

(DIS)REGARDING PRIVACY IN THE BALANCE BETWEEN LIBERTY AND SECURITY

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ABSTRACT

The intrusiveness of post-9/11 security measures and related privacy concerns caused wide debates regarding the balance between liberty and security in academia and world of politics. This paper examines the balance between liberty and security and suggests that the discussion about this balance often underestimates the importance of privacy. This paper provides reconsideration of the balance based on careful examination of privacy's roots in classical liberal thought, invoking Locke's theory of property. The thesis suggests that the real opposition in the balance is between private (individual) security and public (state) security rather than between individual privacy and public security, and discusses its implications.

INTRODUCTION

Fingerprints in visas and passports, retina scans at the airport gates. Surveillance cameras monitoring ‘every breath you take, every step you make’. Life long traveling dossiers processed in state databases, including detailed itinerary and even the lunch menu one had on-board. Is the world becoming as George Orwell described in his novel “Nineteen-Eighty-Four”?¹ Is “Big Brother” step by step creating a total control on everyone’s life? Or are these limitations of privacy the price which must be paid for security in the terrorism age?

These and other similar questions underlie the intrusiveness of post-9/11 security measures and foster a wide debate concerning the balance between liberty and security. On political level this debate concentrates on the call to strike the right balance between civil liberties and state security.² In addition, it emphasizes a compelling need for the government to gather, process and sift huge quantities of personal information in the fight against terrorism.³ Thus, political discourses express the dominant political stance that “we live in an ‘age of balancing’ and the prevailing view is that most rights and civil liberties are not absolute”.⁴ On academic level, equal debate about the trade-off between liberty and security takes place. On the one hand, liberals and libertarians resist any form of extended governmental intervention and are reluctant to agree on an increase of state power.⁵ On the other hand, communitarians value the common interest of security and call for a prioritization of public good.

¹ George Orwell, *Nineteen Eighty-four* (New York: Harcourt, Brace, 1949).

² EU Counter Terrorism Coordinator G. De Vries presenting counter terrorism policy called for the balance between security and human rights, G.De Vries at Clark University:
<http://ue.eu.int/uedocs/cmsUpload/ClarkUniversityOctober17.2004.pdf>.
Commissioner for Justice, Freedom and Security Franco Frattini stated: “New balance must be found between privacy and security”, 21 December 2004, SPEECH/04/549.

³ Daniel J. Solove, “Data Mining and the Security-Liberty Debate”, *University of Chicago Law Review* 75, (2008):344.

⁴ Ibid., 345.

⁵ Tamar Meisels, “How Terrorism Upsets Liberty”, *Political Studies* 53, (2005):162.

Privacy is one of the values the term liberty includes in this debate. However, talking about liberty and security balance, privacy is often put into the set of ‘other civil liberties’, such as freedom of speech, freedom of religion or fair trial. Due to this limited understanding, privacy remains disregarded. Not many scholars have thought about long standing distinction between public and private in respect of security measures related to the fight against terrorism. Almost none of them has taken into consideration that in post-9/11 world, expanded application of security measures affect the whole population and require the sacrifice of privacy more than other kind of liberty. Thus, this thesis suggests that if one takes into consideration a deeper analysis of privacy concept, he would come to the conclusion that trade-offs between liberty and security may be much more complicated than the existing literature suggests.

Thus, the main purpose of this thesis is to reconsider the balance between liberty and security and to suggest that the discussion about this balance often obscures the importance of privacy. The reconsideration of the balance is based on a few steps. First, careful examination of privacy’s roots in classical liberal thought discovers privacy having a great proprietary value. More importantly, invoking Locke’s theory of property, it becomes evident that privacy already includes security. Second, understanding of privacy helps to question the assumption that society must carefully balance privacy and public security. If privacy entails security, this balance is wrongly defined. Finally, the thesis suggests that the real opposition is not between individual privacy and public security but between private (individual) security and public (state) security.

The thesis will be structured in the following manner: the first chapter focuses on practical puzzle. It describes radical changes related to the new post-9/11 security environment, with particular focus on three security measures - video surveillance, biometrics and transfers of passengers’ data. All these measures are analyzed by highlighting major privacy concerns. This chapter, as an empirical part of the thesis, helps in the further stage of the research by providing evidence of currently dismissal of privacy. The second chapter explores a wider debate

concerning liberty and security balance. It chooses two divergent philosophical trends within the same liberal tradition – communitarians and libertarians. Exploring the debate based on their assumptions about liberty and state power to restrict it, the debate is divided into three parts: libertarian approach, communitarian approach and their common points of agreement. This chapter draws the conclusion that independently from the approach, on certain ground all parts agree to limit individual interest in order to guarantee public safety. Thus it demonstrates that there is a constant tension between liberty and security. The last chapter suggests a closer look to privacy concept, which reveals the dismissed aspect that privacy entails combination of property and security. In order to demonstrate that, one should go back to Locke and his theory of property. Once it is established that privacy in proprietary sense can not be understood without security, the implication of this claim leads to the suggestion that privacy can not be covered under liberty in the debate about balance between liberty and security. This leads to the conclusion that the balance should be redefined from individual liberty versus public security, to the balance between public security and individual security.

CHAPTER 1 - SECURITY MEASURES AFTER 9/11 AND PRIVACY

1.1 What has changed after 9/11?

The 11 September 2001 terrorist attacks and the following fight against terrorism have caused “a dramatic - and often draconian - securitization of the politics of borders and bodies”⁶ worldwide. Combined with constantly developing technological advancements of 21st century, this securitisation has enabled governments to create from their nations ‘multiscale spatiotemporal tracking’ societies.⁷ In these societies, which are by many scholars called ‘surveillance societies’, the focus of national governments, instead of limiting the possibilities to endanger the informational privacy of individuals by private sector, switched to expanding efforts to track millions of people. This constant collection and storage of huge personal data amounts has resulted in the public threat for privacy invasions.⁸

Personal data related to individual travels or bodily patterns processed in massive state databases and almost unlimited exchanges of these data has caused a ‘chilling effect’ on any legal individual activities and has raised the suspicion in the public mind. It not only deprived individuals of any freedom to decide whether to disclose certain personal information or to conceal it but also eliminated any privacy expectation in many spheres.

Due to increased terrorism fears, in the last decade expanded video surveillance not only in airports or government buildings, but in all public areas such as public parks or streets constrained individuals in their acts and choices and limited their autonomy.⁹

⁶ Benjamin J. Muller, “(Dis)Qualified Bodies: Securitization, citizenship and ‘Identity’ Management”, *Citizenship Studies* 8, no. 3 (2004): 281.

⁷ A. Hampapur et al., “Smart video surveillance”, *IEEE Signal Processing Magazine*, 2005, March: 38-51.

⁸ Collin J. Bennet, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*, (London: Cornell University Press), 18.

⁹ Anabelle Maria D’Souza, “Technological Advances Leading to the Diminishing of Privacy Rights”, 2003, http://digitalcommons.law.uga.edu/stu_llm/11, 26.

Many of these new technologies, even if employed for legitimate purpose of state security, have been marked by lack of proportionality and effectiveness.

Legal instruments, such as the US Patriot Act (2001) or the UK Anti-Terrorism, Crime and Security Act (2001), adopted immediately after the 9/11 terrorist attacks have provided a clear legal basis for almost unlimited governmental power to know everything about an individual's life. The personal information needs of state authorities, even if ideologically justified under 'war on terror' label, have caused tensions with personal privacy rights of the citizens. The debate about intrusive security measures, allegedly ensuring state's security in border control areas, airports or even public streets, has gained new momentum. In this debate, the question what individual rights can be limited for the good of the community has frequently involved the sacrifice of the right to privacy.¹⁰

Widely spread application of Closed-circuit Television (CCTV), tracking technologies, computerised databases and biometrics are just some examples of new security measures. Below the description these state surveillance technologies, introduced as anti-terrorism measures, is provided stressing related privacy concerns.

1.1. Security measures diminishing personal privacy

1.1.1. Video surveillance

"If we can never be sure whether or not we are being watched and listened to, all our actions will be altered and our very character will change".

Hubert Humphrey¹¹

As some privacy experts have noticed, "[T]he sword of technology has two razor-sharp edges. While one edge can be employed to preserve a nation's security, the other one can imperil

¹⁰ Chris C. Demchak, Kurt D. Fenstermacher, "Balancing Security and Privacy in the Information and Terrorism Age: Distinguishing Behaviour from Identity Institutionally and Technologically", *The Forum* 2, no. 2 (2004):1.

