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## ARTICLE

### LIBERTY AND SECURITY: A BALANCED APPROACH

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*This article considers the relationship between liberty and security, proposing a balancing approach to make adjudications when they conflict. The theoretical framework is developed in § 1, then applied in § 2 to the USA PATRIOT Act and aviation security, two archetypical post-9/11 restrictions on liberty for the sake of security. To understand whether restrictions on liberties can be justified, the costs of security—or its absence—must be understood; this discussion is offered in § 3, with a focus on the costs of terrorism and counterterrorism. § 4 uses these results to argue against critics of the balancing approach, most notably Jeremy Waldron.*

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### I. AN ANALYTICAL FRAMEWORK

Liberty and security stand in tension with each other.<sup>1</sup> There are at least some liberties that, if retained—or conferred—will lessen security.<sup>2</sup> This conceptual claim need not be committed to any particular conception as to *which* liberties those are, and it certainly does not follow that *all* liberties bear some relationship to security. To be sure, they do not, which is to say that many liberties gain no purchase at all on the security debate. But granting that at least some do, the tension appears: should—or do<sup>3</sup>—we

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<sup>1</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) (acknowledging the trade-off between security and liberty, but arguing that deference should be given to the executive branch in adjusting the security policy during times of emergency). See also John Kleinig, *Liberty and Security in an Era of Terrorism*, in *CRIMINOLOGISTS ON TERRORISM AND HOMELAND SECURITY*, 357-82 (Brian Forst, Jack R. Greene & James P. Lynch eds., 2011) (examining the issue regarding the appropriate balance between liberty and security during times of increased threat to national security). Though terrorism presents a compelling context in which to consider this issue, it has been suggested in other contexts and eras as well. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (finding the internment of Japanese Americans during World War II constitutional). See also Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103 (1951) (highlighting the tension between liberty and security that resulted from wartime stresses in U.S. history). This was a lecture given by former Supreme Court Justice Jackson to the Buffalo Law School.

<sup>2</sup> I will not have much to say about what liberty and security *are*, which is certainly important. In this regard, Kleinig, *supra* note 1, is useful; I agree with his characterizations of both concepts.

<sup>3</sup> While my project is more normative than descriptive, there is important empirical data on the latter. See Carol W. Lewis, *The Clash between Security and Liberty in the U.S.*

prefer more liberties or more security?

This is an incredibly difficult question to answer, though there are at least several broad approaches that might be undertaken. On the one hand, we might think that liberties are more important than security; it is better to be free than to be safe. On the other, we might think that security is more important than liberty; it is better to be safe than to be free. But are these real answers to the question? Or are they just platitudinous rhetoric?

Neither end of this spectrum portends much plausibility. If we were fully free, we would also be perpetually at risk since unconstrained liberties could be nefariously deployed. This sort of Hobbesian state of nature motivates our departure into civil society and the associated restrictions on our liberties.<sup>4</sup> Lest the pendulum swing too far in the other direction, a police state threatens. Under this totalitarian regime, we may well be secure, but toward what end?<sup>5</sup> If security comes at too high a price, we might well reject the offer.

Without luck on the extremes, a more moderate approach looks attractive. On such an approach, liberty and security both matter, and the aim is to strike an adequate balance between the two.<sup>6</sup> While this approach is not without detractors—several of whom will be considered in § 4—it serves as a useful starting point. Here we acknowledge the tension between liberty and security, without taking a dogmatic approach as to which takes priority in individual cases. Rather, there will be interplay between the two where we will—whether judiciously or liberally—restrict liberties for the sake of security.

Still, there are at least two substantial preliminary problems. First, the project now becomes at least partially empirical insofar as it starts to matter *whether* any particular restriction on liberty improves security.<sup>7</sup> On

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*Response to Terror*, 65 PUB. ADMIN. REV. 18, 18-30 (2005) (examining the public's opinion on the tradeoff between security and liberty before and after 9/11).

<sup>4</sup> THOMAS HOBBS, LEVIATHAN XII.9 (A.P. Martinich & Brian Battiste eds., Broadview Press 2010). See also JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 6 (1986) (discussing the implications of a state where everyone has the power to enforce the law).

<sup>5</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

<sup>6</sup> In addition to striking a balance between these values, we might also want to strike a balance between the modes of political enforcement. See Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 ARIZ. L. REV. 607, 607-19 (2004) (“[D]escribing what the technologies and legal arrangements might look like if they were modified to achieve this balance between privacy and security; and . . . who is most likely to guarantee this effective balance.”).

<sup>7</sup> Lewis, *supra* note 3, at 23.

this tack, the civil libertarian could avoid value judgments altogether by successfully arguing that some curtailment of liberties just does not matter for our security. There would still be the issue of whether people *are* safer or whether they *feel* safer; pending the discussion in § 4, the appropriate metric has not been fixed either way. But conceding that some restriction does not make people safer and that promulgation of this fact precludes them from feeling safer—which surely will not always be true—the restriction would not be offset by any compensatory benefit. In such a case, there would be no reason to sustain it.

While more will be said about this problem later, it can somewhat be cabined for the purposes of the theoretical project. Still, that theoretical project borders on the irrelevant without any sort of practical upshot, so some engagement is owed. The principal dialectical move is to simply deny that any liberty restriction we would seriously countenance has *no* implications for security; else, why affect it? Surely the critic can charitably allow that the restriction has *some* implications for security, the issue then becoming *how much*. And once we have gotten this far, the first problem transposes into the second.

That second problem then becomes one of commensurability, under which liberty and security need to be represented in some common currency.<sup>8</sup> This problem is even worse than it appears, because it requires not only that liberty and security are commensurable, but also that either can be measured at all. So even if we could say that  $x$  units of security were worth  $y$  units of liberty, we would have to be able to say what those respective units were in the first place. In other words, imagine that some restriction of liberty has some upshot in terms of security; is it worth it? To answer that question, we would obviously want to know how much security we were getting for how much liberty restriction, and this apparently requires both: (1) that we quantify each; and (2) in common terms. Either of these requirements seems daunting, if not insurmountable. The way forward is to trade precision for heuristic. As an analogy, consider the weight of a

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<sup>8</sup> The problem of commensurability and value is an old one. See HENRY SIDGWICK, *THE METHODS OF ETHICS* (1907) (exploring methods for making value choices and the required assumption that pleasures and pains are commensurable). While present purposes do not require a technical conception of commensurability, this suffices: “[t]wo items are commensurable if and only if there is some single norm such that consideration for and against choosing each item may be adequately arrayed prior to the choice (for purposes of deliberation” simply in terms of the greater or lesser satisfaction of the single norm.” Henry S. Richardson, *Commensurability as a Prerequisite of Rational Choice: An Examination of Sidgwick’s Position*, 8 *HIST. OF PHIL. Q.* 181 (1991).

rhinoceros versus the weight of a grand piano: we do not need to know the weight of either to know that the rhinoceros weighs more.<sup>9</sup> This example gets us past (1) insofar as we can make comparisons without knowing quantities. But we are still left with (2) as the example presumes a common currency (*viz.*, weight) that is inapplicable to comparisons between liberty and security.

