected throughout our society, albeit prized differently by different people.

As part of valuing choice, we also value security. We want to be able to live our lives and conduct our daily activities without feeling the need to keep looking over our shoulders, waiting for an attack that could come at any minute. This leads to a tension between personal liberty and security, particularly as it applies to privacy.[75] National security's function is to protect us from those who would do us harm. In general, terrorists wish to kill, maim, intimidate, and/or convert us to their cause.[76] Given these facts, as well as the proliferation of terrorist organizations such as ISIS, it is no wonder we place a high premium on security. However, there is mounting evidence that while

72. This will certainly not work in all cases. For example, sometimes subdividing parcels is a terrible decision.

73. In this Article, I specifically argue that the concept of choice can be malleable to some extent and argue for the maximization of both quantity and quality of choices.

74. N.Y. PENAL LAW § 40.00 (McKinney 2017).

75. *See, e.g.*, VERMEULE, *supra* note 6; Crocker, *supra* note 6.

76. *See generally* RICHARDSON, *supra* note 7.

Americans value national security, they do not wish for security to come at an excessive price to their privacy.[77]

As Pew Research data suggests, when deciding on a national security scheme, the proposed measure will only be valid and valuable to Americans if it still allows for the same or an increased number of choices.[78] In essence, when asked to choose a government security measure, members of the public may weigh the ability to choose how to live their lives against the effects of the measure. If the proposed measure only marginally protects against terrorism and a terrorist's ability to force a particular outcome, while dramatically decreasing our ability to make choices in our own lives, then we should reject it because our right to choices has been subverted to the government's program. In particular, we should reject such measures when they affect our ability to choose privacy in the face of insufficient benefits to security. Of course, as stated before, the measure may provide a marginal increase in security—should not that make the removal of choice "worth it"? I would argue that it does not.[79]

One argument against this idea of Americans preferring choice over increased security or the illusion thereof is levied by those who look to post-9/11 polls. Immediately after the attacks, Americans felt vulnerable and were willing to excuse greater intrusions on their civil liberties in the name of security.[80] However, as time has progressed, studies have shown that Americans are showing more and more concern for their privacy and civil liberties, and for their lack of choice in

77. *See* Eileen Sullivan & Jennifer Agiesta, *AP-GfK Poll: Americans Value Privacy Over Security*, AP-GFK (Jan. 22, 2014), http://www.ap-gfkpoll.com; *see also* Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR.: FACT TANK (May 20, 2015), http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/.

78. *See* Madden & Rainie, *supra* note 77.

79. The fact that potentially more Americans approved than disapproved of President Trump's travel ban from some Muslim countries may be directly related to the fact that it was not going to affect their own choices in any immediate way. *Katie Reilly, Americans Like President Trump's Immigration Ban More Than They Like Him: Poll*, TIME (Feb. 8, 2017), http://time.com/4664114/donald-trump-immigration-ban-ratings-poll/. Scholars have argued that foreign lives should be valued more highly than they currently are, however, and taking into account the choices of foreigners would change the calculus here. *See, e.g.*, Ilya Somin, *Assessing Immigration Policy as if Immigrants Were People Too*, WASH. POST (Mar. 2, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/02/debating-immigration-policy-as-if-immigrants-were-people-too/?utm_term=.Bcc77a2deb6f; Ilya Somin, *The Moral and Strategic Case for Admitting Syrian Refugees*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/23/the-debate-over-syrian-refugees/.

80. *See* Doherty, *supra* note 9.

those areas.[81] Yet, a lot of Americans fail to grasp the idea that it is far easier to put (national security or other) measures in place, even ones that do not work, than it is to reverse such measures. Many do not realize that politicians can be influenced by a myriad of factors when choosing security schemes, some of which may have little to no actual influence on substantive security. If we think of this in terms of the law, we can look to the sentencing guidelines handed down by the Sentencing Commission in 1984.[82] While many have criticized the guidelines,[83] Congress has been slow to take any real steps to reform them. This can at least partially be blamed on no congressperson wanting to seem "soft" on crime, even though the sentencing guidelines might have punishments that would seem to be incompatible with the severity of the crime.[84]

Similarly, when discussing national security, politicians do not want to risk being perceived as doing "nothing" in the face of terrorism.[85] Because politicians know that they can be voted out in the next election, and the American public tends to demand immediate and swift solutions, politicians have a vested interest in not only maintaining the status quo, but also furthering programs regardless of their effectiveness.[86] We can potentially see this pressure the most clearly in the actions of the office of the President. While Barack Obama argued against Bush-era tactics regarding privacy and national security, he largely adopted a comparable platform while in office.[87] Similarly, President Trump has justified a host of national security measures using the same rationale.[88]

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81. *See* Sullivan & Agiesta, *supra* note 77.

82. Sentencing Reform Act, 58 U.S.C. §§ 991–998 (1984).

83. *See generally* Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, ABA HUM. RTS. (2002), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_gertner.html; Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html; Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, CATO INST. POL'Y ANALYSIS, No. 458, 2002.

84. For example, simple possession of marijuana could carry a sentence as long as two years. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D2.1 (2015) (U.S. SENTENCING COMM'N 2015). A recent study shows that most people are in favor of reforming the guidelines, with potential elimination altogether of federal mandatory minimum sentences. *See* MELLMAN GRP. & PUB. OP. STRATEGIES, NATIONAL SURVEY KEY FINDINGS—FEDERAL SENTENCING & PRISONS 1 (2016).

85. *See* Romano, *supra* note 11; *see also* Reed, *supra* note 11.

86. *See generally* KAHN, *supra* note 10.

87. *See generally* GOLDSMITH, *supra* note 12.

88. Using a security rationale and after about 200 people were arrested for vandalism, the Department of Justice sought the records of 1.3 million individuals who visited a website regarding protests on President Trump's inauguration day. *See* Ellen

II.
Terrorism and Its Progeny

A. Definition and Odds

The first issue we must consider in beginning to discuss privacy, terrorism, and security concerns in-depth is how to define terrorism. Surprisingly, there is not a great deal of consensus regarding what constitutes terrorism even among government agencies. The State Department defines it as politically motivated, but the Federal Emergency Management Agency (FEMA) does not require political motivation.[89] It seems that every day we are subject to media stories either endlessly discussing a terrorist attack and how we are less safe due to an increase in terrorism, or attempting to link a whole host of criminal acts to terrorism.[90] We need a universal definition of terrorism to create effective measures and not succumb to the temptation of labeling every major violent act as a potential terrorist attack, thus artificially enhancing our anxiety about terrorist events.[91] For purposes of this Article, I will adopt the definition of terrorism as given by the National Consortium for the Study of Terrorism and Responses to Terrorism's Global Terrorism Database (GTD): "[T]he threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious or social goal through fear, coercion,

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Nakashima, *Tech Firm Is Fighting a Federal Demand for Data on Visitors to an Anti-Trump Website,* Wash. Post (Aug. 14, 2017), https://www.washingtonpost.com/world/national-security/tech-company-is-fighting-a-federal-order-for-ip-addresses-to-find-visitors-to-an-anti-trump-website/2017/08/14/a65b7544-8152-11e7-b359-15a3617c767b_story.html.

89. Oliver Malito, *How Do You Define Terrorism?*, ABCNews (Oct. 11, 2001), http://abcnews.go.com/US/story?id=92340&page=1.

90. Two recent examples include the shooting at the Orlando nightclub, Pulse, in June 2016 and a shooting of Dallas police officers a month later. In both situations, news media felt at least some obligation to attempt to decipher if the shootings were related to any terrorist groups. While there was evidence that the shooter in Orlando had some terrorist group sympathies, there was very little evidence of the attack actually being directed by any terrorist group or of the shooter being actively involved with any terrorist organization. *See* Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN, http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/ (last updated June 13, 2016, 11:05 AM); *see also No Evidence Dallas Cop Killer Connected to Terror Network, Homeland Security Johnson Says,* Fox News (July 10, 2016), http://www.foxnews.com/politics/2016/07/10/no-evidence-dallas-cop-killer-connected-to-terror-network-homeland-secretary-johnson-says.html.

91. *See generally* Sandee LaMotte, *The Psychology and Neuroscience of Terrorism*, CNN (July 15, 2016, 9:07 AM), http://www.cnn.com/2016/03/25/health/brain-and-terrorist-attack/.

or intimidation."[92] I will look at how terrorism and the push for security from the government has affected different branches of the intelligence community—in particular the NSA, TSA, and Federal Bureau of Investigation (FBI)—and how these concerns have tended to erode our privacy and civil rights. I will also examine the efficacy of the different programs in determining whether such erosion of our civil liberties is justified.

In the 1970s, there were a large number of terrorist attacks in the United States. In response, the government formed the Joint Terrorism Task Force[93] and what is commonly known as "Delta Force."[94] In 1972, the Federal Aviation Administration (FAA) started to require that all people boarding a plane go through a basic metal detector and have their bags scanned.[95] It would appear that these measures were effective, as there was a significant decrease in terrorist attacks in the United States between 1970 and 1973.[96] However, at the height of terrorism in the United States in 1970, there were still fewer than 500 terrorist attacks.[97] It is also relevant that of the 2697 incidents over the last forty-four years, most (roughly 2124) have resulted in no casualties, with only nine leading to more than one hundred casualties.[98] Given the odds, this means that in general, a person is more likely to be killed by a falling bureau than to suffer a terrorist attack.[99]

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92. NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, GLOBAL TERRORISM DATABASE: CODEBOOK: INCLUSION CRITERIA AND VARIABLES 9 (2017), http://www.start.umd.edu/gtd/downloads/Codebook.pdf.

93. Peter Bergen, *The Golden Age of Terrorism*, CNN (Aug. 21, 2015), http://www.cnn.com/2015/07/28/opinions/bergen-1970s-terrorism/.

94. Rowan Scarborough, *Delta Force: Army's "Quiet Professionals,"* WASH. TIMES (June 3, 2012), http://www.washingtontimes.com/news/2012/jun/3/delta-force-armys-quiet-professionals/ (describing Delta Force as "counter-terrorism covert warriors" and noting several of its high-profile missions, including the search for Saddam Hussein).

95. Jane Engle, *U.S. Aviation Security Timeline*, L.A. TIMES (June 12, 2011), http://articles.latimes.com/2011/jun/12/travel/la-tr-airline-safety-timeline-20110612.

96. *Search Results: 2697 Incidents*, GLOBAL TERRORISM DATABASE, http://www.start.umd.edu/gtd/search/Results.aspx?chart=overtime&casualties_type=b&casualties_max=&start_yearonly=1970&end_yearonly=2015&dtp2=all&country=217 (last updated June 2017).

97. *Id.*

98. *Id.*

99. Andrew Shaver, *You're More Likely to be Fatally Crushed by Furniture Than Be Killed by a Terrorist*, WASH. POST: MONKEY CAGE (Nov. 23, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/23/youre-more-likely-to-be-fatally-crushed-by-furniture-than-killed-by-a-terrorist/. The psychological effects of the risks of each are different, though some are malleable and driven in part by the attitudes of the government and the media in the first place.

These statistics show the importance of analyzing any steps taken in the name of "government security," particularly when these actions will significantly infringe on personal privacy and our ability to choose. Thus, a government program that minimally infringes on one's privacy while also having a proven track record of protecting its citizens would generally be acceptable.[100] A program that is more invasive, but preserves its citizens' right to opt out without significantly increasing societal protection might also be acceptable. However, a program that has produced few to no results in the area of protecting its citizens while subjecting people to ever-increasing violations of their personal space would not be a justifiable program. Unfortunately, a number of programs that the government has implemented fall into the latter category. Specifically, I will highlight programs created and actions taken by the TSA, NSA, and FBI and how they have actually undermined the idea of privacy and choice for most Americans.

