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# Walking the Tightrope of Israeli Privacy Law and National Security

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## Walking the Tightrope of Israeli Privacy Law and National Security

There is a delicate balance between a nation's Privacy Rights and National Security. Israel has been criticized that its Privacy Laws lag behind the world and need to be updated<sup>1</sup>. This report discusses how the Israeli Law system is set up with a focus on its privacy Laws and analyzes the main factors needed to be considered when judging the appropriate level of Privacy Rights: the modernization of technology and the proliferation of terrorism. Only then will we be able to judge if the claims against Israeli Privacy laws are accurate.

On May 14, 1948 the State of Israel was established.<sup>2</sup> The main catalyst for the foundation of Israel was the persecution of Jews in Nazi Germany during WWII.<sup>3</sup> After the world witnessed the atrocities committed on the Jewish Nation in Nazi Germany the world recognized that Jews needed their own Homeland.<sup>4</sup>

According to a Democracy Index 2016 study<sup>5</sup>, Israel is the only democracy in the Middle East. Democracy has many different components but one aspect that people generally associate with a democracy is a constitution.<sup>6</sup> People living in the United States are accustomed to a government with the rights of its citizens written in a constitution. A constitution is defined as, "the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it."<sup>7</sup> Part of the everyday

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<sup>1</sup> <https://www.timesofisrael.com/israel-lags-behind-world-on-cyber-rules-privacy-lawyers-say/>

<sup>2</sup> See <https://history.state.gov/milestones/1945-1952/creation-israel>

<sup>3</sup> <http://www.history.ucsb.edu/projects/holocaust/Research/Proseminar/tomerkleinman.htm>

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

<sup>5</sup> See <https://www.eiu.com/democracy2016>

<sup>6</sup> <http://www.civiced.org/resources/publications/resource-materials/390-constitutional-democracy>

<sup>7</sup> See [www.merriam-webster.com/dictionary/constitution](http://www.merriam-webster.com/dictionary/constitution)

fabric of American society is the idea that it is a “free country”. One can point at the black and white document of the constitution as the basis for ones rights.

The State of Israel on the other hand, has no formal constitution.<sup>8</sup> This is despite the fact that Israel’s Declaration of Independence states, “by October 1, 1948, a formal written constitution is to be formed by the elected Constituent Assembly<sup>9</sup>.”

There are many reasons attributed to why Israel hasn’t kept its commitment to create a constitution. When it was established, Israel was still fighting wars and was focused on the practical matter of keeping the country secure.<sup>10</sup> In the following years Israel tried to create a written constitution but it was thwarted for several reasons, the main one being that David Ben Gurion, whose influence was strong amongst the members of the assembly, was vehemently against it.<sup>11</sup>

There is an anecdote<sup>12</sup> about the meeting during which David Ben Gurion convinced his peers to resist creating a constitution. Towards the end of the meeting, there was an exchange between Ben Gurion and Golda Meir. Meir, although she agreed with Ben Gurion arguments, remarked, ‘in principle I am in favor of having a constitution’, to which Ben Gurion responded, “That’s because you’re an American”. Meir then responded, “Yes that may be”. (As mentioned earlier the idea of a constitution is cemented deeply in the psyche of Americans.)<sup>13</sup>

Ben Gurion opposed a constitution in Israel for three reasons. First, he questioned the premise of having a set of rules with more legal strength than others. What is special about the

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<sup>8</sup> <http://www.jcpa.org/dje/articles/const-intro-93.htm>

<sup>9</sup> See [http://knnesset.gov.il/docs/eng/megilat\\_eng.htm](http://knnesset.gov.il/docs/eng/megilat_eng.htm)

<sup>10</sup> <http://israelsdocuments.blogspot.com.au/2013/04/who-needs-constitution.html>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

group of people creating these laws that should require them to carry more weight.? This argument is like the argument between Constitutional fundamentalists<sup>14</sup> and those that believe the constitution is a living, breathing document<sup>15</sup>.

Another reason Ben Gurion fought against having a constitution was that there were major disagreements between the religious and secular parties. <sup>16</sup>Ben Gurion believed that taking sides between them creating official state laws would cause disunity and polarize the country. <sup>17</sup>

Ben Gurion's last reason was stated in a speech to the Knesset. "The coming few years are the most important in our history. If anyone thinks that declaring independence or winning the war (of 1947-1949) were what was needed to found the state, they're wrong. The work is all ahead of us."<sup>18</sup> By this he meant that before a country can set up a constitution it must first ensure the country is firmly established as a nation.

Even though Israel never created a constitution, it had mechanisms in place that functioned as a constitution. <sup>19</sup>On February 16, 1949, the Constituent Assembly adopted the Transition Law, by which it renamed itself the "First Knesset."<sup>20</sup> Because the Constituent Assembly didn't fulfill its own responsibility of creating a constitution for Israel, the Knesset became the heir of the Assembly for the purpose of fulfilling this function. <sup>21</sup>

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<sup>14</sup> <http://tenthamentcenter.com/2015/07/19/constitution-101-living-and-breathing-is-the-same-as-dead/>

<sup>15</sup> <https://www.law.uchicago.edu/news/living-constitution>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> <http://israelsdocuments.blogspot.com.au/2013/04/who-needs-constitution.html>

<sup>19</sup> <http://www.jcpa.org/dje/articles/const-intro-93.htm>

<sup>20</sup> <https://www.jewishvirtuallibrary.org/the-constituent-assembly>

<sup>21</sup> *Id.*

On June 13, 1950, the Knesset decided to adopt a resolution known as "the Harari proposal<sup>22</sup>". According to this proposal "the First Knesset assigns to the Constitution, Law and Justice Committee, the preparation of a proposed constitution for the state. The constitution will be made up of chapters, each of which will constitute a separate basic law. After all the basic laws will be enacted, they will constitute together, with an appropriate introduction and several general rulings, the constitution of the State of Israel."<sup>23</sup>