¹¹ Jerry Kang, Information Privacy in Cyberspace Transactions, *Stanford Law Review* 50 (1998):1220.

its very essence.”¹² This statement perfectly illustrates the current situation regarding video surveillance in public places: thousands of video cameras installed in major cities for security reasons in the last decade have caused fear and a sense of insecurity in the population. In D. Harper’s words, “one consequence of constantly being watched is to render the subject self-conscious and fearful”.¹³

Although not so much research has been conducted about the exact increase of video surveillance and CCTV in open streets since 11 September 2001 all over the world, there seems to be a clear link between these two variables. As some scholars stated, rapid diffusion of CCTV surveillance has been a consequence of technological developments, declining costs and heightened concerns about terrorist attacks.¹⁴

The UK is regarded to be a pioneer in monitoring the society by camera based surveillance. Since early 1990s, UK Home Office invested around £500M of public money for CCTV installations.¹⁵ Today, in order to prevent crimes and tackle terrorism threat, it is estimated that 4.2 million CCTV cameras are installed, statistically one for every fourteen persons living in England, which are able to capture a single individual more than three hundred times per day.¹⁶

The installation of video surveillance is rapidly increasing also in the US. Only in California, according to ACLU findings, from 119 cities one third are using or considering to use some form of video surveillance.¹⁷ Future tendencies in other states can be illustrated by example of

¹² James J. Tomkovicz, “Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures”, *Miss. L. J.* 72 (2002):317-320.

¹³ David Harper, “The Politics of Paranoia: Paranoid Positioning and Conspiratorial Narratives in the Surveillance Society”, *Surveillance and Society* 5, no. 1, (2008):5.

¹⁴ M. Nieto, K. Johnston-Dodds and C. Simmons, “Public and Private Application of Video Surveillance and Biometric Technologies, Sacramento: Californian Research Bureau. <https://www.library.ca.gov/crb/02/06/02-006.pdf>, 5

¹⁵ Clive Norris, “Closed Circuit Television: a Review of Its Development and Its Implications for Privacy”, Paper prepared for the Department of Homeland Security Data Privacy and Integrity Advisory Committee quarterly meeting, 7 June, 2006, San Francisco, CA.

¹⁶ Kirstie Ball, David Murakami Wood (eds.), *A Report on the Surveillance Society*, September 2006, 8.

¹⁷ Mark Schosberg, Nicole A. Ozer, “Under the Watchful Eye: The Proliferation of Video Surveillance Systems in California”, ACLU Report, 16.

Chicago: its Mayor Richard Daley promised to install video surveillance cameras on every street corner by 2016.¹⁸

Why should privacy advocates worry about video surveillance? First, the installation of cameras is often justified as necessary tool to prevent crimes and to fight against terrorism. However, except from being a powerful tool for government to abuse its powers, today it is recognised that surveillance cameras are neither effective in crime reduction nor in terrorism prevention.¹⁹

Second, video surveillance cameras with the possibility to incorporate into them other sophisticated technologies such as facial recognition, radio frequency identification (RFID) or automated identification software, may have a wide encroachment on privacy. In the future further multiplication integrated monitoring use can negatively impact privacy by providing the government the ability to identify individuals and monitor their every movement in public places and thus totally eliminate anonymous existence.²⁰

Third, surveillance due to its inherent capability to discriminate people between groups, known as ‘social sorting’, poses privacy as well as broader ethical concerns. As some authors notice, surveillance “that was once reserved for the ‘suspect’ or ‘deviant’, has become extended to cover the majority of the population, which can then be sorted, categorized and targeted.”²¹

Moreover, constant surveillance causes the adjustment of the privacy expectations of people. The society gradually finds itself in a situation which has been “compared to the fable of the

¹⁸ Mark Schlosberg, Nicole Ozer, “Security Cameras Erode Liberties Without Increasing Safety”, *Daily Journal*, August 22, 2007.

¹⁹ Heather Knight, “Crime Cameras not Capturing many Crimes”, *San Francisco Chronicle*, March 21, 2008; “CCTV Cameras ‘Have Failed to Cut Crime’”, *Daily Telegraph*, May 6, 2008; “Tens of thousands of CCTV Cameras, Yet 80% of Crime Unsolved”, *Evening Standard*, September 19, 2007; “Security Cameras Erode Liberty Without Increasing Safety”, *Daily Journal*, 22 August 2007.

²⁰ Mark Schlosberg, Nicole Ozer, “Security Cameras Erode Liberties Without Increasing Safety.

²¹ David Lyon, “Surveillance as Social Sorting: Computer Codes and Mobile Bodies” in David Lyon (ed.), *Surveillance as Social Sorting: Privacy, Risk and Digital Discrimination* (London: Routledge, 2003), 13; David Lyon “Everyday Surveillance: Personal Data and Social Classification”, *Information, Communication and Society* 5, (2002): 242.

‘boiled frog’: the frog fails to jump out of the saucepan as the water gradually heats”.²² It is not surprising that routine surveillance and information collection have deep implications for understanding of privacy. Adjustment of society to progressive privacy erosion can be noticed in prevalent approach: ‘if I’ve got nothing to hide, I’ve got nothing to worry about’.²³

1.1.2. Biometrics

In the aftermath of the 9/11 terrorist attacks biometric technologies became a “silver bullet” in the war on terror.²⁴ Forty five days after September 11, the US adopted Patriot Act²⁵, which increased the ability of law enforcement agencies to use personal records for intelligence gathering purposes. A few months later, American president George W. Bush signed Enhanced Border Security Act²⁶, allowing the use of biometric technologies for identification of people at the borders by digitally scanning their faces and hands upon entry to the US. As a result, under the US visa Waiver program, the US introduced the requirement for travellers to have passports containing biometric data. Following this requirement, the European Union adopted legislation on biometric passports with digital facial images, obliging its member states to implement it from August 2006.

What are biometrics? In the literature biometrics are defined as “the use of a person’s physical characteristics or personal traits to identify, or verify the claimed identity of that individual”.²⁷ Biometrics encompasses a wide range of human patterns: from stable aspects of

²² Privacy: Concepts and Issues, Review of the Law of Privacy stage, 139.

²³ Daniel Solove, “‘I’ve Got Nothing to Hide’ and Other Misunderstandings of Privacy”, *San Diego Law Review* 44, 2007 .

²⁴ Electronic Frontier Foundation, “Biometrics: Who’s Watching you?”, September 2003. .

²⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstructed Terrorism (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272, 2001.

²⁶ Enhanced Border Security and Visa Entry Reform Act of May 14, 2002, H.R. 3525.

²⁷ Woodward, J. *Biometrics: Facing Up to Terrorism*, Santa Monica, CA: RAND, 2001, 3.

the body to behaviour, such as processes of signing, walking.²⁸ Biometric technologies can be based on all these human characteristics: appearance (such as height, weight, skin colour, hair and eyes, gender, race), natural physiography (such as skull measurements, thumbprint, retinal scans, earlobe capillary patterns, hand geometry, DNA-patterns), bio-dynamics (voice characteristics, keystroke dynamics), social behaviour (habituated body-signals, voice characteristics, style of speech) or imposed physical characteristics (dog-tags, collars, bracelets and anklets, bar-codes and other kinds of brands, embedded micro-chips and transponders).²⁹ Perfectly developed biometric technologies would characterize biometrics according to five qualities³⁰: robust (repetition is not largely possible), distinctive (there are wide differences in patterns among human beings), accessible (sensors can easily access biometric data), acceptable (non-intrusive to a person) and available (a person can provide many independent personal features). However, it should be noted, that till now the possibility to find a biometric technology able to ensure all these qualities is very limited.

Why would biometrics cause a threat to privacy? As George Tomko notices, biometric technologies can be privacy's foe or its friend. The role of biometrics in privacy context entirely depends on the designation of systems and information management.³¹ However, currently counter terrorism measures have been deploying biometric systems without enough consideration of their risks to privacy, and thus are more invading privacy than enhancing it.³²

The main privacy concerns related to the use of biometrics are described below.

²⁸ Roger Clarke, Biometrics and Privacy, 15 April 2001, <http://www.anu.edu.au/people/Roger.Clarke/DV/Biometrics>

²⁹ Ibid.

³⁰ Electronic Frontier Foundation, "Biometrics: Who's Watching you?", September 2003.

³¹ George Tomko, "Biometrics as a Privacy-Enhancing Technology: Friend or Foe of Privacy?," Privacy Laws & Business 9th Privacy Commissioners/Data Protection Authorities Workshop, Spain, September 15, 1998 (as of 7/5/99), www.dss.state.ct.us/digital/tomko.htm.

³² Ibid.

