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Rethinking Surveillance and Control

Beyond the "Security versus Privacy" Debate

Nomos

Elisa Orrù | Maria Grazia Porcedda
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Foreword

When questions about security need a reliable answer, based on evidence and data, professional experts from the security services are called upon. But politicians, confronted with a security problem, not only rely on members of the intelligence or police communities. Often security consultants and industry representatives are considered as knowledgeable and reliable sources for risk and threat assessments as well. They give testimony in front of parliamentary committees, drafting and deliberating new regulations. They dominate public discourse on security and are interviewed to elaborate on periodically released reports about the developments of the security landscape – from crime statistics to intelligence briefs about new trends in terrorism. The problem though is, these experts are at the same time beneficiaries of their expertise. Security threats going up in most cases translates into more resources and competences, less legal constraints and more discretion for the actors of the security-industrial-political complex. Driven by a fatal logic producing a more-of-the-same approach, surveillance and screening measures are stepped up, and the next turn of the surveillance screw is supposed to prevent the next terrorist attack. If a predator used a bottle with liquids to smuggle explosives on board an airplane, liquids will be banned; should he have placed it in the heels of his shoes, passengers will have to take off their shoes for close inspection. Security thinking has no built-in stop rules.

Imagine a frequent traveller put to sleep in summer of 2001 and reawakened fifteen years later entering an airport to embark on his flight – the person most probably would feel highly embarrassed being exposed to humiliating procedures, being asked to remove belts, watches, open the cabin luggage and take out the toilet bag, and should she happen to carry any metal object, listed as prohibited item, we most probably would witness an unfriendly exchange between the traveller and the (underpaid, badly trained) operators performing this security theatre. I remember such a confrontation, flying back from Naples/Italy on Sept 13, 2001, carrying – as always in pre 9/11 times – my little Swiss army knife with me. As citizens living under a regime of dangerisation, we have become suspects by default until proven otherwise in the surveillance society. The level of suspicion (and the ensuing procedures of proving innocence) is rising dramatically for all those who are not holding a European passport or deviate from a simplified ideal of the white Caucasian. If you really want to learn what it means to live under a regime of surveillance, paranoia and

control, talk to a young male Arab and listen to his account attempting to enter Fortress Europe or travelling within the Union territory.

We are witnessing a dynamic of comprehensive securitisation creating counter-productive effects. Under the regime of universal vigilance, citizens are exposed to warning signs in their daily walks of life, flagging potential security threats and conveying the message to stay alert. Public authorities in New York after 9/11 advertised the slogan "If you see something, say something" – but what the "something" should stand for, remained unclear. Contemporary Western societies having manoeuvred themselves into a state of constant paranoia, produce strong reactions of panic when exposed to unforeseen events.

Any small event can trigger global reactions. A young man entering a fast food restaurant in Munich in July 2016 and randomly killing nine customers immediately created a global terror paranoia with breaking news around the world, paralysing the city of Munich for at least 24 hours. The gunman who killed himself after the rampage had no terrorist background and was not linked to any terrorist group. But this incident shows how the strategy of terror seems to have succeeded: Throw a pebble into the water and watch how it creates an irritating tsunami, reinforced by news media. It works, even without a terrorist background. Engaging in the exercise of body count always is a bit awkward, but to correctly assess the scale of fatalities caused by terrorist attacks, consider that the third leading cause of death in the United States is by iatrogenic causes, i.e. maltreatment of patients by physicians, killing some 250.000 individuals each year, according to conservative estimates by the American Medical Association (robust epidemiological data for Europe are not available). Now compare this to the numbers of U.S. fatalities, inside and outside the country caused by terrorists between 1995 and 2014, amounting to 3.500 individuals (incl. perpetrators), and the dimension of the terrorist threat can be put into perspective. Would the resources for the war on terror be invested in the improvement of health services and policy measures to counter social inequality – the security effects of saving human lives most probably could be much higher. It might be worth to compare the logic of the security-industrial complex to the medical-industrial complex, both exploiting public fears and making tremendous profits marketing their products and services as remedies to societal risks.