Even though the Harari proposal called for a committee to create a constitution, what resulted from the proposal was an ongoing, evolving system at protecting the rights of Israeli citizens.<sup>24</sup> Instead of a committee at one time in history creating a list of rules and calling it a constitution, laws would be created at separate times. The totality of all these laws passed through the years would be considered the "Constitution." It is important to note that the Knesset was able to pass laws on any subject and in any matter. With the condition that the proposed law did not contradict an existing law and the legislative process is carried out as required by the law.<sup>25</sup>

Although Israel has never fulfilled its commitment to create an official written constitution, it has a set of laws called, the Basic Laws of Israel<sup>26</sup>. The Basic Laws consist of 11 Laws passed from 1958 until most recently in 2001.<sup>27</sup> Israel's Basic Laws deal with the basic and fundamental components of the Israeli political and societal landscape.

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<sup>22</sup> <https://israeled.org/harari-proposal-constitution/>

<sup>23</sup> [https://knesset.gov.il/description/eng/eng\\_mimshal\\_hoka.htm#4](https://knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4)

<sup>24</sup> <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1328&context=pilr>

<sup>25</sup> *Id.*

<sup>26</sup> [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod2.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm)

<sup>27</sup> *Id.*

For many years there was a debate as to the legal status of the above mentioned “Basic Laws”. Some believed<sup>28</sup> they are just a set of laws like any other laws and are bound to the regular legal process. Hence, they can get overturned by the Knesset and need to be reconciled with other laws. The other view is that Basic Laws have normative supremacy over "regular" laws.<sup>29</sup> (These arguments echo those of David Ben Gurion’s arguments against an Israeli constitution mentioned earlier.)

The question of the status of the Basic Laws was finally settled in 1993 by the Supreme Court of Israel. The court concluded, “A law which contradicts the provisions of a Basic Law may be invalidated as unconstitutional.”<sup>30</sup>

The Basic Laws of Israel have two categories of laws: governmental laws and individual rights laws.<sup>31</sup> From 1958 until 1988 the Knesset enacted nine Basic Laws that pertained to the State of Israel.<sup>32</sup> These are a broad set of laws dealing with and defining the various roles of the different components of government such as the Knesset, the President and the Army. In 1992 the Knesset passed the first 2 Basic Laws that pertained to *human rights and liberty*.<sup>33</sup>

It is a bit ironic that Israel had no Basic Laws governing human rights until 1992. One would think that a country such as Israel, whose entire genesis was due to the genocide of private citizens, would ensure the utmost protection of its citizens. Yet, Israel waited over 40 years to enact Basic Laws protecting its citizens rights. The answer to this apparent contradiction is that

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<sup>28</sup> [http://duncankennedy.net/documents/Is-Pal/First-Syllabus/Suzie-Navot\\_Constitutional-Law-of-Israel.pdf](http://duncankennedy.net/documents/Is-Pal/First-Syllabus/Suzie-Navot_Constitutional-Law-of-Israel.pdf) page 36-37

<sup>29</sup> [CA 6821/93 Bank Mizrahi v. Migdal Cooperative Village](#)

<sup>30</sup> *Ibid*

<sup>31</sup> [http://knesset.gov.il/description/eng/eng\\_mimshal\\_yesod.htm](http://knesset.gov.il/description/eng/eng_mimshal_yesod.htm)

<sup>32</sup> *Id.*

<sup>33</sup> [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm)

even though there were no *official* Basic Laws protecting the rights of citizens until 1992, there were other mechanisms in place that ensured their protection.

From the time the State of Israel was formed until 1984 the Supreme Court of Israel unofficially functioned as the medium to enforce human right protections.<sup>34</sup> The Supreme Court decided on any human rights infringements based on its own judgements. The court passed laws based on what it believed was appropriate.

In 1984 a Basic Law was passed to enact the Judiciary was enacted and *officially* established the Supreme Court of Israel.<sup>35</sup> It established that the Supreme Court should hear appeals against judgments and other decisions of the District Courts. Secondly, Article 15(c) of “Basic law: The Judiciary” stipulates that the Supreme Court shall act as the High Court of Justice which shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.<sup>36</sup> Furthermore, Article 15(d)(2) of this law defines the formal powers of the High Court of Justice “to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting.”<sup>37</sup> Thus, although technically there weren’t any Basic Law laws specifically protecting the rights of Israeli citizens until 1992, through the Basic Law on the Judiciary the rights of individuals were protected by the Supreme

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<sup>34</sup> <https://www.jewishvirtuallibrary.org/freedom-of-religion-in-israel>

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<http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20yea.aspx>

<sup>36</sup> <http://knesset.gov.il/laws/special/eng/BasicLawTheJudiciary.pdf>

[https://www.knesset.gov.il/laws/special/eng/basic8\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm)

<sup>37</sup> *Id.*

Court. The decisions of the Supreme Court became legal precedents that all courts had to consider thereafter when dealing with similar cases.<sup>38</sup>

As time passed, the Israeli Supreme Court developed human rights protections through these judicial precedents.<sup>39</sup> It should be noted that the Knesset passed many laws from its inception to the current day Israel that are not in the category of Basic Laws and did not form part of its eventual constitution.<sup>40</sup>