Before we continue to look at specific organizations within the government, it should be noted that all government agencies purport to follow the "Fair Information Practice Principles" (FIPPs)[101] as formulated by the Department of Health and Welfare (HEW) 1973 report,[102] which principles include:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual, to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.

100. Further analysis would be required for measures that protect citizens but impose a cost on non-citizens because the ability of non-citizens to make choices must be weighed as well.

101. NAT'L PUB. SAFETY P'SHIP, THE FAIR INFORMATION PRACTICE PRINCIPLES (FIPPS) IN THE INFORMATION SHARING ENVIRONMENT (ISE) (2017) (noting that FIPPs are "at the core of the Privacy Act of 1974, which applies [FIPPs] to U.S. Federal Agencies"); *see also* Press Release, U.S. Dep't of Justice, Deputy Attorney General James M. Cole Speaks at the Administration Event to Highlight Priorities for Cybersecurity Policy (Feb. 13, 2013), https://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaks-administration-event-highlight-priorities; Memorandum from Hugo Teufel III, Chief Privacy Officer, U.S. Dep't of Homeland Sec., Privacy Policy Guidance Memorandum No. 2008-01, Privacy Policy Memorandum (Dec. 29, 2008), https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2008-01.pdf.

102. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, RECORDS COMPUTERS AND THE RIGHTS OF CITIZENS (1973).

- There must be a way for an individual to correct or amend a record of identifiable information about him.
    - Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.[103]

These principles were never codified, but were used as the basis for several federal laws, including the Privacy Act of 1974, Fair Credit Reporting Act, and Electronic Communications Act.[104] The principles reflected the thinking in many different countries around the globe at the time[105] and were incorporated into the Organisation for Economic Cooperation and Development's (OECD) 1980 report.[106] By further breaking down the five general principles from the HEW Report and practices and reports of other countries into eight specific categories, the OECD brought clarity to what is currently known as the FIPPs. The current FIPPs recognized by most agencies and governments focus on:

- Transparency
- Individual Participation
- Purpose Specification
- Data Minimization
- Use Limitation
- Data Quality and Integrity
- Security
- Accountability and Auditing[107]

The five principles articulated by the HEW Report are all encompassed by these standards. The primary problems with the standards are the individual participation and transparency, particularly when dealing with issues of government security.[108] The problem arises

103. *Id.* at xx–xxi.

104. *A Review of the Fair Information Principles: The Foundation of Privacy Public Policy*, PRIVACY RTS. CLEARINGHOUSE (Oct. 1, 1997), https://www.privacyrights.org/blog/review-fair-information-principles-foundation-privacy-public-policy.

105. Robert Gellman, Fair Information Practices: A Basic History (Apr. 10, 2017) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2415020.

106. ORG. FOR ECON. COOPERATION & DEV., OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1980).

107. Memorandum from Hugo Teufel III, *supra* note 101, at 3–4.

108. Rachel Brand, *Memo to NSA: Stop Saying You Apply the FIPPs*, LAWFARE (Nov. 25, 2014, 11:51 AM), https://www.lawfareblog.com/memo-nsa-stop-saying-you-apply-fipps.

when an agency provides only "lip service" to these principles.[109] Often, documents that pronounce new rules will include a statement that outlines these principles and how the government action conforms to them. When considering the impact these programs have on privacy, one should keep the FIPPs in mind in determining if the government has actually made the effort to follow the guidelines.

B. Aviation and Security

This Section will begin by examining modern aviation before September 11 and the creation of the TSA. In the 1960s and 1970s, airports and airplanes were targets for militants and others who used hijackings as political statements and to further terrorist plans.[110] In response, the government installed metal detectors, ostensibly set to detect metal about the size of a .25 caliber pistol.[111] The Second Circuit noted in *Albarado* that not only were the metal detectors the least invasive method for detecting metals, but that they had a significant dampening effect on hijackings.[112] Even so, the court was concerned about their use for two reasons. First, the court noted that the machines had a high rate of false positives, being set off by things such as keys left in a passenger's pocket, sewing scissors, or even the latches on a briefcase.[113] Such a high rate of false positives is inefficient, somewhat diminishing the worth of the machines. Second, once the number of hijackings was decreased to nearly negligible numbers, the court feared that the technology would be used to search for general contraband rather than weapons.[114] The court also noted that the defense of "everyone has to go through it" is not a real defense at all. Instead, the court found that if one must choose between exercising the constitutional right to travel and not traveling at all, the search takes on the nature of consent under duress.[115] The court in general

109. For example, although the Department of Homeland Security states that individuals can opt out of Advanced Imaging Technology screening, it ignores the fact that some people cannot opt out of the scanners, and downplays the importance of flight in today's business economy. *See* U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR TSA ADVANCED IMAGING TECHNOLOGY DHS/TSA/PIA-032(D), at 2 (2015) [hereinafter DHS PRIVACY UPDATE]; *see also* Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?*, 74 OHIO STATE L.J. 1263, 1263–65 (2013).

110. Andrew Welch, *Full-Body Scanners: Full Protection from Terrorist Attacks or Full-on Violation of the Constitution?*, 37 TRANSP. L.J. 167 (2012).

111. United States v. Albarado, 495 F.2d 799, 805 (2d Cir. 1974).

112. *Id.* at 806.

113. *Id.* at 805.

114. *Id.*

115. *Id.* at 806.

was very concerned about protecting the citizen's right to privacy, which is couched in the language of an unlawful search and seizure.[116]

Once hijackings decreased, the FAA and airlines became complacent. The FAA left security measures and the creation of security programs largely up to the airlines and airports.[117] This was problematic because the airport's security devices and practices were inefficient,[118] and airlines were more focused on customer service. Meanwhile, the FAA had its own problems, such as the DC-10 airplane cargo door issue. After American Airlines Flight 96 lost its cargo door due to a design flaw, the National Transportation and Safety Board (NTSB) recommended the door be redesigned and an airworthiness directive be issued.[119] The FAA ignored this advice, instead choosing to enter a "gentleman's agreement" with McDonnell-Douglas and bury the issue.[120] This would lead to hearings before the House of Representatives and the firing of several FAA officials after the crash of Turkish Airways flight 981.[121] Throughout the 1980s, the FAA continued to have its plate full with several incidents. Eventually, the negligence on the part of the FAA to create a uniform system for checking passengers was found to have been a likely contributor or worse to the tragedy of Lockerbie.[122]

On December 21, 1988, Pan Am flight 103 was thirty minutes outside of London over Lockerbie, Scotland. As the plane reached 31,000 feet, a bomb in the cargo hold exploded.[123] The resulting explosion tore the plane apart, killing all 259 passengers and crew, along

116. Not all court decisions have agreed with this approach. *See, e.g.*, Ruskai v. Pistole, 775 F.3d 61 (1st Cir. 2014) (finding that, in the balancing test between public interest and individual liberty, the least intrusive alternative need not be adopted, as long as the search was a reasonably effective means of furthering the public interest).

117. *See* PRESIDENT'S COMM'N ON AVIATION SEC. & TERRORISM, REPORT OF THE PRESIDENT'S COMMISSION ON AVIATION SECURITY AND TERRORISM 41 (1990) [hereinafter PCAST REPORT], https://archive.org/details/PCASTreport.

118. *Albarado*, 495 F.2d at 806 (discussing the large number of false positives and negatives when using metal detectors and the need for passengers to either pass through the machine again after emptying their pockets or to be frisked).

119. NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT: AMERICAN AIRLINES, INCORPORATED MCDONNELL DOUGLAS DC-10-10, N103AA NEAR WINDSOR, ONTARIO, CANADA, JUNE 12, 1972 (1973), libraryonline.erau.edu/online-full-text/ntsb/aircraft-accident-reports/AAR73-02.pdf.

120. *Air Crash Investigation (Episode 3: Behind Closed Doors)*, NAT'L GEOGRAPHIC CHANNEL (Apr. 16, 2008), http://www.nationalgeographic.com.au/tv/air-crash-investigation/episodes.aspx?series=5

121. *Id.*

122. PCAST REPORT, *supra* note 117, at 6, 29.

123. *See* Jesse Greenspan, *Remembering the 1988 Lockerbie Bombing*, HISTORY (Dec. 20, 2013), http://www.history.com/news/remembering-the-1988-lockerbie-bombing.

with eleven people on the ground. Even today, twenty-seven years later, the bombing still shocks the public consciousness when discussed and is the subject of multiple television programs and stories.[124]

After the bombing, the United States joined an international effort to find those responsible, eventually tracking the luggage to Libyan terrorists.[125] In 1989, the families of the victims of the flight pushed for the President to begin investigating possible failures of the FAA and other security agencies in preventing the Lockerbie bombing. The first President Bush then formed the President's Commission on Aviation Security and Terrorism (PCAST) to investigate and make recommendations for steps to be taken in order to ensure the future safety of passengers.[126]

The Commission focused largely on what role private security firms played at airports, along with how a lack of FAA oversight as well as a lackadaisical attitude that focused on response instead of prevention came together to allow Lockerbie to happen.[127] The FAA had been investigating the use of thermal neutron analysis (TNA) equipment to find explosives that contained no metal parts, such as the one used in the Lockerbie bombing.[128] The Commission went on to note the research being done in explosive detection. Further, the FAA had already ordered TNA machines to be built, albeit without regard to any scientific basis for their specifications.[129] The Commission pointed out that the machines could not detect the small amount of explosive that was used in the Lockerbie bombing, nor could it check large cargo for explosives.[130]

Even though the equipment was not effective, the FAA created a rule that permitted it to require that carriers use the TNA devices to check luggage.[131] The FAA stated that by forcing carriers to use the

124. *See, e.g.*, Ken Dornstein, *My Brother's Bomber (Episode 1)*, PBS (Sept. 29, 2015), http://www.pbs.org/wgbh/frontline/film/my-brothers-bomber/; *A Byte Out of History: Solving a Complex Case of International Terrorism*, FBI (Dec. 19, 2003), https://www.fbi.gov/news/stories/2003/december/panam121903; *Pan Am Flight 103 Fast Facts*, CNN, http://edition.cnn.com/2013/09/26/world/pan-am-flight-103-fast-facts/index.html (last updated Dec. 16, 2016, 1:46 AM); *see also* Greenspan, *supra* note 123.

125. Greenspan, *supra* note 123.

126. PCAST REPORT, *supra* note 117.

127. *Id.* at 41, 63.

128. *Id.* at 63.

129. *Id.* at 64.

130. *Id.* Interestingly, roughly fifteen years later explosives hidden in large cargo would become a major plot point in the Jody Foster movie *Flightplan*. *See* FLIGHTPLAN (Touchstone Pictures & Imagine Entertainment 2005).

