András L. Pap

INTRODUCING THE "EFFICIENCY" ELEMENT IN TO THE "LIBERTY VS. SECURITY" DILEMMA

"*Those who would give up Essential Liberty to purchase a little temporary safety, deserve neither liberty nor safety.*" This statement is commonly attributed to Benjamin Franklin,[1] and has been paraphrased in various forms, usually with an additional phrase forecasting the fate of those who are willing to fall into the trap of such a seductive and morally despicable tradeoff: „*People willing to trade their freedom for temporary security deserve neither and will lose both.*" Bearing in mind this 150-year-old warning, this article will investigate the proliferation of various forms of law enforcement activity and authorization in the post 9/11 world. Although I will focus on the academic and policy discussions of one particular law enforcement measure, I hope to provide a more general caveat in the "liberty vs. security" dilemma.

Just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded measures and procedures thus introduced were often ones that legislators and law enforcement officials otherwise only had dreamed of attaining, but this time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and fear spreading in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organized crime, but beforehand they were unable to attain them due to constitutional misgivings. Under the auspices of anti-terror action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. It looks as though the horrific image of weapons of mass destruction and recurring terrorist attacks has overwritten the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished.

As Federico Rahola put it: "As a matter of fact, the current, 'securitarian' dynamics can be summarised in a double tautological process according to which the relentless production of insecurity, through the colonisation of social life by security measures and practices (highly improved in the post-9/11 era), makes in turn proliferate the industry of security. From this point of view, even an undetermined notion such as the one of terrorism has to be seen less as a specific threat than a necessary place-holder in order to legitimise the adoption of security apparatuses and devices."[2]

The uniqueness of this New World is twofold: First, new standards have been set up (required and accepted) for government activism in the sphere of curtailing freedom as an exchange for security. People (the political class, the electorate) appear to be willing to reformulate the traditional balance between liberty and security: a little bit more documents and ID-checks, longer lines and more flexible search-warrants seem an acceptable tax levied in return for more stringent demands for government-provided security. It seems to be the case that there is a broad consensus on the fact that traditional policing principles or, for that matter, the law of the Geneva Conventions (regulating the interrogation of prisoners of war, for example) have become unsuited for handling the peculiar warfare put on by suicide bombers and terrorist organizations. This may be alarming for many, but one can easily say that if this New Security Deal is passed within the habitual pathways of constitutional participatory democracy, there probably is not too much room for complaints against a unanimously empowered protective state. After all, the state is theoretically reconstructed as the outcome of a notional social contract in which individuals agree to trade a quotient of their liberty in exchange for the state's guardianship of security[3] in the broad sense.[4]

The other apparent specialty of this new era, however, is more problematic: the concept of security, which is thus positioned centrally in the political, legal and social discourse does not seem to receive the degree of scrutiny its weight and relevance

would require. In other words, not only is "security" a buzz-word for budgetary and policy demands that can easily overrule long-standing constitutional and human rights limits for government power, but while willingly giving in to these demands, we do not even seem to investigate the actual effectiveness of many of these measures, for example, whether they actually provide us security (in exchange for the liberty value offered).

In other words, at least two separate discussions should be going on in the "security vs. liberty" debate: a theoretical and a practical one. The theoretical needs to be centered around the reformulation of the traditional "security-liberty" balance-recipe. The other line of inquiry should focus on the actual practical effectiveness of certain political and legal measures the government and law enforcement agencies are allowed to have.

In this paper, I will provide some additional arguments to the second debate. By investigating a specific law enforcement action and a potentially structural human rights risk involved—stop and search powers and ethnic profiling—I will highlight the importance of defining and testing the security-content of all new government powers before and during the balancing of how much liberty it is worth. The underlying thesis is that "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. Due to the overrepresentation of crime and violence in media and the entertainment and infotainment-business, the public usually vastly overestimate both the crime problem in general, and the actual probability of one's criminal and especially violent criminal victimization.

While in their reports about crime and security in general, high-end newspapers are trying to be factual and analytical, tabloid media tend to be anything but restrained. As David Green put it: "Broadsheets tend to focus on government, quoting professional experts, elites and interest group representatives. The tabloids tend to focus on crime victims and their relatives, offering dramatic testimonials as counterpoint to the more professionalized discourse of the broadsheet press."[5] Thus, tabloid readers tend to be more fearful of crime than broadsheet readers, particularly about being mugged or physically attacked. For example, a British Crime Survey (BCS) data for example indicated that they were almost twice as likely than broadsheet readers to believe crime had 'increased a lot' over the last several years—43 versus 26 per cent—when it had actually

declined.[6] Green points out that "Research focused on the media's 'agenda-setting' function reveals how 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*'. As the media provide the 'informational building blocks' to structure conceptions of social problems, their causes and possible solutions, the media also contribute to the store of available cognitive tools and materials that also constrain *how* readers and viewers think about the agendas presented. Additionally, people are not only cognitively constrained by encountering the discourses they do, but they are also 'constrained by omissions from the media discourse'… Complex public policy debates are thus mediatized in increasingly constricted and emotive terms, and the lines between news and entertainment values have been blurred in the quest to retain consumers in a crowded marketplace. Even among quality news media, evidence suggests that the ability or willingness of the media adequately to inform the public is further diminishing."[7]