Because there were no Basic Laws concerning human rights protections, the Supreme Court gradually established these precedents as the main legal body that protected human rights until 1992.<sup>41</sup> One caveat about these protections was that laws could easily be overridden by a simple majority of the Knesset. However, all that changed when in 1992 The “Basic Law: Human Dignity and Liberty” and “The Basic Law: Freedom of Occupation” were created. Basic Law: Human Dignity included the following human rights protections: Preservation of life, body and dignity (prevention of humiliation), protection of property, protection of personal liberty, freedom to leave Israel, freedom for Israeli nationals to enter Israel, and the right and protection of privacy.<sup>42</sup>

Justice Aharon Barak, of Israel’s Supreme Court publicized his opinion that these Basic Laws amounted to a Constitutional Revolution in Israel.<sup>43</sup> The main reason why this was such a groundbreaking change was because now it essentially transformed Israel into a constitutional

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<sup>38</sup> The American Journal of Comparative Law by David M. Sassoon

<sup>39</sup> <https://www.jewishvirtuallibrary.org/israel-studies-an-anthology-human-rights-and-the-supreme-court-in-israel>

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> A Constitutional Revolution: Israel’s Basic Laws

[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4700&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4700&context=fss_papers)

democracy since it had a bill of rights and formal legal grounds for judicial review of Knesset legislation.<sup>44</sup>

Justice Barak stated “By virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status much like the situation in the United States, Canada and many other countries.”<sup>45</sup> As Barak further put it, these Basic Laws now “bind the Knesset itself and a Knesset law may no longer infringe the basic rights mentioned, unless it is enacted for a worthy purpose, even then only to the extent necessary, and it fits the values of the state of Israel as a Jewish, democratic state.”<sup>46</sup>

Now that we have established how the Israeli law system is set up, it’s worth exploring why Israel created the first Basic Laws for human rights specifically in 1992. There is not much case law surrounding 1992 that would explain the impetus for the Knesset to enact the Basic Law: Human Liberty and Dignity. So why in 1992 did Israel finally officialize human rights as a Basic Law? If we look at the historical progress of the internet and computers, I believe it can shed some light into the timing of the creation of Basic Law: Human Liberty and Dignity.

Israel is known for its prowess in the field of computers. Israel is responsible for creating such famous products as the first USB- flash drives<sup>47</sup> and the Intel 8088, the processor that was used for the first PC.<sup>48</sup> Recently, a company in Israel made headlines with the sale of the popular Map App called “Waze”. Waze was acquired by Google for a reportedly \$1.1 billion<sup>49</sup>. There are

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<sup>44</sup> <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=http://paperity.org/p/84849600/constitutional-upgrading-of-human-rights-in-israel-the-impact-on-administrative-law&httpsredir=1&article=1427&context=jcl>

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See [http://content.time.com/time/specials/packages/article/0,28804,2023689\\_2023703\\_2023613,00.html](http://content.time.com/time/specials/packages/article/0,28804,2023689_2023703_2023613,00.html)

<sup>48</sup> See <https://www.pcmec.com/article/a-cpu-history/>

<sup>49</sup> <https://techcrunch.com/2013/06/11/its-official-google-buys-waze-giving-a-social-data-boost-to-its-location-and-mapping-business/>

many other inventions that Israel is responsible for, but the purpose of showing these inventions is to show how much Israel is involved in the Tech community.

When analyzing the dates of some of the inventions and their correlations with various privacy laws one begins to see a pattern emerging. The year the Intel 8088 came out was 1979.<sup>50</sup> Two years later Israel introduced its first law regarding the right of privacy. Although this was not a Basic Law, it was the first time the Knesset enacted a written law concerning privacy rights.<sup>51</sup> The law was called the Protection of Privacy Law of 1981, and focused on the privacy of individuals in computer databases. These laws were not applicable to corporations but only individuals.<sup>52</sup> I believe that it is no co-incidence that once the first PC was in use and databases started to become ubiquitous that the Knesset felt it necessary to enact a law regarding individuals privacy rights.<sup>53</sup>

After the PC was created then came the evolution of the internet. The first web page that ever existed came about in 1991.<sup>54</sup> The evolution of the internet commenced once the world wide web protocols were finished. Israel was already aware of the need for privacy laws as evidenced by its 1981 Protection of Privacy Law. But with the advent of the internet something more powerful was now in order.

It is no surprise that once the web became prevalent amongst the general populace that the Knesset enacted its first Basic Laws covering the privacy rights of Israeli citizens. As described in the section above on the Israeli government framework, the Knesset is able to enact

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<sup>50</sup> <https://www.techopedia.com/definition/20075/intel-8088>

<sup>51</sup> [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=347462](http://www.wipo.int/wipolex/en/text.jsp?file_id=347462)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See <https://www.webpagefx.com/blog/web-design/the-history-of-the-internet-in-a-nutshell/>

Basic Laws at any time since the founders of Israel wanted its “constitution” to crystalize over time. Common sense dictates that the Knesset enacted the Basic Laws when they deemed them necessary for the continued success of the country. Hence, as Israel’s technology progressed, specifically in the computer industry with advanced, more invasive capabilities to access personal information, the Knesset wrote Legislation to protect against potential misuse of the advancing technology. Once the Knesset decided to enact Basic Laws covering privacy rights it went further and created a more encompassing Basic Law covering all sorts of individual rights and liberties.<sup>55</sup>

Now that we have explained the timeline and correlation between technological advancement and the passing of Israeli privacy laws, I would like to focus on the nature of Israeli Privacy laws, specifically, Israel’s supposedly lenient Privacy Right laws when compared to other democratic countries in the world.