131. PCAST REPORT, *supra* note 117, at 64.

machine, it will encourage the manufacturers to improve the system, and that "passenger safety . . . dictates deployment of TNA simply because it is the best available device."[132] The Commission noted that the equipment on which the FAA relied had a pass rate of only 64% and caused an alarming number of false positives;[133] it was thus concluded that to invest in such technologies simply for the illusion of security that they would provide was too wasteful. Instead, the Commission recommended that the FAA spend more on research and development, while creating federal security protocols for all airports.[134] The Commission also stated that an independent testing unit be created which would test the FAA's security protocols from time to time.[135]

Unlike what we would see about a decade later, the tone of the report is one of caution. The Commission believed that the various intelligence branches should be able to share information more easily, but stopped short of recommending the expansion of any intelligence agency's powers.[136] In fact, the main effort was to streamline the process by which information could be disseminated. The Commission even went so far as to say that with only a few exceptions, the current framework used at the time was fully functional and actually worked to catch terrorist threats.[137] The main complaint was a lack of efficient information sharing, a problem that would again be highlighted after the attacks of 9/11.[138]

The legislation that resulted from the Lockerbie attack, the Aviation Security Improvement Act, also did very little to infringe on any privacy rights of Americans.[139] In general, it emphasized the need to improve training at airports and information sharing among different intelligence organizations and the FAA.[140] According to a Pew report, soon after the attack and around the time of the commencement of the

132. *Id.* at 65.
133. *Id.*
134. *Id.* at 66.
135. *Id.*
136. *Id.* at 82.
137. *Id.* at 69–70.
138. *Ten Years After 9/11: Status Report On Information Sharing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) (statements of Zoe Baird, President, Markle Foundation & Jeffrey Smith, Member, Markle Task Force) (discussing the fact that one of the major contributing factors involved with 9/11 was the inability of different actors in the intelligence and law enforcement community to communicate to put all the pieces together).
139. Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990).
140. *Id.*

commission, the number of Americans who believed that the "best way to ensure peace" was through military action increased.[141] These numbers were similar to those seen in the years after 9/11.[142] However, unlike in 2001, the House and the Senate waited for the recommendation of the Commission before passing any legislation, seeking to chart a cautious course.[143]

On September 11, 2001, two planes were flown into the twin towers of the World Trade Center in New York City.[144] Another plane was flown into the Pentagon, and a final plane was brought down by its passengers, possibly on the way to Camp David.[145] The stories of the heroes and survivors were widely reported and continue to live with us today. Many can remember what they were doing when the news broke.[146] The news footage is watched over and over again by those who are trying to understand exactly what happened on that day. The nation mourned the dead and those affected by the tragedy. People sought answers and demanded action. To that end, the United States government convened the 9/11 Commission to report on how everything went so wrong so quickly. However, unlike after Lock-

141. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987–2007: POLITICAL LANDSCAPE MORE FAVORABLE TO DEMOCRATS 20 (2007), http://www.people-press.org/files/legacy-pdf/312.pdf.

142. *Id.*

143. The 1990 Aviation Security Act was passed on November 16, 1990, two years after Lockerbie. On the other hand, the PATRIOT Act was passed October 26, 2001, a mere month and fifteen days after 9/11. While 9/11 was a much larger attack and occurred on American soil, Pan Am was considered America's flagship airline and so an attack on the carrier was seen as a strike directly at America. There was extensive news coverage along with hearings by government officials and an international manhunt for the Libyan terrorists. Further, there was evidence the terrorists might have been supported, or even ordered to carry out the bombing, by the Libyan government itself. *See* Felicity Barringer, *Libya Admits Culpability in Crash of Pan Am Plane*, N.Y. Times (Aug. 16, 2003); Ian Black & Peter Beaumont, *Gaddafi Ordered Lockerbie Bombing—Ex-Minister*, GUARDIAN (Feb. 23, 2011); Sara Obeidat, *Muammar Qaddafi and Libya's Legacy of Terrorism*, PBS Frontline (Oct. 13, 2015). In many ways, one can easily draw parallels between the two incidents as I do here, making this incident an ideal backdrop against which to examine the fallout and incursions on personal privacy from the actions taken in response to 9/11.

144. *September 11: Chronology of Terror*, CNN (Sept. 12, 2001, 12:27 PM), http://edition.cnn.com/2001/US/09/11/chronology.attack/.

145. *See id.*

146. Websites such as *Where Were You on September 11, 2001?* collect several pages of stories of average Americans who remember the attacks. *See Read Stories*, WHERE WERE YOU ON 911?, http://www.wherewereyouon911.com/default.asp?ReadStories=1&CategoryID=4& (last visited Oct. 31, 2017).

erbie, the government acted quickly to pass the PATRIOT Act.[147] President Bush would also sign the Aviation and Transportation Security Act into law, creating the TSA in the process.[148]

Notably, there is a distinct change in tone between the Lockerbie and the 9/11 Commission reports. In Lockerbie, while the report in general deals with the incident, the report is very businesslike and focuses on solutions to the problem.[149] On the other hand, the 9/11 Commission report gives a full account of the disaster for eleven sections, with only two sections at the end devoted to actually analyzing any security failings on the part of a government agency.[150] In general, these sections tend to focus on what the United States was doing *right* and discuss increasing the power of the current national security framework, including the systems implemented after 9/11 such as the TSA.[151] In particular, the report talks of increased use of the "no fly" list.[152]

C. The TSA and Lack of Choice

One of the more public actions taken by the government in response to September 11 was the creation of the TSA. In general, the Agency is a substantive security failure whose cost has not justified its existence.[153] The Agency has repeatedly been mired in scandal due to the actions not only of its local screeners, but also a lack of significant oversight by the government.

Going back to the idea of choice and using it as a way to measure the efficacy of government security programs against personal liberties, the TSA provides us with a plethora of incidents and practices. For most Americans, the chance of flying at some time in their lives is relatively high.[154] Transportation has also been confirmed by the Su-

147. Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71; *see also* Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 163–65 (2014).

148. Welch, *supra* note 110.

149. *See generally* PCAST REPORT, *supra* note 117.

150. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), https://www.9-11commission.gov/report/911Report.pdf.

151. *See id.*

152. *Id.* at 393.

153. Bruce Schneier, *Why Are We Spending $7 Billion on TSA?*, CNN, http://www.cnn.com/2015/06/05/opinions/schneier-tsa-security (last updated June 5, 2015, 3:31 PM); *see also* Mark G. Stewart & John Mueller, *Cost-Benefit Analysis of Airport Security: Are Airports Too Safe?*, 35 J. AIR TRANSP. MGMT. 19 (2014) (arguing that cost-benefit analysis did not justify increasing airport security expenditures and that in fact a reduction might be warranted).

154. Christine Negroni, *How Much of the World's Population Has Flown in an Airplane?*, AIR & SPACE MAG. (Jan. 6, 2016), http://www.airspacemag.com/daily-planet/

preme Court as a constitutional right.[155] With this in mind, it is then imperative that before taking any steps that might infringe on a person's rights in this context, the government ensure that such a program will have a significant positive effect on the security of the passengers. Unfortunately, as we have seen, this does not seem to be the case.[156]

In 2015, over 100 million passengers traveled through Atlanta's Hartsfield-Jackson Airport, making it the busiest airport in the world.[157] Four of the ten busiest airports in the world as measured by passenger traffic are in the United States: Atlanta, Chicago O'Hare, Los Angeles, and Dallas.[158] As noted by the Lockerbie Commission, prior to September 11, this sometimes led to vastly different security protocols between airports.[159] Some believed that after September 11 and the creation of the TSA, things would equalize and in fact improve in measurable ways. However, this has not been the case overall.

It is interesting that in 1989, the FAA explored implementing scanners for all checked luggage.[160] However, the President's Commission, as noted previously, found that the scanners were largely ineffective and money should not be wasted on them.[161] After September 11, attitudes changed. In 2005, the TSA began to use full-body scanners at airports across the country.[162] When they were installed, the TSA already knew that the scanners were ineffective.[163] The scanners also began to raise privacy concerns. There were two types of scanners dispatched: millimeter wave and backscatter X-ray scanners.[164] When they were first deployed, both machines produced

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how-much-worlds-population-has-flown-airplane-180957719/?no-ist (noting that while hard data can be difficult to obtain, a 2003 U.S. Bureau of Transportation survey noted that only eighteen percent of Americans said they had never flown in their life).

155. Welch, *supra* note 110, at 189 n.176 (referring to three cases where the court held that transportation is a constitutionally protected right). For a longer discussion on how this relates to air travel specifically, see Manta & Robertson, *supra* note 12.

156. *See* Reed, *supra* note 11.

157. *Year to Date Passenger Traffic*, AIRPORTS COUNCIL INT'L, http://www.aci.aero/Data-Centre/Monthly-Traffic-Data/Passenger-Summary/Year-to-date (last updated Apr. 11, 2016).

158. *Id.*

159. PCAST REPORT, *supra* note 117.

160. *Id.* at 64.

161. *See id.* at 65–66.

162. Jason Harrington, *Dear America, I Saw You Naked and Yes, We Were Laughing: Confessions of an Ex-TSA Agent*, POLITICO MAG. (Jan. 30, 2014), http://www.politico.com/magazine/story/2014/01/tsa-screener-confession-102912?o=0.

163. *Id.*

164. Tirosh & Birnhack, *supra* note 109, at 1263–65.

an actual picture of the passenger's body.[165] Millimeter wave scanners produce a fully three-dimensional view of the body, while backscatter scanners produced a two-dimensional view.[166] Yet, both, according to the TSA, would detect items that people were attempting to smuggle items through airport security.[167]

The body scanners, as mentioned earlier, raised many privacy concerns. Professors Tirosh and Birnhack noted that as people, we are taught to cover ourselves when we leave the house.[168] Laws against nudity reinforce that being clothed is the expected norm and that nudity in public is unacceptable.[169] However, the nude scanners strip us naked in public, at times exposing everything from bodily anomalies to the size of a person's genitalia. There also seems to be an (some might say naïve) assumption on the part of the government that its agents will act professionally at all times. That assumption has been discredited regularly. The machines did little to detect weapons or explosives hidden on the body.[170] Further, as Jason Harrington notes, TSA agents would "clown[ ] around" in the image-viewing room (sometimes with a significant other), or would spend time making fun of passengers.[171] In 2010, a TSA agent volunteered to go through the machine during a training session and attacked a coworker after being subjected to ridicule at the size of his genitals.[172] Instances such as these lead one to believe the gaze of the TSA agent is likely not merely clinical, but possibly one of interest.[173] In essence, one is undressed by the eyes of the agent, an act that is defined as sexual harassment by the United Nations.[174]

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165. *Id.* at 1272.

166. *Id.* at 1272.

167. George Leef, *TSA Boondoggles: High Costs, Low Effectiveness, But It's Only Your Money*, Forbes (Oct. 9, 2014, 9:00 AM), http://www.forbes.com/sites/georgeleef/2014/10/09/tsa-boondoggles-high-costs-low-effectiveness-but-its-only-your-money/#6366393939ef.

168. Tirosh & Birnhack, *supra* note 109, at 1287.

169. *Id.* at 1288.

170. Leef, *supra* note 167.

171. Harrington, *supra* note 162.

172. Scott Mayerowitz, *Small Manhood Jokes Lead to Miami TSA Officer's Arrest*, ABCNews (May 7, 2010), http://abcnews.go.com/Travel/miami-airport-tsa-officer-charged-assault-manhood-jokes/story?id=10583691.

173. Tirosh & Birnhack, *supra* note 109, at 1291 (noting that TSA agents are not perceived as having merely clinical gazes when looking at passengers).

174. *See What Is Sexual Harassment?*, United Nations, http://www.un.org/womenwatch/osagi/pdf/whatissh.pdf (last visited Dec. 2, 2017) (describing verbal and physical conduct that could constitute sexual harassment).

The body scanners also raise concerns about people with bodies that do not fit the norm.[175] Such individuals are at times subjected to a more invasive "pat down."[176] These additional searches also help to reinforce social stigma that such people might experience.[177] As a society, we are taught that there are cultural norms, including bodily norms to which we should conform. In fact, when a person's body does not measure up to what is considered to be attractive, that person may find herself subject to harassment and "body shaming."[178] One does not need to look far to understand that a person being singled out due to an abnormality will feel shame or distress in a TSA search. Take the cancer survivors who are reduced to tears and forced to remove their adult diapers when going through security.[179] Children have been made to endure a full search.[180] Such searches can be traumatic for the children and even involve a child being subjected to being yelled at by the TSA agent for being "an uncooperative suspect."[181]

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175. Tirosh & Birnhack, *supra* note 109, at 1292.