Following Rob Allan's remark[8], David Green[9] calls it something of a "comedy of errors" in which policy and practice are not based on a proper understanding of public opinion, which is, in turn, not based on a proper understanding of policy and practice'.[10]

Take, for example, the widely held belief (depicted in so many movies and novels) that the job of an American police officer is dangerous. But, as Roger Roots[11] points out, police work's billing as a dangerous profession plummets in credibility when viewed from a broader perspective. According to the National Institute for Occupational Safety and Health[12], it is true that 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. A police officer's death on the job is almost as likely to be from an accident as from homicide, since approximately 40 percent of police deaths are due to accidents. When overall rates of injury and death on the job are examined, policing barely ranks at all. The highest rates of fatal workplace injuries occur in the mining and construction industries, with transportation, manufacturing and agriculture following close behind. Fully 98 percent of all fatal workplace injuries occur in the civilian labor force.[13]

The above example shows that it lies within the nature of the concept of "security" that due attention needs to be given to the actual verification of security risks and the effectiveness of the offered securi-

ty measures for which we are willing to offer some of our rights and liberties.

For instance, take the case of ID cards: not only can terrorists use a wide range of techniques to forge identities, a recent report by Privacy International showed that two-thirds of all terrorists in history have operated under their true identity,[14] thus, identity cards would have little preventative effect. Nevertheless, one hundred countries around the world currently use national identification cards,[15] and (despite concerns raised by privacy advocates) a number of governments are promoting it as a powerful tool to prevent and fight terrorism.[16]

Amitai Aviram highlights the importance of law's general placebo effect, that is—security issues aside—its impact on social welfare beyond its objective effects by manipulating the public's subjective perception of the law's effectiveness.[17] Aviram argues that "a law is analogous to medical treatment in the sense that for those individuals affected by a risk addressed by the law (the "patients"), the law corrects their biased[18] perceptions of the risk (the "illness") and causes the perceived probability and magnitude of the risk to converge with the objective risk.[19] Thus, like its medical counterpart, the law's effect on expectations (the "placebo effect of the treatment") results in a benefit that is distinct from the objective effect of the law in reducing the objective risk." He also adds that while in the medical sphere, placebo effects are tested on medicine but not on poison: "the expectation of the patient, if she has any expectation, is that the medicine/placebo will make her better. Although the patient may instead believe that the medicine would not improve her condition, it is unlikely that she would believe that the medicine would worsen her condition. In contrast, a law may create an expectation that it would either reduce or exacerbate a risk that it purports to address. In addition, a patient taking medicine usually knows that she is taking medicine, and therefore, the medicine would have both an actual effect (caused by the pharmaceuticals) and a placebo effect (caused by the knowledge of consumption of the medicine). In contrast, many individuals who are subject to a law may be ignorant of its existence. When an individual is subject to the actual effects of a law (caused by the government carrying out the law's dictates) but not to its placebo effect (caused by the changes in expectations due to knowledge of the law's existence), the result is the reverse of the medical placebo effect. The enactment of the law creates a discrepancy between the actual risk, which was reduced by the law, and the perceived risk, which did not change because the individuals are not aware of the law's existence. In other words, expectations are manipulated in a medical placebo effect in only one direction, between having no effect at all at one end, and fully curing the illness at the other end. Legal placebo effects, however, may manipulate expectations in both directions, either mitigating or exacerbating the discrepancy between the objective and perceived risk that the law purports to address. Thus, the manipulation of expectations that occurs in the world of legal placebo effects is more varied and diverse than what occurs with medical placebo effects."[20] In his analysis Aviram distinguishes between four categories of placebo effects: (1) positive placebo effects, which occur when individuals overestimate a risk prior to the implementation of a law and perceive the law as mitigating that risk; (2) negative placebo effects, which occur when individuals underestimate a risk prior to the implementation of a law and perceive the law as mitigating that risk; (3) positive anti-placebo effects, which occur when individuals underestimate a risk and perceive a law as increasing that risk; and (4) negative anti-placebo effects, which occur when individuals overestimate a risk and perceive a law as increasing that risk.[21] Aviram[22] also adds that like "psychic effects, placebo effects are thus caused by a law's manipulation of subjective perception. But, like real effects and unlike psychic effects, placebo effects have an objective impact on the behavior of individuals—an increase or decrease in activity related to the risk that is addressed by the law. It is this objective impact that causes the placebo effect to increase or decrease utility, but unlike the real effects of a law, the placebo effect is triggered by the law's perceived (not actual) effectiveness."

ETHNIC PROFILING AND ASSUMED EFFICIENCY

In what follows, I will delineate the general practice of ethnic[23] profiling and ethnicity-based selection, and how these arise in the context of the fight against terrorism. I will argue that besides the perennial problem with ethnic profiling—that it readily turns into a form of ethnic discrimination—it faces an independent problem: lack of effectiveness.