The interesting point here is that robust evidence does not seem to matter much when it comes to policy measures in the broad area of security. Policy debate and legal arguments remain at the abstract level of fluffy concepts, compiled in chains of general reasoning, building scenarios of

abstract threats, risks and vulnerabilities largely detached from a serious analysis of events on the ground. Policy measures, addressing the presumed security risks do have far reaching effects, albeit their impact often is not as intended and does not always affect the target area. It is mainly the critics who strive for conceptual clarity, precision and ask for supporting evidence. And that is where the papers presented in this volume have their analytical and political value. They demonstrate how the rhetorical tool kit security policy makers use lacks precision and grounding and what kinds of side-effects new security measures produce. Societies pay a price for securitization, but do they get more security?

The answer for most cases, substantiated by the authors is a clear No! Measured against entrenched standards of rule of law, democratic governance and human rights, security policies fail the tests of proportionality, adequacy and effectiveness. Practical measures rarely are means-tested, new legislation never has a built-in sunset clause and so Western societies are sleep walking into a kind of police state kept in stand-by mode to be activated if deemed necessary. The authors of this volume provide ample evidence for the effects and flaws of security legislation and policy measures. They deconstruct the infamous balancing metaphor that presents security as a zero-sum game of privacy vs. security. Reconstructing the processes leading to new security regulations, the contributors to this book reveal the lack of procedural rationality; and elaborating on the comprehensive concept of privacy as a foundational principle of contemporary culture, they point to the many, often overlooked and taken for granted dimensions of privacy. At the same time the emergence of new technologies with high potential for surveillance, gradually transforming citizens into techno-social hybrids, opens new venues for all kinds of intrusive practices. But then, instead of falling prey to a dystopian tristesse, an attitude often entertained by critics of surveillance society, the contributions collected in this volume also entail food for further thought and reflection and if Hegel was right (and I am sure he was!) there is still hope for an ironic twist of history and the authors stay alert so as to detect any early signs of hope in the Dark Age of the present.

Reinhard Kreissl
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Table of contents

Elisa Orrù, Maria Grazia Porcedda and Sebastian Weydner-Volkmann

Introduction

Beyond the security v. privacy trade-off

The idea that human rights need to be bartered for security has been an integral part of counterterrorism policies ever since 9/11. One of the most common declensions of this barter is 'security v. privacy', which originates from intelligence-led pre-emptive policing founded on technology-based profiling and surveillance of potential terrorists. The discussion on the implications of trading off privacy for security has been brought to the fore and revived by the excesses of personal data collection epitomized by Snowden's revelations and the recrudescence of terrorist attacks in Europe, and elsewhere, in 2015-16.

The consequences of overreaching security-oriented policies are the object of numerous academic reflections on 'security v. liberties', and, to an extent, our contribution may easily fit in the 'security v. privacy' debate. However, while much passionate scholarship has focussed on providing arguments in favour of or against a trade-off model, we wish instead to investigate elements that have been overlooked as a consequence of such a polarizing debate.

We set out, in particular, to investigate surveillance as an expression of power and control, to understand the concept of liberty and its exercise – chiefly, but not only, privacy – and their interrelation. These dimensions, which have research as well as policy relevance, could pave the way for the identification of elements for a (new) theoretical framework that would tackle implications of surveillance and control, and whose import would go beyond 'security v. privacy'.

As for the research dimension, the trade-off model may be seen as intellectual blinkers cutting off substantial parts of a rather kaleidoscopic reality.

By removing the blinkers we may appreciate the multiple notions of safety, security and risk, which are buried underneath a seemingly monolithic conception of security. Each of these notions can manifest distinct sets of values justifying the use of different techniques and technologies, including information and communications technologies (ICTs). It is by bringing them to the surface that the use of such techniques and technologies can be discussed alongside their consequences, i.e. surveillance and

forms of control/power, such as inclusion and exclusion. These, in turn, may prove useful in making sense of current policy issues, such as the national and international approach to migration in the Mediterranean Sea, framed as a permanent state of emergency that may have more in common with the lasting 'war on terrorism' than it may prima facie seem.