176. *Id.* at 1295–96.

177. *Id.* at 1297.

178. Unfortunately, there are many examples of this in the media. *See, e.g.*, Kareem Abdul-Jabbar, *Body Shaming Black Female Athletes Is Not Just About Race*, TIME (July 20, 2015), http://time.com/3964758/body-shaming-black-female-athletes/ (discussing the problems faced by female athletes when they are perceived as "too muscular" even though it would be an advantage in their sport); Andrew Adam Newman, *Under Armour Heads Off the Sidelines for a Campaign Aimed at Women*, N.Y. TIMES (July 30, 2014), https://www.nytimes.com/2014/07/31/business/media/under-armour-heads-off-the-sidelines-for-a-campaign-aimed-at-women.html (discussing how Under Armour's new campaign featuring Misty Copeland includes her reading the letters she received from ballet academies, many of which include comments about how she did not have the "right body" for a ballet dancer); Simone Olivero, *Vlogger Quits Lucrative Job Because of Body Shaming*, YAHOO! STYLE (July 22, 2016) (discussing how a popular vlogger left YouTube due to people attempting to body shame her after her miscarriage); Taylor Pittman, *Woman Shares Her "Lumpy, Bumpy" Body to School Body-Shaming Model*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/woman-bares-her-lumpy-bumpy-body-to-school-body-shaming-model_us_578fa624e4b04ca54ebfc89d (last updated July 21, 2016).

179. *See* John Hudson, *The Latest TSA Outrage: A Cancer Patient Forced to Remove Adult Diaper*, ATLANTIC (June 27, 2011), https://www.theatlantic.com/national/archive/2011/06/tsa-forces-95-year-old-cancer-patient-remove-adult-diaper/352186/.

180. *See, e.g.*, Associated Press, *TSA Defends Patting Down Hysterical 4-Year-Old Who Had Just Learned About "Stranger Danger" in School*, N.Y. DAILY NEWS (Apr. 26, 2012), http://www.nydailynews.com/news/national/tsa-defends-patting-hysterical-4-year-o ld-learned-stranger-danger-school-article-1.1068296; John Del Signore, *Video: TSA Traumatizes Child in Wheelchair So Much She Doesn't Want to Go to Disney World*, GOTHAMIST (Feb. 21, 2013 11:55 AM), http://gothamist.com/2013/02/21/video_tsa_traumatizes_wheelchair-bo.php.

181. Associated Press, *supra* note 180.

Of particular concern are victims of sexual assault. According to the Veteran's Administration, one out of every three women who have survived sexual assault will develop a form of Posttraumatic Stress Disorder (PTSD) at some point after their assault.[182] This is also a concern in male survivors of sexual assault.[183] When a person is a victim of sexual assault, she may feel shame over the encounter and struggle to tell even close relatives about it.[184] Sometimes, the victim may be blamed or subjected to "slut shaming," giving her further incentive not to share her experience.[185] However, in public airport settings, these victims, and other passengers, are stripped bare by the scanners and potentially subject to further physical search.[186] Further reinforcing that TSA agents lack the "clinical gaze," and that their searches are instead more akin to sexual assault, are stories about agent misconduct. In 2015, two Denver agents concocted a scheme whereby one agent would signal to another the male passengers he wanted to fondle.[187] Unfortunately, they were apparently not the only agents who might have engaged in this behavior.[188]

When faced with challenges to the virtual strip search, the agency did present an alternative: the "enhanced" pat down. This is similar to

182. Nat'l Ctr. for Posttraumatic Stress Disorder, *Sexual Assault Against Females*, U.S. DEP'T OF VETERANS AFF., http://www.ptsd.va.gov/public/PTSD-overview/women/sexual-assault-females.asp (last updated Aug. 13, 2015).

183. Nat'l Ctr. for Posttraumatic Stress Disorder, *Men and Sexual Trauma*, U.S. DEP'T OF VETERANS AFF., http://www.ptsd.va.gov/public/types/violence/men-sexual-trauma.asp (last updated Apr. 18, 2016).

184. *See* Suzannah Galland, *Speaking Out: Shame and Sexual Assault*, HUFFINGTON POST (Aug. 24, 2016), http://www.huffingtonpost.com/suzannah-galland/speaking-out-shame-and-se_b_11685474.html.

185. For one of the more extreme cases of this phenomenon, one need only point to the story of Audrie Potts, a teen who was raped at a party, came forward, and subsequently committed suicide. *See* Julia Dahl, *Audrie Potts Suicide: Teens Accused of Raping Girl Who Committed Suicide Are Released from Juvenile Hall*, CBS NEWS (Apr. 24, 2013, 5:11 PM), http://www.cbsnews.com/news/audrie-pott-suicide-teens-accused-of-raping-girl-who-committed-suicide-are-released-from-juvenile-hall/.

186. *See* Kate Dailey, *TSA Screenings Worry Sexual-Assault Survivors*, NEWSWEEK (Nov. 17, 2010, 5:45 PM), http://www.newsweek.com/tsa-screenings-worry-sexual-assault-survivors-70029; *see generally* Sarah Beaulieu, *How I Told the TSA I Was a Sexual Assault Survivor*, ENLIVEN PROJECT (Mar. 8, 2016), http://theenlivenproject.com/tsa-sexual-assault-survivor/. There have also been reports of impersonations of TSA officers to conduct fake screenings on women. *See* Joe Sharkey, *Fake Security Screener Highlights a Concern*, N.Y. TIMES, Aug. 19, 2014, at B6.

187. *See* Brian Maass, *CBS4 Investigation: TSA Screeners at DIA Manipulated System to Grope Men's Genitals*, CBS DENVER (Apr. 13, 2015, 10:00 PM), http://denver.cbslocal.com/2015/04/13/cbs4-investigation-tsa-screeners-at-dia-manipulated-system-to-grope-mens-genitals/.

188. Jason Edward Harrington, *Former TSA Agent: Groping Scandal Is Business as Usual*, TIME (Apr. 15, 2015), http://time.com/3822487/tsa-sexual-assault-denver/.

the pat down conducted on a person who originally went through the machine and triggered an alert, but without the person going through the machine first. However, in a vaguely worded update to its Privacy Impact Assessment for Advanced Imaging Technology (AIT) in December of 2015, the TSA decided that *some* individuals would not have the option to refuse the scanner.[189] Somewhat ironically, in making the decision that certain individuals will no longer have the ability to decide to be patted down rather than scanned, the agency quotes the Privacy Act of 1974 and the Fair Information Practice Principles (FIPPs). These principles supposedly act as a guidepost for how the agency interacts with the public.[190]

The TSA has also opted to change the software on which the scanners run, ending its contract with Rapiscan.[191] The new technology projects a generic image, merely "flagging" abnormalities on the outline of a human body.[192] The software is being touted by the TSA as less invasive because it does not actually show the naked form of the person being scanned.[193] This might be seen as analogous to the police using listening devices or thermal imagers to detect abnormalities in homes in a neighborhood. The devices do not show the actual interior of the home, but can give police an idea as to something like an unusual heat signature, which might indicate growing lights for marijuana. This exact scenario was before the Supreme Court in *Kyllo* in 2001.[194] Responding to those facts, the Court stated:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[195]

If we extend the ruling in *Kyllo* to outside the home (which is arguably appropriate in the context of the close examination of one's

189. DHS PRIVACY UPDATE, *supra* note 109, at 5; *see also* Christopher Elliott, *What the TSA's New Body-Scanner Rules Mean for You*, WASH. POST (Dec. 30, 2015), https://www.washingtonpost.com/lifestyle/travel/what-the-tsas-new-body-scanner-rules-mean-for-you/2015/12/30/f739e922-a4f5-11e5-9c4e-be37f66848bb_story.html.

190. DHS PRIVACY UPDATE, *supra* note 109.

191. Leef, *supra* note 167.

192. DHS PRIVACY UPDATE, *supra* note 109.

193. Bart Jansen, *TSA Defends Full-Body Scanners at Airport Checkpoints*, USA TODAY (Mar. 2, 2016, 10:01 AM), https://www.usatoday.com/story/news/2016/03/02/tsa-defends-full-body-scanners-airport-checkpoints/81203030/.

194. Kyllo v. United States, 533 U.S. 27 (2001).

195. *Id.* at 40.

body[196]), then it would seem that even scanners that only mark abnormalities on a general shape are an invasion of privacy. While it is true that they do not show as much detail as the X-ray type of scanner and the older versions of the body-scanner software, the technology still exposes abnormalities not immediately visible on a person. This would be analogous to the police discovering abnormal heat signatures in Kyllo's house.

As the LGBT community continues to gain greater equality under the law, the enemies of the movement have begun to take aim at the transgender community. This was most recently exemplified by North Carolina House Bill 2, which forbade transgender individuals from using the restroom facility consistent with their gender identity.[197] In many ways, the transgender community is the most vulnerable group

196. While the Supreme Court has not directly applied the reasoning of *Kyllo* to body searches, it did apply *Kyllo* to GPS monitoring of a vehicle parked in a public place in *Jones*. There, Justice Scalia noted that the government "physically occupied private property for the purpose of obtaining information." United States v. Jones, 565 U.S. 400, 405 (2012). The Court found the attachment of the GPS device to be an unconstitutional search under the Fourth Amendment. The Court's decision and reasoning were then discussed and extended to private persons in *Grady v. North Carolina.* There the issue was about an ankle monitoring program for civilly committed sex offenders who had been released into the community. The Court acknowledged that logically, if the state attached a monitoring device to one's person without their consent, it would be a violation of the Fourth Amendment. Grady v, North Carolina, 135 S. Ct. 1368 (2015). In a dissenting opinion in *Maryland v. King*, Justice Scalia notes that the issues raised in *Kyllo*, specifically the invasiveness and intrusion on a person's privacy with little to no justification, are more persuasive when discussing searches of the body. Maryland v. King, 569 U.S. 435, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). The Third Circuit addressed whether a search at an airport is a special "administrative search" in *United States v. Hartwell*, but held that the search must be tailored to be minimally intrusive and protect personal privacy; more intrusive levels of search are only justified *after* the agent has detected something through less intrusive means. United States v. Hartwell, 436 F.3d 174, 180 (3d Cir. 2006); *see also* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (holding that, since Mr. Aukai had no identification, he was subject to a higher-threshold search and the search was an administrative one. In this case, the officer did not pat down Mr. Aukai until the hand-held metal detector indicated something was in his pocket and restricted their touch to his pocket where the alarm was sounding). While circuit court decisions have not directly addressed the legality or illegality of full body scanners, they do state that the government must use the least invasive means possible to protect the public. Given this information, along with the Supreme Court's ruling in *Kyllo* and the concurrence in *King*, one can see that the Court is untrusting of obtrusive technology and the current scanners fit squarely into this category. It is well within the realm of reason to believe that if we expand the *Kyllo* holding—combined with the holdings of the circuit courts—that the current technology would be an illegal search under the Fourth Amendment.

197. As of this writing, the law is currently working its way through the court system due to challenges by Lambda Legal and the ACLU. More information on the implications of the bill for the LGBT community can be found at Lambda Legal's website. *See* Carcaño v. Cooper *(formerly* Carcaño v. McCrory), LAMBDA LEGAL, http://

in the LGBT movement, and this is especially true when dealing with the TSA.