Still, we *do* make adjudicative policy decisions all the time, apparently across disparate considerations. If, for example, a gun control bill fails to clear Congress, there is some straightforward sense in which we, as a polity, fail to ratify the restriction on liberty that would have conferred added security.<sup>10</sup> To be sure, there are distortional effects in an example like this (e.g., disproportionate lobbying power), but that just makes the point: if there *were* sufficient political will, then the legislation would get through. Obviously this process generalizes beyond the liberty/security context. Whether we think about decisions to go to war, to offer farm subsidies, to institute performance-based evaluations in public schools, or any other complex policy decision, a wide range of apparently incommensurable values are put in conflict. That we do adjudicate those conflicts shows that we can, even if it does not elucidate *how*.<sup>11</sup>

The fact that there is partisan disagreement over some of these issues complicates things issue, though not irretrievably so.<sup>12</sup> To return to our example, suppose that there are two reasonable views one could take about gun control. One of these sides will prevail, while the other will not;

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<sup>9</sup> In an informal poll I conducted among my colleagues and students, ninety-one percent of those asked got the answer right, but their answers on relative weights varied by 6,000% ( $n = 11$ ). The average rhinoceros weighs two or three times as much as the average grand piano.

<sup>10</sup> See, e.g., Ed O'Keefe, *Gun Background Check, Assault Weapon Compromise Fail in Senate*, WASH. POST, Apr. 17, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/17/senate-to-vote-on-amendments-to-gun-bill-with-background-check-plan-in-doubt> (explaining that proposal to expand the national gun background system lacked the votes required to pass).

<sup>11</sup> See Richard F. Elmore, *Backward Mapping: Implementation Research and Policy Decisions*, 94 POL. SCI. Q. 601, 601-16 (1979) (discussing forward mapping and backward mapping approaches to implementation analysis).

<sup>12</sup> See AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT* (1996) (reflecting on the implications of political disagreement and proposing ways to address it). See also Charles Larmore, *Pluralism and Reasonable Disagreement*, 11 SOC. PHIL. & POL'Y 61 (1994) (recognizing an inevitable disagreement about the nature of the good life).

there either will, or will not, be background checks, magazine restrictions, and so on. This does not preclude that there could be compromise within or across the relevant parameters, but rather only presupposes that at least some reasonable people will be unhappy with the eventual outcome. There are two possible explanations here. First, people could simply ascribe different values to those outcomes; in other words, they just fundamentally *disagree* about what a good outcome would look like.<sup>13</sup> Second, their commitments might be sufficiently coarse so as to render any particular outcome indeterminate. In other words, those commitments might have enough imprecision that the disagreement is effectively spurious; it reflects, not a failure of ultimate agreement, but rather of epistemic resolution and articulation.<sup>14</sup>

Whether the disagreement is thoroughgoing or provisional, it need not derail our attempt at commensurability. In either case, the inter-personal tension is substantively akin to the intra-personal one, which is to say that competing values that some particular individual has are ultimately adjudicated when she expresses her considered policy preference. The inter-personal tension is similarly adjudicated when society ultimately speaks—i.e., when it adopts some particular policy—since, as a first approximation, it has internalized the intra-personal values of its constituents.

This section has been admittedly abstract, so it will be useful to recapitulate the key ideas before moving on. In thinking through the tension between liberty and security, neither takes absolute preeminence over the other. Rather, there is a trade-off between the two under which some augmentation of security is worth some restriction on liberty.<sup>15</sup> This highly formalistic answer takes no substantive position on how much of one is worth how much of the other; the commitment is simply that the two are commensurable, at least heuristically if not quantitatively.<sup>16</sup> Moving

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<sup>13</sup> John Doris & Alexandra Plakias, *How to Argue about Disagreement: Evaluative Diversity and Moral Realism*, in *MORAL PSYCHOLOGY: THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY*, 303 (Walter Sinnott-Armstrong ed., 2008). See also Sarah McGrath, *Moral Disagreement and Moral Expertise*, 3 *OXFORD STUD. IN METAETHICS* 87 (2008) (examining to what extent does moral disagreement undermine moral knowledge).

<sup>14</sup> Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215, 215-40 (1987).

<sup>15</sup> Kleinig, *supra* note 1, at 377-79.

<sup>16</sup> See Hillel Steiner, *How Free?: Computing Personal Liberty*, in *OF LIBERTY*, 73-90 (A. Philips Griffiths ed., Cambridge University Press, 1983) (elaborating on the difficulties of quantifying liberties).

forward, the discussion will be concretized by considering particular ways in which liberties and security interact.

## II. APPLYING THE FRAMEWORK

It will be useful to see how, in practice, the tension between liberties and security is manifest. The hope is that we can gain greater purchase on the theoretical discussion by exemplifying it. Furthermore, § 4 will consider criticisms of the view that I defend, and those criticisms come both at the theoretical and practical levels. By presenting a practical discussion to complement the theoretical one, both a fuller picture will be developed and more critical work will be able to be incorporated. To put it another way, the theoretical and practical discussions take parallel tracks, yet both tracks head in the same direction vis-à-vis ultimate conclusions. This section therefore presents another dimension of the framework—*viz.*, its application—and will be useful moving forward.

While there is a range of examples that illustrate the tension between liberty and security, the focus here will be on just two: the USA PATRIOT Act and aviation security. In many ways, these are the most visible of our responses to terrorism, and their implications the most widely discussed. They are also both highly politicized, with passionate supporters and detractors. Furthermore, there are—or least let us charitably suppose—reasonable views on both sides of the debate. By exploring the associated contours, we can gain a clearer focus on the more general project.

That said, nothing in particular hangs on either of the two examples. Per above, it will be useful to have some specific examples on the table, but it matters not so much what the examples are. The ones I am presenting here are tied to the terrorism context, which is on purpose: terrorism and counterterrorism constitute the interface at which the tension between liberty and security is most pronounced. And, in the public conscience, this context is the one in which that tension is most viscerally felt. The overall discussion, though, generalizes beyond terrorism.