Similarly, setting aside the trade-off model enables us to go beyond a cliché understanding of liberties, so that we can consider rights, particularly privacy, as historically situated objects of analysis. The origin of rights, their significance, and architecture of safeguards can be questioned with a view to providing new insight into the need to protect liberties, and how to do so. This includes an appraisal of the readiness of individuals to give up privacy in the face of technological evolution. Likewise, this exercise allows questioning the ability of existing forms of regulation to protect people vis-à-vis intrusion by the private sector, rather than the state.

Last but not least, observing the state of affairs without the conceptual constraints of the trade-off model unveils the importance of discourse in shaping the political approach to security and privacy.

As a matter of fact, removing the 'trade-off blinkers' may demonstrate the limitedness of 'security v. privacy' as an intellectual device to describe reality, thus placing this contribution firmly among those critical of the trade-off model. However, our strongest research contribution lies in the invitation to look into concrete policies. We show the need to focus on current security-oriented practices stemming from contemporary counter-terrorism and its influence over standard policing, as well as its spill-over to other areas of policy-making, such as migration or the regulation of (the market of) technology.

We leave it to the reader to infer what, if anything, is wrong with the 'security v. privacy' debate on the basis of the diverse contributions contained in this volume (where we have namely taken up the challenge of trans-disciplinarity).

Trans-disciplinary contributions for a kaleidoscopic reality

As an alternative to a monolithic perspective, this volume looks at phenomena of surveillance and control from multiple loci of observation, in geographical but also disciplinary terms. The contributions gathered here both express perspectives from different countries and give voice to a dialogue between critical studies, international relations, law, philosophy and sociology.

The meaning of the aforementioned dialogue is not only literary: it actually took place in Freiburg in November 2015, in the course of a two-day symposium held at the Freiburg Institute of Advanced Studies (FRIAS). Participants not only discussed the security v. privacy model, which they assessed against the background of Snowden's revelations, the wave of terrorist attacks of 2015 and the response to the continuous migratory flows, but they also shed light on the wider meaning of privacy rights, the implications for security beyond surveillance, and the power implicit in control.

The debate stemming from the symposium inspired the authors' contributions appearing in this book. Hence, the contributions are trans-disciplinary in form and substance. As for the form, they were written so as to be accessible to readers across social sciences and humanities (and hopefully beyond). Assumptions were spelled out, and hermetic references avoided.

More importantly, the chapters express research questions originating from within a discipline but going beyond the discipline's boundaries, in a way capable of challenging assumptions in other disciplines.

The remainder of this introduction will focus on bringing to the surface the various ways in which these chapters are valuable within and across fields of knowledge, and how they ideally talk to one another. We do so, first, by expounding the structure of this book, and then, by drawing some conclusions with regard to the object of our investigation.

Structure of the book

We like to understand this book as an intellectual journey into the concepts of surveillance and control beginning with research matters that have an international policy bearing and ending with a focus on the domestic. During the journey, the book goes through objects of enquiry that relate to a regional organization (the EU) and the way how two nation-states (Italy and Germany) approach international challenges.

The first three contributions concern the interaction between, on the one hand, policies that have gained profound relevance in fighting terrorism, i.e. UN-targeted sanctions, airport security screening and the US National Security Agency's (NSA) electronic surveillance, and on the other hand, the notions of security, risk and rights.

In chapter 1, titled "Beyond Balance: Targeted Sanctions, Security and Republican Freedom", Patrick Herron discusses and evaluates the activity

of the UN Al-Qaida and Taliban Sanctions Committee ('1267 Committee') as a case study to reappraise the relationship between security and liberty. Herron criticises liberal approaches to liberty, which frame the relationship between liberty and security in terms of a balance, and discusses the alternative concept of republican freedom. This republican understanding frames liberty as non-domination as opposed to the liberal understanding of liberty, according to which it means non-interference. In the liberal framework, security is at once antagonistic to liberty and a necessary condition for its existence. Liberal theories, thus, contextually postulate liberty and its necessary limitation through security. On the contrary, republican freedom provides the theoretical background that avoids considering liberty as a value in conflict with security, and that allows understanding security and liberty as mutually reinforcing.