When the TSA introduced Secure Flight,[198] passengers were required to include information such as their full name, birthday, and gender as reported on their government-issued identification.[199] However, for transgender travelers, these may not be their preferred names or the genders they express. The process of correcting documents can be not only time consuming, but also disheartening and capricious for transgender persons. In New York, for example, simply to change a person's name, the applicant must not only apply to the court, but also publish the proposed name in the paper.[200] The court has the ability also to order the applicant to inform other parties it deems appropriate of the application or order to change the name.[201] The applicant must then incur costs associated with incorporating the new name into all government identification documents. To legally change their gender on government documents in New York, applicants must provide an Application for Correction of Certificate of Birth, a notarized affidavit of gender error, copy of their current birth certificate, notarized affida-

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www.lambdalegal.org/in-court/cases/nc_carcano-v-mccrory (last visited Nov. 9, 2017).

198. *See TSA Secure Flight Program*, TRANSP. SEC. ADMIN., https://www.tsa.gov/news/testimony/2014/09/18/tsa-secure-flight-program (last visited Dec. 15, 2017).

199. *Security Screening*, TRANSP. SECURITY ADMIN., https://www.tsa.gov/travel/security-screening (last visited Nov. 9, 2017).

200. N.Y. CIV. RIGHTS LAW §§ 60–65 (Consol. 2017). The name change order is generally not considered effective until after publication. *See Publication in a Newspaper*, NYCOURTS, https://www.nycourts.gov/courthelp/Namechange/publication.shtml (last visited Nov. 29, 2017). The requirement for publication can be waived, but the decision to waive publication is left up to the judge. Further, while it would be expected that states such as New York would place few hurdles for transgendered individuals when obtaining a name change, three recent cases show conservative trial-court judges in the state may not share the same ideas as their appellate counterparts. *See In re* Powell, 945 N.Y.S.2d 789 (N.Y. App. Div. 2012) (The lower court originally denied petition of transgender prison inmate to use a female name, holding that the name change would cause confusion and the prisoner had not yet undergone sex-reassignment surgery. The appellate court reversed, finding these reasons to be insufficient.); *In re* Winn-Ritzenberg, 891 N.Y.S.2d 220 (N.Y. App. Div. 2009) (Here the court was unclear on its reason for reversal, simply holding that the petition had met the requirements of the law.); *In re* Golden, 867 N.Y.S.2d 767 (N.Y. App. Div. 2008) (The lower court held that the name change would cause confusion, and the appellate division held that this alone was not a reason to deny the application.). We can see from these decisions that the appellate courts have still left the interpretation of the statute open, giving the lower courts wide margin to continue to interpret the statute as they choose.

201. *Name Change Basics*, NYCOURTS, https://www.nycourts.gov/courthelp/Namechange/basics.shtml (last visited Nov. 29, 2017).

vit from a physician that they are undergoing treatment related to their diagnosis of gender dysphoria, and finally, any fees.[202]

As one can imagine, this can be a very onerous process for transgender people. Transgender travelers who have not completed this process are forced by the current system to use birth name and gender when booking travel, even if not presenting as that gender in daily life.[203] Terminology used by the TSA when dealing with transgender persons has caused further issues. Originally, any warnings received by the body scanners were considered "anomalies," but are now referred to as "alarms."[204] Another problem comes from the use of the new scanners as opposed to the old full-body scanners. The current scanners require an agent in a room to look through the camera and press either a blue or pink button to inform the computer whether someone is male or female. This results in a large number of "alarms" being triggered by transgender people.[205] Such policies single out transgender people as "odd" or "different" and can cause acute embarrassment as well as invade their right to choose with whom they share their status as transgender persons.

Transgender people have also experienced harassment by TSA agents. This was the case with Shadi Petosky when she attempted to board a flight home after celebrating her mother's birthday in Orlando.[206] Ms. Petosky was isolated and forced to undergo interrogation and invasive searches by the TSA because she still had male genitalia.[207] She told her story by tweeting the ordeal, which caused Ms. Petosky to miss her flight, and she eventually booked an alternative flight to nearby Miami simply to get out of the Orlando airport.[208]

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202. For a list of laws regarding name changes and gender changes on identification documents, broken down by state, such as New York, see *ID Documents Center: New York,* NAT'L CTR. FOR TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/new-york (last updated June 5, 2017).

203. *See Transgender Passengers*, TRANSP. SECURITY ADMIN., https://www.tsa.gov/transgender-passengers (last visited Nov. 9, 2017) (when making reservations a person is "encouraged" to use the same name and gender displayed on their government identification).

204. Dawn Ennis, *Goodbye "Anomaly"—TSA's New Word for Trans Bodies Is "Alarm,"* ADVOCATE (Dec. 23, 2015), https://www.advocate.com/transgender/2015/12/23/goodbye-anomaly-tsas-new-word-trans-bodies-alarm.

205. Dawn Ennis, *WATCH: TSA Makes Full Body Scanners Mandatory for Some Travelers*, ADVOCATE (Dec. 24, 2015), http://www.advocate.com/travel/2015/12/24/watch-full-body-scanners-now-mandatory-some-travelers-under-new-tsa-guidelines.

206. Dawn Ennis, *Her Tweets Tell One Trans Woman's TSA Horror Story*, ADVOCATE (Sept. 22, 2015), http://www.advocate.com/transgender/2015/9/22/one-trans-womans-tsa-horror-story.

207. *Id.*

208. *Id.*

Unfortunately, it appears that Ms. Petosky's ordeal—one which she would not have chosen, to put it in terms of the framework of this Article—is not uncommon, with transgender individuals having to place prostheses through the X-ray machine among other invasions of their privacy.[209]

D. The Cost-Benefit Calculation

As stated previously, whether the TSA's AIT machines are effective is questionable. If they are effective in deterring and detecting terrorists, then the damage to our privacy might be justifiable. Sadly, this is simply not the case. Aside from the several studies, tests, and drills in which individuals have successfully smuggled weapons past the scanners,[210] Shon Agard conducted a study analyzing the number of firearms seized by airport security before and after 9/11, expecting to find that TSA was more effective at detecting and seizing firearms after September 11 than its predecessors (private firms) had been before then.[211] Instead, he found little to no difference between the private companies used from 1990–2000 and the TSA from

209. Zach Stafford, *TSA Agents Who Flag Trans People Cause Trauma and Don't Make Us Safer*, GUARDIAN (Sep. 23, 2015, 11:15 AM), https://www.theguardian.com/commentisfree/2015/sep/23/tsa-agents-transgender-people-trauma.

210. Although the government studies evaluating the effectiveness of the TSA's Advanced Imaging Technology (AIT) machines have mostly been classified, their results have been discussed extensively. *See, e.g.*, Costello & Johnson, *supra* note 28; David Kerley & Jeffrey Cook, *TSA Fails Most Tests in Latest Undercover Operations at US Airport*, ABC NEWS (Nov. 9, 2017, 1:10 AM), http://abcnews.go.com/US/tsa-fails-tests-latest-undercover-operation-us-airports/story?id=51022188; Jess McHugh, *Undercover Report Reveals TSA Screening May Fail as Much as 80% of the Time*, TRAVEL + LEISURE (Nov. 9, 2017), http://www.travelandleisure.com/airlines-airports/tsa-security-screening-failures; Jennifer Scholtes, *Price for TSA's Failed Body Scanners: $160 Million*, POLITICO (Aug. 17, 2015, 3:27 PM), https://www.politico.com/story/2015/08/airport-security-price-for-tsa-failed-body-scanners-160-million-121385. In 2014, a joint group from UC San Diego, University of Michigan, and Johns Hopkins University presented their study on the use of TSA backscanning technology. *See* Keaton Mowery et al., *Security Analysis of a Full Body Scanner*, 23 USENIX SEC. SYMPOSIUM (2014), https://www.usenix.org/system/files/conference/usenixsecurity14/sec14-paper-mowery.pdf. Even though the government does classify most of the studies, they have been referred to in hearings before the House Oversight Committee. John Roth, the Inspector General in 2015, noted in his written statement that multiple failures were found when they conducted their tests, but noted that these results were "not . . . unexpected." *TSA: Security Gaps: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 3 (2015) (statement of John Roth, Inspector General, U.S. Dep't of Homeland Sec.).

211. Shon Agard, Civilian Aviation Screening: A Time-Series Analysis of Confiscated Firearms at Screening Checkpoints (Jan. 2012) (unpublished Master of Science dissertation, Eastern Kentucky University), http://encompass.eku.edu/cgi/viewcontent.cgi?article=1059&context=etd.

2003–2009.[212] Yet, according to documents submitted by the TSA in attempting to legally justify its use of the scanners, the agency would have people believe the scanners not only have a high success rate, but also could have detected weapons and prevented several high-profile attacks, including the underwear bomber.[213]

The TSA has a history of touting its "successes." However, at no time has the agency actually stopped a terrorist.[214] By forcing people to reveal medical information, such as whether they are cancer survivors or that they are undergoing treatment to bring their presented gender expression into alignment with their gender identity, the TSA grossly invades our privacy.[215] As for victims of sexual assault, it is recommended by organizations such as the Rape, Abuse, & Incest National Network (RAINN) that victims carry a TSA notification card.[216] These cards and self-identification at the TSA line both raise concerns, though, as individuals should not have to disclose this confidential and sensitive information to board a plane. It is also important that the public *in general* know that it can remain free from being molested prior to boarding. Unfortunately, an agency that has never had a pass rate greater than twenty-five percent made the decision, in the name of security, to take away the option not to disclose traumas and not to risk molestation. Although individuals give up privacy interests in the name of security, there is little to no evidence that the agency gives us a commensurate rise in freedom from terrorism. While the agency may argue that its very presence helps deter terrorism, we should keep a few facts in mind. First, the last time there actually was a noted statistical drop in terrorism—meaning one that would even suggest possible correlation without proving causation—through the implementation of a government program similar to the TSA was in the 1970s.[217] Second, other measures such as the locking and reinforcing

212. *Id.*

213. Jansen, *supra* note 193.

214. Juliet Lapidos, *Does the TSA Ever Catch Terrorists?*, SLATE MAG. (Nov. 18, 2010, 6:12 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/11/does_the_tsa_ever_catch_terrorists.html.

215. Consider that Congress created the Health Insurance Portability and Accountability Act (HIPAA), violations of which often entail large judgments. *See generally* 45 C.F.R. § 164. One example is the case of Abigail Hinchy, which resulted in a $1.44M judgment against Walgreens after a pharmacist shared private information with Hinchy's ex-boyfriend. Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. App. 2014). Given this information, it would seem that Congress values our ability to keep our medical histories private.

216. *Airport Security for Survivors*, RAINN, https://www.rainn.org/articles/airport-security-survivors (last visited Dec. 15, 2017).

217. *See supra* notes 93–97 and accompanying text.

of cockpit doors to prevent terrorists from breaking in, the positive matching of luggage, and the increase in the willingness of passengers to fight back provide a much more direct explanation for why we have not seen another 9/11.[218]

If we want to look at actual numbers, the TSA costs the public over $10 billion per year and causes more than 500 additional accidents from people driving because many more individuals choose to drive rather than fly due to the degree to which airport security has become a negative experience.[219] These figures can be translated into a loss of choice, as many people would probably prefer to spend this money differently than on an agency that does not deliver on its promise to increase choice. The people who die on the road lose their ability to choose when their existence ends just as they would if dying from a terrorist attack. This also does not even take into account the effect that the "no fly" list has on businesses, individuals, and the economy by preventing people from flying.[220] These expensive efforts have not increased our security and ability to make choices. Given the amount of money that the measures taken by the TSA have cost the American public, coupled with the low degree of success in stopping terrorist threats, the math simply is not on the side of the agency. Some scholars have estimated that the TSA would need to stop at least 1667 attacks on the scale of the planned 2010 Times Square attack to be cost-effective.[221] Because that simply is not happening, it would be safe to say the agency fails a cost-benefit analysis. In short, the agency limits the choices of millions of individuals every day with little to show for it.

