

Security and Liberty: The Image of Balance*

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I.

THERE seems to be general acceptance in the wake of the terrorist attacks of September 11, 2001 that some adjustment in our scheme of civil liberties is inevitable. This is partly the product of political defeatism: the state is always looking to limit liberty, and a terrorist emergency provides a fine opportunity. People become more than usually deferential to the demands of their rulers in these circumstances and more than usually fearful that if they criticize the proposed adjustments they will be reproached for being insufficiently patriotic. There is also little likelihood that reductions in civil liberties will be opposed by the courts. Even in countries like the United States with strong judicial review, the courts have proved reluctant to oppose reductions in civil liberties in times of war or war-like emergency.¹ This makes it something of a mystery why legal scholars continue to defend the counter-majoritarian power of the judiciary on the ground that such a power will prevent panic-stricken attacks on basic rights by popular majorities. Those who make that argument know perfectly well that the judiciary is not immune from popular panic and that in times of emergency it usually proves itself “more executive-minded than the executive.”² Anyway, with or without courts there is a dearth of serious political opposition to encroachments on civil liberty.

Political realism aside, there is also a sense that some curtailment of liberty might be *appropriate* in the wake of the terrorist attacks, and that it might be *unreasonable* to insist on the same restrictions on state action after September 11 as we insisted on before September 11.

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¹For acknowledgment of this point by well-known defenders of judicial review, see Laurence Tribe, “Trial by fury: why Congress must curb Bush’s military courts,” *The New Republic*, December 10, 2001: “Historically, the judiciary has been so deferential to the executive in wartime as to provide virtually no meaningful check. . . . [I]t would be a terrible mistake for those who worry about civil rights and liberties to pin too much hope on the judiciary in times of crisis.” See also Ronald Dworkin, “The threat to patriotism,” *New York Review of Books*, February 28, 2002.

²Lord Atkin’s words, from his lonely dissent in *Liversidge v. Anderson* [1942] A.C. 206.

A common suggestion invites us to think about this in terms of the idea of *balance*. According to this suggestion, it is *always* necessary—even in normal circumstances—to balance liberty against security. We always have to strike a balance between the individual’s liberty to do as he pleases and society’s need for protection against the harm that may accrue from some of the things it might please an individual to do. The former surely, cannot be comprehensive even under the most favorable circumstances—nobody argues for anarchy—and the latter has to be given some weight in determining how much liberty people should have. So there is always a balance to be struck. And—the suggestion continues—that balance is bound to change (and it is appropriate that it should change) as the threat to security becomes graver or more imminent. One newspaper columnist, Nicholas Kristoff, put it this way:

[T]errorist incidents in the 1970s (such as at the Munich Olympics) had maximum death tolls of about a dozen; attacks in the 1980s and 1990s raised the scale (as in the Air India and Pan Am 103 bombings) to the hundreds; 9/11 lifted the toll into the thousands; and terrorists are now nosing around weapons of mass destruction that could kill hundreds of thousands. As risks change, we who care about civil liberties need to realign balances between security and freedom. It is a wrenching, odious task, but we liberals need to learn from 9/11 just as much as the FBI does.³

This is the proposition I want to examine: a change in the scale and nature of the harms that threaten us explains and justifies a change in our scheme of civil liberties; and that process is best understood in terms of “striking a new balance between liberty and security.”

II.

The idea of striking a new balance can be interpreted more or less literally. We know the language of balance is used in morality and politics when there are things to be said on both sides of an issue, values that pull us in opposite directions. But what does it mean to say that we confront this array of values or reasons by *balancing* the competing considerations? And what are we implying when we say the balance has shifted? Is it just a matter of our having thought of a new reason, or of new facts having given rise to new reasons, which weigh more on one side than the other? That we can make sense of: there is now (say, since September 11, 2001) something new to be said on one side of a familiar debate and nothing new to be said on the other. But “balance” also has connotations of quantity and precision, as when we use it to describe the reconciliation of a set of accounts or the relative weight of two quantities of metal. Where is the warrant for our reliance on this quantitative imagery when

³Nicholas Kristoff, “Liberal reality check: we must look anew at freedom vs. security,” *Pittsburgh Post-Gazette* June 3, 2002, p. A9.

we say that the new consideration not only adds something to the debate but “outweighs” all considerations on the other side?

Here is one possibility. We know that liberty is in some respects a matter of more or less. For example: I can range more or less widely without restrictions on my travel; or I may be permitted to come closer to or be kept back from important public sites or important public officials. So we may be able to make at least ordinal comparisons between different quantities of liberty L_x and L_y (for example, between one person’s liberty and another’s, or between my liberty one day and my liberty the following day).⁴ And security may be conceived quantitatively, too, in terms of the extent of risk (R) faced by a person (where R equals the magnitude of a possible harm times the probability of its occurrence): we might say that a person is less secure the greater R is with regard to that person. With this primitive apparatus, we might then be able to express the idea of the security cost to a person A of another person B having a certain amount of liberty. The security cost to A of B ’s having a higher amount of liberty L_y rather than a lower amount L_x is the difference between two risks, the higher risk (let us call it R_n) to A from B ’s having the greater liberty (L_y) and the lower risk (R_m) to A of B ’s having the lesser liberty (L_x).