In chapter 2, titled "Risk Based Passenger Screening in Aviation Security: Implications and Variants of a New Paradigm", Sebastian Weydner-Volkmann describes the current paradigm shift from 'traditional' forms of screening to 'risk based passenger screening' (RBS) in aviation security. This paradigm shift is put in the context of the wider historical development of risk management approaches. Through a discussion of Michel Foucault, Herfried Münkler and Ulrich Beck, Weydner-Volkmann analyses the shortcomings of such approaches in public security policies, which become especially evident in the aviation security context. As he shows, the turn towards methods of RBS can be seen as an attempt to address a trade-off 'trilemma' between the effective provision of security, the implied costs for industry and passengers, and the ethical, legal and societal implications of the screening procedures. In order to analyse foreseeable outcomes of embracing RBS, he differentiates three prototypical variants of the new paradigm on the basis of their main referent and rationale. For each variant, he then subsequently assesses the implications for the 'trilemma', after having unveiled the criteria of analysis that will necessarily have to be followed within a serious appraisal of RBS methods.

This section ends with chapter 3, "Debating Surveillance: A Critical Analysis of the post-Snowden Public Discourse". There, Thomas Linder analyses recent debates on the NSA surveillance activities uncovered by the Snowden revelations. The analysis shows that most of the debate, including critical appraisals of the NSA activity, has been based on a framing of the issues at stake that relied on panoptic metaphors. This way of approaching the topic, Linder argues, effected a series of ambiguities, which, in turn, obscured fundamental aspects of the surveillance practices

it focused on. A more promising approach is offered in his view by post-panoptic theories, which allow a more differentiated apprehension of surveillance. Finally, relying on Ernesto Laclau and Chantal Mouffe's theory of discourse analysis, Linder shows how antagonistic actors of the surveillance practices and discourses have differently constructed central concepts of the debate, including 'privacy' and 'liberty', and the definition of 'targets' and 'targeted'.

The book continues with two chapters that focus on the approach of the European Union to surveillance and the role of privacy rights.

In chapter 4, "The Schengen Information System and Data Retention. On Surveillance, Security and Legitimacy in the European Union", Elisa Orrù analyses current EU practices of surveillance to appraise the nature of the evolving power of the European Union. The theoretical background is provided, first, by Hannah Arendt's analysis of totalitarian domination. The reference to Arendt acts as a methodological guidance to identify power patterns through the analysis of concrete facts and events, rather than paralleling EU and totalitarian power. The second theoretical point of reference is provided by Max Weber's reflections on legitimacy, as corrected by Jürgen Habermas and Norberto Bobbio. The two case studies analysed, the Schengen Information System (I and II) and the invalidated Data Retention Directive, reveal the vertical and horizontal fluidity of decision-making in the EU, where decisional and implementation responsibilities are not clearly and stably assigned. Orrù suggests that such fluidity negatively impacts the legitimacy claim of the expanding EU power and that EU institutions compensate for this lack by having recourse to security as a value. She highlights the way in which the concept of security has acquired increasing importance, and how the EU seemingly clings to security as a point of reference in the face of dynamism.

This second part ends with Chapter 5, authored by Maria Grazia Porcedda and titled "The Recrudescence of 'Security v. Privacy' after the 2015 Terrorist Attacks, and the Value of 'Privacy Rights' in the European Union". The chapter questions the ability of the trade-off approach to apprehend and evaluate security-related measures in the EU. Porcedda depicts the conceptual complexity of privacy and its meaning in EU law, by demonstrating that "privacy" is used, in fact, as an umbrella term for two distinct rights: respect for private and family life and the protection of personal data. Hence, it is not a monolithic privacy right that must be balanced against security, but rather several distinct entitlements. Adopting a 'law and society' approach, the author analyses how and why each of the "privacy rights" recognised in EU law has become crucial to

fostering personhood and autonomy. Porcedda draws two conclusions from this analysis. First, reference to trading-off privacy for security in abstract terms is an empty exercise. What is at stake in specific cases can be better appraised by replacing the general term "privacy" with the concrete privacy rights protected by law and "security" with the concrete measures adopted to achieve it. Second, the understanding of security and privacy sheds new light on the constitutional architecture, or ordre public, of the EU.