E. The NSA in Historical Perspective and Recent Developments

"[T]hose government agencies created to protect and uphold the law have admitted to deliberate violations of the law and of constitutional guarantees of privacy."[222] These words were written in 1975 by

218. Bruce Schneier, *Security vs. Privacy*, SCHNEIER ON SEC. (Jan. 29, 2008, 5:21 AM), https://www.schneier.com/blog/archives/2008/01/security_vs_pri.html.

219. *See id.*; *see also* David Dobbs, *Is Airport Security Killing 500 People a Year?*, WIRED (Apr. 5, 2012, 10:32 PM), https://www.wired.com/2012/04/is-airport-security-killing-500-people-a-year/ (analyzing these calculations and concluding that although the figures may be "rough," they are "of an order of magnitude that warrants attention").

220. For a deeper analysis of this, see my earlier co-authored work on the problems with the "no-fly" list, including the impact on individuals stranded abroad and the difficulties in being removed from the list. *See* Manta & Robertson, *supra* note 12.

221. MUELLER & STEWART, *supra* note 33.

222. Richard D. Cotter, *Notes Toward a Definition of National Security*, WASH. MONTHLY, Dec. 1975, at 4.

the former Chief of the Research Section of the FBI Intelligence Division, Richard Cotter, when speaking about the FBI mail covers of the 1950s. These mail covers sought to intercept the mail of people who might be members of a group that the FBI had decided was "subversive,"[223] and thus considered to be a threat to national security. As such, the FBI was highly interested in knowing with whom their members corresponded.[224] The address of the sender would be copied down along with his or her name, and the Post Master would then forward the information to the appropriate FBI office, which would investigate the individual.[225]

The criteria for what warranted inclusion on the list was relatively ephemeral. The FBI took the approach that, if one *might* violate federal law, then that was a reason to start a mail cover.[226] As an example, Mr. Cotter recounted an example of an African-American man who was a member of a local "Black Power" group. The group itself seems to have been relatively benign, but the man once expressed approval of more radical international civil rights leaders. This was enough to begin a mail cover on him since he might be a threat to national security.[227] Mr. Cotter notes that the General Accounting Office (GAO) conducted a review of 676 cases from the mail program.[228] Of the cases reviewed, only thirty-four percent, or 230 out of 676 cases, had what the office classified as "hard" evidence. Such evidence would show that the individual could be incited to political violence or was a member of a recognized "subversive" group.[229] Further, only three percent of those 230 cases actually made it to the Justice Department.[230] Finally, the FBI only developed advanced knowledge of an incident or actions by subversive persons or groups two percent of the time.[231]

In 1973, the FBI faced a challenge to this practice resulting from its investigation of Lori Paton, a 15-year-old student enrolled in a social studies class who accidentally wrote a letter to the Socialist Workers Party.[232] Originally, Ms. Paton meant to write to the Socialist

223. *Id.* at 6.
224. *See id.*
225. *Id.* at 8.
226. *Id.* at 10.
227. *See id.*
228. *Id.*
229. *Id.*; *see generally* Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. Rev. 976 (1983).
230. Cotter, *supra* note 222.
231. *Id.*
232. Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).

Labor Party as part of an assignment in her social studies class.[233] After Ms. Paton's letter was intercepted by the postmaster, her information was sent to the local New Jersey FBI office.[234] An agent then learned the identities of her father and mother, where they worked, and what school Ms. Paton attended.[235] The agent spoke to the local sheriff and Ms. Paton's school principal to gather more information.[236] A file was opened in Ms. Paton's name and she was eventually found not to be a threat.[237] Ms. Paton and her teacher learned about the actions of the FBI, and Ms. Paton sued, alleging a violation of her First Amendment rights and a violation of her rights under the postal statute.[238] Her original complaint was dismissed,[239] but Ms. Paton appealed to the Third Circuit, which held that her First Amendment argument was valid.[240]

Specifically, the court indicated that the FBI was infringing on the right of freedom of association.[241] Further, the court noted that Ms. Paton stated a goal of becoming a Chinese translator for the government. The heading on Ms. Paton's file read "SM-SWP," which stood for "Subversive Matter-Socialist Workers Party."[242] Although the FBI assured the court that it meant nothing, the Third Circuit held that it might mislead any department vetting Ms. Paton for a position in the future.[243] The court decided that a balancing test should be used to evaluate the permissibility of marking Paton's file in this manner by balancing the value of doing so against the harms it imposed.[244]

Unfortunately, when given the opportunity, the court did not speak directly to Ms. Paton's allegations of the violation of her Fourth Amendment right to privacy. However, it did expand the ruling of *Bivens v. Six Unknown Named Agents*,[245] a 1971 Supreme Court ruling finding an implied cause of action for Fourth Amendment violations committed by government officials, to include issues that might fall under the right to freedom of speech. In justifying its expansion, the court stated: "The converse of a restraint on government power

233. *Id.* at 865.
234. *Id.*
235. *Id.*
236. *Id.* at 866.
237. *Id.*
238. *Id.*
239. *Id.* at 867.
240. *Id.* at 870.
241. *Id.* at 869
242. *Id.* at 868.
243. *Id.*
244. *Id.*
245. 403 U.S. 388 (1971).

must be that the individual is free to do that which the Government cannot prevent. First Amendment rights must be as personal to an individual as are Fourth Amendment rights."[246]

The government settled with Ms. Paton out of court, which may seem like an odd decision. The government surely had the financial resources to continue litigating the case. The district court had ruled largely in the government's favor on summary judgment. It can be assumed from the comments of Mr. Cotter, however, that the FBI might have been worried that a definitive judgment against the agency might force the agency to stop many similar programs.[247] Mr. Cotter notes that in 1939, President Roosevelt issued an executive order that essentially directed all local and state law enforcement to forward any cases that might involve sabotage, espionage, and neutrality violations to the FBI.[248] This order was repeated by President Roosevelt in 1942.[249] In 1950, President Truman reissued the order, with a slight change, in that the FBI was now in charge of matters that involved "espionage, sabotage, neutrality violations *and subversive activities*."[250] Mr. Cotter notes that the vagueness of the phrase "subversive activities" was taken by the FBI to mean that the agency had almost unlimited power when deciding who to watch or investigate and why. In 1972, though, then-Director of the FBI J. Edgar Hoover passed away and the agency began to look at its manual of operations a little more closely. Some changes were proposed, including mandating that all mail cover or other investigation orders have a stated statutory basis.[251] In 1973, the mandate would be adopted under pressure that the FBI's manual might soon become public.[252] However, even then, Mr. Cotter notes, the "statutory reasons" tended to be vague at best.[253] Mr. Cotter also seems to have predicted the abuses that would later be exposed by Edward Snowden: "In the absence of clear boundaries it is almost inevitable that an intelligence agency—anxious to be as fully informed as possible regarding potential threats to national security—will carry its investigations too far."[254]

Eventually these actions by the FBI, as well as actions taken by the CIA and NSA, led to the formation of the Church Committee,

246. *Paton*, 524 F.2d at 869.
247. Cotter, *supra* note 222.
248. *See id.*
249. *See id.*
250. *Id.*
251. *See id.*
252. *See id.*
253. *Id.*
254. *Id.*

which was established to review the various programs of the intelligence and law enforcement divisions of the government.[255] During this investigation, the Committee discovered an NSA program codenamed "SHAMROCK."[256] SHAMROCK looked at the telegrams of foreign nationals and American citizens alike, making copies of these telegrams, ostensibly to cut down on any subversive or terrorist activity.[257] In response to discovering this program, the Church Committee helped to pass the Foreign Intelligence Surveillance Act (FISA), which created the FISA court.[258] Senator Church himself was alarmed at the ability of the NSA to spy on Americans, stating that the "potential to violate the privacy of Americans is unmatched by any other intelligence agency."[259] Operation SHAMROCK, along with the mail cover operations of the FBI was finally terminated, and hence a greater level of individual choice was restored.

In September of 2013, Leslie Pickering found a card accidentally included with his mail. The card indicated that his mail was to be scanned by the Post Master and the information forwarded to a government organization, though it did not specify which organization.[260] Mr. Pickering was formerly a member of the Earth Liberation Front (ELF)[261]; he currently co-owns a bookstore with his wife in Buf-

255. John Prados & Arturo Jimenez-Bacardi, *White House Efforts to Blunt 1975 Church Committee Investigation into CIA Abuses Foreshadowed Executive-Congressional Battles After 9/11*, NAT'L SECURITY ARCHIVE (July 20, 2015), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB522-Church-Committee-Faced-White-House-Attempts-to-Curb-CIA-Probe/.

256. L. Britt Snider, *Recollections from the Church Committee's Investigation of NSA: Unlucky SHAMROCK*, CENT. INTELLIGENCE AGENCY (Apr. 14, 2007, 11:27 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art4.html.

257. *See id.*

258. 50 U.S.C. § 1803(a) (2015); Bruce Schneier, *Project Shamrock*, SCHNEIER ON SEC. (Dec. 29, 2005, 8:40 AM), https://www.schneier.com/blog/archives/2005/12/project_shamroc.html.

259. *Id.*

260. Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement*, N.Y. TIMES (July 3, 2013), http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html.

261. The Earth Liberation Front (ELF) is considered a domestic eco-terrorism group by the FBI. *See* FED. BUREAU OF INVESTIGATION, TERRORISM 2002–2005 (2006), https://www.fbi.gov/stats-services/publications/terrorism-2002-2005; *see also Oversight Hearing Before the House Resources Committee, Subcomm. on Forests and Forest Health: The Threat of Eco-Terrorism*, 107th Cong. 1 (Feb. 12, 2002) (statement of James F. Jarboe, Domestic Terrorism Section Chief-Counter Terrorism Division, Federal Bureau of Investigation). ELF uses extreme measures such as setting fire to a dealership's SUVs and other acts of eco-terrorism to protest against major manufacturers and governments. *See* Bruce Barcott, *From Tree-Hugger to Terrorist*, N.Y.

falo.[262] Frank Askin, the director of the Constitutional Litigation Clinic at Rutgers University, investigated the matter further. He discovered that even after the judgment in *Paton*, which condemned the use of a mail cover for "security reasons" as overly broad, "protection of national security" is still credited as a valid reason for a mail cover.[263] Additionally, to begin a mail cover, an agency must simply provide a letter to the Post Master, who will review the request and either grant or deny it. At no point does the process imply a public adjudication or even a notice-and-comment period; the Post Master alone simply makes the decision.[264] This is even though, as noted by Professor Askin, no Post Master or postal employee is likely to be a First Amendment constitutional scholar.[265]

Two years later, on December 2, 2015, Syed Rizwan Farook and his wife, Tashfeen Malik, shot fourteen people at the Inland Resource Center in what became known as the San Bernardino attack and classified an act of Islamic terrorism. After the shooting, the FBI obtained Mr. Farook's iPhone and requested that Apple unlock it for the agency, even if it meant developing additional software to do so.[266] Apple refused and the FBI took the company to court.[267] Eventually, the FBI would find a third party to override the phone's security and decrypt the data.[268] Before this time, however, Apple's grounds for refusing to do so were rooted in the protection of its users' privacy.[269] Apple stated that if it were to change the software and make the phone less secure, it could be a disaster for the company and for the privacy of customers if the program was leaked.[270] Separately, another concern that resulted from the shooting related to the U.S. Customs and Board Protection Agency. The agency has proposed that people who come into the country under certain visas be required to tell the gov-

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TIMES MAG. (Apr. 7, 2002), http://www.nytimes.com/2002/04/07/magazine/from-tree-hugger-to-terrorist.html.