Now, if we assume (for the sake of argument) that the balance between security and liberty was exactly right on September 10, 2001, then maybe what happened the following day was that we became aware (or it became the case) that the risks of ceding a given amount of liberty were greater than we thought. Even on September 10, we knew that any amount of liberty carried with it a certain risk of harm. But we were prepared to accept a certain risk—say, R_n rather than a lower risk R_m —because any attempt to secure R_m would mean giving up something we valued at least as much as that extra security, namely, a certain degree of liberty: on September 10, we thought that to secure R_m we would have to diminish individual liberty from L_y to L_x ; and we were not prepared to do that. However even on September 10 we were not prepared to cede a greater degree of liberty than L_y —say L_z —because we knew that that would carry a risk of harm greater than R_n . And we were not prepared to accept a greater risk than R_n . However, it now turns out (in light of the events of September 11) that the cost of L_y (which we *were* prepared to concede) is much greater than we thought—say, R_o rather than R_n . Since we were prepared on September 10 to give up any degree of liberty that would pose a risk greater than R_n , consistency indicates that now we are going to have to settle for an amount of liberty much less than L_y —say, L_x —on September 12. That I think is what the case for “striking a new balance” is supposed to amount to. We have an idea of the maximum risk we are prepared to bear as a result of people’s

⁴Of course quantitative computations of liberty present enormous difficulties, many of them connected to the problem of the individuation of actions. For a discussion, see Hillel Steiner, “How free? Computing personal liberty,” in *Of Liberty*, ed. A. Philips Griffiths (Cambridge: Cambridge University Press, 1983) and Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), pp. 42–54.

liberty, and we adjust their liberties downwards when it appears that the risk associated with a given quantum of liberty is greater than we thought (or greater than it used to be).

Of course it is possible that we could make the adjustment in the other direction. Instead of beginning with an idea of the maximum risk, R_n , we were prepared to bear as a result of people's liberty, we might begin with an idea of the minimum liberty, L_y , we were prepared to accept. The recalculation after September 11 would then require us not to accept less liberty but to brave a higher risk for the sake of the liberty we cherish. The appropriate changes in public policy, then, would be calls to greater courage, rather than diminutions of liberty. Most probably we work at the matter from both ends, and perhaps this is where talk of "balance" really comes into its own. Our liberties are not untouched. There has been a downward adjustment, to help address some of the graver risks. But even with the adjustments in civil liberties that have been put in place (and are likely to be put in place) since September 11, no one feels as secure as before: so everyone has to be a little braver for the sake of the modicum of liberty that is left.

III.

Readers may think all this is over-fussy. Surely everyone knows what we mean when we talk about the balance between liberty and security, and surely it is obvious that some adjustment has to be made after it becomes evident that terrorists can take advantage of our traditional liberties to commit murder on such a scale. Does it really need to be spelled out with this sort of algebra? Well, I think we *do* need to subject the balancing rhetoric to careful analytic scrutiny, and this for several reasons:

(i) *Objections to consequentialism.* Talk of balance—particularly talk of changes in the balance as circumstances and consequences change—may not be appropriate in the realm of civil liberties. Civil liberties are associated with rights, and rights-discourse is often resolutely anti-consequentialist. Maybe this imperviousness to consequences is something that rights-theorists need to reconsider. But that does not mean they should automatically buy into the sort of common-or-garden consequentialism involved in the argument set out in Section II.

(ii) *Difficulties with distribution.* Though we may talk of balancing our liberties against our security, we need to pay some attention to the fact that the real diminution in liberty may affect some people more than others. So, as well as the objection to consequentialism, justice requires that we pay special attention to the distributive character of the changes that are proposed and to the possibility that the change involves, in effect, a proposal to trade off the liberties of a few against the security of the majority.

(iii) *Unintended effects.* When liberty is conceived as *negative* liberty, a reduction in liberty is achieved by enhancing the power of the state. This is done so that the enhanced power can be used to combat terrorism. But it would be naive to assume

that this is the only thing that that enhanced power can be used for. We need to consider the possibility that diminishing liberty might also diminish security against the state, even as it enhances security against terrorism.

(iv) *Real versus symbolic consequences.* Though talk of adjusting the balance sounds like hard-headed consequentialism, it often turns out that those who advocate it have no idea what difference it will actually make to the terrorist threat. Accordingly we must subject these balancing arguments to special scrutiny to see how far they are based on fair estimates of actual consequences and how far they are rooted in the felt need for reprisal, or the comforts of purely symbolic action.

I will discuss these concerns, one by one, in more detail in Sections IV through VII of this article, and I will try to show how they might apply to various issues of civil liberty.

As we pursue that discussion, we will need to bear in mind that the class of civil liberties at stake here is not necessarily a homogenous class of rights, principles, or guarantees. The term “civil liberties” represents a variety of concerns about the impact of governmental powers upon individual freedom. Because the issue of a change in the “balance” between civil liberties and security plays out slightly differently for different kinds of concern, let me briefly set out some distinctions.

(a) In its most straightforward meaning, “civil liberties” refers to certain freedoms understood as actions that individuals might wish to perform, which (it is thought) the state should not restrict. Free speech, religious freedom, freedom of travel fall into this category.

(b) We also use the phrase “civil liberties” to refer to more diffuse concerns about government power, which are not necessarily driven by any sense of a privileged type of action which individuals should be left free to perform. For example, the government’s ability to listen in on telephone conversations is a civil liberties concern, even though the “liberty” in question—sometimes referred to as “privacy”—does not amount to very much more than the condition of not being subjected to this scrutiny.

(c) Sometimes “civil liberties” refers to procedural rights and powers which we think individuals should have when the state detains them or brings charges against them or plans to punish them. These are rights like the right not to be detained without trial, the right to a fair trial process, the right to counsel, etc.

This short list is by no means complete. A comprehensive account would also say something about (d) the rights associated with democracy and civic participation. Fortunately these rights have not been an issue in the current crisis. So for the rest of the article, I will focus mainly on (a), (b), and (c) and consider how the concerns I have outlined—(i) through (iv)—apply to them.

IV.