Firstly, biometrics entail risks of inaccuracy. Biometric identifiers are a convenient way of identification or authentication as “they cannot be borrowed, stolen, forgotten or forged”.³³ However, they are “neither completely secure nor accurate” identifiers.³⁴ As various research has shown, many factors may influence the precision of biometric technologies: different lighting, background composition or angle may cause a mistake in facial scan or the inappropriate position of eye may misread the iris and retina. Even fingerprints, which are regarded as the most reliable biometric, may be questioned for their accuracy, depending on a person’s age (old or young person) and environment (dry or humid).³⁵ For example, the British Parliamentary Office of Science and Technology illustrated the possible error rates and their implications:

“...63 million passengers travel through Heathrow each year. If fingerprint scans offering 98% accuracy were introduced there would be over a million errors each year; with 99.9% accuracy there would be 63.000 errors – more than 1000 every week.”³⁶

In case of an error a burden of technological imperfections is transferred to individuals, who have no real possibilities to change incorrect information or control their incorrect samples in biometric systems. If one’s identity has been misappropriated or combined with identities of others or changed by an inaccurate sample taking due to a human error, there are very limited possibilities for an individual to challenge the accuracy of his/her biometric data.³⁷ More importantly, even to prove the mistake is very difficult, because biometrics are considered to be very reliable and unique identifiers.

³³ Robin Cooper Felman, “Considerations on the Emerging Implementation of Biometric Technology”, *Hastings Communications and Entertainment Law Journal*, (2004):114.

³⁴ Ibid.

³⁵ Vance C. Bjorn, An Introduction to Privacy and Security Considerations of Biometrics Technology, 701 PLI/Pat., 2002, 105-107

³⁶ Angela Liberatore, “Balancing Security and Democracy: The Politics of Biometric Identification in the European Union”, EUI Working paper, No. 2005/30, 16.

³⁷ Juliet Lodge, “A question of identity becomes a matter of freedom”, 24 December 2007, <http://www.libertysecurity.org/article1784.html>

Moreover, the functioning of biometric technologies depends on the accurate registration of samples in the system. Once a sample linked to a certain subject is included into the system, future identification process is based on comparison between the live sample and reference sample. A perfectly functioning system must match a person in 100 percent of cases. However, as biometric systems are still under development, there are no perfectly functioning systems. Moreover, biometric samples are often collected in various environmental conditions, using not very precise technologies. For these reasons, the tendency to experience a “false match” or false “non-match” always remains.³⁸ In this respect, technology failures have been illustrated by tests of face recognition, showing how technology failed to match faces with names in 503 cases out of 958.³⁹ Another example has been provided by a Japanese research group from the University of Yokohama, which carried out research circumventing the effectiveness of fingerprint biometric technology. The research demonstrated that fingerprints gathered from drinking glasses can be replicated by jelly moulds.⁴⁰

Secondly, biometric technologies limit the individual’s ability to know or control his/her personal information. Biometric technologies entail the capacity to collect or authenticate biometrics without a person’s knowledge. For instance, biometric systems based on DNA samples, fingerprints, keystroke analysis or distance facial recognition can easily gather the data without the data subject’s awareness, or process it without noticing. Moreover, a person may unconsciously leave traces such as fingerprints on various objects in different environments, which can be used for his identification by applying biometric algorithms.⁴¹ Thus, in many cases “the public has no idea who has access to the information being gathered or how it will be

³⁸ Ibid.

³⁹ Darcie Sherman, “Biometric Technology: The Impact on Privacy”, *CLPE Research Paper 5/2005*, vol. 01 no. 01, (2005):34.

⁴⁰ Ibid.

⁴¹ Article 29-Data Protection Working Party, Working Document on Biometrics, 1 August 2003, no. 12168/02/EN, 4 -5.

used”⁴². Consequently, when a person is not aware of his data gathering, he has no possibility to exercise rights of control, objection or correction of his biometric data.

Thirdly, the purpose of biometric data collection and proportionality in their current use may be often questioned. According to safeguarding principles embodied in data protection laws and guidelines, personal data must not exceed the purpose for which they are collected and processed.⁴³ Consequently, the purpose of collection of biometric data should be clearly determined in every case of their application. However, biometric data often contain more information than it is necessary to achieve the purpose (identify or authenticate a person). For instance, biometric systems of facial recognition may reveal a person’s race, ethnic origin or specific health data.⁴⁴ The examination of a one’s retina could possibly reveal evidence of various health changes such as hypertension or pregnancy.⁴⁵ Fingerprint data may disclose specific genetic anomalies, tendencies to certain illnesses or syndromes and according to some scholars, even male homosexuality.⁴⁶ This kind of biometric information shares many of the attributes of information defined as sensitive. As sensitive data is information about an individual's physical self, it is very personal and deserves special protection. The possibility through the use of biometrics to reveal sensitive data of a person is a serious risk to privacy.

Moreover proportionality and legitimacy of data collection must be considered, taking into account whether it is possible to achieve the same purpose in another less intrusive way. Some introduction of biometric data processing has been often criticized as disproportional, for instance, EU Regulation 2254/2004/EC obliging member states to introduce biometric passports

⁴² Darcie Sherman, “Biometric Technology: The Impact on Privacy”, 35.

⁴³ OECD Guidelines on the Protection of Privacy and Transborder flows of Personal Data; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal no. L 281 of 23/11/1995

⁴⁴ Darcie Sherman , “Biometric Technology: The Impact on Privacy”, 35.

⁴⁵ Robin Cooper Felman, “Considerations on the Emerging Implementation of Biometric Technology”, 114.

⁴⁶ Ibid.

containing facial image and fingerprints. According to the critics, the risk to the privacy of biometric passports is very significant and their reliability is low.

Lastly, the expanded application of biometrics has evolved into means allowing tracking individuals on mass levels across their lives. Digitalized unique biological characteristics of a human being of eye structure, fingerprints, face scanning and DNA have been more and more applied in ID cards and passports, border control areas and enhanced video surveillance with facial recognition. For instance, mass biometric applications took place in war zones of Iraq and Afghanistan, where recently the concept of biometrically gated communities has been introduced.⁴⁷ In 2007, EU member states agreed to establish a database containing DNA and fingerprints from all 27 member states law enforcement authorities.⁴⁸ Moreover, discussions about possibilities to create national identity databases, including even surveillance data collected without the consent of data subjects, arose.

1.1.3. Passenger data transfers

In the aftermath of the terrorist attacks of 9/11, among many other efforts to enhance security, air passenger name record (PNR) data assumed an important value for law enforcement authorities. In May 2004 the US concluded a PNR Agreement with the EU, requiring air carriers to transmit PNR data of every individual flying to or from the US territory to competent US security authorities.⁴⁹

The travelling surveillance system, including every individual trip with all its details, invoked a deep debate and opposition by legal experts, human right groups and privacy advocates. As

⁴⁷ In one of Iraq zones (Gasolier) US soldiers captured fingerprints of all the inhabitants and created a biometric database of the zone.

⁴⁸ The Integration of the "Prüm Treaty" into EU-legislation - Council decision on the stepping up of cross-border co-operation, particularly in combating terrorism and cross-border crime, Press Release IP/07/803.

⁴⁹ This agreement has been replaced in 2007 by Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS), 4 August 2007, *Official Journal* L 204.

Statewatch has noticed, “there is little evidence that the gathering of ‘mountain upon mountain’ of data on the activities of every person in the EU makes a significant contribution.”⁵⁰ However, even evidences of intrusiveness and threat to individual privacy provided by privacy defenders did not stop the creation of PNR systems on both translational and later EU levels.

The EU did not lag behind and followed controversial US example related to passenger data exchanges and transfers, “stepping up Europe’s capability to protect citizens against the threat of terrorism”⁵¹. In July 2007 Commissioner for Freedom, Security and Justice, Franco Frattini, announced the need to strengthen common efforts in the cooperation against terrorism and proposed to establish a European PNR system.⁵² Creation of EU PNR database was justified by the high level of terrorist risk for Europe: “The Union is at least as much a potential target of a terrorist attack as the United States, and the use and analysis of passenger name records is an important law enforcement tool to protect our citizens”⁵³. Four months later, the Commission approved a new package of proposals related to the counter-terrorism measures, including the European version of the EU-US PNR Agreement⁵⁴.

PNR agreements oblige to collect 19 elements of PNR data from air carriers coming into and leaving the EU or US territory. Passenger data include name, telephone number, e-mail address, travel agent, full itinerary, billing data, all baggage information and many other personal details, even the food order during the flight. After the exchange of this data, authorized state institutions have the duty to make a “risk assessment” for each passenger. The purpose for this assessment is

⁵⁰ Statewatch, “PNR (Passenger name record) scheme proposed to place under surveillance all travel in and out of the EU”.