Ethnic or racial profiling is a practice that relies on the tenet that ethnicity in itself signals a certain type of criminal involvement as more likely, and this assumption serves as a sufficient and therefore legitimate basis for law enforcement (police, secret service etc.) suspicion. The institution was first developed in the U.S. for detecting drug couriers, and

was later implemented in traffic control, and more recently in anti-terror procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Thus, stops are not induced by suspicious or illegal behavior, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behavior of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources. After all, the majority of the prison population is Black (Roma etc.),[24] and almost all of the terrorists are Islam fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable. Such law enforcement-related prejudices against minorities are very widespread. For example, in Hungary, according to a survey in 2006, almost two thirds (62 percent) of the Hungarian adult population agreed fully or to some degree with the claim: "the tendency to commit crime is in the nature of the Roma"[25] A 1997 survey by the Ministry of Interior, showed that 54 per cent of police perceived criminality as a central element of Roma identity[26] and in 2002-2003, the Hungarian Helsinki Committee carried out a research on discrimination against Roma in the criminal justice system, finding deep-running traces of racial profiling by the police within Roma communities.[27]

Originally, the procedure of profiling was about an attempt to create a description profile for suspects, in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behavior and circumstances. In the case of drug couriers, such a characterization might include short stop-overs between significant drug sources and the distribution location, cash paid for the airline ticket, and, based on criminal statistics, also ethnicity, sex and age. The case for ethnic profiling is further strengthened by the fact the gangs that play key roles in organized crime tend to be almost exclusively ethnically homogenous.

The idea to take race into consideration as a helpful tool to screen offenders was widely accepted among law enforcement officers.[28] American studies on highway patrols for example have shown that blacks, comprising 12.3 percent of the American population, are significantly overrepresented among those stopped and checked by the police. [29] In New Jersey, between 1994 and 1999, 53 percent of those stopped by the police were black, 24.1 percent were Hispanic and only 21 percent were white.[30]

As the racially profiling practice proliferated, a fierce academic and political debate erupted over the issue. Criticism of such practices is manifold. Some emphasize that ethnic profiling is in principle unacceptable, because it results in the harassment of the innocent minority middle class, which is thus subjected to a kind of "racial tax" that affects all aspects of people's lives. A further unwanted result is the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.).

Another, straightforwardly pragmatic criticism, however, has been calling attention to the practical ineffectiveness of racial profiling: inherent in the prima facie plausible reasoning based on statistics is a profound (and provable) error. Studies conducted in New Jersey and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. The studies have clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but they have also confirmed that the hit rate does not justify the utility of ethnic profiling. Racial profiling relies on the assumption that ethnicity and a high rate of criminality are connected, so the hit rate must be higher among, say, African Americans. For a long time, no-one had asked for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost effective method because the number of false negatives and false positives is bound to be much too high.[31] In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.[32] Thus, the retrospectively judged effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

Another related argument mentions the risks in-

herent in alienating crucial minority communities in the context of law enforcement (policing and prevention).The model of community policing emphasizes that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should not overlook the importance of community cooperation. It is no coincidence that the Bush government identifies truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), and, above all, the Muslim community, which can detect suspicious behavior.[33] Indeed, most of the American terrorists identified up until recently were caught based on community reports. It is worth considering that one of the very few terrorist arrests where the suspect was eventually charged, in Lackawana, New York, a report from the local Muslim community tipped off the authorities, leading to the arrest.[34]) Further, false positives raise a special problem with respect to terrorism: it seems untenable to assume that only Arabs are involved in terrorist attacks. We need only mention a couple of incidents that happened on American soil: Richard Reid (the "shoe bomber"), a Brit from the West Indies; Jose Padilla (the "dirty bomb" terrorist of Chicago's O'Hare Airport), a Hispanic man who converted to Islam while in jail; not to mention white Americans like John Walker Lindh (the American Talib), Timothy McVeigh, and Charles Bishop.[35]

The irony of the case is that it was right around the time of the World Trade Center attacks that racial profiling suffered decisive rejection within professional as well as political circles. In the fall of 1999, 81 percent of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58 percent approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.[36]

THE EFFICACY VALUE OF PERCEPTION

In this article two important points were made: one pertaining to the elusive and subjective nature of security, and the other one relating to the lack of objective verification of preventive measures.