The first point—point (i)—is that we need a clear idea of what balancing is supposed to be so that we can determine whether it is even an appropriate tool

to use with regard to civil liberties. The argument given in Section II assumes that an increase in risk is a *pro tanto* reason for diminishing liberty; maybe not a conclusive reason, but a reason that should count none the less. The argument assumes that the introduction of a new set of considerations (along the lines of “Now we have to worry about terrorism”) or the perception that old reasons have greater weight (“Terrorists are more deadly than they used to be”) adds something to one side of the balance of reasons that apply to the issue of liberty. It assumes that even though there are good reasons for protecting civil liberties, civil liberties must give way if the reasons in their favor remain the same while something is added to the reasons on the other side. But this may be misleading; for in certain contexts, it is not always appropriate to relate reasons to one another in this simple additive way.

Consider—as an analogy—the reasons associated with promise-keeping. If I have already promised to meet with a student to discuss his paper at 12.30 p.m., then I may not accept an invitation to lunch with a colleague at that time. There are good reasons not to inconvenience my student or disappoint his expectations, and those reasons outweigh the reasons associated with lunch. So far so good. But then what if I find out that it is going to be a *really delicious lunch* (which I did not know when I conceded that the obligation to the student “outweighed” the lunch invitation)? Does the introduction of this new factor change the balance? Not at all. The attractions of lunch and the importance of meeting my student are not to be weighed against one another, once the promise has been given. The existence of the promise provides a reason for not acting on considerations like the quality of the lunch; it provides what Joseph Raz has called an “exclusionary reason.”⁵

Maybe something analogous is true of civil liberties. Maybe—like promises—they too are not supposed to be sensitive to changes on the scale of social costs. Certainly some have thought so. Civil liberties are often regarded as rights, and the idea of “rights as trumps”⁶—which many have found appealing, at least at the level of rhetoric—is precisely the idea that rights are not to be regarded as vulnerable to routine changes in the calculus of social utility.

Or consider a slightly different account—the proposition that civil liberties are best conceived as Nozickian side-constraints.⁷ Perhaps the rule that the government must not imprison anybody it does not propose to charge with an offense is best understood on the model of the rule in chess that one may not move one’s king into check. It would be like a side-constraint on the pursuit of one’s goals, not something which is supposed to make the pursuit of one’s goals more efficient overall. If this account were accepted, then the notion of a change in the pay-offs from detention without trial (greater security etc.) would be quite irrelevant; just as the change in pay-offs from moving one’s king into check—

⁵Raz, *Practical Reason and Norms*, new edn (Oxford: Clarendon Press, 1999), pp. 37 ff.

⁶See Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. xi and 190 ff.

⁷Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), pp. 28 ff.

“Just this once, it would really make a difference to my game”—is irrelevant in chess. (Or consider John Rawls’s argument about the lexical priority accorded to the principle of basic liberties: if security falls into the domain of the principle governing social and economic goods, then a trade-off of liberty against security is simply ruled out.)⁸

None of this is conclusive against the balancing approach. “Rights as trumps” is so far just another piece of imagery to pit against “striking a new balance.” And we must not be seduced by our technical familiarity with ideas like side-constraints or lexical priority into thinking that these can be applied unproblematically to civil liberties. On the contrary, there is much in our tradition of civil liberties thinking which cannot be modelled in this way. For instance, existing legal guarantees of civil liberties are always hedged around with explicit provisos to the effect that they may be limited “in the interests of national security, territorial integrity or public safety,”⁹ and sometimes with implicit doctrines to the effect that the rights must be adapted to circumstances, the constitution is not a suicide pact, etc.¹⁰ How far these should be regarded as political compromises to get the state to offer any guarantees at all, or how far they should be regarded as reasonable features of a well-thought-through theory of civil liberties is an open question.

Even apart from outright opposition to the trumping idea and the other models of special priority, there are various things that the proponents of “striking a new balance” can say in response to the concerns about consequentialism that I have raised in this Section.

They may say, first, that it is important to distinguish between two questions: (1) how is a given right defined? and (2) once defined, what sort of priority does it have over other goals and values? Even if the answer to question (2) is quite stringent—trumps, side-constraints, lexical priority, etc.—that is, even if balancing is precluded at that stage, still the idea of a balance may enter into the way we answer question (1). At the beginning of Section II, I said that liberty could be a matter of more or less. For example, I am free to move around the country but I am not free (unless invited) to come within touching distance of the President; and I could be made a little less free than that by being required to stand back, say, a hundred yards from the President. Where that boundary is drawn—from a few feet to a hundred yards—is surely a matter that requires consideration of consequences; it will be drawn differently in a republic with hand guns than in a republic where the weapon of choice for assassination is the

⁸See Rawls, *A Theory of Justice*, rev. edn (Cambridge, Mass.: Harvard University Press, 1999), pp. 36–40 (lexical priority) and 214–20 (priority of liberty).

⁹See, e.g., *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 10 (2).

¹⁰See *Terminiello v. City of Chicago*, 337 U.S. 1, at 37 (1949) (Jackson, J., dissenting) (“There is danger that . . . [the Court] will convert the constitutional Bill of Rights into a suicide pact.”), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, at 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact”).

stiletto. So we may say civil liberties are not even defined until some balancing exercise is undertaken. And all that is happening in a post-September 11 world is that our understanding of civil liberties is being made responsive to changes in the very factors that enter routinely into its definition. The balance does not affect the priority we accord to liberty: it affects only our discussion of what the appropriate liberty is. Admittedly this line is easier to take for those freedoms, like freedom of movement, that have no intrinsic definition and are obviously a matter of degree than for those—like free speech and freedom of religion—whose definition may be given in large part by the nature of the interests they embody. It will be quite implausible to say, for example, that ordinary political criticism does not count as “speech” in a time of crisis though it may count as “speech” in a time of peace.