For example, as already mentioned, gun control is another context in which liberty is pitted against security. As it stands, we have various liberties with regards to guns (e.g., to purchase them without background checks at gun shows, to load them with high-capacity magazines, to deploy them with certain firing rates, etc.). Particularly in the aftermath of school

shootings, many—predominantly, but not exclusively liberals<sup>17</sup>—think that these liberties should be curtailed under the aegis of increased security, whether for the benefit of schoolchildren or for society at large. This debate is therefore isomorphic to the ones that we will consider with regards to the USA PATRIOT Act and aviation security, the only difference being that it does not (directly) relate to terrorism.<sup>18</sup> At any rate, this is a minor disclaimer that need not detract from the central argument.

### A. USA PATRIOT Act

The USA PATRIOT Act<sup>19</sup> was signed into law by President Bush within two months of 9/11; it was a direct response to those terrorist acts.<sup>20</sup> The title of the legislation is important, even if it goes unnoticed, or is misunderstood. USA PATRIOT Act is an acronym that stands for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” Of course, many of us know this, but the general public almost certainly thinks that “USA” stands for “United States of America” and that “patriot” is part of the title, not an implicated metaphor; neither presumption is true. But why does the title matter? For present purposes, the answer is that the title straightforwardly ties to liberty and security, specifically by empowering law enforcement with tools to stop terrorism. Those tools obviously confer security, but at the cost of liberties.

While a complete discussion of the Act’s provisions is unnecessary for present purposes, some of those provisions are worth highlighting.<sup>21</sup>

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<sup>17</sup> Larry Alan Burns, *A Conservative Case for an Assault Weapons Ban*, L.A. TIMES, (Dec. 20, 2012), <http://articles.latimes.com/2012/dec/20/opinion/la-oe-burns-assault-weapons-ban-20121220>. Judge Burns is the Republican-appointed judge who oversaw the trial and sentencing of Jared Lee Loughner—Loughner perpetrated a mass shooting in Tucson, Arizona in 2011, killing six people and injuring U.S. Representative Gabrielle Giffords and federal judge John Roll.

<sup>18</sup> Of course it might relate indirectly insofar as gun control has implications for the guns to which terrorists have access. That said, terrorism is not the primary context in which gun control is presented.

<sup>19</sup> H.R. 3162, 107th Cong., 115 Stat. 272 (2001).

<sup>20</sup> See, e.g., American Civil Liberties Union, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act* 1, 5 (2009) [hereinafter ACLU] (identifying the Patriot Act provisions “that require intensive oversight and modification to prevent abuse”).

<sup>21</sup> For more discussion, see Fritz Allhoff, *The War on Terror and the Ethics of Exceptionalism*, 8 J. OF MIL. ETHICS 265, 265-88 (2009) (explaining that the USA PATRIOT Act contained various “sunset provisions” that were set to expire in 2005; however, these were made permanent by Congress).



Many of them were originally set to expire in 2005,<sup>22</sup> though were subsequently renewed.<sup>23</sup> Ultimately, the legislation increases the surveillance power of the government, and in controversial ways. The most important new surveillance powers are these:

- (1) the ability to conduct surveillance on a particular target regardless of the specific communications provider and facility the target uses [i.e., the “roving wiretap”; § 206] . . . ;
- (2) the ability to conduct surveillance on non-U.S. persons who are not affiliated with any known terrorist organizations [i.e., “lone wolf” terrorists; § 207] . . . ; and
- (3) the ability to obtain a court order (provided certain conditions are met) for any tangible item, including documents [i.e., the “library

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<sup>22</sup> For the complete list, see CHARLES DOYLE, CONG. RESEARCH SERV., RL 32186, USA PATRIOT ACT: SUNSET PROVISIONS THAT EXPIRE ON DECEMBER 31, 2005 (2004). The list includes: § 201 (wiretapping in terrorism cases); §202 (wiretapping in computer fraud and abuse felony cases); § 203(b) (sharing wiretap information); §203(d) (sharing foreign intelligence information); § 204 (Foreign Intelligence Surveillance Act (FISA) pen register/trap and trace exceptions); § 206 (roving FISA wiretaps); § 207 (duration of FISA surveillance of non-US persons who are agents of a foreign power); § 209 (seizure of voice-mail messages pursuant to warrants); § 212 (emergency disclosure of electronic surveillance); § 214 (FISA pen register/trap and trace authority); §215 (FISA access to tangible items); § 217 (interception of computer trespasser communications); §218 (purpose for FISA orders); §220 (nationwide service of search warrants for electronic evidence); § 223 (civil liability and discipline for privacy violations); and § 225 (provider immunity for FISA wiretap assistance. *Id.* (adapted from Jonathan Marks, *9/11 + 3/11 + 7/7 = ? : What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 121 (2006)).

<sup>23</sup> The USA PATRIOT Act was renewed and amended through three subsequent pieces of legislation. The first piece of legislation was the USA PATRIOT Improvement and Reauthorization Act of 2005.

USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). The second piece of legislation was the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006). For analysis of this piece of legislation, see CHARLES DOYLE, CONG. RESEARCH SERV., RS22216, USA PATRIOT ACT REAUTHORIZATION IN BRIEF (2005). The third piece of legislation was PATRIOT Sunsets Extension Act of 2011. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-114, 125 Stat. 216 (2011). See EDWARD C. LIU, CONG. RESEARCH SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXTENDED UNTIL JUNE 1, 2015 (2011) (discussing the extension of the three amendments and their respective expansion of federal intelligence-gathering authorities' scope).

records” provision; § 215] . . . .<sup>24</sup>

Each of these provisions restricts certain liberties, most generally liberties against being surveilled. Still, it will be useful to look at them individually.

The Foreign Intelligence Surveillance Act (FISA) is amended by § 206, which allows for roving wiretaps. The amended legislation weakens privacy protections since surveillance orders no longer require the specification of a particular location, phone number, or internet account, nor do they require the identification of a particular target.<sup>25</sup> While FISA had typically required that a surveillance target be affiliated with a foreign power (e.g., a foreign government or foreign terrorist organization), § 207 makes possible the surveillance of “lone wolf” terrorists, namely terrorists without an established connection to a foreign power. A motivation for this provision was that, prior to 9/11, the FBI could not tie Zacarias Moussaoui to a foreign terrorist organization and therefore was unable to examine his laptop; § 207 would have made such an examination possible.<sup>26</sup>

Prior to 9/11, FISA allowed the Foreign Intelligence Surveillance Court (FISC) to issue orders requiring third parties to supply business records of suspected terrorists, pursuant to a government investigation. However, requests could only be served upon four types of entities: common carriers (e.g., airlines and bus companies); establishments of public accommodation (e.g., hotels); storage locker facilities; and vehicle rental agencies.<sup>27</sup> Under § 215, however, the FISA business records provision was amended in three principal ways. First, the supplying entities no longer had to fall into one of the aforementioned categories. Second, “business records” was replaced with “any tangible things (including books,

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<sup>24</sup> Philip M. Bridwell & Jamil N. Jaffer, *Updating the Counterterrorism Toolkit: A Brief Sampling of Post-9/11 Surveillance Laws and Authorities*, in THE LAW OF COUNTERTERRORISM 232 (Lynne K. Zusman ed., 2012). For a more comprehensive—if bombastic and heavy-handed—discussion, see John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1079, 1079-1133 (2002) (“[W]hile Congress’ anti-terrorism law, the so-called Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (‘Patriot Act’) may not have been designed to restrict American citizens’ civil liberties, its unintended consequences threaten the fundamental constitutional rights of people who have absolutely no involvement with terrorism.”).