It is a well documented in criminology that individual risk predictions are largely based on interpre-tations far removed from rational considerations of likelihood based on recorded crime rates.[37] Far more people believe that they will become future victims of a nominated offence than, what the number that actually become victims. For example, respondents in three waves of a longitudinal crime survey conducted in Trinidad believed 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. In fact, in 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 in the question.[38]

It has to be added though that the "it is in no sense individually or collectively irrational for all of a given population to feel that there is some degree of likelihood that they will become victims even though only a tiny proportion will actually do. Until victimization is inflicted on the few to which it eventually is, how can anybody know who should predict it for themselves?"[39] Unlike estimating objective group risk, it is very difficult to objectively pinpoint to an individual's objective risk.[40] Research on the fear of crime suggests that people respond to the 'social facts' of crime in ways which reflect their personal experience and values.[41] In other words, people predict on the basis of information available to them.[42] For example, death by homicide is rarer than death by suicide (even though suicides are underreported, since they are often classified as accidents), but homicide receives more publicity than suicides and so are remembered more easily.[43]

This leads us back to the question of available information. Media theory frequently refers to the concept of cultivation. According to this, television is society's storyteller and if a viewer sees a great deal of violence on television, then she will presume that society is violent; once this presumption takes root, it can penetrate the viewer's attitudinal base and become a decision-making factor. Hence, a viewer who believes that society is violent may be more afraid to walk alone at night, inclined to purchase a home alarm system, or likely to support increasing the police force.[44]

As it had been shown, "security", a core concept in contemporary socio-political developments is a rather peculiar phenomenon. The process of securitization[45] is intertwined with a number of institutional, political and bureaucratic interests, and the entire avalanche is based on perception rather than on objective features.[46] The irony of the case is that no efforts are required from governments to try to assess how certain institutions or law enforcement measures will affect the actual risk of criminal or

terrorist involvement, or even risk-perception. Thus, the state is under no pressure or obligation to prove the correlation between the increase in (the perception of) security—which is in most cases only assumed, presumed and forecasted. Presumably, a lack of a proper methodology to test such dynamics lies behind the fact that the public seems to accept "risk prevention" as a proper price to be paid for extended law enforcement authorizations, and social risks are not weighted against the potential benefits. "Prevention of terrorist attacks" appears to be a blank check, where we are waiving our rights to actually control the effectiveness of the preventive measures. If no terrorist attack happens, the government may argue that is exactly due to these preventive commitments that we could have escaped the threatening disasters. If such incidents do take place in our approximate or remote distance, it is even more a reason to strengthen government efforts and establish further law enforcement measures.

According to Peter Lock "Though once being upgraded to 'war', anti-terrorism becomes an open-ended activity because it is intrinsically impossible to define criteria which would unequivocally permit to declare victory and put an end to this war. The institutions charged with carrying out the 'war against terrorism' emerge as powerful bureaucracies with their own corporate agendas. They are often capable of eclipsing from parliamentary oversight. It plays to their advantage in their drive to achieve dominant positions in the state apparatus that many of their activities are shielded from scrutiny for asserted operational reasons. Their claims of effectiveness cannot be measured as the full dimension of their task is by definition unknown as long as the unbounded concept of terrorism rules political discourses. Their persistent exigency that they must be entitled to carry out covert operations at their own discretion is inherently difficult to monitor. Confronted with imagined terrorism as opposed to defined political challenges in a populist political climate elected bodies are not inclined sufficiently challenge the agendas of the institutional security network. The executive is capable of launching a dynamic of circular causation by imaging a hypothetical terror network, which is delineated as invisible (and hence unknowable). Politicians are not inclined to take risks and do not define how much production of alleged security is enough. As a result, measures adopted in the fight against terrorism acquire features of self-fulfilling prophecies. … In such a context it is virtually impossible to measure progress in the fight against terrorism."[47] Commentators point out that fear also plays a noticeable role in generating identity and feeling of belonging, and collective insecurity can be understood as the purest form of community belonging. The «dangerization process» facilitates an increasing culture of defense. The security discourse serves as an effective means to stimulate community belonging, and is an effective vehicle of post-industrial political power.[48]

The irony of the case is that inspired by the academic discipline of law and economics, in the past years, a considerable body of literature has focused on estimating the social costs of crime and crime prevention—only these findings have not seem to have made the desirable impact on public policy and discourse. For example, Paul Dolan and Tessa Peasgood developed a methodology to provide estimates of the intangible costs arising from the anticipation of possible victimization; that is, estimates of the costs of fear of crime.[49] These costs are categorised according to whether they result in non-health-related losses or health-related losses. When people feel that they may be about to become a victim of crime, they will experience anxiety and stress. The frequency with which people are in this state and the intensity of the anxiety is one measure of the health-related loss from anticipated crime. Non-health losses are associated with changes in behavior (where for example people use their own cars or take taxis rather than walk or use public transport because of their fear of crime)[50] and/or changes in how society is viewed.

For example, a survey of public attitudes to quality of life in the United Kingdom in 2001 found that crime was mentioned by 24 percent of respondents as an important factor affecting quality of life, which made crime the third largest factor after money and health.[51] They claim that the direct costs of security measures, insurance administration expenditure and costs incurred from crime-averting behavior can be interpreted as revealing people's preferences to reduce the risks of victimization and the worry about victimization. Also, a further tangible cost attributable to anticipating crime is any loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization. This may include leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm that has been accidentally set off.[52] In addition to these, other behavioral changes also involve additional time costs. Based on survey observations in the United States, on average, an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys, which is valued at—437 per year.[53] It means that U.S. citizens are estimated to spend

nearly—90 billion worth of time each year simply locking their doors and searching for their keys.[54]

It needs to be added that according to estimates, citizens of the United States spend more on private precautions—"estimates range from —160 billion to —300 billion per year—than on the entire public law enforcement budget. That is, citizens spend more on locks, neighborhood watches, and the like than U.S. governments (state and federal) spend on police, judges, prosecutors, prisons, and prison guards."[55]

CONCLUSION

This article has argued that besides the doctrinal debate between "security" and "liberty", there is another important, and slightly overlooked question to be investigated: the actual efficacy value of policies and law enforcement measures that trigger the entire "liberty vs security" polemics.