⁵¹ EU Press Release, “Fight Against Terrorism: stepping up Europe’s capability to protect citizens against the threat of terrorism”, 6 November, 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1649&format=HTML&aged=0&language=EN&guiLanguage=en>

⁵² Plenary session of the European Parliament, 9 July 2007, Commission statement - PNR Agreement with the United States, <http://www.statewatch.org/news/2007/jul/ep-pnr-council-report.pdf>

⁵³ European Digital Rights, “EC plans to profile all passengers in and out EU”, EDRI-gram no. 5.21, 7 November 2007, <http://www.edri.org/edrigram/number5.21/eu-pnr>

⁵⁴ Proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes, 6 November 2007, COM/2007/0654 final.

to identify persons who are or may be involved in a terrorist or organized crime offences, create risk indicators for their assessment, provide intelligence or use PNR data in criminal investigations and prosecutions of terrorists and criminals. As every passenger's data is subject to this assessment, it may be concluded that all passengers, irrespective of their suspicion for any crime, are subjects to data profiling.⁵⁵ Thus, this tool "places everyone under surveillance and makes everyone a 'suspect' without any meaningful right to know how the data is used, how it is further processed and by whom".⁵⁶

The period of PNR data retention in the EU active database is 5 years after the data transfer. A further retention in a dormant database (accessible under special conditions database) is foreseen for an additional period of 8 years. According to the EU-US PNR Agreement this retention period is even longer, amounting to 15 years. Such a long duration of storage has been recognised as excessive and unjustified by a number of data protection experts.⁵⁷ Also the majority of EU member states have stated that the average storage duration should not exceed 3.5 years.⁵⁸

The fight against terrorism can be a legitimate ground to apply limitations to fundamental human rights and restrict privacy. In order for these exceptions to be valid, however, "the necessity of the intrusion must be supported by clear and undeniable elements, and the proportionality of the processing must be demonstrated".⁵⁹ In case of extensive intrusion into the privacy of individuals present in case of passenger data collection, such legal justification and the establishment of proportionality is essential. Without a concrete efficiency and

⁵⁵ Statewatch, "PNR (Passenger name record) scheme proposed to place under surveillance all travel in and out of the EU".

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Impact Assessment, Commission Staff Working Document, 6 November 2007, COM (2007) 654 final.

⁵⁹ Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, 20 December, 2007.

proportionality assessment PNR schemes lead to “a move towards a total surveillance society” and cause a high risk for privacy.⁶⁰

1.2. Measuring the extent of imbalance

Previous chapters discussed three security measures, introduced to ensure public safety after 9/11 terrorist attacks. One should not be a civil libertarian to understand how extensively these changes undermine individual rights, especially right to privacy. However, purely descriptive analysis cannot appropriately illustrate the imbalance between privacy and security. Those who advocate for a careful balance between public good and privacy, propose the way how to measure the extent of the imbalance.⁶¹ This measurement is expressed through certain fixed criterion related to compelling need for limiting changes, alternative measures, intrusiveness and side effects. In order to explore the imbalance better, these four criterion will be taken into consideration.

First, a compelling need for introducing privacy limiting changes should exist. The establishment of such need is important, because unnecessary restrictions of privacy may endanger its legitimacy. Moreover, the society may encounter so called ‘slippery slope’ phenomenon.⁶² This phenomenon means that restrictive measures can cause a constant descent into more privacy diminishing restrictions. ‘Slippery slope’ statement is closely related to the situation discussed in video surveillance chapter, referred to as a fable of a boiled frog. Civil libertarians who invoke this comparison emphasize that society which is constantly under surveillance adapts to the erosion of privacy. Gradually elimination of privacy changes its understanding and has negative implications for privacy concept as such. Thus, one should

⁶⁰ Ibid.

⁶¹ Etzioni, Amitai, *The Limits of Privacy*, Basic Books: New York, 1999, 184.

⁶² Ibid.

determine the importance of security interest which should be protected before setting privacy on stake.

Terrorism is generally perceived as the most challenging global threat to security since 2001. It endangers main values of democratic societies, free exercise of human rights, economic and social development. In other words, “where government is too weak to prevent terrorists from threatening schools, cafes, shopping centers, pedestrian malls, office buildings and airports on daily basis, citizens’ choices are severely limited by the necessities of sheer survival”.⁶³ In fact, no one would deny that terrorism is a grave security threat and can cause a significant loss for the whole population. Terrorist groups acquiring weapons of mass destruction can be the example of such risk when survival of millions of people may be at stake. But one could assess the gravity of terrorism also differently. Although the exact assessment of its harm is complicated, according to some scholars the threat has been clearly overstated.⁶⁴ As political scientist John Mueller concluded “even with the September 11 attacks included in the count... the number of Americans killed by international terrorism since the late 1960s (which is when the State Department began its accounting) is about the same as the number killed over the same period by lightning, or by accident-causing deer, or by severe allergic reactions to peanuts”.⁶⁵ It is important to acknowledge that widely spread fear in public mind of being a victim of terrorist attacks and large media coverage of the issue contributed to the excessive assessment of the fear.

Second, alternative tools for the achievement of security without privacy restrictions should be examined.⁶⁶ The analysis of passenger data collection showed that EU could have the same counter terrorism results through a number of already existing measures. These measures Schengen Information System, Visa Information System, co-operation under Europol and Prüm

⁶³ Tamar Meisels, “How Terrorism Upsets Liberty”, 170.

⁶⁴ Daniel J. Solove, “Data Mining and the Security-Liberty Debate, University of Chicago Law Review 75, (2008):337.

⁶⁵ Ibid.

⁶⁶ Ibid.

Treaties are less invading person's privacy and can sufficiently support the fight against terrorism. Especially the obligation to collect API, which has not less value but more privacy protection instead of PNR data has been showed as an adequate measure to achieve the same goal. Video surveillance analysis let to the conclusion that it is not significantly useful tool to reduce crime rates, let alone to identify or arrest terrorists. As ACLU has announced cameras are not able to prevent crime because criminals move to not monitored locations.⁶⁷ It is also true, that alternative tools can be found to tackle street crimes and terrorist activities. As Jerry Brown noticed, "reducing crime is something community and police must work together. Installing a few or a few dozen surveillance cameras will not make us safer."⁶⁸

As regards biometric technologies it is hard to establish a general judgment about the possibility to achieve the same purpose in less intrusive way. As biometric technologies are used in various ways, incorporating them into passports, checking at airports, in each case of their use a specific research should be conducted. However, as it was mentioned, biometric passports have been criticized as not reliable enough in comparison to the risk of privacy they cause.

Third, according to properly balanced privacy and security interests, intrusive intervention of security measures into privacy should be minimal. However, the analysis of biometrics showed the entailment of excessive intrusion. Only the way biometric samples are taken entails bodily intrusive manner, for instance retina scanning or DNA sample collection. As far as video surveillance or PNR data are concerned the way of intrusiveness is not so noticeable, because very often the individual is not aware of the fact that his data is gathered.

⁶⁷ Nicole Ozer, Technology and Civil Liberties Policy Director, "Do Surveillance Cameras make the City Safer?", *San Francisco Chronicle*, August 28, 2005.

⁶⁸ The impact of video surveillance cameras, in Mark Schosberg, Nicole A. Ozer, "Under the Watchful Eye: The Proliferation of Video Surveillance Systems in California", ACLU Report, 3.

Finally, laws establishing security measures should address the undesirable side affects of intervention.⁶⁹ As it was notices, biometric data may have clear side effect in being able to disclose more information than it is necessary for established purposes. Possibility to gain excessive personal information related to one's race, ethnic origin or various health anomalies evidence a very undesirable side effect. Even it may be resolved in the future development of biometric technologies, till now the law is not able to address this privacy concern adequately. PNR data retained in governmental data basis for a long period of time and unclear sharing mechanisms between US authorities may be viewed as possible risk for side effects. Video surveillance, especially with the capability to recognize the face, entails the capability to discriminate people. Engendered discrimination of certain groups such as black or people of Arabic origin, could be viewed as very significant side effect.

In short, empirical analysis above shows that the application of three security measures under consideration favors security in all respects.

⁶⁹ Amitai Etzioni, *The Limits of Privacy*, 186.

CHAPTER 2 - BALANCING LIBERTY AND SECURITY

As the empirical analysis of three security measures in the first chapter demonstrated, a dramatic enhancement of public security after 9/11 leads to serious privacy concerns. One should naturally wonder whether increased threat of terrorism requires such a significant diminution of privacy. The answer to this question lies in a wider debate concerning liberty and security balance. One side in the debate, civil libertarians, who tend to defend civil liberties at all costs and claim that no trade-offs should be allowed between liberty and security. On the other side, communitarians, prioritizing public good over private interest, seem to take an opposite position. The third point of view in this debate is related to certain principles when both parts would agree to favor security. Taking into account these diverging views, this chapter aims to explore the debate about liberty and state power to restrict it, dividing the debate into three parts: libertarian approach, communitarian approach and their common points of agreement.