<sup>25</sup> Bridwell & Jaffer, *supra* note 24, at 239-40.

<sup>26</sup> Two restrictions on § 207 are worth noting, namely that it cannot be exercised against Americans or permanent residents and that it only applies to “international terrorism.”

<sup>27</sup> Bridwell & Jaffer, *supra* note 24, at 241.

records, papers, documents, and other items)”; this substantially expands the scope of materials that can be requested. Third, § 215 eliminates the requirement that the government show the person against whom materials are requested is a foreign power or agent of foreign power. Rather, the government only need to certify that the records are germane to a national security investigation.<sup>28</sup>

These provisions compromise liberties in straightforward ways. Under § 206, an individual can be surveilled without previously-required government specifications, which is to say that more surveillance is possible and that liberty against that surveillance is therefore curtailed. To put it another way, the government may surveil individuals post-§ 206 that it could not surveil pre-§ 206, whether because certain conditions that would have prevented their surveillance no longer immunize them (e.g., failure to name the individual, location, phone number, or internet account). The lone-wolf allowance of § 207 also expands the number of people that can be surveilled; non-affiliation with a foreign power is no longer sufficient for immunity. Furthermore, § 215 expands the sorts of materials that can be surveilled, which means that liberties that individuals had vis-à-vis “any tangible thing[s]” that were not “business records” have been eviscerated.

Not surprisingly, civil libertarians have expressed dismay about these developments.<sup>29</sup> The ACLU complained that “[b]y expanding the government’s authority to secretly search private records and monitor communications, often without any evidence of wrongdoing, the Patriot Act [sic] eroded our most basic right—the freedom from unwarranted government introduction into our private lives...”<sup>30</sup> Here, one certainly has to wonder why *this* would be our most basic right, as opposed to, say, the

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<sup>28</sup> *Id.*

<sup>29</sup> Whitehead & Aden, *supra* note 24, are particularly concerned with Fourth Amendment violations since various USA PATRIOT Act provisions relax the standard of probable cause. Fourth Amendment jurisprudence would take us too far afield for present purposes, but let me just register my skepticism. The Fourth Amendment protects against *unreasonable* searches and seizures, and we can certainly allow that the context of terrorism lowers the requisite justification. The probable cause standard was promulgated in *Carroll v. United States*, 267 U.S. 132 (1925), but *Illinois v. Gates*, 462 U.S. 213 (1983), introduced a complementary notion of “totality of the circumstances.” Given my pluralistic predilections, I would transfer rigid emphasis on probable cause to a more permissive standard under which probable cause generally controlled, but was contextually defeasible. Prospective terrorist attacks would almost certainly portend such a defeating condition.

<sup>30</sup> ACLU, *supra* note 20, at 7.

right to life, a right whose redemption may well require security and, therefore, at least some infringement on liberty. They acknowledge that proponents of the USA PATRIOT Act “suggest that reducing individual liberties during a time of increased threat to our national security is both reasonable and necessary,”<sup>31</sup> but decry this reduction as a poisonous interpretation of our Founders’ vision. While much of their presentation is rhetorical, their basic idea is that liberty takes priority over security and that we must not capitulate on the former to promote the latter.

This is exactly the sort of incommensurability approach that I rejected in § 1. On such an approach, it *really does not matter* how substantial the terrorist threat is; if we take the ACLU at its word, it is just unwilling to compromise on liberty despite countervailing security concerns. Surely this goes too far. The justification of the USA PATRIOT Act cannot hinge on *whether* it adversely affects liberties since this sets the bar far too low. Rather, the appropriate metric has to be whether those adverse effects are *worth it*, a calculus that the ACLU completely rejects. The commensurability approach that I defend queries not just adverse effects on liberties—which we can stipulate to exist—but also the upshot in terms of security.

A better critique would therefore be to say that this legislation has adverse effects for liberty that are not offset by corresponding gains in security. It is very hard to think through how to analyze such a claim, particularly given the paucity of empirical data about how many terrorist threats the USA PATRIOT Act has prevented. Interestingly, the government claims that it has never invoked § 207, but my inclination is to think that liberties are compromised whether the government *actually* invokes the provision or not; the freedom against surveillance is lost regardless. Similarly, with § 206 and § 215, the fact that individuals could be subject to roving wiretaps or third-party requisition of materials inherently compromises liberty, even if those powers are not exercised.

Therefore, we should concede the loss of liberty expansively, but such a conceptualization is not dispositive against the legislation. Rather, it just calls for greater countervailing gains in terms of security; a large imposition against liberty can still be offset by an appropriate security gain. The issue of how much liberty is worth how much security still obtains, and reasonable people will surely disagree. But, as a conceptual matter, even the prevention of a single terrorist attack could justify substantial infringements

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<sup>31</sup> *Id.* at 8.

against liberty *if* the costs of that attack are high enough. An accounting of those costs is still owed—and will be offered in § 3—but let us turn to aviation security in the meantime.

### B. Aviation Security

The liberties sacrificed under the USA PATRIOT Act are largely unfelt and unseen; for the vast majority of Americans, this legislation has no material impact on our lives. To be sure, many of us take great umbrage at the potential invasions of their privacy, but the invasions themselves remain substantially unrealized. Aviation security stands diametrically opposed in this regard, with millions of Americans being daily subjected to its demands. That 9/11 was perpetuated by airplanes hardly makes it a surprise that aviation security has become a post-9/11 focal point. The effect is unmistakable, particularly via the increased burdens on travelers.

Already explicit in the locution, aviation *security* seeks to secure air travel; it does so by restricting liberties that people would otherwise have. Just think of the process that it now takes to get on an airplane. We must remove our laptops from their carrying cases, take off belts, sweaters, jackets, and shoes, and then go through a metal detector, a backscatter x-ray machine, or a body scanner.<sup>32</sup> The whole process is rife with foregone liberties, namely the liberty against boarding a plane absent any of these screening procedures. Of course, one has the liberty to take a pass on air travel altogether, but that misses the point; the liberty to participate in air travel *without* being subject to these screenings is still triaged.