What needs to be kept in mind is that "security" itself is a rather social construct, and thus, there is another war, one that needs to be fought in the heads and research papers, in which it needs to be proven that even if we are willing to trade in liberty (or some of our constitutional rights) for security, we still need to be aware of the fact that "security" is an elusive concept.

Instead of pursuing efficient protection mechanisms, we may just be scapegoating and trusting our fates to a tyrannical state that we are creating along the way; a state in which with time, the persecution and ostracization of a minority may well be followed by everybody else's.

Translated by the author

NOTES

1. The proverb was used as a motto on the title page of An Historical Review of the Constitution and **Government of Pennsylvania**. (1759) which was published by Franklin in 1812. The phrase itself was first used in a letter from the Pennsylvania Assembly dated November 11, 1755 to the Governor of Pennsylvania.

2. Federico Rahola, 'The political impact of security policies' 17 July 2007 <http://www.libertysecurity.org/article1574.html?var_recherche=rahola>. Analysts also mention a 'functional spill-over' as the major propellant of European cooperation in matters of justice and home affairs—wherein law enforcement measures are deemed necessary to fill 'gaps' created by wider integrative processes such as the lifting of border controls. See Ian Loader, 'Policing, Securitization and Democratization in Europe' 18 April 2005 <http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization>.

3. According to Ian Loader, the politics of resources or the politics of allocation is concerned with trying to ensure that all citizens are provided with a 'fair' share of available policing goods; something that requires attention both to the unwarranted 'over' (or overly invasive) policing of particular individuals or social groups, and to the inability of (disadvantaged) citizens and communities to acquire a proportionate level of such goods. See Loader (n 2).

4. See for example Ian Loader, 'Necessary Virtues: The Legitimate Place of the State in the Production of Security' Tuesday 19 April 2005 <http://www.libertysecurity.org/article232.html?var_recherche=necessary%20virtues>.

5. David A. Green, 'Public opinion versus public judgment about crime. Correcting the 'Comedy of Errors' [2006] January British Journal of Criminology 139.

6. Green (n 5) 138.

7. Green (n 5) 140–141. As Ackerman and Fishkin explain: '[w]e have a public dialogue that is ever more efficiently segmented in its audiences and morselized in its sound bites. We have an increasingly tabloid news agenda that dulls the sensitivities of an increasingly inattentive citizenry. And we have mechanisms of feedback from the public, from viewer call-ins to self-selected Internet polls, that emphasize the intense commitments of narrow constituencies, unrepresentative of the public at large.' B Ackerman, JS Fishkin, *Deliberation Day* (Yale University Press, New Haven 2004) 8–9. This is a decidedly weak foundation upon which to build sensible, defensible and effective penal policy. Green (n 5) 150 concludes by saying: "Only methods embracing deliberation and fostering the conditions to achieve public judgment are sufficient to generate the kind of informed and considered public preferences that could justify the level of political deference public preferences currently receive. Because most typical conceptions of public opinion are not based on deliberation, public opinion is only that–uninformed, unconsidered opinion, tending to lack validity on contentious issues, measuring top-of-the-head reactions to questions about which little is known. Typical assessments of public opinion provide a poor justification for policy, and remain susceptible to exploitation by those of all ideological affiliations with axes to grind. At precisely the time when notions of the will of the public have acquired such political currency, these views are simultaneously being assessed more frequently and in ways that lack both depth and validity."

8. R Allen (2003) "There Must Be Some Way of Dealing with Kids': Young Offenders, Public Attitudes and Policy Change' [2003] 2 Youth Justice 3–13.

9. Green (n 5) 138.

10. **It needs to be noted that it may very well fall within the interest of politicians to rely on unsubstantiated public opinion. For example; see Green (n 5) 137;** following a high profile murder case, the then Shadow Home Secretary, Tony wrote a piece in *The Sun* asserting, '[w]e can debate the crime rate statistics until the cows come home. The Home Office says crime is falling. Others say it isn't. I say crime, like economic recovery, is something that politicians can't persuade people about one way or another. People know because they experience it. They don't need to be told. And they know crime is rising' „Blair's comments imply that there is no substitute for experience, even secondhand, mass-mediated experience, and his piece lent unqualified credibility to tabloid portrayals. He as much as told the public that their fear of crime, irrational or not, is more important than any unbiased assessment of the problem."