Our imaginary journey from the supra-national to the regional and 'domestic' levels ends with three examples that demonstrate how the interplay between surveillance, security and privacy impacts the 'domestic' level. This section begins with two chapters that focus on the reactions, in Germany and Italy, to international policy challenges.

Chapter 6, "Practical Experiences in Data Protection", gives an account of the enforcement of data protection in times of profound change. It is based on the contribution of Jörg Klingbeil, then Data Protection Commissioner of the State of Baden-Württemberg, to the conference's public policy session. Klingbeil focusses on the impact of the European Court of Justice's ruling on Safe Harbor, which overturned the legal instrument that '(self-)certified' the compliance of US companies with EU privacy regulation. In addition to this specific focus, he also offers a broader introduction to the structural framework of his agency and the European and national legal principles of data protection in which it operates. As becomes clear in the text, Klingbeil's arguments remain highly relevant in the light of newer developments such as the introduction of Privacy Shield and the upcoming General Data Protection Regulation.

In chapter 7, "Monitoring or Selecting? Security in Italy between Surveillance, Identification and Categorisation", Enrico Gargiulo discusses surveillance practices adopted in Italy relating to 'undesired' categories of individuals, such as migrants and low-life people. Such practices range from trying to prevent migrants from entering their municipalities to refusing to register migrants who are legally present within the municipal boundaries. In realising these practices, municipalities have interpreted the surveillance "mandate" issued by central authorities in quite an eccentric way: instead of monitoring the whole population residing on their territories (a genuine surveillance task), they have used surveillance to make a distinction between those who have the right to reside (and therefore to access basic services) and those who have no such entitlements. Thus, Gargiulo concludes that surveillance, instead of consisting in monitoring municipal population and acquiring information on it, has rather become a

way of defending the symbolic borders of the community through exclusion of the "undesired".

The last chapter of our imaginary journey from the international to the domestic addresses the impact of (self-)surveillance on the smallest social unit, the home. In "Domestic Surveillance Technologies and a New Visibility", Michele Rapoport focuses on the use of smart surveillance technologies within the home. Along with introducing panoptical effects into the domestic sphere, the use of these technologies can also lead to desirable effects and become coterminous with empowerment, since in these cases it is the individual who chooses to be visible and surveilled. This challenges traditional understandings of the home and privacy. While the home can still act as the place where one forms her personality, it does not do so by providing seclusion, but rather by offering the opposite: here, identity is built as a result of 'being seen'. Rapoport's conclusion is open-ended, particularly with regard to the kind of identity that can result from this process of empowerment, as well as the impact across all strata of the population.

Conclusions: a constant dialogue between chapters

As anticipated, there are several ways in which the chapters 'talk' to each other.

First, many contributions in the book have focussed on the relationship between security and rights, especially privacy, and they have implicitly, or explicitly, adopted a critical position towards the trade-off model. It is striking how differently the authors criticized the trade-off model, nonetheless converging on the fact that the weakness of the trade-off model comes from its – otherwise appealing – simplicity, which consists in opposing two clusters of values, security and rights, whose meaning is taken for granted. When one appraises 'security v. liberties', the authors argue, the purchase of the trade-off model begins to vacillate. On the one hand, both terms are intrinsically rich and polysemous, in that they refer to multifaceted and often ambiguous phenomena – so ambiguous that their theoretical apprehension is a genuinely challenging task. Security appears to be normatively charged (Herron, Linder, Orrù and Porcedda), a potentially thin concept (Orrù and Porcedda), to the point that debates remaining under the cloak of security seem to hide relevant dimensions, such as surveillance and rights (Linder, Orrù and Weydner-Volkmann), as well as legal procedures and technological factors (Porcedda). Conversely,

rights appear underdetermined, because they are not discussed, either as a result of the agenda-setting (Linder), or because their significance to contemporary democratic society is not thoroughly reflected upon (Porcedda), or else because they are explained through security (Herron), so that we need to rebuild the foundations of liberties. Once unpacked, the trade-off model paves the way to a complex web of relationships and 'multi-lemmas' (Weydner-Volkmann), which is the point of departure for a serious appraisal of the significance of addressing security and rights in contemporary societies (Porcedda and Weydner-Volkmann).