Secondly, it should be noted that most of the philosophical theories which oppose routine trade-offs between rights and consequences nevertheless toy with the idea of some sort of “out” to avoid *ruat caelum* absolutism. Robert Nozick’s caveat is typical:

The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.¹¹

It may be thought that the events of September 11 do constitute exactly that—catastrophic moral horror—and that the occurrence of such horror should trigger whatever qualifications we are prepared to impose on our rights-absolutism. But it is important to notice that the *occurrence* of catastrophic horror is not the issue; the issue is whether the abrogation of rights is a plausible means of avoiding it. I shall say more about this in Section VII. For now, it is sufficient to point out that the balancing argument is supposed to turn on what we can achieve by diminishing liberty; it is not supposed to turn on the sheer fact of horror at what has happened nor of our fear at what might happen. Fear is only half a reason for modifying civil liberties: the other and indispensable half is a well-informed belief that the modification will actually make a difference to the prospect that we fear.

When Ronald Dworkin gave his version of the *ruat caelum* qualification—“Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right”¹²—he suggested that the state may override a given right when this is necessary to protect the rights of others. This is a very common move in popular discussion of these matters. Someone worries aloud about changes in civil liberties and the rights of suspects etc., and people respond: “Well, what about the rights of those who might get blown up by terrorists?”. Rights versus rights is a different ballgame from rights versus social utility. If security is also a matter of rights, then

¹¹Nozick, *Anarchy, State and Utopia*, p. 30 n.

¹²Dworkin, *Taking Rights Seriously*, p. 191.

rights are at stake on both sides of the equation, and it might seem that there is no violation of the trumping principle or of the idea of lexical priority when some adjustment is made to the balance.

This business of conflicts of rights is a terribly difficult area—with which moral philosophers are only just beginning to grapple.¹³ There are some who want to insist very strongly on distinctions between acts and omissions and on structures of agent-relativity that would make it quite wrong to posit an equivalence between a government violating someone's civil liberties and a government failing to save someone's life (because it refused to violate civil liberties).¹⁴ Failing to do what is necessary to save P's life (because this would actively violate Q's rights) is not a way of disrespecting P; the responsibility rests with those—the terrorists—who kill P, not with the government that refuses to violate rights in order to stop them. Others, however, find the stringency of this approach unacceptable, either because they take a more consequentialist view of rights to begin with,¹⁵ or because they accept that people do actually have certain rights to positive goods from their government—like the good of protection—which simply cannot be handled in the manner indicated in the previous sentence. But even those who find the acts/omissions and agent-relativity approach unacceptable are still nervous about treating the infringement of a right simply as a bad consequence to be minimized on the model of the utilitarian calculus. At the very least, they want conflicts of rights to be dealt with in a way that is sensitive to issues about the distribution of infringements. (Some argue, for example, that we should trade off rights-infringements against one another using a maximin model rather than a utilitarian model.)¹⁶ Rights-talk is about respect for individuals, one-by-one; and these philosophers figure that if we abandon that distributive concern—which I discuss in more detail in the following section—then we forfeit our entitlement to say that we are balancing conflicts of *rights* as opposed to simply maximizing the satisfaction of underlying interests.

It is not my intention to get very much further into this discussion. I only wanted to show the depth, the complexity, and the philosophically controversial character of the issues that open up when we start talking about balancing rights against interests that are included under the heading of “security” (whether we describe those too as rights or not). There is no consensus on any of these issues. But I think it is fair to say that even if there are very few who believe that rights

¹³See the essays by F. M. Kamm, Philip Montague and Claire Finkelstein in a special symposium issue on “Conflicts of Rights” in *Legal Theory*, 7 (2001). See also Jeremy Waldron, “Rights in conflict,” *Ethics*, 99 (1989), 503–19, reprinted in Waldron, *Liberal Rights* (Cambridge: Cambridge University Press, 1993).

¹⁴Nozick, I think, would take this line. And Frances Kamm does too in “Conflicts of rights: typology, methodology and non-consequentialism,” *Legal Theory*, 7 (2001), 239.

¹⁵Amartya Sen, “Rights and agency,” *Consequentialism and its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), p. 186, esp. pp. 191–6.

¹⁶*Ibid.*, p. 193.

should be utterly impervious to very large changes in social costs, there is almost nobody (who believes in rights) who thinks that they should be adjusted in every case where it appears that some other right-bearer has something to gain from the adjustment. Almost everyone believes that adjustments in rights require structured arguments for their justification—arguments that pay attention to their special character, to the ordered priorities of moral theory, and to the intricacies of various possible relations between one person's rights and another's.

So this should put us on warning that a peremptory use of the balancing idea—something has been added to one tray of the scale, so the balance must now be struck differently—will not do. If security outweighs liberty now in a way it did not outweigh it on September 10, then there must be complicated reasons (rather than simple consequentialist reasons) why that is so, reasons that are not necessarily captured in the straightforward additive connotations of the balancing argument in Section II.

V.

My second point is this: in order to evaluate the balancing argument, we have to ask tough questions about the *distribution* of the various changes envisaged in liberty and security. It is tempting to read the argument set out in Section II in terms of a diminution in liberty for everyone—everyone's liberty is reduced from L_y to L_x —in order to secure the same amount of security for everyone. But often it does not work out that way.

The perpetrators of the September 11 attacks were foreigners, members of a foreign organization, and the U.S. government has taken that as grounds for drawing some quite sharp distinctions in its subsequent legislation between the protections accorded to the civil liberties of Americans and the protections accorded to others who are legally in the United States. Section 214 of the USA Patriot Act, for example, alters existing legislation concerning wire-tapping so that “investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.” (The class of “United States persons” includes American citizens and legally admitted permanent residents; but it does not include non-resident aliens legally present in the United States.) More importantly perhaps, the perpetrators of the September 11 attacks were not just non-residents but also members of a fairly visible ethnic group: and their actions mean that everyone (whether a United States person or not) who looks or dresses or speaks in any way like them is likely to face much greater levels of suspicion. Most of the changes in civil liberties are aimed specifically at suspected perpetrators or accomplices or persons who might be thought to have information about past or future terrorist actions, and most Americans assume that persons in these categories will look quite different from themselves.