Of course, aviation security existed prior to 9/11.<sup>33</sup> The

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<sup>32</sup> In 2013, the Transportation Security Administration introduced a new program, TSA Pre✓ that “allows select frequent flyers of participating airlines...to receive expedited screening benefits.” Sally Black, *TSA Pre Check Program*, VACATION KIDS, <https://www.vacationkids.com/Vacations-with-kids/bid/320962/TSA-Pre-Check-Program>. These benefits include “leaving on shoes, light outerwear and belts . . . [and] leaving laptops . . . in carry-on bags.” *Id.* This has had substantial benefits to those who qualify, but will not displace security protocols for other travelers. For more detail, see TSA Pre✓, <http://www.tsa.gov/tsa-precheck>. CLEAR is another program—currently being piloted at select airports—that accelerates security checks for subscribers; an annual membership is \$179. *How it Works*, CLEAR, <https://www.clearme.com/how-it-works>. For more details, see CLEAR, <http://www.clearme.com>.

<sup>33</sup> Such aviation security existed at least for the vast majority of travelers, at least to some extent. As recently as 2007, I took a plane from Armidale to Sydney (Australia) and was astounded to find that travelers just walked on the plane without any screening. Armidale

contemporary version then, is not so much a sharp break from the past as the tightening of screws along a continuum. Some of the changes are subtle, like the removal of shoes. This policy owes to would-be shoe bomber Richard Reid, a British citizen who, just three months after 9/11, smuggled explosives onto a plane. The explosives had been located in his shoe, though they did not detonate, whether from perspiration or rainy conditions in Paris before he embarked.<sup>34</sup> Ever since, Americans have been forced to remove their shoes at security checkpoints, a practice that has drawn the ire of myriad passengers.<sup>35</sup>

Imaging technologies are another new development at airport checkpoints. Traditionally, metal detectors constituted the primary screening metric for passengers. However, metal detectors were unable to detect non-metallic bombs, and imaging technologies offer greater security in that regard. They effectively come in two sorts, backscatter x-ray and body scanner, the latter using millimeter wave technology. Due to health concerns, backscatter x-ray devices are being supplanted by the body scanner,<sup>36</sup> even though the Transportation Security Administration (TSA) has downplayed risks.<sup>37</sup>

From the outset, critics decried body imaging as an assault on privacy. The principal worry was that the technology revealed intimate details about the people it screened, that the images produced were

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is predominantly a New South Wales farm town, but that just seems irrelevant, particularly since the plane was headed toward a crowded metropolitan center.

<sup>34</sup> Reid ultimately pled guilty to multiple criminal counts of terrorism and was sentenced to life without parole at a super maximum security (Supermax) prison in Florence, Colorado. He since has undertaken various hunger strikes in protest of his conditions of confinement. Lee Moran, *Shoe Bomber in Supermax: Richard Reid Pictured for First Time Inside High Security Prison*, DAILY MAIL (Oct. 10, 2011), <http://www.dailymail.co.uk/news/article-2047093/Shoe-bomber-Richard-Reid-pictured-inside-US-Supermax-jail.html>.

<sup>35</sup> Steven Frischling, *10 Years Ago Today Airline Travelers Lost Their Shoes*, BOARDING AREA, (Dec. 22, 2011), <http://flyingwithfish.boardingarea.com/2011/12/22/10-years-ago-today-airline-travelers-lost-their-shoes>.

<sup>36</sup> Michael Grabell, *TSA Removes X-Ray Body Scanners from Major Airports*, PRO PUBLICA, (Oct. 19, 2012), <https://www.propublica.org/article/tsa-removes-x-ray-body-scanners-from-major-airports>.

<sup>37</sup> According to the TSA, one backscatter scan produces the same radiation exposure as being on board a flying aircraft for two minutes. The TSA also claims that millimeter wave technology is said to emit thousands of times less energy than a cell phone transmission. Transportation Security Administration, *Safety* (2013), <https://www.tsa.gov/blog/2012/01/17/truth-about-tsa-testing-technology-radiation>.

personalized and represented the screened as “nearly naked.”<sup>38</sup> Technology has mitigated many of these concerns, however, with software updates that produce generic avatars as opposed to personal renderings. Other safeguards have also been implemented, such as that the images taken cannot be stored or transmitted; they are only available for viewing and are summarily deleted thereafter.<sup>39</sup> Furthermore, the images are kept off-network so hackers cannot access them.

Let us grant that the transition from backscatter to millimeter wave technology is a positive one for health risks and that improved software alleviates many privacy concerns. Still, imaging compromises liberties. No longer are passengers free to pass through security checkpoints un-imaged, or at least without submitting to additional protocols (e.g., pat-downs).<sup>40</sup> Some would-be travelers even take these impositions so personally that they elect not to fly at all; in other words, they feel—whether reasonably or otherwise is beside the point—that their flying experience has been so encumbered as to be unredeemable.<sup>41</sup> Imaging may have an upshot in terms of security, but that upshot is certainly offset by imaging’s effect on liberties.

In addition to the physical screening of carry-ons and persons, a more subtle sort of screening has been rolled out post-9/11. This is behavioral profiling, which has been a longstanding practice at Israeli airports, and is new at American ones; it runs under the acronym SPOT, “Screening Passengers by Observation Techniques.”<sup>42</sup> There are approximately 3,000 behavioral detection officers working at 161 domestic airports, meaning that behavioral profiling has quickly been distributed

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<sup>38</sup> John Hughes, *Airport “Naked Image” Scanners May Get Privacy Upgrades*, BLOOMBERG, (Sept. 8, 2010), <http://www.bloomberg.com/news/2010-09-08/airport-naked-image-scanners-in-u-s-may-get-avatars-to-increase-privacy.html>.

<sup>39</sup> Or at least so says the TSA. There might be a workaround when then machines are set to “test” mode. See Kim Zetter, *Airport Scanners Can Store, Transmit Images*, WIRED, (Jan. 11, 2010), <https://www.wired.com/2010/01/airport-scanners> (noting that although the machines possess functions that enable them to store and send images, screeners at the airport are not able to put the machines into “test” mode to access those functions).

<sup>40</sup> One interesting advantage of the new technologies is how they are actually *less invasive* for certain demographics: those wearing metallic prosthetics would have alerted a metal detector, but can pass through imaging technology without being called for secondary screening.

<sup>41</sup> Hughes, *supra* note 38.