One example of Israel’s supposedly lenient Privacy laws is the Criminal Procedure Act (Powers of Enforcement – Communications Data), 5768-2007.<sup>56</sup> The Criminal Procedure Act was enacted in 2007 and came into effect on June 27, 2008.<sup>57</sup> This legislation enabled the Israeli investigatory authorities to obtain communications data from all communications companies such as the various cellular or landline telephone companies and Internet providers<sup>58</sup>. This law also provided that the authorities were able to access this data without a judicial order.<sup>59</sup> Such broad invasive powers given to government officials would never occur in the United States.

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<sup>55</sup> <https://www.jewishvirtuallibrary.org/israel-studies-an-anthology-human-rights-and-the-supreme-court-in-israel>

<sup>56</sup> Criminal Procedure

<http://versa.cardozo.yu.edu/topics/criminal-procedure>

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Jonathan Klinger Information and Technology Lawyer -Bar Ilan Univeristy

<http://room404.net/?p=60179>

One Israeli internet privacy law expert went so far as to publish that “the powers of the American agencies are a joke.”<sup>60</sup>

We will analyze the Criminal Procedure Act in depth a bit further, but as an introduction to the parameters of Israeli privacy rights one must visit the timeless conflict between Privacy rights and National Security.

One of the most effective ways to prevent security risks and crime is by spying on potential perpetrators.<sup>61</sup> Surveillance allows law enforcement authorities to anticipate a potential criminal’s next move.<sup>62</sup> Snooping on criminals also helps gather the information needed to make a case against them. Obviously, spying on someone without their consent is an infringement of basic privacy rights.<sup>63</sup> However, most people agree that under certain circumstances eavesdropping by law enforcement should be permitted.<sup>64</sup> On the other hand, giving up privacy rights, specifically with today’s all-invasive technology, generally receives a negative reaction. George Orwell’s dystopian novel, “1984”, with all of its invasive “Big Brother” references, are often used as an analogy.<sup>65</sup>

If one inspects history one can see that giving up some privacy rights to improve national security isn’t new. Alexander Hamilton in the Federalist Papers said, “Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the

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<sup>60</sup> *Id.*

<sup>61</sup> <https://en.wikipedia.org/wiki/Espionage>

<sup>62</sup> Policing, surveillance and law in a pre-crime society: Understanding the consequences of technology based strategies by: Rosamunde Van Brakel

<sup>63</sup> <https://www.aclu.org/other/nsa-spying-americans-illegal>

<sup>64</sup> *Id.*

<sup>65</sup> <https://www.nytimes.com/2017/01/25/books/1984-george-orwell-donald-trump.html>

most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civilian and political rights. To be safer, they at length become willing to run the risk of being less free.”<sup>66</sup>

The advancement of the capabilities of technology to snoop on people’s private lives created a new challenge. Many previous privacy laws require interpretation and modernization to be applied to modern technology.<sup>67</sup> One example was a case brought in front of the U.S. Supreme Court in January 2012 as to whether attaching a GPS to a person’s vehicle was considered a search.<sup>68</sup> In addition, tracking someone with a GPS would be prohibited by the Fourth Amendment of the U.S. Constitution.<sup>69</sup> The decision is mentioned by 9th president of the Supreme Court of Israel, Dorit Beinisch. Beinisch said, “The United States Court unanimously held that the search violated the Constitution and that an appropriate judicial order was therefore necessary. Nevertheless, the Justices were split on the proper criterion for the application of the Fourth Amendment – whether it should be in the context of the doctrine of trespass under common law (the majority opinion) or in the scope of the criterion adopted in *Katz v. United States*, 389 U.S. 347, namely the “reasonable expectation of privacy” (the minority). The ability of different criteria to adapt to the changing technological environment that makes the physical dimension underlying the search less relevant given the technological surveillance capabilities that the authorities currently possess was, among other things fundamental to the difference in opinions between Justices.”<sup>70</sup>

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<sup>66</sup> THE FEDERALIST No. 8, at 67 (Alexander Hamilton) (1961).

<sup>67</sup> <https://law.stanford.edu/stanford-lawyer/articles/civil-liberties-and-law-in-the-era-of-surveillance/>

<sup>68</sup> <https://www.theatlantic.com/technology/archive/2015/03/supreme-court-if-youre-being-gps-tracked-youre-being-searched/389114/>

<sup>69</sup> *Id.*

<sup>70</sup> <http://versa.cardozo.yu.edu/topics/criminal-procedure>

Another example of the modernization of technology affecting privacy law is the controversial debate about the use of “Roving Surveillance” as part of a FISA warrant.<sup>71</sup> A FISA warrant is a warrant to wiretap someone suspected of spying with or for a foreign government.<sup>72</sup> It is issued by the Foreign Intelligence Surveillance Court -- or FISA Court.<sup>73</sup> Roving Surveillance is surveillance that is not limited to one specific place or medium of communication.<sup>74</sup> Until 1986, a FISA warrant required one to specify the exact location of the communication device.<sup>75</sup> In 1986, with the passing of 18 U.S. Code § 2518, the parameters of surveillance were expanded.<sup>76</sup> As it states “where the Government can demonstrate in advance to the FISA Court that the target's actions may have the effect of thwarting surveillance, such as by changing providers, FISA’s roving surveillance provision allows the FISA Court to issue a generic secondary order that we can serve on the new provider to commence surveillance without first going back to Court.”<sup>77</sup>

Paul Rosenzweig explained the need of modernizing the FISA warrant laws. “Roving wiretap authority is a response to changing technology.<sup>78</sup> Our original electronic surveillance laws stem from a time when phones were fixed in one place and linked to a network by a hard copper wire.<sup>79</sup> Today, when phones can cross state and international boundaries at the speed of light and where they are disconnected from any physical network, that model is antiquated.”<sup>80</sup>