Second, the contributions in this book entertain a lively debate on the notion of privacy: by agreeing to disagree, authors seem to confirm the dynamism of privacy. On the one hand, privacy has acquired significance and legal protection over time, in line with its importance to democratic societies (Klingbeil, Porcedda). On the other hand, it seems constantly threatened by technological developments. ICT-enabled mass surveillance not only threatens the autonomy of right holders (Klingbeil), but it also decouples individuals from their 'dividuals', undermining individuals' exercise of their right to the protection of personal data (Linder). Yet, self-surveillance may challenge the reader to abandon the comfort zone of 'privacy' as a concept carved in stone, and desirable as is (Rapoport). This raises compelling questions, in particular as to whether we are facing a paradigm shift in how personality and identity are built in contemporary societies (Rapoport and Porcedda).

Third, the authors appreciate the interaction between the trade-off model and surveillance. Such interaction is mediated by the concept of risk, which, similarly to security, embodies different meanings, paving the way for multiple solutions, which in turn carry diverse implications (Weydner-Volkmann). In fact, and on the one hand, the notion of risk informs the collection of personal data for security purposes (Linder, Weydner-Volkmann). This includes the bulk collection of personal data, which defies the dividing line between 'good' and 'bad' and conflates 'targets' with 'suspicious individuals' (Linder). Yet, the notion of risk is at the heart of the protection of personal data and the germane notion of information security (Porcedda). An important policy conclusion is that we need to make the understanding of risk underpinning policy measures explicit, so as to entertain an open appraisal of the goals that such measures purport to achieve.

The authors also provide a trans-disciplinary account of the relationship between security and surveillance. Both security and surveillance seem to act as catalysers for shifting competences, reshaping power relationships

(Orrù), and limiting the autonomy of individuals (Klingbeil). Yet, more surveillance does not automatically translate into higher levels of security (Orrù, Gargiulo), not least because the disciplining effect of surveillance is fading away. New forms of surveillance, in fact, seem to shy away from the Panopticon (which aimed at enforcing a desired behaviour) because they remain secret (Linder), or rather aim at social sorting, e.g. between the desired citizens and the unwanted ones (Gargiulo). The refugee crisis may be exacerbating the abovementioned consequences (e.g. in Italy, see Gargiulo) of the interplay between security and surveillance, and pave the way for Weydner-Volkmann's explication of multilemmas.

Finally, from different angles, several authors urge to appraise security, surveillance, and privacy in context (Orrù, Porcedda, Weydner-Volkmann). A closer analysis of current practices (Gargiulo, Herron) suggests the need to abandon old interpretive schemes that hinder a full understanding of what is happening, such as the panopticon and self-discipline paradigms (Linder), the self-sustaining desire for (home) privacy (Rapoport), and the inherent ability of rights to resist vis-à-vis Hobbesian appeals to survival (Herron). It also means demanding that the security objective of any measure and its underlying understanding of risk be made clear (Weydner-Volkmann). In this volume, policy-makers themselves engage in constructive self-criticism and call for Data Protection Authorities to stop hiding behind the inaction of politicians. They for instance demand serious policies for the collection of data by US-based companies, which will always share data with security forces.

In sum, surveillance is neither simply a way to endorse security, nor is it just a threat to privacy. Surveillance, as the contributions show, is a way to exercise control over people, to sort them into different groups in order to treat them differently and to foster power relationships and redefine institutional assets. In doing so, surveillance does not only affect privacy and the other rights commonly brought under its umbrella, such as data protection, but it also affects individuals' self-understanding, the relationship of citizens to power, their liberty rights, their way to participate in democratic life and, not least, their de jure and de facto equality. In a different sense, control can then also imply checks and balances, including rights, to resist power. In order to exercise such control, however, we need to be able to understand the world we live in.

At the core of the book, thus, lies the common understanding that the dictum 'security v. privacy' works as blinkers, hiding what is really at stake, i.e. the several implications of (tech-mediated) surveillance and control. We believe the various authors have greatly contributed, each

from the angle of their discipline, to bringing to the fore the dimensions of surveillance and control hidden by 'security v. privacy', appraising decision-making in so-called security matters, and calling for corrective interventions in the areas they scrutinized. We hope readers will be able to appreciate such cross interactions, and discover more, to enrich our interim conclusions.