262. Nixon, *supra* note 260.

263. Frank Askin, *The Spies Who Never Came in from the Cold*, HUFFINGTON POST (Dec. 16, 2013, 4:09 PM), http://www.huffingtonpost.com/frank-askin/the-spies-who-never-came-_b_4428542.html.

264. *Id.*

265. *Id.*

266. Jim Stavridis & Dave Weinstein, *Apple vs. FBI Is Not About Privacy vs. Security It's About How to Achieve Both*, HUFFINGTON POST: THE WORLD POST (Mar. 8, 2016), http://www.huffingtonpost.com/admiral-jim-stavridis-ret/apple-fbi-privacy-security_b_9404314.html.

267. Arjun Kharpal, *Apple vs. FBI: All You Need to Know*, CNBC (Mar. 29, 2016, 6:34AM), https://www.cnbc.com/2016/03/29/apple-vs-fbi-all-you-need-to-know.html.

268. *Id.*

269. *Id.*

270. *Id.*

ernment their social media usernames.[271] The idea is that knowing what is on a person's social media sites could help to inform law enforcement of any suspicious activities, groups, or postings by the person. The new rule is opposed by civil liberties groups due to the gross invasion of privacy.[272]

In the meantime, the 2013 revelations of NSA contractor Edward Snowden changed the way that many Americans think about surveillance, the government, and their own choices. Among the most explosive information he leaked was that the NSA forced phone providers to hand over their customers' calling records, hacked into the data centers of Google and Yahoo!, collected hundreds of thousands of email and instant messaging contact lists, made tech companies cooperate in handing over information and then imposed a gag order on them, and had the capability of spying even on computers not connected to the Internet.[273] Regular Americans learned that they do not have the choice to conduct their personal and professional business *without* such surveillance, which led to chilling effects even for something as basic as intellectual exploration. Indeed, as one study found, people performed less reading of Wikipedia articles on some topics related to terrorism, presumably due to the fear that they would draw the government's attention while engaged in completely innocuous activities.[274] This impoverishes individual education and discourse, with far-reaching implications that cause significant damage to society;[275] and the effects were both immediate and long-lasting.[276] Worst, these losses are occurring with no known countervailing benefit; as a White House review panel put in place after the Snowden uproar found, the NSA surveillance programs *have not stopped a single terror attack*.[277] This means that, as far as the framework of this Article is concerned, the loss of Americans' choices—to be free from surveillance—has not

271. Safia Samee Ali, *Border Protection's Social Media Proposal Comes Under Fire*, NBCNews (Jul. 19, 2016, 11:24 AM), http://www.nbcnews.com/storyline/san-bernardino-shooting/border-patrol-s-social-media-proposal-comes-under-fire-n602671.

272. *Id.*

273. Chandra Steele, *The 10 Most Disturbing Snowden Revelations*, PCMag (Feb. 11, 2014, 1:50 PM), http://www.pcmag.com/article2/0,2817,2453128,00.asp.

274. Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech. L.J. 117, 146–47 (2016).

275. *See* Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 180 (2015).

276. *See id.* at 148.

277. *See* Michael Isikoff, *NSA Program Stopped No Terror Attacks, Says White House Panel Member*, NBCNews (Dec. 20, 2013, 9:22 AM), http://www.nbcnews.com/news/other/nsa-program-stopped-no-terror-attacks-says-white-house-panel-f2D11783588.

engendered any corresponding increase in choices by having terrorism reduced.

After Mr. Snowden's revelations and the study of the review panel, one would expect the NSA to dial back its operations locally. However, that does not seem to be the case. The agency is still spying on Americans and opening new facilities domestically.[278] There are concerns about the contractors hired by the NSA not protecting the private data of the Americans being spied on.[279] Since Snowden, other NSA insiders have come forward and acted as whistleblowers. These agents have confessed to taking part in operations that listened in on the calls of Americans illegally.[280] Further, the agency is building more large facilities, without providing Congress a great deal of information as to what will take place there.[281] It seems that not only do we have a modern version of operation SHAMROCK in effect, but there is no clear and immediate way to stop it. Hence, individuals' control and choices over their data remain greatly limited.

For a recent article, David Herbert met with the CEO of a new data mining company, IDI, to find out about its plans. IDI seems to be the first commercial entity to aggregate all information currently available about a person, making it easier for private investigators to predict one's day-to-day habits.[282] The company states that it is actively seeking customers in private investigation firms, law firms, and even the government.[283]

The FBI may not be in need of IDI's services though. It has two different data collection branches, the Domestic Communications Assistance Center (DSAC)[284] and the National Security Breach Analysis

278. James Bamford, *Shady Companies With Ties to Israel Wiretap the U.S. for the NSA*, WIRED (Apr. 3, 2012, 6:30 AM), https://www.wired.com/2012/04/shady-companies-nsa/ (noting the opening of facilities in Georgia and Hawaii).

279. *Id.*

280. Robert Johnson, *Even Congress Wants to Know What the NSA Is Doing with This $2 Billion Utah Spy Center*, BUS. INSIDER (Apr. 4, 2012, 5:17 AM), http://www.businessinsider.com/top-nsa-general-says-this-new-2-billion-spy-center-will-definitely-not-snoop-on-americans-2012-4.

281. *Id.*

282. David Gauvey Herbert, *This Company Has Built a Profile on Every American Adult*, BLOOMBERG BUSINESSWEEK (Aug. 5, 2016, 7:55 AM), https://www.bloomberg.com/news/articles/2016-08-05/this-company-has-built-a-profile-on-every-american-adult.

283. *Id.*

284. Michael Kelley, *This New FBI Unit's Sole Mission Is to Help Spy on Americans' Cell Phone and Internet Usage,* BUS. INSIDER, (May 25, 2012, 1:28 PM), http://www.businessinsider.com/fbi-domestic-spying-technology-2012-5.

Center (NSAC).[285] The DSAC mostly concerns itself with telephone and electronic data, such as "listening in" on Skype conversations.[286] NSAC, on the other hand, deals more with individuals' conduct. For example, it collects information on stays at Wyndham hotels and resorts, as well as credit card transactions from Sears.[287] Assuming that the data collection is close to as extensive as the collection proposed by IDI, there is no reason to assume that the government may not already know individuals' regular habits and manners, which they did not choose to disclose to the government.

III.
Difficulties in Subjecting the National Security Apparatus to Cost-Benefit Analysis

So, is the cost to our privacy worth the benefit we get from the FBI and NSA programs? Considering what the GAO found about mail covers and the repercussions on individual choices, this Article argues that it does not. While both agencies arguably provide some useful services and intend to help to keep incidents of terror to a minimum, at this point we also have to ask ourselves if we are hurtling towards an Orwellian future.[288] To assure that this does not come to pass, one option would be to have another committee, similar to the Church Committee, as suggested in an article by Conor Friedersdorf.[289] As pointed out by Mr. Friedersdorf, a new committee would hopefully be able to rein in the more obviously illegal activities of the U.S. Intelligence Community. This in turn should help to assuage the fears of many Americans while making the heads of our intelligence agencies answerable to Congress in a public forum. Any way one looks at the

285. Ryan Singel, *Newly Declassified Files Detail Massive FBI Data-Mining Project*, WIRED (Sep. 23, 2009, 7:00 AM), https://www.wired.com/2009/09/fbi-nsac/.

286. *See id.*

287. Singel, *supra* note 285.

288. The idea of the FBI's data collection efforts along with the NSA's calls to mind the future seen in Orwell's *1984*. For example, a simple Google search will turn up several ways to remotely access a person's phone. Then, there is the story of the Kuykendall family, who was stalked and harassed by an unknown hacker through their phone. *See* Brittany Bacon & Scott Michels, *Cell Phone Stalkers Harass Washington Family*, ABCNews (June 25, 2007), http://abcnews.go.com/TheLaw/story?id=3312813. In 2014, NPR spoke with experts on domestic violence and found that "stalking apps" are now a normal part of any domestic violence investigation. Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NPR (Sep. 15, 2014); *see also* Casey Quinlan, *Stalking by Cell Phone*, Crime Report (Apr. 2, 2015) https://thecrimereport.org/2015/04/02/2015-04-stalking-by-cellphone/.

289. Conor Friedersdorf, *Lawbreaking at the NSA: Bring on a New Church Committee*, Atlantic (Aug. 16, 2013), https://www.theatlantic.com/politics/archive/2013/08/lawbreaking-at-the-nsa-bring-on-a-new-church-committee/278750/.

situation, though, there need to be major reforms and a restoration of the ability to choose to keep our information private.

There are three major critiques to a cost-benefit analysis such as the one I have proposed. First, there are people who say that the analysis is irrelevant. Their logic goes: "If you have nothing to hide, you should have no problem with the government collecting information on you." This is a patently false argument, as explained below. Second is the idea that the value of each human life (and the many remaining choices it embodies) is so great, it would be impossible to have it involved in trade-offs. However, each time we get into a car, or board a plane, or make any other decision that involves risk but will yield a benefit, we have at least implicitly decided on the value of a human life. Third, some argue that while the TSA and NSA have not caught any terrorists so far, they serve a deterrent effect.

A. The "I Have Nothing to Hide" Defense

Often when we raise concerns about the TSA, NSA, FBI, and other government intelligence communities, the response is that, if a person has not done anything wrong, then she will have nothing to hide.[290] This argument misconstrues the issue. Let us return for a moment to the idea of the Panopticon.[291] In such a facility, a person has an equal chance at any time of the day of being watched as anyone else does. The prisoner is held essentially in stasis, never knowing if his actions are being watched or not. The question now is how his behavior will be perceived by the person doing the watching. If he drops something and is searching for it under the bed, will the watcher come in after the item has rolled under the bed, see him on the floor, and assume he may be trying to escape or using contraband under the bed? Will someone raise the alarm, branding the prisoner as a "troublemaker"? If something is seen and misinterpreted, will the prisoner have the opportunity to plead his case?[292]

All of these are issues that must be confronted when in a state of constant surveillance. Those who say they have "nothing to hide" are usually not thinking of the long-term effect on their level of choice, even leaving aside the overly narrow definition of privacy they adopt

290. *See* Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745 (2007); *see also* Alex Abdo, *You May Have "Nothing to Hide" But You Still Have Something to Fear*, ACLU: SPEAK FREELY (Aug. 2, 2013, 10:17 AM), https://www.aclu.org/blog/you-may-have-nothing-hide-you-still-have-something-fear.

291. *See supra* notes 30–32 and accompanying text.

292. *See* Solove, *supra note* 290, at 766 (pointing out the due process-type problems in such situations).

by making this statement in the first place.[293] First, the U.S. Code has over fifty chapters, and agency provisions and sanctions add an additional 10,000 regulations to that, at a minimum.[294] It is almost a guarantee that each of us has broken a law or regulation at some time in the past or will in the future—a fact which one may wish to hide. Second, "I have nothing to hide" assumes that every person conforms to one's moral code and one's wishes. For example, there are many people in the world that different groups would classify as sexual deviants. Unfortunately, in many places a person who identifies as LGBT has no opportunity to be "out," and "outing" a person is considered to be a dramatic and vicious thing to do.[295] LGBT people still face discrimination and hatred, even in a post-*Obergefell* world. Since the act of coming out is so personal, it is understandable that a person who is LGBT may feel like she has something to hide. Even though being LGBT is not against the law, it is also not a fact about which everyone can talk freely.