2.1. Libertarian approach

Liberalism embraces a wide range of approaches. One of them called ‘hard’ liberals, are libertarians. This approach has emerged as a stream, restating classical liberal themes, which strongly supported traditional individualistic values.⁷⁰ It combined a strong endorsement of several central ideas: skepticism about power, limited government, dignity of the individual, individual rights, free market, and spontaneous order.⁷¹ As David Boaz notices, “we might define libertarianism as a species of (classical) liberalism, an advocacy of individual liberty, free markets, and limited government rooted in a commitment to self-ownership, imprescriptible

⁷⁰ P. Barry, *On Classical Liberalism and Libertarianism* (The Macmillan Press LTD: London, 1986), 2.

⁷¹ David Boaz (ed.), *The Libertarian Reader: Classic and Contemporary writings from Lao-tzu to Milton Friedman* (The Free Press: New York, 1997), xv.

rights, and the morals autonomy of the individual”.⁷² Although libertarians share all mentioned core ideas with classical liberals, they are characterized by a particular maximization of individual freedom. Expressing that, they focus on two main aspects: maximization of political and civil liberties and minimization of the role of the state in economic sphere. The first aspect is represented by civil libertarianism which seeks to guarantee civil rights and liberties, such as information privacy or freedom of association. Many of civil libertarians take part in American Civil Liberties Union (ACLU), CATO institute or European Civil Liberties Network and actively oppose to any liberty restrictions. Civil libertarians are particularly important for the liberty and security debate. Their voice represents the main criticism for liberty and security balance. They insist that any kind of diminution of individual rights “must be so encumbered with demanding standards and rigorous process that it effectively thwarts the exercise of power”.⁷³ More radical libertarians even hold that while the first principle of liberalism is individual sovereignty, for libertarians it is non-interference, which is logically equal to the first principle of justice. In this respect, libertarians should rule out interference from the very beginning.⁷⁴

Thus, libertarians express the most radical stance on the debate about liberty and security. In the aftermath of 9/11 terrorist attacks they often challenged government’s power to use security measures, which undermine privacy. Claiming that the application of such measures is “shredding the Constitution” and endangering fundamental rights libertarians characterized intervention of the state as the “erosion of civil liberties”.⁷⁵ Although not all libertarians take such a clear-cut position, the general principle that “no trade-offs between personal rights and common goods are required” dominates in a majority of libertarian views.

⁷² Ibid., xiv

⁷³ Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?" . Florida Law Review, vol. 55, (2003):1105.

⁷⁴ Jeffrey Reiman, “Liberalism and Its Critics”, in *The Liberalism-Communitarian Debate*, ed. C. F. Delaney (Rowman & Littlefield Publisher Inc.: Boston, 1994), 22.

⁷⁵ Amitai Etzioni, “After 9/11, Rights and Responsibilities”.

2.2. Communitarian approach

Communitarian philosophy is based on the criticism of the libertarian concept of the autonomous and self-interested individual. Communitarians prefer “social formulations of the good” over the independent individual choice of it.⁷⁶ According to communitarian thought, individuals, as moral and political agents, can prosper and fulfill themselves only in the community. Outside of it neither individual liberty nor real human existence can be reached.⁷⁷ Only communities can legitimately and properly articulate values and concepts of the good, cultivate and enforce them.⁷⁸ Community, such as family, school or church, is regarded as inevitable for the fulfillment of every human because every person is intrinsically social and reflects social units in which they are embedded.⁷⁹

All communitarians share their basic assumption that social sphere and community are of primarily importance. Although various communitarian scholars give different weight to liberty and individual rights, their philosophical thought has never abandoned the emphasis on public good.⁸⁰ Some communitarians even explicitly advocate limitations on individual rights and liberties for the maintenance of social order.⁸¹

The most influential wave of communitarian thought, particularly relevant to the debate about the balance between liberty and security, is associated with the 1990s and the emergence

⁷⁶ Amitai Etzioni, “Communitarianism”, in *The Cambridge Dictionary of Sociology*, ed. Bryan S. Turner (Cambridge University Press: Cambridge, 2006).

⁷⁷ Amitai Etzioni, *Rights and the Common Good: The Communitarian Perspective*, St. Martin’s Press: New York, 1995, 11.

⁷⁸ Amitai Etzioni, Communitarianism, in *Encyclopedia of Community: From the Village to the Virtual World*, vol. 1, eds. Karen Christensen and David Levinson, (Sage Publications, 2003), 224.

⁷⁹ Amitai Etzioni, “A Matter of Balance, Rights and Responsibilities”, in *The Essential Communitarian Reader*, ed. Amitai Etzioni (Rowman & Littlefield Publishers, Inc.: Lanham, 1998), xi.

⁸⁰ Amitai Etzioni, Communitarianism, in *Encyclopedia of Community*, 2.

⁸¹ Ibid.

of “responsive communitarians”.⁸² Willing to respond to the “breakdown in the moral fabric of society endangered by excessive individualism” Amitai Etzioni, William A. Galston, Mary A. Glendon, Jean Bethke Elshtain and other scholars and politicians elaborated a manifesto called The Communitarian Platform containing their core ideas.⁸³ One of them is that good societies should balance individual rights and social responsibilities, liberty and social order, autonomy and public good.⁸⁴ This idea is related to the acknowledgment that societies have many needs which can not be always compatible.

The idea of balancing between individual interests and public goods is clearly contrasted with the liberal core statement that individual rights have priority over common goods.⁸⁵ Thus communitarians challenge one of the core concerns of liberalism related to the protection of individual rights against the intrusion of the state.⁸⁶ Based on the core assumption of balancing public good with private interest communitarians strongly advocate the precise balance between privacy and security. They state that privacy is not an absolute value and should “trade-off in the name of the common good”.⁸⁷

2.3. Common grounds

Despite diverging approaches between libertarians and communitarians a deeper analysis shows that both parts may find arguments for reconsidering their positions. Both philosophical traditions would recognize the legitimacy of state intervention to avert a significant risk.⁸⁸ For

⁸² Ibid.

⁸³ Responsive Communitarian platform: Rights and Responsibilities, 1991, <https://www.gwu.edu/>

⁸⁴ Amitai Etzioni, *The Limits of Privacy*, 184.

⁸⁵ C F. Delaney, *The Liberalism-Communitarian Debate*, ix.

⁸⁶ Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 37.

⁸⁷ Amitai Etzioni, *The Limits of Privacy*, 184

⁸⁸ Lawrence O. Gostin, 39 Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 39

instance, in the emergency situation libertarians and communitarians would find a common agreement about restrictions of civil liberties.⁸⁹ If one presumes that terrorism constitutes such a grave threat that security can not be reached at all without extraordinary security measures, the suspension of liberty would be justified by both camps. Both libertarians and communitarians would agree that if security is a prerequisite for liberty, the discussion about the liberty and security balance should be based on assumptions of classical liberals who support state's power to ensure security. Philosophical thought of John Locke and John Stuart Mill, in this respect, would provide reasons and justifications for the exercise of unconstrained governmental power.

John Locke, in all his writings advocates minimal state and prefers strictly constrained government could be viewed as a supporter for executive power acting at its own discretion for security purposes.⁹⁰ In cases when the protection of life, liberty and property people permit Executive Power to act in the interest of public good. This discretion of sovereign to exercise its power without the permission of the law or even against it is called Prerogative.⁹¹

Although liberals adverse state's warrant of intervening into individual behavior, they acknowledge that due to significant harm prevention state can exercise its power legitimately.⁹² For instance, John Stuart Mill claims that state coercion can be justified in order to prevent or punish acts which cause harm to other people.⁹³ "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"⁹⁴ As

⁸⁹ Tamar Meisels, "How Terrorism Upsets Liberty", 162.

⁹⁰ Ibid., 165.

⁹¹ Mark Neocleous, Critique of Security Politics, *Contemporary Political Theory* 6, (2007):135

⁹² Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 31.

⁹³ J. S. Mill, *On Liberty*, in *Mill: Texts, Commentaries*, ed. Alan Ryan (Norton and Company Inc: New York, 1997), 49

⁹⁴ Ibid.

Lawrence O. Gostin summarizes, liberals from John Stuart Mill to Joel Feinberg acknowledge that individual freedom related to autonomous self-regarding behavior can be viewed as almost absolute, individual behavior towards others have clear limitations.⁹⁵

Thus, for the sake of public good in hard cases, emergency situations limitations on civil liberties would be viewed not only as consistent with liberalism, but also as warranted.⁹⁶ Waldron notices that no one conceives individual rights as absolute or untouchable.⁹⁷ In Ronald Dworkin's words, one should not disregard that even if citizens have rights against their government it does not mean that state can *never* override them and be justified, in case it is necessary to protect the rights of others.⁹⁸ Communitarian position is similar to libertarian but based on different primary liberal assumptions they strive for the balance differently.