11. Roger Roots, 'Are Cops Constitutional?' [2001] Summer Seton Hall Constitutional Law Journal 686–757.

12. National Institute for Occupational Safety and Health, Violence in the Work Place, June 1997. National Institute for Occupational Safety and Health, Fatal Injuries to Workers in the United States, 1980-1989: A Decade of Surveillance, National Profile, August, 1993 DHHS (NIOSH) Publication No. 93-108.

13. Roots (n 11) 711–712. Also note that about two percent of American soldiers serving in South Vietnam during the Vietnam War died during their service there, yet most Americans would view a one-year tour of duty in South Vietnam during that war as a grave danger. Amitai Aviram, 'The Placebo Effect of Law: Law's Role In Manipulating Perceptions' [2006] November George Washington Law Review, footnote 80.

14. Privacy Int'l, Mistaken Identity; Exploring the Relationship Between National Identity Cards & the Prevention of Terrorism 2 (2004) The report also shows that "[a]t a theoretical level, a national identity card as outlined by the UK government—the proposed legislation in question—could only assist anti-terrorism efforts if it was used by a terrorist who was eligible and willing to register for one, if the person was using their true identity, and if intelligence data could be connected to that identity" See <http://www.privacyinternational.org/issues/idcard/UK/ id-terrorism.pdf>.

15. See Simon Davies, 'Identity Cards: Frequently Asked Questions' Privacy Int'l 24 Augustus 1996 <http://www.privacy.org/pi/activities/idcard/idcard_faq.html>.

16. Jennifer Morris, 'Big Success or "Big Brother?": Great Britain's National Identification Scheme Before The European Court Of Human Rights' [2008] Winter Georgia Journal Of International And Comparative Law 471.

17. Aviram (n 13).

18. **The literature mentions three common cognitive biases: availability bias, vividness bias, and social amplification.** The availability bias heuristic causes people to "assess the frequency of a class or the probability of an event by the ease with which instances or occurrence can be brought to mind." In other words, events are more "available" (i.e., more easily brought to mind) when we encounter them ourselves or learn about them from others. To demonstrate it, subjects were asked to estimate in relative terms the number of words in which the letter "r" appears as the first letter of the word versus the number of words in which the letter "r" is the third letter of the word. The subjects consistently judged that words containing the letter "r" as the initial letter outnumbered words containing the "r" as the tertiary letter. In fact, words with "r" as the third letter are much more common than words in which "r" is the initial letter. The reason subjects continually made this mistake is that words which began with the letter "r" are much easier to recall than words which have "r" as the third letter. A related pattern of inaccurate heuristics has been called the vividness bias. It causes individuals to place more weight on concrete, emotionally interesting information than on more probative abstract data. Social amplification is a heuristic by which an individual relies on others' beliefs when the individual has little independent knowledge of the matter. This reliance causes people to perceive as more probable those risks that also concern others with whom they interact. As a result, highly visible, dramatic events that capture media attention generate immense public concern that is disproportionate to the actual risk. See Aviram (n 13) 71–75.

19. **The author brings the following example: On September 11, 2001, terrorists hijacked four passenger airplanes and flew three of them into the World Trade Center and the Pentagon, murdering at least 2981 people, including all 256 people on the planes. Among the many repercussions of this terrible calamity was a panic regarding aviation security. In the following month, commercial passenger traffic dropped by over 45%. Two months later, on November 19, the Aviation and Transportation Security Act ("ATSA") was signed into law. Its announced goal was "[t]o improve aviation security." By August 2002, the num-**

ber of passengers was only 9,2% lower than in August 2001, and by August 2003, it was lower by only 5,7%. Aviram (n 13) 55–56 (Talking about risk-assessment, it needs to be added, as Aviram does, that Cornell University economists Garrick Blalock, Daniel H. Simon, and Vrinda Kadiyali found that "nearly 1,200 more people died in the months subsequent to the [September 11th] attacks when they switched their travel plans from flying to driving." Press Release, 'After Sept. 11 attacks: as traveler plans changed from flying to driving, highway deaths rose in subsequent months' Cornell University News Service (10 March 2005), <http://www.news.cornell.edu/stories/March05/Sept11.PlaneCar.bpf.html>.

20. Aviram (n 13) 57–58.

21. Aviram (n 13) 60–61.

22. Aviram (n 13) 65.

23. A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.

24. In Hungary, Research was published in the mid '90s revealing estimates on the ratio of Roma inmates, which showed that based on self-definition of inmates about 40 percent of the prison population is Roma. See Huszár László 'Romák, börtönök, statisztikák' [1997] August Amaro Drom 9–11. With prison directors giving much higher estimates, on average 60 percent. (Women Integration and Prison Project (MIP). Hungarian report 'Data on Crime, Judicial and Prison data' [2004] <http://mip.surt.org> (unpublished).

25. See <http://www.tarki.hu/kozvelemeny/kitekint/20060201.html> (02. 10. 2006).

26. Csepeli György, Örkény Antal, Székelyi Mária, 'Szeretelen módszerek' [Insubstantial methods] in Csányi Klára (ed) Szöveggyűjtemény a kisebbségi ügyek rendőrségi kezelésének tanulmányozásához (OSI-COLPI, Budapest 1997) 130–173.