Acknowledgements

Patrick Herron

Beyond Balance:
Targeted Sanctions, Security and Republican Freedom

Introduction

How can we best strike the balance between security and freedom? Since 11 September 2001, this question has permeated discussions about counter-terrorism in the media, politics and academia, framing the arguments of advocates of tighter security measures, and those of ardent defenders of civil liberties. As the former Deputy Attorney General to the Bush Administration put it, the quest for the appropriate balance between security and liberty has become part of the contemporary "drinking water" (James B Comey, quoted in Waldron 2003, 455). In addition to being widespread, the notion of a balance between security and freedom has also been enduring, given fresh salience in recent years by the questions regarding privacy and security implicated in the exposure of mass surveillance practices.

The longevity of the metaphor of balance has not been the result of a lack of scrutiny, however, and the balancing approach has been subject to a number of compelling criticisms. Similarly, criticisms of counter-terrorism practices have been in plentiful supply over recent years. This is true of scholarly thought, media discourses, opposition political parties, and challenges heard through legal courts. Given the criticisms of contemporary counter-terrorism practices, and given the criticism of the attendant balancing framework, it is somewhat surprising that this conceptual approach has continued to be employed with such regularity. A principal reason for this, I suggest, is an absence of conceptual alternatives. Although it is cited with some frequency by both politicians and scholars that liberty and security are not zero-sum but rather mutually reinforcing, such statements are made with little or no empirical or theoretical justification. It is therefore unsurprising that such a notion has been unsuccessful in supplanting balancing as the dominant conceptual metaphor. The extant literature offering thorough conceptual reflection on the relationship between security and liberty has tended to remain at the level of critique, neglecting or refusing to offer an alternative to balancing. Indeed,

a number of the explicit critics of the balancing metaphor have nonetheless continued to employ it (e.g. Cole 2004; Waldron 2003).

Addressing the absence of a conceptual alternative is the focus of this paper. In it I attempt to identify an approach that both better captures the complexity of the issues at stake with respect to countering terrorism and provides greater analytical purchase with which to assess political responses to terrorist threats. I begin by making the case against balancing, with my critique focusing on three grounds. First, balancing is conceptually ill-equipped to address many of the issues thrown up by counter-terrorism practices such as distributive issues, the multifaceted (and often changing) meanings of security and liberty, and the uneven privilege of access to the empirical claim upon which the presupposed normative dilemma rests. Second, it forecloses critique, structuring debate in a way that accepts coercion as the necessary and appropriate response to terrorism. Third, it obscures important practical and philosophical questions that are begged by the use of coercive measures by liberal polities to counter-terrorism.

I will then explore the possibility that adopting a republican understanding of freedom as non-domination, rather than non-interference,[1] may provide a conceptual starting point for analyses of counter-terror measures that both undercuts the theoretical bases of 'security politics' and provides greater traction for analytic analysis. I explore this alternative conceptualisation through an analysis of the Al-Qaida and Taliban Sanctions Committee ('1267 Committee'), which, since 1999, has imposed targeted sanctions—including asset freezes and travel bans—on individuals and entities suspected to be associated with Al-Qaida, the Taliban or Usama bin Laden. I tentatively suggest that republican freedom may be able to provide a theoretical basis for claims that security and liberty are mutually reinforcing.

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1 I will expand on my understandings of these two terms below but, broadly, I understand interference as behaviours "intended by the interferer to worsen the agent's choice situation by changing the range of options available by altering the expected payoffs assigned to those options, or by assuming control over which outcomes will result from which options and what actual payoffs, therefore, will materialise" (Pettit 2000, 53). I understand domination to be the dispositional power to interfere *arbitrarily* with another agent (5).