<sup>42</sup> Tovia Smith, *Next in Line for the TSA?: A Thorough ‘Chat-Down’*, NPR, (Aug. 16, 2011), <http://www.npr.org/2011/08/16/139643652/next-in-line-for-the-tsa-a-thorough-chat-down>.

since appropriations began in 2007.<sup>43</sup> Furthermore, these appropriations are already in excess of \$800M, which gives a sense for the large scale.<sup>44</sup>

In behavioral profiling, TSA agents ask travelers basic questions, ranging from general conversation to details travelers' trips. The content of the answers plays a lesser role than the way in which passengers give those answers; agents are looking for "behaviors and appearances that deviate from an established baseline and that may be indicative of stress, fear, or deception."<sup>45</sup> Relevant indicators in that regard might be eye movement, perspiration, facial muscle movement, and so on, but operators have been reluctant to provide fuller details. A positive indication generates "referral screening," which involves additional questioning and a physical search.<sup>46</sup>

Criticisms of this practice abound. TSA deployed behavioral profiling "before first determining whether there is a scientific basis for the program."<sup>47</sup> The main worry here is that SPOT officers may literally do no better than chance in picking out deception,<sup>48</sup> and that false hits abound.<sup>49</sup> Much of the scientific literature on this subject is inconclusive, though there are certainly grounds for skepticism. Still, do false positives wholly compromise the case for behavioral profiling? It seems to me the greater concern is that of a false negative: what happens when officers let through a threat?

This ties back to the broader discussion of the tension between liberty and security. In some ways, everyone who is subject to behavioral profiling has lost liberty, namely the liberty against being observed or questioned. Or, granting that these are liberties rarely retained in public settings, at least liberties from *elevated* observance and questioning are lost. The innocent person subject to a false positive is deprived of even more

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<sup>43</sup> Sharon Weinberger, *Intent to Deceive?*, 465 NATURE 412 (May 27, 2010).

<sup>44</sup> JENNIFER A. GROVER, GOV'T ACCOUNTABILITY OFF., GAO-11-461T, TSA IS TAKING STEPS TO VALIDATE THE SCIENCE UNDERLYING ITS PASSENGER BEHAVIOR DETECTION PROGRAM, BUT EFFORTS MAY NOT BE COMPREHENSIVE, 1-2 (2011).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 3.

<sup>48</sup> For more discussion, see ALDERT VRIJ, DETECTING LIES AND DECEIT (2000). *See also* Samantha Mann, et al., *Detecting True Lies*, 89 J. OF APPLIED PSYCHOL. 137, 137-49 (2004) (finding that "[p]olice officers can detect truths and lies above the level of chance and accuracy is related to experience with interviewing suspects.").

<sup>49</sup> Weinberger tells of a traveler who was detained, ostensibly because he possessed Arabic flash cards and a book critical of U.S. foreign policy. Weinberger, *supra* note 43, at 412. It is unclear from her telling what behavioral cues tripped the officers, though the detainee was an innocent college student.



liberties, potentially including a lengthy delay with adverse effects on travel and beyond. But these lost liberties factor into a broader calculus under which a missed terrorist could do much damage. If the system is literally no better than chance, then \$800M+ hardly seems justified, but TSA is conducting a scientific review, and more information may soon be available.<sup>50</sup> The broader point, though, is simply that the details are going to matter and that the propensity for false positives should not be dispositive against behavioral profiling.

A final way in which aviation security threatens liberties differentially attaches to ethnic and religious minorities.<sup>51</sup> Some of the

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<sup>50</sup> Weinberger, *supra* note 43, at 412-13.

<sup>51</sup> President Trump's proposed travel bans threaten to exacerbate these disparities. On January 27, 2017, President Trump issued an executive order barring citizens of Iran, Iraq, Libya, Somali, Sudan, Syria, and Yemen from entering the United States; it also suspended the United States' refugee program with regards to these countries for 120 days, except Syrian refugees, who were suspended indefinitely. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), revoked by Exec. Order No. 13,780, 82 Fed. Reg. 13209 (March 6, 2017). A federal judge in New York issued an emergency injunction against this ban on January 28, 2017, which was followed by another temporary stay by a federal judge in Boston the following day. *Darweesh v. Trump*, No. 17 Civ. 480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017). See also *U.S. Judge Bars Deportations under Trump Travel Ban*, FOX NEWS (Jan. 29, 2017), <http://www.foxnews.com/us/2017/01/29/us-judge-bars-deportations-under-trump-travel-ban.html> (reporting that U.S. District Judge Ann Donnelly's "emergency order . . . temporarily barred the U.S. from deporting people from nations subject to President Donald Trump's travel ban"); Shannon Dooling, *Boston Federal Court Puts Hold on Trump's Travel, Refugees Ban*, WBUR (Jan. 29, 2017), <http://www.wbur.org/news/2017/01/29/boston-ruling-trump-executive-order> (reporting the temporary restraining order issued by Judge Allison Burroughs and Magistrate Judge Judith Dein). On January 30, President Trump fired acting Attorney General Sally Yates, who refused to defend the travel ban. White House Statement On Firing of Acting Attorney General Sally Yates, FOX NEWS (Jan. 30, 2017), <http://www.foxnews.com/politics/2017/01/30/white-house-statement-on-firing-acting-attorney-general-sally-yates.html> (reporting then-acting Attorney General Sally Yates' firing by the White House).

On February 1, 2017, the administration refined the travel ban to exempt permanent legal residents of the United States. Matthew Nussbaum, *White House Tweaks Trump's Travel Ban to Exempt Green Card Holders*, POLITICO (Feb. 1, 2017), <https://www.politico.com/story/2017/02/white-house-green-card-holders-no-longer-covered-by-trump-executive-order-234505> (explaining that that the travel ban was reinterpreted to "exempt legal permanent residents of the United States"). On February 3, 2017, another federal judge in Boston declined to extend a restraining order against the ban, while a federal judge in Seattle temporarily blocked it again. See *Judge Declines to Extend Trump Travel Ban Restraining Order*, FOX NEWS (Feb. 3, 2017), <http://www.foxnews.com/politics/2017/02/03/judge-declines-to-extend-trump-travel-ban->

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restraining-order.html (reporting that U.S. District Judge Nathaniel Gorton “refused to extend a temporary injunction against President Donald Trump’s travel ban” and “declined to renew an order prohibiting the detention or removal of persons as part of Trump’s executive order on refugees and immigrants”); *US Judge Temporarily Blocks Trump’s Travel Ban Nationwide*, FOX NEWS (Feb. 3, 2017), <http://www.foxnews.com/us/2017/02/03/us-judge-temporarily-blocks-trump-travel-ban-nationwide.html> (“A U.S. judge . . . temporarily blocked President Donald Trump’s ban on people from seven predominantly Muslim countries after Washington state and Minnesota urged a nationwide hold on the executive order that has launched legal battles across the country.”).