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<sup>71</sup> <https://apps.americanbar.org/natsecurity/patriotdebates/section-206>

<sup>72</sup> <https://www.ajc.com/news/national/what-fisa-warrant/WqP428Eg04nHe933u1GazO/>

<sup>73</sup> *Id.*

<sup>74</sup> <https://apps.americanbar.org/natsecurity/patriotdebates/section-206>

<sup>75</sup> <https://fas.org/irp/crs/RL30465.pdf>

<sup>76</sup> *Id.*

<sup>77</sup> <https://www.justice.gov/nsd/justice-news-0>

<sup>78</sup> <https://apps.americanbar.org/natsecurity/patriotdebates/section-206>

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Rosenzweig continued, “The Fourth Amendment requires that search warrants specify with particularity the place to be searched. This is intended to prevent the accidental or abusive search of an innocent person with, for example, a warrant obtained to search the home of another. As originally applied to electronic surveillance, the particularity requirement meant that law enforcement officers had to specify the particular phone they were intercepting.”<sup>81</sup>

“In response to these changes in technology, in 1986 Congress authorized a relaxation of the particularity requirement for the investigation of drug offenses. Under the modified law, the authority to intercept an individual's electronic communication was tied only to the individual who was the suspect of criminal activity (and who was attempting to 'thwart' surveillance by, for example, changing phones or locations frequently) rather than to a communications device. In 1998, Congress altered the standards somewhat to permit use of a roving wiretap when the target's conduct in changing telephones or facilities had the effect of thwarting the surveillance.”<sup>82</sup>

The extension of power of surveillance of the above-mentioned 18 U.S. Code § 2518 has been subject to several challenges claiming that it violates the Fourth Amendment’s “particularity” requirement. All the challenges to 18 U.S. Code § 2518 have been struck down.<sup>83</sup>

In addition to advances in technology, the second factor that caused worldwide changes in privacy laws were the ever-increasing global terrorist attacks.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., *United States v. Jackson*, 207 F.3d 910, 914 (7th Cir. 2000), vacated on other grounds, 531 U.S. 953 (2000); *United States v. Gaytan*, 74 F.3d 545, 553 (5th Cir. 1996); *United States v. Bianco*, 998 F.2d 1112, 1122-1123 (2d Cir. 1993);

In the aftermath of September 11, in an effort to improve the government's ability to combat terrorism, the USA PATRIOT Act was passed. Many of the parameters dealing with Roving Surveillance that were enacted in the USA PATRIOT Act were modeled after the above-mentioned 18 U.S. Code § 2518.<sup>84</sup>

After the Boston Marathon attack there was a similar reaction, this time regarding a different mode of surveillance; street surveillance through video cameras. According to a New York Times/ CBS Poll, "Americans overwhelmingly favor installing surveillance cameras in public places, judging the infringement on their privacy as an acceptable trade off for greater security from terrorist attacks."<sup>85</sup>

I believe there is an underlying reason why the above-mentioned laws were passed, upheld and accepted by the U.S. public. The reason is that U.S. Citizens experienced terrorism firsthand. i.e. they saw the grisly images of bodies strewn on the floor along with the look of terror in the eyes of the victims and their families. When a nation experiences the pain and horror of terrorism on its own shore, its collective consciousnesses changes. The society becomes more open to some limitations on its privacy rights to combat terrorism.

Europe's perspective on privacy rights has also changed because of terrorist attacks at home.<sup>86</sup> An article in the Economist written a few weeks after the November 2015 Paris attacks concludes, "After the Paris attacks, democratic societies can reasonably ask whether the right to remain anonymous, be it online or travelling around Europe, should remain near-absolute. As long as there is proper democratic oversight of those handling the data, Europeans will have to

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<sup>84</sup> <https://www.justice.gov/nsd/justice-news-0>

<sup>85</sup> See <https://www.nytimes.com/2013/05/01/us/poll-finds-strong-acceptance-for-public-surveillance.html>

<sup>86</sup> <https://belconlawblog.com/2016/06/27/two-faces-counter-terrorism-measures/>

give up some anonymity to preserve the liberty and security that matter. In an open internet, the security of personal data and identities should be preserved with strong and ubiquitous encryption. In an open Europe, personal safety is best safeguarded by police and intelligence services sharing information as seamlessly as do the terrorists.”<sup>87</sup>

There are many different methods that governments use to monitor communications and personal information, but there are also methods to prevent governmental spying. One of the main ways to prevent spying is called encryption. Encryption is the process of encoding data, making it unintelligible and scrambled. In many cases, encrypted data is also paired with an encryption key, and only those that possess the key can access the data<sup>88</sup>. Encryption is a very effective method of protecting data to the point that even the NSA has trouble breaking through some encryption systems.<sup>89</sup>

Encryption is another piece of the privacy rights/ National Security puzzle. This is because companies feel responsible to their customers to protect data used on their platforms.<sup>90</sup> This is a hard point to argue against especially as security breaches become more frequent.<sup>91</sup> On the other hand, these companies are creating a means for criminals to remain untracked to conduct illegal activities.<sup>92</sup>

One example that crystalizes the above-mentioned debate followed the terrorist attack in San Bernardino on Dec. 2, 2015.<sup>93</sup> The FBI found a work-issued phone belonging to shooter

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<sup>87</sup> <https://www.economist.com/news/briefing/21679266-how-balance-security-privacy-after-paris-attacks-terrorist-data>

<sup>88</sup> <https://www.techworld.com/security/what-is-encryption-3659671/>

<sup>89</sup> *Id.*

<sup>90</sup> <https://www.inc.com/rahul-varshneya/how-companies-can-protect-their-customers-and-themselves-today.html>

