

# **Socio-legal Notes on the Liberty vs. Security Dilemma**

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- *“Those who would give up Essential Liberty to purchase a little Temporary Safety, deserve neither Liberty nor Safety.”*
- *"People willing to trade their freedom for temporary security deserve neither and will lose both.,,"*
- *Benjamin Frankin (?)*

# New Security Deal

- Traditional policing principles and the law of the Geneva Conventions are unsuited for the peculiar warfare by suicide bombers and terrorist organizations.

# The uniqueness of this New World

- 1. new standards (required and accepted) for government activism in the sphere of curtailing freedom as an exchange for security.
- 2. the concept of security, centrally positioned in the political, legal, social etc. discourse, does not seem to receive the degree of scrutiny that its weight and relevance would require.
- 3. Commerical sector: victim and perpetrator

# The “security vs. liberty” debate:

- 1. the reformulation of the traditional “security-liberty” balance-recipe;
- 2. the actual practical effectiveness of certain political and legal measures

# SECURITY?

- National Institute for Occupational Safety and Health:
- 1. Homicide is the second leading cause of death on the job for all American workers, however, the taxicab industry suffers homicide rates almost six times higher than the police and detective industry.
- 2. 40 percent of police deaths are due to accidents.
- 3. Fully 98 percent of all fatal workplace injuries occur in the civilian labor force.

The overrepresentation of crime and violence in media and the entertainment and infotainment-business:

- British Crime Survey: tabloid readers are more fearful of crime than broadsheet readers, particularly about being mugged or physically attacked.
- Twice as likely to believe crime had ‘increased a lot’ over the last several years—43 versus 26 per cent—when it had actually declined.
- The press ‘may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*’.

# SECURITY?

- Three waves of a longitudinal crime survey in Trinidad: respondents believe that they are 'likely' or 'very likely' to be murdered in the following 12 months at each of three times at which the sample was questioned.
- 1999: 120 murders were recorded in the population of 1.3 million, that is: 99.8 per cent of those 585,000 expecting to die erred.

# Security

- „Security” is not an objectively determined social condition, but a socio-psychological construction influenced by a number of irrational features and it is subject to both intentional and circumstantial manipulation.

# Securitization

1. a process intertwined with a number of institutional, political and bureaucratic interests.
2. A process based on perception rather than on objective features
3. no efforts are required from governments to try to assess how institutions or law enforcement measures affect the actual risk of criminal or terrorist involvement, or perception.

# “Prevention of terrorist attacks”: a blank check

- 1. social risks are not weighted against the potential benefits
- 2. “war on terrorism”: open-ended activity (intrinsically impossible to define victory and end to it: if no terrorist attack happens: due to these preventive commitments; if incidents do take place, even more a reason.)
- 3. institutions charged with carrying out the ‘war’ emerge as powerful bureaucracies with own corporate agendas (often eclipsing from parliamentary oversight)

# SECURITIZATION INDUSTRY

- Example: biometric industry, profiling and data mining: ATS, Automated Targeting System
- Data mining: marketing and customer management (moving from mass marketing to genuinely personalised strategic marketing; identifying high-risk customers, clickstream, cable digital TV)
- computerised method involving data mining from data warehouses, behavioural analysis

# Irony:

- 1. law and economics
- 2. constitutional balancing

# Social cost-assessment

- 1. health or non-health-related losses (anxiety and stress)
- 2001 UK: 24 % mentions crime as important factor affecting quality of life (3rd after money and health)
- 2. changes in behavior (cars or taxis rather than walk or use public transport)

- 1. direct (security measures, insurance administration expenditure)
- 2. indirect (loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization: leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm)

# USA

- an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys: \$437 per year, total \$ 90 billion
- private precautions \$160-300 billion to \$300 billion: more than the entire public law
- (often wasted: shifting)

# BALANCING

- *Proportionality test between the means employed and the aims sought:*
  - 1) *legitimate aim*
  - 2) *objective and reasonable justification*

- 1. *effectiveness criterion*: the ability of the concrete measure to achieve the ends for which it was conceived
- 2. *necessity criterion*: are there less invasive, measures in order to achieve the same aim
- 3. *harm criterion*: extent to which it affects other rights

# Case study: Racial profiling

- “Racial or ethnic profiling, as the term has evolved in the United States, encompasses the use by police of racial or ethnic characteristics as one set of clues among others to decide whom to stop, question, search, or otherwise investigate for as-yet unknown criminal offences. In this definition, profiling involves the use of racial or ethnic characteristics to *predict* which persons among some group might be involved in criminal behaviour, even where there is no evidence yet of any particular crime, and no unique suspect.”
- Harris, D.A. (2005). *Confronting ethnic profiling in the United States*. New York: Open Society Justice Initiative, p. 67

## EU's Working Party:

*"... a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect."*

# EU Network of Independent Experts on Fundamental Rights:

*"... the practice of classifying individuals according to their 'race' or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification."*

# European Commission:

*"...racial or ethnic profiling encompasses any behaviour or discriminatory practices by law enforcement officials and other relevant public actors, against individuals on the basis of their race, ethnicity, religion or national origin, as opposed to their individual behaviour or whether they match a particular 'suspect' description."*

# James Goldston (OSI JI):

*"... by ethnic profiling we mean the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques."*

# ECRI General Policy Recommendation N° 11

## on Combating Racism and Racial Discrimination in Policing:

*“The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.*

## HISTORICAL DEVELOPMENT OF PROFILING:

1. Crime profilers
2. Traffic control
3. Anti-terrorist measures
4. Marketing and customer management, risk management

## Racial/Ethnic Profiling:

- Race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality;
- It seems like a rational assumption to stop someone on ethnic grounds (based on the high rate of criminality within the ethnic group, or its dominant / exclusive involvement in terrorism);
- Therefore, measures are applied not so much on the basis of the (suspicious) behavior of the individual, but on an aggregate reasoning;
- The goal is to make an efficient allocation of the limited amount of the available police and security resources.

# CRITICISM

- 1) "RACIAL TAX"
- 2) RACIAL ESSENTIALISM
- 3) ALIENATION – COMMUNITY POLICING
- 4) PURE (PRACTICAL) EFFICIENCY:
  - No significant, tangible difference between the proportional hit rates  
*(within the white population and the non-white population)*
  - False negatives and false positives  
*(both over-inclusive and under-inclusive)*

# **EU Race Directive**

(Council Directive 2000/43/EC)

**The importance of efficacy: The differential treatment has no objective and reasonable justification:**

- if it does not pursue a legitimate aim or
- if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

# FINDINGS

- Security:
  - 1. elusive and subjective nature of security
  - 2. lack of objective verification of preventive measures

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