On February 6, 2017, the administration asked the Ninth Circuit to intervene and reverse the order of the Seattle judge. Reply in Support of Emergency Motion for Stay Pending Appeal, *Washington v. Trump*, 2017 WL 492504 (9th Cir. 2017) (No. 17-35105). See also *Justice Department Asks Appeals Court to Restore Trump Travel Ban*, FOX NEWS (Feb. 6, 2017), <http://www.foxnews.com/politics/2017/02/06/justice-department-asks-appeals-court-to-restore-trump-travel-ban.html> (providing that the Department of Justice filed appeals asking the courts to restore the travel ban). The Ninth Circuit unanimously upheld the ban’s suspension on February 9, 2017. *Washington v. Trump*, 947 F.3d 1151 (9th Cir. 2017). On February 13, 2017, a federal judge in Virginia granted an injunction against the administration’s implementation of the ban. *Aziz v. Trump*, 234 F.Supp.3d 724 (E.D. VA 2017).

On March 6, 2017, President Trump reissued the travel ban with some changes, such as removing Iraq and exempting permanent residents and visa holders. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (March 6, 2017). Hawaii then sued, and a federal judge granted its request for a temporary restraining order. *Hawaii v. Trump*, 233 F.Supp.3d 850 (D. Haw. 2017). This order was extended two weeks later, and the administration again petitioned the Ninth Circuit for relief. *Hawaii v. Trump*, 245 F.Supp.3d 1227 (D. Haw. 2017). Months later, on May 25, 2017, the Fourth Circuit again blocked the ban. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). However, the Supreme Court allowed for the travel ban to be implemented on June 26, 2017, albeit in a more limited version. *Trump v. Int’l Refugee Assistance Project*, 137 S.Ct. 2080 (2017). For example, the Court provided that “§ 2(c) [of the Executive Order, or EO-2] may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. [However], all other foreign nationals are subject to the provision of EO-2.” *Id.* at 2089. See also Melanie Zanona, *White House Outlines Who Can Travel under Trump’s Ban*, THE HILL (June 29, 2017), <http://thehill.com/policy/national-security/340095-white-house-outlines-who-can-travel-under-trumps-ban> (reporting on the White House’s guidance that was issued in response to the Supreme Court’s decision). On September 7, 2017, the Ninth Circuit expanded the interpretation of “bona fide relationship” to include more family members, such as grandparents, in-laws, aunts and uncles, nephews and nieces, and cousins. *State v. Trump*, 971 F.3d 646 (9th Cir. 2017).

A third version of the travel ban came out on September 24, 2017, including citizens of Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen, as well as some government officials from Venezuela. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017). In December 2017, the Supreme Court issued two stay orders. *Trump v. Hawaii*, 138 S.Ct.

differential treatment is transparent, and some is not. Starting with the former, U.S.-bound passengers from fourteen countries—including Yemen, Nigeria, and Saudi Arabia—face mandatory full-body pat-downs, extra luggage checks, and explosive detection sweeps. These added measures apply if those passengers hold passports from the listed countries—or are embarking within them—and destined for the U.S. Some of the countries are designated by the U.S. as state sponsors of terrorism, whereas others are designated as “countries of interest.”<sup>52</sup> While the civil rights and Muslim anti-discrimination groups have decried this practice as tantamount to racial discrimination, the U.S. has tied it to security.

While this constitutes U.S. official policy, abuse of discretion portends another way in which minorities may face added scrutiny. Screeners at Newark Liberty Airport were charged with racially profiling Mexican and Dominican passengers;<sup>53</sup> four of these screeners were ultimately fired, and dozens more suspended.<sup>54</sup> Mexican travelers were also allegedly targeted for secondary screening at Honolulu International Airport.<sup>55</sup> Sikhs have long complained of profiling, and a thorny issue herein emerges given their religious use of turbans and the associated security issues that such headwear raises.<sup>56</sup> Since secondary screening is often discretionary, it is simply hard to know if minorities subjected to that screening are subjected under good faith or are differentially targeted given

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542 (2017). On January 19, 2018, the Supreme Court announced it would hear oral argument in April and issue a final ruling by June. Josh Gerstein, *Supreme Court To Hear Case Over Trump’s Revised Travel Ban*, POLITICO (Jan. 19, 2018), <http://www.foxnews.com/politics/2018/01/19/supreme-court-announces-it-will-rule-on-trumps-travel-ban.html>.

<sup>52</sup> Peter Grier, *US-Bound Passengers from 14 Countries Face New Airport Security*, CHRISTIAN SCIENCE MONITOR, (Jan. 10, 2010), <https://www.csmonitor.com/USA/2010/0104/US-bound-passengers-from-14-countries-face-new-airport-security>.

<sup>53</sup> Steve Strunsky, *Report: Newark Airport Screeners Targeted Mexicans*, THE STAR-LEDGER, (June 11, 2011), [http://www.nj.com/news/index.ssf/2011/06/report\\_newark\\_airport\\_screener.html](http://www.nj.com/news/index.ssf/2011/06/report_newark_airport_screener.html).

<sup>54</sup> Steve Strunsky, *TSA Fires 4 Screeners, Suspends Dozens in Wake of Probe at Newark Liberty Airport*, THE STAR LEDGER, (March 29, 2013), [http://www.nj.com/news/index.ssf/2013/03/tsa\\_announces\\_dismissals\\_suspe.html](http://www.nj.com/news/index.ssf/2013/03/tsa_announces_dismissals_suspe.html).

<sup>55</sup> Jennifer Sinco Kelleher, *TSA Investigates Profiling Allegations at Honolulu Airport*, CNSNEWS.COM, (Dec. 1, 2011), <https://www.cnsnews.com/news/article/tsa-investigates-honolulu-airport-allegations>.

<sup>56</sup> *Airport Screening Procedures As Applied to Sikh Travelers and Your Rights as a Sikh Air Traveler*, THE SIKH COALITION: THE VOICE OF A PEOPLE (Oct. 7, 2013), <http://www.sikhcoalition.org/documents/pdf/KYR-SikhTravelerBillOfRights.pdf>.

their minority status. And this issue gets even trickier when considering that differential targeting could result from unconscious or implicit bias, not necessarily from screeners' willful misconduct.

Differential targeting raises a whole host of concerns. While more universally-applied measures infringe greater amounts of liberty overall, at least they do so without prejudice. But, in terms of the calculus between liberty and security, where is the upshot? Prejudicial enforcement infringes less liberty than ubiquitous enforcement (i.e., by enforcing against fewer people), which is a *prima facie* good. To take an example, the U.S. could solve the differential enforcement against citizens or passengers from the fourteen listed countries by subjugating *all* passengers to elevated screenings. This might appease our moral outrage, but does that make it good policy?