True—as a legalistic matter, the changes in civil liberties may be formulated innocuously enough—“Anyone who is officially suspected of doing A or knowing B will have his or her liberty reduced from L_y to L_x ”—and the “anyone” term seems universalizable. However, we must avoid a certain childish formalism in making the claim that civil liberties are diminished equally for everyone. As Ronald Dworkin points out,

None of the administration’s decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offenses, or have our houses searched without our knowledge, or find ourselves brought before military tribunals on grave charges carrying the death penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.¹⁷

So perhaps the balance we ought to be discussing is not so much a balance between one thing we all like (liberty) and another thing we all like (security). It is more like the balance that is sometimes referred to when we say we should balance the interests of a dissident individual or minority against the interests of the community as a whole.

Ronald Dworkin has argued in a number of places that there is some confusion in the idea of a balance of interests between the individual and the community: “The interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious.”¹⁸ But confusion is not the problem; the problem is moral, not logical. There are in fact two ways of parsing the idea of a balance between the interests of an individual and the interests of the community in the present context, neither of them reassuring.

First, talk of balancing the interests of the individual against the interests of the community may be a way of indicating that “the individual” in question is not really thought of as a member of the community at all: he is an alien, a foreigner, and so his interests have *not* already been counted in “the interests of the community.” Alternatively, if we say that his interests *are* already counted in the interests of the community—for example, because he too is more secure from being blown up, as a result of what we do to the liberties of suspicious characters (like him)—we may mean to indicate that a balance must be struck between (i) what *justice* requires in the way of respect for his interests and (ii) what would best promote the aggregate interests—his included—calculated in a way that is indifferent to justice.

¹⁷See Dworkin, “The threat to patriotism.” See also Dworkin’s more general discussion of the proposition that “[i]t is never true, at any time, that all members of a society are equally likely to be accused of any particular crime,” in his essay “Principle, policy, procedure,” in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), p. 87.

¹⁸Dworkin, “Principle, policy, procedure,” p. 73.

This second account is quite complicated, so let me explain it a little further. We know that “the interest of the community” is often calculated in a way that sidelines issues of justice and distribution: utilitarians do this all the time.¹⁹ To take a very crude example: suppose that a choice between two policies (I and II) offers the following pay-offs to three individuals:

| | I | II |
|---|----|----|
| A | 20 | 30 |
| B | 20 | 10 |
| C | 20 | 30 |

Plainly policy II best promotes the interests of the community (comprising A, B, and C) in an aggregate sense: the total pay-off is higher and so is the average. But someone who believes this may also acknowledge that the outcome of policy I is more fair; and let us assume for the sake argument that they are right. Now, since fairness is concerned particularly with what happens to individuals (rather than to arithmetical totals), and since A and C are both better off as individuals under the less fair policy, a concern about fairness and about the issue of sacrificing fairness to aggregate utility is likely to focus particularly on B. It would not be surprising if this concern were *abbreviated* as a concern about the balance between B’s interests and the aggregate interests of the community, even though B’s interests are actually counted in the aggregate interests of the community. Another way of putting it would be to say that the real issue is the relation between a concern for justice, on the one hand, and the prospect of gains (to some or to the aggregate) from ignoring justice, on the other.

Talk of “balance” here is quite insidious. Although it all sounds very moderate, the implication is that we should have *some* concern for justice but not too much: a proper sense of balance requires us to give up on justice when the costs of pursuing it (to those who would benefit from injustice) become too high. Now A and C might not think this in the choice between policy I and policy II above: there the cost to them of justice is not very great. But if we imagine that a new set of policy choices presents itself (say, on September 11), which greatly increases what A and C have to lose from sticking with justice—

| | III | IV |
|---|-----|----|
| A | 10 | 30 |
| B | 10 | 5 |
| C | 10 | 30 |

—then we might be tempted to talk about “adjusting the balance” between justice and utility. After all, it is one thing to require A and C each to give up ten units of goodies for the sake of justice in the choice between I and II; it is

¹⁹See the discussion in Rawls, *Theory of Justice*, pp. 19–22.

quite another thing—and the aficionado of balance may say it is quite unreasonable—to expect them to give up twice that in the choice between III and IV.

I have put this provocatively—with what I hope is an ill-concealed sneer of outrage at the idea of “striking a new balance” between the demands of justice on the one hand, and what most members of a society could get for themselves if they were allowed to arrange their society unjustly on the other. But mainly what I am trying to establish is the need for care with the idea of balancing. If security-gains for most people are being balanced against liberty-losses for a few, then we need to pay attention to the few/most dimension of the balance, not just the liberty/security dimension. Given that the few/most dimension presents an issue of justice, it is by no means clear—I think it is clearly false—that simply adding something to the “most” side of the balance is sufficient by itself to justify taking something away from the “few”.

Someone may respond by observing that the “few” in our present case are terrorists or persons suspected of participation or complicity in terrorism. No one believes that criminals should have the same rights as the rest of us, and even those who are suspected but not convicted of criminal activity have lesser rights even in ordinary times: they may be held pending trial, or required to surrender their passports, etc. The point may be accepted, but the issue is whether we should now make some additional downward adjustments to the scheme that already puts criminal suspects in a special position of more restricted liberty. The civil liberties in category (c) define the procedures and protections that are offered to those suspected of ordinary crimes, from the trivial to the heinous. Is there a good reason for changing these, in the light of the events of September 11?

Ronald Dworkin observes a temptation to think that the extraordinary gravity of the crimes that were committed on September 11 (or that terrorists are presently conspiring to commit) is itself a reason for diminishing the protections afforded to those who are charged with such offenses. But, as he said, that makes no sense: “If they are innocent, the injustice of convicting and punishing them is at least as great as the injustice in convicting some other innocent person for a less serious crime.”²⁰ The “civil liberties” in category (c) are oriented in large part towards preventing such injustice, and the case for respecting them increases rather than diminishes the greater the crime that the suspect stands accused of. (This is because category (c) liberties are designed to protect people against condemnation and punishment, and both will be greater the more serious the charge.)