Moreover, it is important to mention that even both libertarians as well as communitarians would agree that in certain situations minimal role of government is not able to guarantee survival without limiting liberty. If one agrees with the argument that after 9/11 the situation changed from Lockean state of nature to Hobbesian 'war of all against all', the justification of extra-ordinary state powers may be supported.⁹⁹ However, in this case the question of any liberty restrictions should be both necessary and effective for reaching public safety.¹⁰⁰

As the analysis of basic assumptions in libertarian and communitarian thought has showed, two philosophical traditions within the same liberal tradition have different views about the justifiable use of state's power. Libertarians actively defend individual rights rejecting intrusive state action. Communitarians, however, would have no problem with individual rights and

⁹⁵ Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 31.

⁹⁶ Tamar Meisels, "How Terrorism Upsets Liberty", 165.

⁹⁷ Jeremy Waldron, "Security and Liberty: The Image of Balance", *The Journal of Political Philosophy* 11, no. 2, (2003):208.

⁹⁸ Waldron, , "Security and Liberty: The Image of Balance", 198.

⁹⁹ Tamar Meisels, "How Terrorism Upsets Liberty", 168.

¹⁰⁰ Tamar Meisels, "How Terrorism Upsets Liberty", 179.

oppressive state in cases of security threat. They stress state's obligation to defend common good, such as safety of its population. Community interest would let them to the conclusion that everyone would benefit if limitations of individual liberties would help to guarantee the public safety.¹⁰¹ Alternative grounds like Mill's harm principle, emergency situation and or impossibility to survive without state's interference would merge the approaches of communitarians and libertarians favoring security.

¹⁰¹ Lawrence O. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?", 40.

CHAPTER 3 - REDEFINING THE BALANCE

“...there may come a time when we think we are merely limiting some personal or property right in favor of some greater good, when in fact we are really sacrificing something of much greater value”.

Jeffery H. Reiman, 1975¹⁰²

Previous chapter described the debate about the balance between liberty and security in the current ‘terrorism age’. The conclusion reflected the dominant forefront: clash between liberty and security is inevitable reality. It always existent and will exist, because every democratic society must sacrifice certain amount of liberty in its desire for security.¹⁰³ If one agrees with this conclusion that there is a constant tension between the individual liberty and public security the only task which remains for the state is to strike the right balance. In this respect, restrictions of privacy make part of individual liberty limitations. Impingements on privacy inherent to security measures are easily justified as a price for security in this balancing. The aim of this chapter, however, is to challenge this assumption and to show that liberty interest is limited by incomplete understanding of privacy. Closer look to privacy reveals the dismissed aspect of it: privacy entails combination of property and security. In order to demonstrate that, one should go back to Locke and his theory of property.

Once it is established that privacy in proprietary sense can not be understood without security, the implication of this claim leads to the suggestion that privacy can not be covered under liberty in the debate about balance between liberty and security. This leads to the

¹⁰² Jeffery H. Reiman, “Privacy, Intimacy and Personhood”, *Philosophy and Public Affairs* 6, no.1 (1976): 28.

¹⁰³ Mark Neocleous, “Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics”, *Contemporary Political Theory*, no. 6 (2007): 132 .

conclusion that the balance should be redefined from individual liberty versus public security, to the balance between public security and individual security.

3.1. Understanding Privacy

Huge volumes of books have been written by lawyers and philosophers trying to define the notion of privacy. Acknowledging all these contributions this chapter looks to classical liberal thought and suggests that the value of privacy can be derived from and understood through Locke's theory of property. Analyzing origins of privacy in this proprietary sense may have different implications for privacy understanding and shed the light on reconsideration of the balance between liberty and security. After reexamination of privacy through Locke's theory of property this chapter shows that privacy is the combination of two ideas - property and security.

3.1.1. Locke's Theory of Property

Locke's theory of property is considered to be "the cornerstone of classical liberalism".¹⁰⁴ It is embodied in the *Second Treatise of Government*, which first was first published in 1690 as a response to the British Whig Revolution.

To understand the central importance of property in Locke's political philosophy, one should keep in mind the historical context in which Locke created his theory. The government of 17th century was marked by absolute monarchy and the overwhelming will of the ruling class. Locke's adversary, Robert Filmer, who supported the existing regime, in 1680 published *Patriarcha*. In this writing Filmer stated that the relationship between individual and the state is the same as between child and father. This meant, consequently, that an individual can gain

¹⁰⁴ Karen Vaughn, "John Locke's Theory of Property: Problem of Interpretation", *Literature of Liberty: A Review of Contemporary Liberal Thought* III, no. 1, (Cato Institute, 1980).

property only from the King.¹⁰⁵ Locke in contrary, claimed that God did not grant property rights exclusively to the monarch, but private property existed prior to the government creation and was independent of it. In Locke's view, the right to property is derived from natural law.¹⁰⁶ Essentially, for Locke this natural law is intrinsically related to the natural right to property: the former begins and ends with the latter.¹⁰⁷ Locke explained the government's role by limiting it to the protection of property and individual right.¹⁰⁸ He stated that "The great and the chief end therefore, of Men uniting into Commonwealths, and putting themselves under Government, is he Preservation of their Property"¹⁰⁹

According to Locke, in the state of nature men were independent: free to do what they wanted and without asking any permission or "depending upon the will of any other man".¹¹⁰ They were also equal and no man governed another.¹¹¹ This state of nature was ruled by a law of nature, which obliged everyone.¹¹² Locke states that "reason, which is that law teaches all mankind, who will but consult it" that "being all equal and independent, no one ought to harm another in his life liberty or possessions".¹¹³ For Locke the right not to be harmed in one's possessions is equally important as the right to life and liberty.¹¹⁴ Treatment of possessions on the same level as life or liberty illustrates the essential role of property for Locke. To elaborate

¹⁰⁵ Edwin G. West, "Property Rights in the History of Economic Thought: From Locke to J. S. Mill", 2001, www.carleton.ca/economics/cep/cep01-01.pdf , 2

¹⁰⁶ Ibid.

¹⁰⁷ Radical Academy, Bibliography of Locke, www.radicalacademy.com/lockebio.htm

¹⁰⁸ Ibid.

¹⁰⁹ John Lock, *Two Treatises of Government*, Peter Laslett (ed.), (Cambridge: Cambridge University Press, 1988), 2: 350-351.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ John Lock, *Two Treatises of Government*, 289.

¹¹⁴ Karen Vaughn, "John Locke's Theory of Property: Problem of Interpretation".

on that Locke dedicates the whole Chapter V of *Second Treatise* which provides reasons why no one should be harmed in his possessions.¹¹⁵

3.1.1 Property as an Extension of the Individual Self

Locke builds his property theory on the assumption that earth and fruits are given for all men in common by God.¹¹⁶ In order to explain how common resources can become legitimate private property to which no one else except the owner has rights, Locke suggests that one form of absolute private property is the property each man has in his own person.¹¹⁷ This statement about a person having property in himself, was quite common among writers of 17th century. Self ownership at that time meant “a definition of personality—that which constituted the individual, and it included one's body, actions, thoughts, and beliefs”.¹¹⁸ Before Locke, Grotius stated that “every individual was surrounding by the *Suum*, that which belongs to a person, or was “proper” to it. Included in the *Suum* were one's “life, limb and liberty . . . reputation and honor . . . [and] one's own actions”.¹¹⁹

Locke explains how people can possess something outside of their self using labor theory of property:

“. . . everyman has a property in his own Person. This no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”¹²⁰

¹¹⁵ John Lock, *Two Treatises of Government*.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ John Lock, *Two Treatises of Government*.

Thus, once a man leaves the state of nature and mixes his labor with his ‘property in person’, he annexes to it different value which eliminates the rights of other to his property.¹²¹

Lock continues by saying that

“From all which it is evident, that though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions of labour of it, had still in himself the great foundation of property...”¹²²

Locke’s use of property in one-self is of dual importance.¹²³ Firstly, it is a necessary component of his claim concerning private property: “man must own his person, in order to own his labor, in order to own the property with which he mixes his labor”.¹²⁴ Once private ownership over certain property is defined, man is allowed to hold his property separately from the state and from other men.¹²⁵

Secondly, the use of property in the person helps Lock to separate paternal power from political power. This provides the ground for Locke to contradict Sir Robert Filmer’s support to the absolute power of the monarch based on the idea that a monarch has paternal, and therefore absolute, power over his people.¹²⁶ Locke criticizes Filmer in various ways, one of which is his claim that every man is an owner of himself. This results in the right of every man to choose whether or not to become a subject of any given government.¹²⁷ Locke states that, “... a child is born a subject of no country or government. ... Every man, as has been shewed, naturally free,

¹²¹ Ibid.

¹²² John Locke, *Two Treatises of Government*, 27.