27. See Farkas Lilla, Kézdi Gábor, Loss Sándor, Zádori Zsolt, 'A rendőrség etnikai profilalkotásának mai gyakorlata' [The Current Police Practice of Ethnic Profiling] [2004] 2–3 Belügyi Szemle.

28. For example, in 1994, an estimated 2,714,000 juveniles were arrested in the United States. Of those juveniles, twenty-nine percent were black and sixty-two percent were white. Black juveniles, however, comprised only fifteen percent of the total juvenile population, whereas white juveniles comprised eighty percent of the total juvenile population. Arthur H. Garrison, 'Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together' [1997] Winter New England Journal on Criminal and Civil Confinement 32.

29. <http://quickfacts.census.gov/qfd/states/00000.html>.

30. See Michael Buerger, Amy Farrell, 'The evidence of racial profiling: interpreting documented and unofficial sources' [2002] 5, 3 Police Quarterly 290; David A. Harris, 'The Stories, the Statistics, and the Law: Why „Driving While Black" Matters' [1999] December Minnesota Law Review 267.

31. See for example Mariano-Florentino Cuéllar, 'Choosing Anti-Terror Targets by National Origin and Race' [2003] Spring Harvard Latino Law Review; Leonard Baynes, 'Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis' [2002] Winter Virginia Sports and Entertainment Law Journal 12–13, and Deborah Ramirez, Jennifer Hoopes, Tara Lai Quinlan, 'Defining Racial Profiling in a Post-September 11 World' [2003] Summer American Criminal Law Review 1213.

32. Consider the fact that the name of Yigal Amir, Yizchak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft—she was a woman who wanted her husband dead in 1949. Gregory Nojeim, 'Aviation Security Profiling and Passengers' Civil Liberties' [1989] Summer Air and Space Lawyer 5.

33. See for example Steven Brandl, 'Back to the future: The implications of September 11, 2001 on law enforcement practice and policy' [2003] Fall Ohio State Journal of Criminal Law; Mark Osler, 'Capone and Bin Laden: The failure of government at the cusp of war and crime' [2003] Spring Baylor Law Review.

34. David A. Harris, 'New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001' [2004] Utah Law Review 933.

35. Harris (n 34) 940, see also Baynes (n 31), and Thomas W. Joo, 'Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11' [2002] Fall Columbia Human Rights Law Review.

36. Samuel R Gross, Debra Livingston, 'Racial Profiling Under Attack' [2002] June Columbia Law Review 1413.

37. See for example Derek Chadee, Liz Austen, Jason Ditton, 'The Relationship Between Likelihood and Fear of Criminal Victimization' [2007] January British Journal of Criminology.

38. Chadee, Austen, Ditton (n 37) 133, 134.

39. Chadee, Austen, Ditton (n 37) 133, 135

40. For example: "It seems that one can have an objective measure of general risk–in this sense, objective risk is group risk rather than individual risk. From the fictitious example given above, this might be a 5 per cent chance of being a victim of that particular crime. This can alternatively be expressed as one chance in

20 of it happening in the next 12 months, or as occurring once every 20 subsequent years. But this does not mean that one can have an objective measure of individual risk. In other words, an individual's average general (or group) risk (the 5 per cent) is not that individual's actual personal risk." Chadee, Austen, Ditton (n 37) 135.

41. A number of research has been done on perceptions on crime and victimization. Besides a widespread confirmation that people typically predict more victimization than they eventually suffer, studies have also shown that while people may base their estimations of their personal risk of victimization on their own experiences and what they perceive to be those of friends and neighbours, they tend not to rely on media accounts, as the latter are typically insufficiently informative, memorable or upsetting. Thus, judgments of personal victimization risk are separate from general concerns about crime, and the latter are demonstrably influenced by media accounts. People also seem to be better at estimating the degree and direction of change in rates of crime as the area in question gets smaller and closer and closer to their own neighbourhood. They can generally believe that crime is rising very fast in the nation as a whole, somewhat less rapidly in their own city than in the rest of the country, but is not rising very rapidly at all in their own neighbourhood. It needs to be added that research shows that people are indeed rather good at specifying the relative frequency of occurrence of crime types, and characteristics of offenders locally, and, given the well known inadequacies of criminal statistics, it is also possible that for certain crimes like vandalism public beliefs are actually more accurate than police recorded rates. See Jason Ditton, Derek Chadee, 'People's Perceptions of their Likely Future Risk of Criminal Victimization' [2006] May British Journal of Criminology 513–514.

42. Chadee, Austen, Ditton (n 37) 137, 138.

43. See Richard Thaler, 'Mental Accounting and Consumer Choice' [1985] Marketing Sci. 199. Of course, one could argue that death by homicide violates a stronger cultural norm than death by suicide and that it is therefore a more threatening and significant event. For these reasons, instances of homicide are more 'available' than instances of suicide, and people overestimate the likelihood that someone will be murdered, relative to the likelihood that he or she will commit suicide. It needs to be added that as opposed to mediated or abstract experiences, lived experience can de-bias or re-bias estimations of likelihood of voluntary and involuntary risks (it has *never* happened to me, therefore it must *not* be frequent.). It is also well established that people overestimate the frequency of rare events and underestimate the frequency of common ones. See Chadee, Austen, Ditton (n 37) 138–139.