Can it not also be said, though, that the greater the crime the greater the dangers of a wrongful acquittal? It is not true in all cases, but it may be true with terrorists. Michael Dorf put the point this way:

²⁰Dworkin, “The threat to patriotism.”

The traditional way we balance these things is with the maxim, “It’s better that 10 guilty men go free than one innocent man be in jail.” I think people are a little nervous about applying that maxim where the 10 guilty men who are going to go free could have biological weapons.²¹

The implicit suggestion that the 1:10 ratio needs to be adjusted in light of the greater damage that the ten may do sounds reasonable enough. But we must not give the impression that it is only a matter of striking a different balance between this one (innocent) suspect and these ten (guilty) ones. That is not who the balance is between. We are not balancing the rights of the innocent against the rights of the guilty. We are balancing the interests in life or liberty of the one innocent man against the security interests of those of the rest of us (non-suspects) that will be served if the ten guilty men are convicted by the procedures that lead to the wrongful conviction of the innocent. The innocent man is being put to death or imprisoned, and his reputation drastically and wrongly besmirched, so that *we* may be safer. It may not be done intentionally, but the gist of the proposal is that it is something we are entitled to be reckless about. There was a way of taking care that it should not happen (or that it should happen less often)—that is what the civil liberties safeguards represent—but for our own benefit we have decided to take less care.

James Fitzjames Stephen remarked, in connection with this business of trading off a certain number of guilty acquittals against innocent convictions that “[e]verything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected.”²² The first point is like Dorf’s. But Stephen’s second point is relevant too. If the innocent persons who are sacrificed to security in this way are sacrificed because it was in the circumstances perfectly reasonable to suspect them of terrorist offenses (though, as it turned out, mistaken)—that is one thing. But if they were suspected in the first place because of appearance, ethnicity, or religion, and if the changes in the scheme of civil liberties facilitated suspicion on just that basis, and removed some of the safeguards that would prevent or mitigate that sort of suspicion—then, that is quite another thing. The injustice associated with the reckless conviction of one innocent man for the sake of the greater good becomes particularly acute—and the “balancing” talk that underwrites it becomes particularly objectionable—when it is associated with ethnic or religious prejudice. At that stage, our worrying has to go beyond the issue of individual costs and benefits and look to the moral corruption of the system as a whole.²³

²¹As quoted in Pam Belluck, “Hue and murmur over curbed rights,” *New York Times*, Nov. 17, 2001, at B8.

²²James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol. I, p. 438, quoted by Richard H. Menard, “Ten reasonable men,” *American Criminal Law Review*, 38 (2001), 179 at p. 199.

²³A system of civil liberties should not be just conceived as an array of individual benefits. It has aspects of a public good—and there is a serious difference between having one’s liberties secured in a system where the same liberties are scrupulously guaranteed to all (a system which resolutely turns

VI.

A third reason for taking care with balancing arguments is that one of the terms—"liberty"—is a relational term, so that it has ramifications for both sides of the balance.

When liberty is understood (as it usually is) in a negative sense, it is something that cannot be reduced without increasing something else, namely the powers and means and mechanisms that obstruct or punish the ability of individuals to do what they want.²⁴ Reducing liberty may prevent an action taking place which would otherwise pose a risk of harm. But it necessarily also increases the power of the state, and there is a corresponding risk that this enhanced power may also be used to cause harm.

It is important not to lose sight of this possibility. The protection of civil liberties is not just a matter of (a) cherishing certain freedoms that we particularly value. It is also a matter of suspicion of power, an apprehension that power given to the state is seldom ever used only for the purposes for which it is given, but is always and endemically liable to abuse. Category (b) of our civil liberties concerns picks this up precisely. Whether there is a freedom at stake or not, there are certain powers which we have traditionally thought it better that the state should not have.

Another way of putting this is to say that a commitment to civil liberties is born in part of a "liberalism of fear" (to use Judith Shklar's phrase),²⁵ that is, an apprehension about what may be done to us using the overwhelming means of force available to the state. True, the events of September 11 have heightened our fear of the worst that can be done to us by individuals and groups other than the state. And an increase in the power of the state may be necessary to prevent or diminish the prospect of that horror. *But the existence of a threat from terrorist attack does not diminish the threat that liberals have traditionally apprehended from the state.* The former complements the latter; it does not diminish it, and it may enhance it. In this regard Shklar notes that the liberalism of fear owes a lot to the political philosophy of John Locke.²⁶ It will not do, said Locke, in justifying strong unconstrained government, to point to the perils that

its back on various forms of prejudice and discrimination) and having one's liberties secured as the artifact of a system that offers liberty to some but not others. (It may be less appropriate to describe the latter system as a scheme of *civil* liberties.) I am grateful to Neil Walker of the European University Institute, for conversation along these lines. "Public safety," says Walker, "is inexorably connected with the quality of our association with others. (See Ian Loader and Neil Walker, "Policing as a public good: reconstituting the connections between policing and the state," *Theoretical Criminology*, 5 (2001), 9, at p. 26.) Professor Walker's analysis suggests that, even though we might be individually safer, our security is degraded as a public good by distributive degradation in our scheme of civil liberties.

²⁴See Isaiah Berlin, "Two concepts of liberty," *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p. 122 ff.

²⁵See Judith Shklar, "The liberalism of fear," *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum (Cambridge, Mass.: Harvard University Press, 1989), esp. pp. 26 ff.