¹²³ Mary McThomas, “The Right to Privacy in Theory and Practice”, Paper presented at the Midwest Political Science Association Annual Meeting, Chicago, IL, April 7-10, 2005, 4.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Mary McThomas, “The Right to Privacy in Theory and Practice”, 4.

¹²⁷ Ibid.

and nothing being able to put him into subjection to any earthly power, but only his own consent...”¹²⁸

So, according to Locke, a man has a right over his own person, over his body and all actions that come from his body. This tendency in interpretation of property as an extension of individual self can be found in US court decisions and writings of privacy scholars. For instance, in the Pavesich case¹²⁹ Georgia Supreme Court confirmed the extension of private property in an intangible sense to include person’s likeness. In this case the use of one’s likeness without his consent was treated as an invasion of privacy.¹³⁰

The next chapter will examine in more detail how Locke’s theory of property has been followed by lawyers and philosophers. Their understandings of privacy can be seen as variations of Locke’s theory and provide a deeper insight about the relationship between privacy and property in the Lockean sense.

3.1.2. Privacy as property

If one wants to understand the concept of privacy and its link to property, the exploration of privacy’s roots should be the first step. The articulation of privacy is traced back to Samuel Warren and Louis Brandeis’ article “The Right to Privacy” in 1890, which entailed the first definition of privacy, expressed as “the right to be let alone”.¹³¹ Although Samuel Warren and Louis Brandeis’ in their article formulated the right to privacy as a separate right, the article begins with the reference to the right to property comprising “every form of possession -

¹²⁸ John Locke, *Two Treatises of Government*, 63.

¹²⁹ Pavesich v. New England Life Insurance Co., 122 GA 190, 50 S.E. 68 (1905).

¹³⁰ Mary McThomas, “The Right to Privacy in Theory and Practice”, 4.

¹³¹ Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review*, vol. 4, no. 5, (1890):193-220.

intangible, as well as tangible”.¹³² The article recognizes that privacy in certain cases can be used as property in an “extended and unusual sense.” Following the position of Samuel Warren and Louis Brandeis, US courts in first privacy cases dealing with the usage of a person’s likeness, explicitly related it to the principle of property. Thus, the relation between privacy and property was evident already in the initial articulation of privacy as a right defining it as property in an extended sense. In this respect, Cranston concluded that courts “have recognized privacy only when it is allied to some form of property interest.”¹³³

Although such an explicit mentioning of privacy as an intangible property can be found only at the initial formulations of privacy as a right, the implicit relationship between those two concepts can be noticed also today. Contemporary scholars in one or another manner come back to Locke’s idea that every man has property in his own person. Some of them theoretically based many human entitlements on the notion of property. For instance, Posner stated that undifferentiated concept of privacy is one kind of property.¹³⁴ Thomson observed that a big part of privacy discourses is grounded on “ownership” basis.¹³⁵ Thus, variations around property assumption may be found in works of many lawyers and philosophers, who addressed privacy related to informational, proprietary privacy or property and expressed ownership, even of intangible property.¹³⁶

All these categories of privacy can be found in Ruth Gavison’s definition. She systematizes a number of classifications of privacy aspects into four categories: decisional, informational, proprietary, and private property.¹³⁷ Decisional privacy is perceived as the freedom of individual to make personal decisions about intimate life and related issues. This

¹³² Ibid.

¹³³ Maurice Cranston, *The Right to Privacy*, Unservile state Papers, no. 21, Oxford: The Unservile State Group, 1975, 8-9.

¹³⁴ Richard A. Posner, “The Right to Privacy”, *Georgia Law Review*, no. 12, (1978):393-404.

¹³⁵ Judith Jarvis Thomson, “The Right to Privacy”, *Philosophy & Public affairs*, no. 4, (1975):303.

¹³⁶ Mary McThomas, “The Right to Privacy in Theory and Practice”, 3.

¹³⁷ Ruth Gavison, “Privacy and the limits of law”, *Yale Law Journal*, no. 89, (1980):421.

category of privacy covers decisions about intimate partnerships, abortion, use of contraceptives, family affairs and raising children. Decisional privacy is often used as synonymous with autonomy, aiming to ensure an individual's freedom to decide what a good life is and make related choices.¹³⁸ Decisional privacy understood in such manner is not closely related to security matters and state interference into private sphere, and thus is not covered in this thesis. Informational privacy is privacy of personal information protecting individual against its unwarranted disclosures or gaining of material regarding personal life. Informational privacy is related to such matters as the monitoring of correspondence, video surveillance, phone tapping, other ways of collection of personal information or data. Due to the topic of this thesis which deals with the collection of personal information in post 9/11 world, informational privacy is the most important aspect. Proprietary privacy, as Gavison determines it, concerns the owning of one's own image. This type of privacy is potentially invaded through unwanted publicity or the use of one's likeness and name without person's permission. Private property is characterized as physical privacy. It is "the ability to have a room of one's own in which you can shut the door, close the curtains, and completely remove yourself from the public sphere".¹³⁹

Westin nominates four states of privacy that include solitude, intimacy, anonymity and reserve.¹⁴⁰ He explains solitude as physical privacy or seclusion from observation of others. Intimacy is perceived as state of corporate seclusion experienced through private and close relations within small units, such as family or friendship circle. Third state, anonymity refers to the freedom from identification and surveillance in public places or in performance of public functions. Westin notices, that unless one is a known celebrity, he does not expect to be identified walking on the street or going in the metro. Reserve expresses individual need to

¹³⁸ Mary McThomas, "The Right to Privacy in Theory and Practice", 2.

¹³⁹ Ibid., 2.

¹⁴⁰ Alan Westin, "Science, privacy and freedom: Issues and proposals for the 1970's", *Columbia Law Review*, vol. 66, (1966).

restrict communications about self and the will of discretion from people around. The most predominant state is the latter one, as Westin states, that privacy first of all “is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.¹⁴¹

Prosser in his definition of privacy invasion enumerates various privacy aspects such as intrusion into a person’s seclusion, publicity placing one in a false light, public disclosure of embarrassing private facts and appropriation of a person’s likeness or image.¹⁴²

All these authors can not characterize privacy without attributing to it some property aspect. They all refer to personal information as an important aspect of privacy. Gavison calls this aspect informational privacy, Westin refers to it as reserve, Prosser as disclose of private facts. All these references are connected to personal information and viewed by authors as personal property. Called as informational privacy this aspect will be discussed in detail.

Informational privacy related to the control over one’s personal information has the most evident link with personal property. There are several reasons for that. First, personal information itself is one’s intangible property, if we view it as an extension of personality.¹⁴³ Personal information entails data which is intrinsic to a person. Although on the theoretical level it is difficult to find the agreement over exact type of information which should be controlled by individual. Lawyers define it as any kind of information from which it is possible identify a person directly or indirectly.¹⁴⁴ Such information may be, for example, person’s name, surname, address, telephone number, health status or any other type of information linked to individual referring to factors specific to his physical, psychological, economic, cultural or social identity.

¹⁴¹ Alan Westin, “Science, privacy and freedom: Issues and proposals for the 1970’s”.

¹⁴² William L. Prosser, “Privacy”, *California Law Review*, vol. 48, (1960):383.

¹⁴³ Daniel J. Solove, “Conceptualising Privacy”, *California Law Review* 90, (2002):1112.

¹⁴⁴ This definition of personal information (data) is taken from the EU Directive 95/46/EC

Second, if a person has the “control” over his information it means his ownership over it. D. Solove confirms that by stating that often “control is understood as a form of ownership in information”.¹⁴⁵ Westin expresses informational privacy through ownership even more explicitly by concluding that “personal information thought of as the right to personality, should be defined as property right”.¹⁴⁶

Third, personal information is generated by extending one’s personality. Every person creates his life and produces information about self during the development of his personality.¹⁴⁷ The understanding of people that their “actions and their history ‘belonged’ to the self which generated them and were to be shared only with those with whom one wished to share them” is related to the rise of individualism.¹⁴⁸ One’s self and the expression of one’s self can be related to art, theater or other intellectual or creative activities. When a person mixes his original personality with ideas and merges property in person with his labor, he acquires property right to something emanating from one’s self.¹⁴⁹ In Lockean sense also personal information (for instance, actor X) is generated by this merge between property in self and labor.

Another example of personal information as property could be linked to public exposition of personal image or personal facts. Commercial use of name or picture clearly includes proprietary aspect. Although the “essence of privacy is not freedom from commercial exploitation”, there are forms when commercial exploitation involve privacy.¹⁵⁰ One can imagine the situation when a newspaper publishes a picture of allegedly suspected terrorist on the front page. The aim of the newspaper is to sell personal image and gain financial benefits. If personal

¹⁴⁵ Daniel J. Solove, “Conceptualising Privacy”, 1112.

¹⁴⁶ Alan Westin, , “Science, privacy and freedom: Issues and proposals for the 1970’s”.