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> <https://www.nytimes.com/2015/12/03/us/san-bernardino-shooting.html>

Syed Farook that was set up to destroy all of its data after ten failed password attempts.<sup>94</sup> The FBI issued a court order to Apple demanding that it write software as a work-around the automatic data destruction system built into the phone.<sup>95</sup> The FBI claimed that increasingly secure encryption was making devices "warrant-proof". The FBI director at the time, James Comey, said "We're moving to a place where there are warrant-proof places in our life ... That's a world we've never lived in before in the United States."<sup>96</sup>

Apples responded to the FBI's accusations with a statement by Apple's CEO Tim Cook, "The United States government has demanded that Apple take an unprecedented step which threatens the security of our customers. We oppose this order, which has implications far beyond the legal case at hand. Smartphones, led by iPhone, have become an essential part of our lives. People use them to store an incredible amount of personal information, from our private conversations to our photos, our music, our notes, our calendars and contacts, our financial information and health data, even where we have been and where we are going. All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission. Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data. Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us."<sup>97</sup>

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<sup>94</sup> <http://www.latimes.com/politics/la-na-pol-fbi-iphone-san-bernardino-20180327-story.html>

<sup>95</sup> *Id.*

<sup>96</sup> <https://www.technologyreview.com/s/601044/the-feds-are-wrong-to-warn-of-warrant-proof-phones/>

<sup>97</sup> <https://www.zdnet.com/article/apples-tim-cook-well-fight-iphone-backdoor-demands-from-fbi/>

Apple's defiance against the FBI caused a public debate about privacy rights and national security. In the end the FBI found an outside 3<sup>rd</sup> party to break into the phone without eliminating the coveted data.<sup>98</sup>

Even though the San Bernardino case ended without judicial intervention, the controversy continued.<sup>99</sup> Once again, the balance between Privacy rights and National security was the basis of it all.<sup>100</sup>(On a side note, interestingly sources say that the third party the FBI used to hack the phone was the Israeli company Celebrate.)<sup>101</sup>

When one analyzes how the two factors: advancement of technology along with the proliferation of terrorism can affect and limit privacy laws globally, one can understand the basis for the seemingly lenient Israel privacy laws. Ever since Israel was created, the Palestinian people, in addition to Arab nations surrounding Israel, have been calling for the destruction of Israel.<sup>102</sup> A recent study conducted by Eldad Pardo suggests that the Palestinian curriculum teaches students to be martyrs, demonizes and denies the existence of Israel, and focuses on a return to an exclusively Palestinian homeland.<sup>103</sup> It is no wonder that generation after generation, the Palestinian people seek the destruction of Israel at all costs.<sup>104</sup>

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<sup>98</sup> [https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5\\_story.html?noredirect=on&utm\\_term=.3548e75d8b84](https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html?noredirect=on&utm_term=.3548e75d8b84)

<sup>99</sup> <https://www.cnet.com/news/apple-vs-fbi-one-year-later-still-stuck-in-limbo/>

<sup>100</sup> *Id.*

<sup>101</sup> <https://www.timesofisrael.com/fbi-contract-a-strong-sign-fbi-used-israeli-tech-to-crack-san-bernardino-iphone/>

And <http://www.chicagotribune.com/bluesky/technology/ct-fbi-iphone-hack-cellebrite-20160330-story.html>

<sup>102</sup> <http://palwatch.org/main.aspx?fi=449>

<sup>103</sup> See <http://www.impact-se.org/wp-content/uploads/PA-Curriculum-2017-Revised.pdf>

<sup>104</sup> *Id.*

Although terrorism exists across the globe, the reason that Israel grapples with its own citizens' human rights issues more than other democratic countries is because Israel's enemy lives within its boundary. Of course, there are many home-grown terrorists in the United States, but Israel is dealing with an entire people within its boundaries seeking its destruction. Never once has there been a terrorist attack by an Israeli on Israeli citizens.<sup>105</sup> The thousands of terrorist attacks that have occurred in Israel all come from either the Palestinian or Hamas groups.<sup>106</sup>

I don't want to minimize the threat that the United States suffers daily. There have been countless terror attacks in the United States over the past 10 years. One of the most horrific attacks to have ever taken place occurred on American soil (September 11 World Trade Center).<sup>107</sup> However, the attacks that have occurred in the United States recently, such as the Florida Parkland shooting and the Las Vegas shooter, to name a few, were "lone wolf" attacks, meaning that they weren't associated with any group or set of beliefs.<sup>108</sup> Each attacker had his own uniquely distorted motive to commit the attack.<sup>109</sup> These forms of terrorist activities are extremely difficult to prevent. The United States has not figured out a way to prevent such attacks from occurring.<sup>110</sup>

Israel has been experiencing similar attacks for decades. But, as previously mentioned, the terrorist acts that occur in Israel are from one religious group-muslims, either sponsored by the Palestinians and/or Hamas.<sup>111</sup> When you're able to single out a group and see on a consistent basis that this group is producing one terrorist after another, you come to the logical conclusion

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<sup>105</sup> <https://www.myjewishlearning.com/article/terrorism-in-israel-questions-and-answers/>

<sup>106</sup> *Id.*

<sup>107</sup> <https://www.britannica.com/event/September-11-attacks>

<sup>108</sup> <https://qz.com/1092042/las-vegas-shooting-terrorist-vs-lone-wolf/>

<sup>109</sup> *Id.*

<sup>110</sup> <https://www.lawfareblog.com/can-lone-wolves-be-stopped>

<sup>111</sup> <https://www.myjewishlearning.com/article/terrorism-in-israel-questions-and-answers/>

that this group need to be highly scrutinized and monitored. (Perhaps if the past ten lone-wolf shooting attacks that have occurred in the United States came from the same religious or radical group living in the United States, the government would have taken unforeseen security measures.)