²⁶*Ibid.*, p. 30.

it might protect us from: “This is to think, that Men are so foolish, that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.”²⁷ We have to worry that the very means given to the government to combat our enemies will be used by the government against *its* enemies—and although these those two classes “enemies of the people” and “enemies of the state” overlap, they are not necessarily co-extensive.

Nowhere is this point clearer than in our apprehensions about the use of torture. We all hope and pray that our government will not have resort to this expedient, although there have been suggestions from hitherto respectable civil libertarians that it should do so.²⁸ There are official assurances that its use is out of the question,²⁹ though that has to be balanced against the depressing precedent of two of our closest allies in the war against terrorism—the United Kingdom and Israel—having resorted in recent memory to methods very close to torture in dealing with their own terrorist emergencies.³⁰ And even if we could rely on the official assurances that torture will not be used—and to do so we would want governments that have been rather less mendacious than ours have been about their support for such practices by other regimes in the past—it is worth pondering why this expedient is unthinkable and what that should tell us about other areas where we are less reluctant to sacrifice civil liberties.

On the face of it, the prohibition against torture should be exactly the sort of thing that gives way in the present atmosphere of adjusting the balance between liberty and security. What we are desperate for in the war against terrorism is information—who is planning what—and torture is supposed to be an effective way of securing information. Philosophy classes studying consequentialism thrive on hypotheticals involving scenarios of grotesque disproportion between the pain that a torturer might inflict on an informant and the pain that might be averted by timely use of the information extracted from him: a little bit of pain from the electrodes for him versus five hundred thousand people saved from nuclear incineration. But now the hypotheticals are beginning to look a little less fantastic. Alan Dershowitz asks: what if on September 11 law enforcement officials had “arrested terrorists boarding one of the planes and learned that other planes, then airborne, were heading towards unknown occupied buildings”? Would they not have been justified in torturing the terrorists in their

²⁷John Locke, *Two Treatises of Government* ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, section 93.

²⁸See Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (New York: Little, Brown, 2002), p. 477.

²⁹Eric Schmitt, “There are ways to make them talk,” *The New York Times*, June 16, 2002 (Week in Review): “Military officials say torture is not an option. But, they said, under the Geneva Conventions, anything short of torture is permissible to get a hardened Qaeda operative to spill a few scraps of information that could prevent terrorist attacks.”

³⁰For Israel, see Julian Borger, “Israeli government report admits systematic torture of Palestinians,” *The Guardian* (U.K.), February 11, 2000. For the United Kingdom, see the ECHR decision in *Ireland v. United Kingdom*, Judgement of 18 January, 1978.

custody—just enough to get the information that would allow the target buildings to be evacuated?³¹ How could anyone object to the use of torture if it were dedicated specifically to saving thousands of lives in a case like this?

The answer comes from Henry Shue: “I can see no way to deny the permissibility of torture in a case *just like this*.”³² But few cases are *just like this*: few have the certainty of Dershowitz’s law school classroom formulation or the clean precision of the philosopher’s hypothetical. Think of the background conditions that need to be assumed:

The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being informed; and a priest and doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer. . . . Most important, such incidents do not continue to happen. There are not so many people with grievances against this government that torture is becoming necessary more often, and in the smaller cities, and for slightly lesser threats, and with a little less care, and so on.³³

There is, as Shue notes, “considerable evidence of all torture’s metastatic tendency.”³⁴ In the last hundred years or so, it has shown itself not to be the sort of thing that can be kept under rational control. On the contrary—from a point near the beginning of the twentieth century in which it was thought it might disappear altogether, torture has returned and now flourishes on a colossal scale. What Judith Shklar calls the liberalism of fear is a response to this actuality—to the prospect that if we allow ourselves to be seduced into “adjusting the balance” in this regard, there is no telling what we will let ourselves in for.³⁵

As I said, so long as there is no serious proposal to use it, the argument about torture is important mainly as an illustration of a more general misgiving, about the dangers of metastasis in regard to other powers which had previously been withheld from government now being fearfully assigned to it. One troubling example is the power of detention without trial. It seems now that the United States has a policy of detaining even its own nationals indefinitely as “enemy combatants,” not in order to charge them with anything but to find out what they know.³⁶ It is not hard to think of scenarios where detention without trial is justified. But it is hard to think of methods of ensuring that this power is not

³¹Dershowitz, *op. cit.*, 477.

³²Henry Shue, “Torture,” *Philosophy and Public Affairs*, 7 (1978), 124, at p. 141.

³³*Ibid.*, p. 142.

³⁴*Ibid.*, p. 143.

³⁵The formulations in this paragraph are adapted from Shklar, “Liberalism of fear,” p. 27.

³⁶I infer this from the recent case of Jose Padilla, held for having talked about the possibility of detonating a radiological bomb in Washington D.C. See Benjamin Weiser with Dana Canedy, “Traces of terror: the bomb plot,” *The New York Times*, June 12, 2002, p. A24.

abused, that it does not get out of hand, and that detention does not turn into “disappearance.” Once again, one’s confidence would be greater if we were dealing with governments that had resolutely opposed all such abuses by their allies and client-states in the past. But we know, on the contrary, that in the recent past the United States, for example, has been complicit in abuses of the detention power in Latin America and elsewhere. There is a sort of magical thinking that we are supposed to forget all about such abuses when we evaluate what is being presently proposed from a civil liberties perspective: it is as though we are supposed to think that now, for the first time, remarkably, we have a government that *can* be trusted to tell the truth about its intentions. (Another, sadder way of putting this is to say that there are costs to the sort of mendacity that in the past U.S. government officials have routinely indulged in: such mendacity leaves no basis for trust when, later, trust may be desperately needed.)