¹⁴⁷ Daniel J. Solove, “Conceptualising Privacy”, 1113.

¹⁴⁸ Ibid., 1113.

¹⁴⁹ Ibid., 1112.

¹⁵⁰ Ibid., 148.

image or facts can bring property to others, it has proprietary aspect. In this case privacy, as a broad concept, could be used for protection against exploitation.

To sum up, privacy can be understood as naturally emerging from selfhood, related to Lockean claim that every person has property in his person. Even contemporary authors did not abandon Lockean interpretation of an extension of individual self as property. According to Locke's theory of property when the ownership over certain property is established a person can hold it separately from the common property and the state is obliged to protect it. In case of personal information or image once the information is defined as personal, others have no right to appropriate it and the state has the obligation to safeguard it from intrusion. The invasion of one's privacy may be viewed as a misappropriation of his property.¹⁵¹

3.1.3. Privacy as combination of property and security

Once the concept of privacy has been defined as the ownership of individual self and linked to property, another important issue arises. The concept of privacy can not be fully understood in a proprietary sense without security. In fact, privacy inherently entails a combination of both property and security and is inseparable from the latter.

The obligation to secure the property of one's self is evident in Locke's *Two Treatise*. This obligation applies to both: the state and the individual. According to Locke, when men from state of nature agree to form civil society, they limit their natural liberty for the sake of civil society bonds. They join into the community, "for their comfortable, safe and peaceful living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it".¹⁵² The role of the state expresses its obligation to secure the property everyone

¹⁵¹ Morris L. Ernst & Alan U. Schwartz, "The Right To be Let Alone", (New York: Macmillan, 1962), 2.

¹⁵² John Locke, *Second Treatise*, § 95.

owns in one's self. As Y. W. Yolton states, "it is property and its protection which is the most fundamental reason for leaving the community of mankind for the greater security of civil society".¹⁵³ Moreover, the reason why men can dissolve the government or make internal changes in it is related to the same reason: safety of property. When it loses the trust related to the protection of property it can not perform its function anymore.

The second aspect of security related to property is the obligation of every man to secure his tangible and intangible property. Although men living in the state of nature have uncontrollable liberty for disposal of their persons and possessions, they have no liberty to destroy themselves.¹⁵⁴ All men are servants of God, who is, according to Locke, the owner of all men. This means that being the property of God, men must preserve themselves, in other words to secure the God's property and "not to quit his station willfully".¹⁵⁵ Thus the demand to secure one's property in one's self is derived from God's will.

In short, Locke emphasizes that every man is obliged to secure his property. Moreover, the state is created for the protection of property. From *Two Treatises* it may be concluded that things which must be secured in civil society by man and by the state are life, health, liberty, possessions, property and actions. All these items have one thing in common - they are private.¹⁵⁶

In order to explain the essence of privacy through the combination of property and security in more detail, one may think about the following example. If a person is the owner of himself and everything it entails in proprietary sense, he must have possession, usage and disposal of his property. These rights of the owner express control over one's property. The first thing the owner controlling the property aims to achieve is the security of his property: to use it

¹⁵³ John W. Yolton, *Locke: An Introduction* (Oxford: Basil Blackwell, 1985), 68.

¹⁵⁴ John W. Yolton (ed.), *The Locke Reader*, (Cambridge: Cambridge University Press), 1977, 276.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

in a certain manner without damaging and to secure it from the damage or destruction of others. If a person owns his tangible property, for instance a house, he seeks to protect it from damage. A person must secure it because if someone intervenes and destroys it, no property remains. Thus he has no property without security. In case of intangible property the inherent security need is even more evident. Misuse or exposition of intangible property (for instance image) without the consent of the owner leads to the loss of control over the property and at the same time amounts to the loss of the property itself. When the image becomes public, it ceases to be a private property.

The same conclusion regarding security as inherent to privacy can be drawn from the analysis of informational privacy. As it was mentioned earlier, informational privacy refers to the control over personal information. The aim of this control is to secure inviolability of personality or personhood. Personhood, expressing “attributes of an individual which are irreducible in his selfhood” is overall intangible property.¹⁵⁷ Once the control over this property is lost it is not secure anymore. If it is not secure and others can access it or control, it is not private anymore.

3.2. From ‘privacy vs. security’ towards ‘individual security vs. public security’

Previous chapter demonstrated that privacy contains not only mere proprietary aspect, but also the aspect of security. It was concluded that privacy is undistinguishable from the security of its substance or personal control over it, because the content is the main aspect of privacy which should be protected in order to remain private. An example of control over one’s intangible property - personal information - was suggested in order to understand practical implications of this claim. This example showed that the main aim of privacy related to personal information is individual’s ability to control it and prevent its circulation. This confirmed the statement that

¹⁵⁷ Daniel J. Solove, “Conceptualising Privacy”, 1112.

privacy inherently contains both property and security aspects. If privacy concept consists of private property and security of this property, privacy thus can be defined as security of private or private security. If we accept this definition we can discuss privacy as a private security.

This claim that privacy can be expressed as private security has particularly important implications for the balance between privacy and security. Once privacy is changed to private security the balance is no longer between privacy and security, but between private security and public security.¹⁵⁸ Such redefinition of the balance discloses many important aspects which were not noticeable discussing it as ‘individual liberty vs. public security’ or ‘privacy vs. security’.

First, empirical analysis of video surveillance, biometrics and passenger data gathering according to the newly defined balance clearly shows the real tension in post-9/11 world: enhancement of public security leads to the diminution of private security. Private security in this case could refer to the full control over one’s private information. For example, collection of passenger data clearly reflects this statement. In order to establish state security in the aviation sector, private security is compromised. Consequently, passengers loose any control of more than nineteen elements of their personal information, which is retained for thirteen years in the US Homeland Security Department’s database. The possibility to exchange this data with other authorized state institutions or to make a “risk assessment” of every passenger without his knowledge, demonstrates the lack of individual security. Everyone, whose data is contained in the PNR database, without affective way to challenge this data and to control its accuracy, can experience possible identification with a terrorist network or organized crime. Another example, related to the diminution of personal security is related to biometric data. By combination of one’s identity with others or inaccurate sample taking the state can endanger one’s privacy, more than protect it. Thus by any inaccuracies in biometric sample taking, the state would endanger

¹⁵⁸ The term “public security” in this thesis refers to state security.

individual security for the public security without leaving any possibility to the data subject to check or challenge his data.

Second, the redefinition of the balance reveals that since 9/11 not only individual liberty (privacy) is at stake, but also individual security. Widely known statement that since 2001 we are less free but more secure, if one redefines the balance as it was proposed, changes to ‘less free, less secure’.

Last, thinking about the balance not as ‘individual liberty vs. state security’, but as ‘individual (personal) security vs. state (public) security’ provides a clear picture about the weight privacy can have in the balancing. If we ask the question about privacy in the balance between liberty and security, privacy is clearly disregarded. In the latter case instead, asking the question about the redefined balance the weight of privacy changes. If we disregard privacy in redefined balance, personal security would be compromised in favor of state security. Then a question arises: why do we need a state, and its public security, if it can not guarantee individual security?

CONCLUSIONS

The aim of this thesis was to reconsider the balance between liberty and security, with a particular focus on the role of privacy. The initial presumption was that privacy is disregarded and obscured in the balance between liberty and security due to the limited understanding of the concept. In addition, expanded application of security measures has been underlined as primarily affecting privacy interest. This led to the question whether the debate about balancing liberty and security is appropriately defined in order to discuss privacy. The thesis suggested a deeper analysis of privacy concept that makes the interpretation of trade-offs between liberty and security much more complicated than the existing literature suggests.

The reconsideration of the balance was based on the following steps. First, careful examination of privacy's roots in classical liberal thought showed privacy having a great proprietary value. More importantly, invoking Locke's theory of property, it became evident that privacy in proprietary sense is the combination of two ideas – property and security. Second, deeper understanding of privacy helped to question the assumption that society must carefully balance privacy and public security. If privacy entails security, this balance is wrongly defined. Finally, the thesis suggested that the real opposition should not be seen between individual privacy and public security but rather between private (individual) security and public (state) security. Second, the redefinition of the balance suggested that since 9/11 not only individual liberty is at stake, but more importantly individual security. Finally, the balance defined as 'individual (personal) security vs. state (public) security' highlights the importance of privacy.

Accordingly, the contribution of this thesis is twofold. First, the academic literature can benefit from understanding that the balance between privacy and security should be rather discussed as the balance between private security and public security. This understanding can contribute to a deeper analysis of privacy's role in terms of security measures. Second, the

implications of the redefined balance can also have practical relevance. Public awareness that security measures, such as the collection of passengers' data or application of biometric technologies, enhance security of the state but at the same time diminish security of the individual, could help to make better informed public choices.

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