44. Kimberlianne Podlas, 'The "CSI Effect" and other Forensic Fictions' [2006–2007] 27 Loyola of Los Angeles Entertainment Law Review 98–99. The author notes that cultivation is rooted more in media theory than psychology and that according to other research, media content merely makes the audience aware of an issue (the agenda-setting effect); at other times, it reinforces pre-existing attitudes; at still others, it seems to have no impact on values or direction of response whatsoever. 101–103

45. According to the constructivist 'Copenhagen School' of security analysis, securitization is constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects. The semiotic structure of securitization differentiates between 'referent objects', 'securitizing actors' and 'functional actors'. A 'referent object' of securitization is something that is considered to be existentially threatened. In the vast majority of cases the security referent is the state, and the 'securitizing actor' is the actor who actually performs the speech act of securitization, by declaring the referent object 'existentially threatened', whereas a 'functional actor' is a participant in carrying out the pragmatic consequences of securitization. Security is never objectively given and there is no implicit, objective or given relation between the subject—the security actor—and the object of securitization as this relation is constructed intersubjectivelythrough social relations and processes. See Peter Burgess, 'The Ethical Subject of Security' Tuesday 10 May 2005 <http://www.libertysecurity.org/article248.html?var_recherche=ethical%20subject>.

46. According to Foucault's concept of „biopolitics" control associated with security should affect the population as a whole, presenting the tendency of depoliticizing security. Michael Foucault, *Naissance de la Biopolitique* (Gallimard, Seuil 2004). Political rationality is indeed suspected of insecurity. Biopolitics therefore individualizes the political discourse, incrementing the responsibility for self protection and security. There is therefore a considerable need for reinstating political rationality of the State, in order to respond to the present uncontrolled situation. See Vivienne Jabri, 'Security and the Return of Politics' Tuesday 6 September 2005 <http://www.libertysecurity.org/article384.html?var_recherche=jabri.> In this theory, Foucault inserts a new conceptual acceleration of the passage to liberalism, through fear and danger. Danger becomes the prerogative of the liberal function, through a culture of stimulating and reproduc-

ing a notion of continuous danger to the actors of economic life. According to Foucault, in this culture of danger, fear lies in the heart of the challenges produced by liberty in governing the subjects. Liberty is organized and reproduced through a new governmental style -liberalism- through a series of economic, legal and social relations that form and divide personalities and thus create a culture. See Nicolas Scandamis, 'Danger in Michel Foucault's Naissance de la Biopolitique' (Lesson of January 24, 1979), Tuesday 26 December 2006 http://www.libertysecurity.org/article1245.html?var_recherche=scandamis

47. Peter Lock, Anti-terrorism and Effects on Freedom of Movement- Assessing the Concept of Progress in the Fight against Terrorism, Wednesday 20 July 2005, <http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter>.

48. See Michalis Lianos, 'Hegemonic Security Discourse: Late Modernity's Grand Narrative' Tuesday 6 September 2005 <http://www.libertysecurity.org/article386.html?var_recherche=michalis>.

49. Paul Dolan, Tessa Peasgood, 'Estimating the Economic and Social Costs of the Fear of Crime' [2007] January British Journal of Criminology.

50. It needs to be added that more expensive forms of transport clearly bring other benefits, such as quicker and more comfortable journeys, and these benefits would need to be controlled for. Dolan, Peasgood (n 49) 123.

51. Dolan, Peasgood (n 49) 123.

52. Dolan, Peasgood (n 49) 124.

53. A study found an average willingness to pay to avoid locking or unlocking assets of —804 (from a sample of 140 respondents). The extra time taken walking home to avoid potentially dangerous shortcuts could, in principle, be valued in a similar way. Dolan, Peasgood (n 49) 124.

54. David A. Anderson, 'The Aggregate Burden of Crime' [1999] 42 J.L. & Econ. 611, 623–624.

55. Robert A. Mikos, '"Eggshell" Victims, Private Precautions, and the Societal benefits of shifting crime' [2006] November Michigan Law Review 308. The author also draws attention to the fact that literature supports the claim that many of the resources spent in the private war on crime are being wasted because many private precautions only shift crime onto other, less guarded citizens, and this redistribution of crime has no net social benefit, as precautions that only shift crime constitute rent-seeking behavior: individuals expend resources to transfer losses, without reducing the size of those losses. A typical example would be vehicle anti-theft devices which will urge thieves to target other cars but not deter them from stealing. A similar discussion centers on the question of gated communities, which are also found only to divert crime to other communities. (As of 2003, there were nearly seven million households located in gated communities in the US, which adds up to seven percent of all households.) It is for this reason that some local governments have simply refused to allow real estate developers to control access to new or existing communities. See 309, 315, 319.