The balancing metaphor: operation and critique

To ask what is the correct or appropriate balance between security and liberty is to accept that to some degree the two concepts relate in a zero-sum manner. Though most proponents of this approach eschew the term 'trade-off' for the more beguiling 'balance', the belief that one must cede liberty in order to increase security is at the crux of this conceptual position; the metric that is 'in the balance' is the extent to which freedom should be sacrificed. This central, and often axiomatic, tenet is what prompts the oft cited image of a set of scales, which holds liberty on one plate, security on the other. Alongside this set of scales in the balancing image is 'threat', in the case of this article, the spectre of international terrorism, which prompts the transfer of weight from one plate to the other. In many cases this threat, and its effect on the balance between freedom and security, is presented as more or less objective and necessary; as the empirical threat (or risk) of harm rises, security is diminished and, in order to maintain a balanced set of scales, weight must be taken from the liberty plate and put in the security plate. The conception of the relationship between security and freedom at the heart of this framework is one of separation and opposition.

This opposition and separation is reflective of the liberal thought upon which the balance metaphor rests. This heritage is one that identifies the individual autonomous subject as being in tension with political authority (often equated with the state). The public and private spheres are held to be distinct domains, which are antagonistic at their points of intersection; though the public is necessary to preserve the private, the latter must resist the former to remain integral.[2] This liberal structure is transposed into the balancing debate, which assumes an autonomous agent capable of exercising freedom and relinquishing a degree of that freedom to a security provider. As a result, in the balancing framework, security is identified with the state (either as 'national security', or through state-led measures

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2   For the classic account of this structure of liberal political thought, which draws heavily upon the liberal canon, see Isaiah Berlin's 'Two Concepts of Liberty' (1969). For the purposes of this essay, I use the term 'liberal' to refer to a political philosophy derived from the axiom of the naturally free individual; the autonomous subject as normatively basic (this is what Gerald F Gaus has called the 'Fundamental Liberal Principle' (1996, 162)). In liberal politics, this postulate translates into an understanding of liberty as non-interference or non-coercion, and a presupposition that government should be neutral on the question of the good life (See, "Liberalism", in Dworkin 1986, 181–205).

to increase security) whereas liberty attaches to the individual (Blunkett 2004; Smith 2004; Crouch 2006; Joint Committee on Human Rights 2007, 34). In this discourse, liberty, or freedom, is understood as the liberal formulation of non-interference.[3] Security is most often presented as objective safety from terrorist attacks (e.g. Cameron 2006), or an absence of risk of harm (Janus 2005, 34; Posner/Vermeule 2008, 22).

This mode of thought—despite its pervasiveness in counter-terrorism discourse—presents a number of problems, both conceptual and political. The first ground for criticism is on its fundamental assumption that liberty and security can be traded off against one another. Balancing implies a degree of precision but measuring security and liberty is a formidable task. Even if we bracket the difficulties in such an exercise, the balancing approach makes the assumption that the two concepts are commensurable in the sense that they can be meaningfully compared and traded off (Posner/Vermeule 2008, 36). However, as numerous authors have asserted (CHALLENGE 2004; Zedner 2007, 257–8), security is often valued as a means to an end, rather than being intrinsically valuable in and of itself. If security is the means to achieve the political good of liberty, then to trade the latter for the former appears logically incoherent when thought of in simple balancing terms.

Putting aside problems of measurement, if we are balancing liberty and security, the question is begged as to whose liberty and security is in the balance (Zedner 2007, 258). The discriminatory nature of many counter-terrorism measures adopted since 9/11 suggests that the security and liberty being gained and lost is far from even across populations (See, e.g. Dworkin 2002; Cole 2003; House of Lords 2004; Katyal 2006). The balancing framework, however, is ill-suited to addressing such distributional questions, instead treating security and liberty as aggregate values (Posner/Vermeule 2008, 30).

A third reason to question the utility of the balancing framework is the obvious but important point that one can have one's liberty curtailed without experiencing an increase in security, and *vice versa*. The near ubiquity of balancing as a conceptual framework for thinking about counter-terrorism measures suggests that this is easily underappreciated in the emotionally and politically charged realm of counter-terrorism, and the

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3   On the connection between liberalism and freedom as non-interference from a theoretical liberal perspective see Berlin (1969). For instances of this formulation in the balancing discourse see, for example, European Court of Human Rights Grand Chamber, quoted in Joint Committee on Human Rights (2010, 17).