Against all this, some will say that the threat from a more powerful state as a result of a reduction in civil liberties is nothing but an hysterical hypothesis, whereas the threat from terrorism is *real*. In response we can say two things. First, no one but a fool thinks that the threat from the state is zero. Of course opinions about the magnitude of that threat may vary. But there is no reason to suppose that the introduction of a heightened threat from terrorism makes it *less* likely than it was (say on September 10) that the state will act oppressively. So unless we assume that the motivation to do so has somehow magically evaporated, we must assume that the net threat from the state goes up as the power accorded to the state increases. Secondly, even though the terrorist threat is very real, the hypothesis that an increase in governmental power will diminish it is in many ways no less fanciful than the hypothesis that the government will abuse the extra power given to it. We must not confuse the means with the end. An enhanced ability to combat terrorism is not the same as an actual diminution in terrorist threat. This leads to the fourth of the grounds for caution that I mentioned in Section III.

VII.

The idea of balance supposes that we should consider civil liberties not just in and of themselves, but in terms of the consequences of their existence. If the consequence of a given degree of liberty is an enhanced level of risk, then we must take that into account when considering whether that degree of liberty should be maintained.

It is important to do these calculations honestly. The fact that a certain degree of liberty is associated in the public mind with a certain degree of risk is not itself a ground for diminishing the liberty given a concern for the risk. *We must also be sure that the diminution of liberty will in fact have the desired consequence.* Or, if the desired reduction in risk is only probable not certain, then we must be as clear as we can about the extent of the probability. In

particular, it is never enough for government to show that reducing a given liberty is *necessary* for combating terrorism effectively. It may be a necessary condition, and yet—because sufficient conditions are unavailable—the terrorist threat may continue unabated. In other words, the case must be based on the actual prospect that security will be enhanced if liberty is reduced. It may be said—quite reasonably—that we cannot know what the prospect is. Fair enough: then what has to be inferred is that *we cannot know whether it is worth giving up this liberty*, and thus we cannot legitimately talk with any confidence about an adjustment in the balance.

It is not that we know nothing about the effects of the change in our liberties. The immediate effects on suspects and dissidents are quite clear. It is the long-range effects for the sake of which these costs are imposed that are less clear. In fact, given the record of the bumbling incompetence and in-fighting of American intelligence and law-enforcement agencies wielding the already very considerable powers that they had in the weeks leading up to September 11, there is no particular reason to suppose that giving them more power will make them more effective in this desperately difficult task. But it might make them more effective in the somewhat easier task of acting oppressively towards vulnerable political opponents at home.

Again, my intention is not to settle any argument with these considerations, but to insist on the importance of detailed scrutiny. The case for diminishing civil liberties is often presented as a hard-headed consequentialist alternative to the soft “pious moralism” of theorists of rights. But those who are used to this sort of Machiavellian abuse know that it becomes most vehement when hard *consequentialist* questions are asked about enhancements of state power that turn out to be purely symbolic in relation to the threat they purport to be dealing with, and deadly dangerous in relation to liberty and justice on the domestic front. In fact I suspect that much of the popular pressure for a change in liberties can be explained almost entirely at the level of symbolism. When they are attacked people lash out, or they want their government to lash out and inflict reprisals. To put it a little more kindly, people want to feel that something is being done, in response to the attacks and in response to the continuing threat—preferably something very, very violent (like the bombing of Afghanistan), or something new and drastic like the setting up of new forms of detention camp or new types of tribunal. People are less interested in the effectiveness of these devices than in *the sense that something striking and unusual is being done*. No doubt the psychological reassurance that people derive from this is a consequential gain from the loss of liberty. But whether it is the sort of gain that should count morally is another question.

The point can be illustrated with a consideration of due process issues. A reduction in due process guarantees may make it more likely that terrorist suspects will be convicted. And that, people will say, is surely a good thing. Is it? What reason is there to suppose that our security is enhanced by making the

conviction and punishment of suspects more likely. We know that the conviction and punishment of an Al-Qaeda fanatic, for example, will have no general deterrent effect; if anything, it will have the opposite effect—making it more rather than less likely that the country punishing the suspect is subject to terrorist attack. Of course, this is not a reason for *not* punishing the perpetrators of murderous attacks, but the reasons for punishing them are reasons of justice, not security (via general deterrence); and those reasons of justice may not be as separable from the scheme of civil liberties that we are currently trading off as the “new balance” image might suggest. Maybe particular incapacitation is a means by which conviction might serve security, but for that it is especially important that we convict and punish the right people, and it may well be that limiting civil liberties in category (c) diminishes rather than enhances our assurance in this regard. Once again, undermining civil liberties—particularly the due process rights of terrorist suspects—may make us seem (at least to ourselves) more ferocious and vengeful in response to the atrocities of September 11. But it is less clear that the psychological benefits we derive from adopting this posture is the sort of value for which procedural rights are appropriately sacrificed.

VIII.

This article does not embrace any particular policy or proposal. It is intended mainly as a call for care and caution. We should be cautious about giving up our civil liberties. We should be even more careful about giving up our commitment to the civil liberties of a minority, so that we can enjoy *our* liberties in greater security. We should be worried about the enhanced power of the state (and we should reject as magical thinking the idea that the risk from that power goes down as the risk from terrorism goes up).³⁷ And finally, if we do remain receptive to the need to compromise civil liberty, we must insist that those who talk the balancing-talk step up to the plate with some actual predictions about effectiveness. We should not give up our liberties, or anyone else’s liberties, for the sake of purely symbolic gains in the war against terrorism.

³⁷We should see accusations of disloyalty which are used to slander those who raise these concerns for what they are—an attempt to distract us from careful public evaluation of these issues. (See Neil A. Lewis, “The Senate hearing; Ashcroft defends antiterror plan—says criticism may aid U.S. foes,” *The New York Times*, December 7, 2001, p. A1: “Emboldened by public opinion surveys showing that Americans overwhelmingly support the administration’s initiatives against terrorism, Mr. Ashcroft told the Senate Judiciary Committee, ‘To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists.’”)