Another reason why Israel has privacy concerns is that it has always been in the forefront of technological progress.<sup>112</sup> Hence, Israel has endless capabilities to invade into its citizens' private lives. An example of Israel's advancement in technology which can invade private lives was revealed in an article published on June 6, 2013 in The Guardian.<sup>113</sup> It claimed that the National Security Agency of the United States government obtained direct access to the systems of Google, Facebook, Apple and other US internet giants, according to a top-secret document obtained by the Guardian.<sup>114</sup> Tabled the NSA PRISM program, it began back in 2007 in the wake of the passage of the Protect America Act under the Bush Administration.<sup>115</sup> Several reliable sources claim that Israeli tech companies were responsible for its creation. According to Business Insider, the source of the technology is Israeli - Verint and Naros.<sup>116</sup>

The article raised concerns of many high-ranking officials in the U.S government, but according to James Clapper, US Director of National Intelligence, the PRISM program is not aimed at Americans, but against foreigners, and only to prevent terror attacks. Further, the article posted in The Guardian stated unequivocally "A senior administration official said in a statement: "The Guardian and Washington Post articles refer to collections of communications

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<sup>112</sup> <http://nocamels.com/2018/05/israel-tech-mobility-trends/>

<sup>113</sup> See <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>

<sup>114</sup> *Id.*

<sup>115</sup> See [https://www.washingtonpost.com/news/wonk/wp/2013/06/06/how-congress-unknowingly-legalized-prism-in-2007/?utm\\_term=.c9de7cba55fb](https://www.washingtonpost.com/news/wonk/wp/2013/06/06/how-congress-unknowingly-legalized-prism-in-2007/?utm_term=.c9de7cba55fb)

<sup>116</sup> <http://www.businessinsider.com/israelis-bugged-the-us-for-the-nsa-2013-6>

pursuant to Section 702 of the Foreign Intelligence Surveillance Act.<sup>117</sup> This law does not allow the targeting of any US citizen or of any person located within the United States.” Israel on the other hand does not have these restrictions.<sup>118</sup>

Israel, which has been under constant onslaught attacks from within its own borders has been forced to take precautionary security measures. The fact that Israel has the means to protect itself from the enemy within its boundaries with its advanced technology, allows it to be one of the leaders in preventing terrorist attacks. Israel has been called upon<sup>119</sup> and has helped many countries in the world combat terrorism<sup>120</sup>.

Even with Israel’s privacy right “leniencies”, Israel doesn’t have free reign to enact invasive privacy laws without opposition. As demonstrated above, there are Basic Laws and standard Knesset Legislation that govern privacy rights. Currently, the two controlling enactments that govern Israeli governmental actions concerning violations of privacy rights are the Liberty and the Protection of Privacy Law<sup>121</sup>(1981), and Basic Law: Human Dignity (1992). The Protection of Privacy which was mainly concerned with data protection is not a Basic Law, while Basic Law: Human Dignity (1992) is a basic law.

The law which most of the debate is dependent on is Basic Law: Human Dignity. Section 7(a) of this law states: “all persons have the right to privacy and intimacy.” Section (b) states that “there shall be no entry into the private premises of a person who has not consented

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

<sup>118</sup> *Id.*

<sup>119</sup> <http://www1.cbn.com/cbnnews/israel/2017/november/israeli-counter-terrorism-expert-says-awareness-is-key-to-preventing-attacks>

<sup>120</sup> <https://www.telegraph.co.uk/news/2018/01/09/netanyahu-israel-helped-stop-terror-attacks-planes-europe/>

<sup>121</sup> [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=347462](http://www.wipo.int/wipolex/en/text.jsp?file_id=347462)

thereto.” And section (c) states that “no search shall be conducted on the private premises of a person, nor in the body or personal effects.”

In 2012, The Association for Civil Rights sued the Israeli police over the constitutionality of some arrangements included in the Criminal Procedure Act (Powers of Enforcement – Communications Data), 5768-2007.<sup>122</sup> The petitioners concentrated their constitutional arguments around the three main aspects of the Act: the ability to obtain a judicial order under section 3; the ability to obtain an administrative order without a court procedure under section 4; and the establishment of a database run by the investigatory authorities under sections 6 and 7.<sup>123</sup> We will discuss parts of the first two arguments brought by the Association for Civil Rights.

The Association for Civil Rights argued that the language in section 3 which allows for court issued warrants even on low level misdemeanors should be limited only to “a particular level of seriousness or where communications data is an inherent component of the crime”<sup>124</sup>. The argument was struck down by the courts, because “the system in place of requesting a court order for a warrant adequately address the Petitioners’ concern about the arrangement’s improper use.”<sup>125</sup>

The Association for Civil Rights second argument was on Section 4 of the Criminal Procedure Act. Section 4 enabled investigatory authorities access to data without a Court Order. The Law as defined by President Beinisch,<sup>126</sup> “makes it possible to obtain communications data

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<sup>122</sup> <http://versa.cardozo.yu.edu/topics/criminal-procedure>

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

from all the communications companies – the various cellular and line telephone companies and Internet providers.<sup>127</sup> The communications data covered by the Act include subscriber data, which include the subscriber’s identifying particulars, details of his means of paying for the service, the address where the telecommunications device used by him is installed and more; location data, which include pinpointing the peripheral equipment in the subscriber’s possession; and traffic data, which include details of the type of message transmitted, its duration and scope, identification details of the subscriber who is the source of the message and also the subscriber to whom it is addressed, the time of the message’s transmission and more.”<sup>128</sup>

(Interestingly, although the Criminal Procedure Act allows for all background information of the data to be analyzed; it does not allow for reading the content of the actual messages.)