We can easily find situation after situation in which a person who "has nothing to hide" might have some fact or behavior taken out of context which could easily paint her in a negative light. Eventually we run the risk of becoming a society similar to the one found in Kafka's *The Trial*, where one has no idea what one is on trial for or even how to fix the problem; one only knows that one is on trial.[296] As my coauthor and I discuss in our work on the "no-fly" list, when one is attempting to defend oneself against an adversary who is hiding information, it is almost impossible to win.[297]

B. Placing a Dollar (or Choice) Value on Human Life

As noted by Bruce Schneier, it can be difficult to place a dollar value on human life, making it hard to do a pure cost-benefit analysis of security measures.[298] In the choice context, this would translate to the inherent difficulty in weighing human life against anything else at all. However, as Mr. Schneier notes, we implicitly make these valua-

293. *See* Solove, *supra note* 290, at 751.

294. Moxie Marlinspike, *Why "I Have Nothing to Hide" Is the Wrong Way to Think About Surveillance"*, WIRED (June 13, 2013, 6:30 AM), https://www.wired.com/2013/06/why-i-have-nothing-to-hide-is-the-wrong-way-to-think-about-surveillance/.

295. *See, e.g.*, Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide (describing the suicide of a college freshman after his roommate "outed" him).

296. FRANZ KAFKA, THE TRIAL (1925).

297. Manta & Robertson, *supra* note 12.

298. Bruce Schneier, *Cost/Benefit Analysis of Airline Security*, SCHNEIER ON SEC. (July 21, 2008, 5:53 AM), https://www.schneier.com/blog/archives/2008/07/costbenefit_ana.html.

tions and calculations every day.[299] Consider the average car wreck. When the wreck happens, we file a claim with the insurance or sue the other party. If someone perished in the accident, then we sue for wrongful death. We are placing a dollar value on the life in that moment. When we board an airline, we may pay more for a "legacy" carrier, or go for the cheapest seat possible on a discount carrier, even though the discount carrier does not have a reputation for maintaining its planes.[300] While the law mandates some minimum standards of maintenance, we regularly book tickets on airlines that have higher rates of accidents or aborted flights than others. We have thus considered and assigned a dollar value to our life and comfort.

It is appropriate to do the same and apply a cost-benefit analysis of the value of our privacy versus the value of security. After all, the likely remainder of our lives represents the potential of an assortment of choices that have to be weighed against the lives potentially shortened by terrorists and the choices that exist in that shortened life. As may be the case, however, the NSA and TSA measures discussed in this Article have so little effect on terrorism that the calculation is greatly eased, and a choice framework dictates that the measures should be modified or eliminated.

C. The Deterrence Argument

Some say that, while the NSA and TSA have not caught any terrorists, their existence and presence discourages perpetrators from taking nefarious actions. As a general matter, the burden would be on these agencies or lawmakers to show that this is the case. Aside from the failure of the NSA and TSA programs to arrest any terrorists,[301] the deterrence claim is difficult to believe because other factors easily explain why we have not had another airline attack similar to 9/11.[302]

Second, as far as the NSA is concerned, its surveillance programs were largely secret before Edward Snowden's revelations. It is difficult for the government to argue simultaneously that maintaining secrecy of its programs is of the utmost importance so that they cannot be circumvented, while also stating that those same programs deter wrongdoing. How can would-be terrorists be deterred by a program

299. *Id.*

300. ValuJet comes to mind in this situation. Even after several infractions and fines from the FAA, as well as airplane accidents, the carrier still managed to attract customers. *See* William Langewiesche, *The Lessons of ValuJet 592*, ATLANTIC (Mar. 1998), https://www.theatlantic.com/magazine/archive/1998/03/the-lessons-of-valujet-592/306534/.

301. *See* Lapidos, *supra* note 214; *see also* Isikoff, *supra* note 277.

302. *See supra* note 218 and accompanying text.

they do not know exists? One might argue that the terrorists know that, say, the NSA is doing *something* even if they do not know exactly what, and that in fact this uncertainty keeps them on their toes. That argument militates for keeping actual NSA surveillance to a minimum, however—both uncertainty for terrorists and constitutional values could better be maintained as long as "something" is enough. Furthermore, when it comes to maintaining secrecy, more targeted surveillance is less likely to motivate whistleblowers like Edward Snowden to reveal the nature of programs because of reduced concerns about the illegality and/or unconstitutionality of these measures. While genuine deterrence could increase individual choices if lives are safeguarded in the process, there is little evidence that this is currently taking place.

D. Possible Future Solutions

1. The TSA

Reformation of the TSA is of great importance. One solution is for the legislature either to privatize the TSA,[303] or to simply return to having private security at every airport and dissolve the TSA as an organization. Especially in large cities with multiple airports, this would allow individuals to choose which security agency to trust, which includes the ability to choose airports that provide greater privacy to travelers. To increase choice and, thus, increase the benefit to the average traveler, each airport should be able to create protocols that work best for that airport. While some may argue that different airports implementing different security procedures would cause chaos in the system, we should keep in mind that, even under government control, airport security can differ vastly from one airport to another. Case in point, Ms. Petosky stated in her tweets that she had never been treated the way she was treated at Orlando before.[304] It seems that it may be a problem with the transgender community or others, to be treated differently at different airports. To ensure a base level of safety, the FAA could promulgate minimum requirements for any airport security program, though the risk would be that these requirements would eventually spiral out of control again and reduce choice by too significant an extent.

303. *See* Chris Edwards, *Privatizing the Transportation Security Administration*, CATO INST. POL'Y ANALYSIS, no. 742, 2013, at 1.

304. *See* Ennis, *supra* note 206.

Private companies would potentially have another advantage over the TSA. In many cases, the government is immune from suit.[305] A private company, however, could be sued if something happens on the plane that the screening agent should have caught. On that note, there is an argument to be made that the justice system may be a better choice for reform as opposed to the legislature.[306] Many state judges are appointed or elected for a number of years and federal judges are appointed for life. The judiciary as an institution is thus less likely to feel pressure from its constituents to decide a certain way (even if in some states the judges may feel this pressure), and thus are able to truly weigh the pros and cons of the system when attempting to shape it in a way that is fair for everyone.

One way for the courts to mold the TSA and its behavior is through stricter enforcement of Fourth Amendment violations. This could include expanding what falls under the purview of the Fourth Amendment, as well as increasing the amount awarded for civil liberties violations, such as through more frequent punitive damages.[307] This could also be effective for the intelligence agencies, as it would at least force them to weigh the possibility of getting caught and the cost to the agency if caught against the value of what it is doing. It would further empower the average person, as she would see more value in bringing such suits before the court.

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305. Expanding the liability of the government is another option worth exploring, even though it creates a burden on individuals to have to sue—due to the costs in money and time as well as amount of anxiety incurred—and may not present some of the advantages that privatization does.

306. *See generally* Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1031 (1996) ("In many instances . . . a common law judge conscious of his role in an ongoing system . . . may be better at finding and articulating any latent consensus that exists than would a legislature driven by majority rule."); Todd Zywicki & Edward Peter Stringham, *Common Law and Economic Efficiency*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (Francesco Parisi & Richard Posner eds., 2010).

307. For a summary of a recent lawsuit in this context, albeit one focused on seeking an injunction, see Lyle Denniston, *New Appeal Coming on NSA Phone Spying*, SCOTUSBLOG (Nov. 20, 2015, 8:37 AM), http://www.scotusblog.com/2015/11/new-appeal-coming-on-nsa-phone-spying (discussing Larry E. Klayman's litigation against the NSA based on Fourth Amendment claims). *See generally* David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1 (1990).

2. *The Intelligence Community*

As outlined earlier, there are really no people who "have nothing to hide."[308] The fact that we all have something that we do not wish to become public, coupled with the unprecedented amount of information that the government has collected, can lead to dire consequences.[309] Since control of the data is out of the hands of the common person, it could theoretically be stored for years and later used to pressure and control anyone.

Due to these dire consequences, and the many constitutional issues involved,[310] it makes sense to place greater constraints on the intelligence community. First, any requested searches or wiretaps should undergo full judicial scrutiny. The government should not be allowed simply to issue a memo stating that it needs to place a person under surveillance to begin monitoring that person, as it did with mail covers.[311] In general, an agency should be required to show that any detriment to the person's choices comes with a corresponding increase in security.[312] If this framework is applied to the current mass data collection efforts of the NSA and FBI, then the agency will fail in meeting the test. These efforts, much like the TSA's, have not been verifiably linked to actually stopping a terrorist event.[313]

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308. *See supra* note 294 and accompanying text.

309. *See* Ewen MacAskill, *The NSA's Bulk Metadata Collection Authority Just Expired. What Now?*, GUARDIAN (Nov. 28, 2015), http://www.theguardian.com/us-news/2015/nov/28/nsa-bulk-metadata-collection-expires-usa-freedom-act. Consider how much damage can be done with a relatively small amount of information that a person does not wish to have made public. An example of this type of damage is "revenge porn" cases, where intimate photos are shared without the subject's permission. *See, e.g.*, Gabrielle Fonrogue, *Revenge Porn Nearly Ruined My Life*, N.Y. POST (Nov. 16, 2017), https://nypost.com/2017/11/16/revenge-porn-nearly-ruined-my-life/; Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016). It is not difficult, particularly in today's political climate, also to imagine the information that could be collected used to silence dissidents and opponents sooner or later. Ultimately, as Daniel Solove has argued, everyone has information that he or she does not wish the government to possess. *See* Solove, *supra* note 290, at 750.

310. *See generally* Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone*, 41 PEPP. L. REV. 1, 60 (2013); Blake Covington Norvell, *The Constitution and the NSA Warrantless Wiretapping Program: A Fourth Amendment Violation*, 11 YALE J.L. & TECH. 228, 260 (2009).

311. *See* notes 263–265 and accompanying text. At a minimum, the government should be required to prove that the proposed search would meet the Fourth Amendment requirements. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (discussing the constitutionality of police sobriety checkpoints).

312. *See generally* Manta & Robertson, *supra* note 12.

313. "We have not identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation." PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF

The legislature could also step in, as it did with the Church Committee in the 1970s. However, this would be somewhat more problematic today, as virtually no representative wants to be the first to suggest that we scale back efforts to prevent terrorism after 9/11. It is considered political suicide if, after a legislator proposes scaling back the intelligence community, another terrorist attack occurs. Alternatively, the legislature could hold public hearings, allowing the people to hear the statistics and testimony so that it can understand the motivations behind the legislature's actions.

CONCLUSION

The protection of choice should be of paramount importance to the government, which includes the safeguarding of privacy and many other types of liberties. This requires the rigorous re-examination of current national security measures and the dismantling of a number of them. As this Article shows, the NSA and TSA deserve particular attention in this context. By focusing the conversation away from incommensurable values, the goal of achieving maximal freedom comes into greater reach. Especially in today's contentious political climate, encouraging lawmakers and judges to engage in weighing the costs and benefits of security programs along the axis of choice prevents the kind of rhetorical obfuscation that can otherwise occur. National security measures must ensure that the nation—in our case, the (hopefully not only so-called)[314] land of the free and home of the brave—remains one worth securing.

THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2014).

314. For background on the tongue-in-cheek nature of this phrasing, see Amy B. Wang, *Trump Lashes Out at "So-Called Judge" Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/.