Firstly, the Association for Civil Rights argued that Section 4 of the Criminal Procedure Act in general is too lax regarding privacy rights.<sup>129</sup> The Law should not allow for spying without a warrant on private citizens because it could lead to improper use.<sup>130</sup> Second, since the law doesn’t specify any exemptions it would include professionals such as journalists and lawyers.<sup>131</sup> They argued the Law greatly undermines both occupations. Journalists would have to give up potential sources without a warrant. Lawyers would have to give up information generally protected by attorney–client privilege.<sup>132</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

The State responded to the arguments of the Association for Civil Rights that the need to save lives or immediately detect offenders at the crime scene does, in urgent cases, justify forgoing judicial review normally facilitated by a court procedure. Regarding the limits of professionals, the State responded, it has Police procedures that regulate the Act's application.

<sup>133</sup>The procedures have very specific guidelines that limit the cases in which the Act can be used to gain access to info covered by professional. The State argued that these limits are sufficient to protect the rights of the professionals. <sup>134</sup>

The court found that even though the Law certainly infringed upon privacy of citizens, it didn't necessary mean that the law should be struck down. As Benisch explained, "In any event, it is clear that such infringement in itself does not render striking down the Act as unconstitutional. Investigatory powers, like penal powers, for the most part inherently infringe protected human rights. We must therefore analyze – under our accepted constitutional system – whether the infringement of the constitutional right which results from the Act's implementation meets the requirements of the Limitations Clause of Basic Law: Human Dignity and Liberty. Should it become clear that the infringement meets such requirements, there would be no constitutional reason to strike down the Act."<sup>135</sup>

After deciding that the Law infringed upon privacy rights, the question that remained was whether the act met the requirements of the limitation clause set in section 8 of the Basic Law: Human Dignity and Liberty.<sup>136</sup> It states: "One is not to violate the rights accordance by this Basic Law save by means of a law that corresponds to the values of the State of Israel, which serves an

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

appropriate purpose, and to an extent that does not exceed what is required, or on the basis of a law, as aforementioned, by force of an explicit authorization therein.”<sup>137</sup>

Firstly, the Knesset had to decide whether The Criminal Procedure Act “serves an appropriate purpose and corresponds to the Values of the State of Israel”.<sup>138</sup> Its purpose was defined by the State as, “to give the Police and other investigatory authorities effective tools for the battle against crime in the developing, modern world.”<sup>139</sup> The court held that even the petitioners agree that since modern technology is highly prevalent in modern society and criminals use it to their advantage.<sup>140</sup> If authorities are not allowed to use modern technology as well, it would create an uneven battlefield for law enforcement. The law also corresponded to the values of Israel as its objective was to battle crime.<sup>141</sup>

The court then decided about the right to search without a warrant, “Nevertheless, from the material presented to us and the Israel Knesset’s position as reflected in its arguments, it appears on its face that the Knesset is acting according to its duties, and that it is aware of the concern of excessive use of, or extending, the powers under the Act to improper cases.

<sup>142</sup>Therefore, we believe that for the time being various authorities should be permitted to do their work with the tools at their disposal.<sup>143</sup> Under these circumstances, at the moment it is inappropriate for us to intervene in the aspects of the Act’s implementation. Hopefully there will be no need for us to consider them in the future either.<sup>144</sup> Nonetheless, we have not overlooked

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

the fact that the duty to report to the Knesset as prescribed in the Act was established as a temporary provision that is in effect only for four years from the date the Act took effect (see section 14(c) of the Act).<sup>145</sup>”

The decision of the court discussed above upholding The Criminal Procedure Act as constitutional is just one part of Israel’s evolving history dealing with privacy and National Security law. As we have shown Israel has a system to keep the balance between Israel’s National Security and Privacy laws at the appropriate level. The balance is kept in check by a system to keep authorities accountable along with a way to appeal for the rights of individuals when they are being unlawfully trampled on.

Since the inception of Israel, it has been barraged with terrorist attacks.<sup>146</sup> Israel’s continued existence is due to its exceptional security.<sup>147</sup> No country is perfect, but Israel has a system built to constantly improve and adjust according to the needs of the times. The system works and many laws that have been passed to protect the privacy rights of its citizens.

Detached philosophers who’ve never experienced terrorism firsthand can always self-righteously point to Israel and say it has lenient privacy laws. But, just as democratic countries across the globe, experiencing terrorist attacks on their own soil tend to view “lenient” privacy laws more favorably. So should people who luckily haven’t experienced the horror of terrorism, understand the pitfalls of overprotective privacy laws.

Perhaps by being overprotective of privacy rights one can be neglecting their own right to live. Being too strict on privacy rights enables terrorists and criminals to get away with heinous

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<sup>145</sup> *Id.*

<sup>146</sup> <https://www.myjewishlearning.com/article/terrorism-in-israel-questions-and-answers/>

<sup>147</sup> [https://www.huffingtonpost.com/daniel-wagner/what-israeli-airport-secu\\_b\\_4978149.html](https://www.huffingtonpost.com/daniel-wagner/what-israeli-airport-secu_b_4978149.html)

crimes. There is no comparison to the Orwellian nightmare of “1984”. I would rather some “Big Brother” surveillance that prevents terrorists from killing innocent people, then overprotective privacy laws that result in the deaths of innocent people.