For the sake of argument, let us stipulate that passengers from those countries, in the aggregate, portend greater security risks than other demographics. The U.S. then has three options: elevated screenings for those passengers, for all passengers, or for no passengers. On my approach, targeting all passengers may burden too many liberties, and targeting no passengers may irresponsibly transgress against security concerns. Of course, the empirical presupposition could well be false, in which case the argument collapses; obviously it would only make more sense to differentially target if the targeted group were more likely to carry security risks. The targeting of Mexicans in Newark and Honolulu almost certainly fails this metric, and is therefore illicit. But differential targeting should not be precluded full stop, so long as the appropriate evidentiary basis is supplied.

With both the USA PATRIOT Act and aviation security, critics allege that the infringements on liberty are intolerable, whether because liberties are sacrosanct<sup>57</sup> or just because these are the costs are too high for the benefits they produce.<sup>58</sup> While I find the first line of thinking radically implausible, the second is certainly on the table; nothing thus far has contended otherwise. But in order to assess its viability, we need a better conception of what hangs in the balance. Certainly our liberties are important. My contention, though, is that our security is undervalued, particularly by civil libertarians. Were a weightier account of how to value security on offer, it could substantiate greater restrictions on liberty. In the

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<sup>57</sup> See generally ACLU, *supra* note 20.

<sup>58</sup> Charles C. Mann, *Smoke Screening*, VANITY FAIR, (Dec. 20, 2011), <https://www.vanityfair.com/culture/2011/12/tsa-insanity-201112>.

next section, I will attempt to develop such an account, particularly in the context of terrorism and counterterrorism.

### III. WHY SECURITY MATTERS

In order to understand whether security is worth the costs, we need to know both what security costs and what it prevents. If the costs of security are higher—whether economically or non-economically—than those incurred by its absence, security's costs are not justified.<sup>59</sup> The preceding section explored some of the costs of security in terms of liberty, but herein I propose that we take a broader approach. In other words, security costs not just liberty; it has other economic and non-economic costs as well. If security is to be justified, it must be justified against the totality of its costs, which is just to say that security is more expensive than just its adverse effects on liberty. In the first part of this section, I will paint a fuller conception of these costs, focusing on terrorism and counterterrorism; roughly speaking, terrorism is the cost of security's absence and (effective) counterterrorism is the cost of security.<sup>60</sup> In the second part of this section, I will consider the complementary question of what costs security redeems, or, to put it another way, the costs that a lack of security would incur. The goal will be to characterize the absence of—or lessened—security as quite expensive indeed, thus meaning that high costs of security are more likely to be justified.<sup>61</sup>

Starting with the costs of terrorism, let us consider 9/11 as a dramatic example. Following the work of Robert Looney, we might say that costs either can be direct or indirect, as well as immediate, short-, mid-, or long-term.<sup>62</sup> Immediate and short-term direct impacts, for example, were

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<sup>59</sup> In case this is not obvious, consider an agricultural example. Some hypothetical blight threatens crops; it would cost \$2M to eradicate the blight, but the crops are only worth \$1M. The crops should be left to wither because the remediation is more expensive than the benefit. The same structural point applies to security (and everything else), with the caveat that both economic and non-economic costs matter.

<sup>60</sup> Of course, a lack of security would have other adverse effects as well, such as ordinary (i.e., non-terroristic) crime. For the purposes of this paper, however, the approximation will suffice.

<sup>61</sup> The ensuing argument is adapted from a different context. See FRITZ ALLHOFF, *TERRORISM, TICKING TIME- BOMBS, AND TORTURE* § 2.3 (2012).

<sup>62</sup> Robert Looney, *Economic Costs to the United States Stemming from the 9/11 Attacks*, STRATEGIC INSIGHTS (Aug. 2002), [https://calhoun.nps.edu/bitstream/handle/10945/25404/Economic\\_Costs\\_to\\_the\\_United\\_St](https://calhoun.nps.edu/bitstream/handle/10945/25404/Economic_Costs_to_the_United_St)

that 200,000 jobs in New York were destroyed or re-located out of New York, at least temporarily. Destruction of physical assets was valued at over \$16B; rescue, clean-up, and related costs have been estimated at approximately \$11B. Immediate and short-term indirect costs included a slowing of economic activity, with original projections putting the cost at as high as \$500B; the actual cost probably fell short of this.

In the mid- and long-term, the costs become indirect but still substantial. Mid-term indirect costs include those to the insurance industry (\$30B-\$58B), airlines (tens of thousands of jobs and an overall devaluing of the industry), tourism and other service industries (tens of thousands of jobs and lowered equity value for hotels and other facilities), increased military spending (\$80B+), and so on. Long-term indirect costs include higher operating costs (e.g., increased security), higher risk premiums (e.g., from lenders to borrowers), shifting of resources from civilian to military forces, shifting away from globalization, and so on.<sup>63</sup> Putting dollar amounts on the long-term costs is difficult, and even assessing the mid-term costs can be challenging. Nevertheless, we might reasonably assess the economic costs of 9/11 to be somewhere in the vicinity of \$500B-\$1T.<sup>64</sup>

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ates\_Stemming\_From\_the\_911\_Attacks.pdf?sequence=1. See also Howard Kunreuther, et al., *Assessing, Managing, and Financing Extreme Events: Dealing with Terrorism*, (Nat'l Bureau of Econ. Research, Working Paper No. 10179, 2003), <http://www.nber.org/papers/w10179.pdf> (putting the "inflicted damage" at \$80B). Kunreuther, et al. does not make clear where this figure comes from nor which damages are meant to be included. I suspect that it does not include many of the long-term costs that Looney identifies, which is why the estimate that I develop is significantly higher.

Another scholar assessed the global economic impact of "transnational terrorism"—as well as the cost-effectiveness of our responses to it. TODD SANDLER, et al., *Transnational Terrorism*, in GLOBAL CRISES, GLOBAL SOLUTIONS, 516-562 (Bjørn Lomberg, ed., 2009). For a response, see S. BROCK BLOMBERG, *The Copenhagen Consensus: Perspective Paper on Transnational Terrorism Policies*, in GLOBAL CRISES, GLOBAL SOLUTIONS, 563-576 (Bjørn Lomberg, ed., 2009) and WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* (2005).

<sup>63</sup> Looney, *supra* note 62, at 3.

<sup>64</sup> None of these estimates include the Iraq war: would this war have taken place had 9/11 not? Assuming that the answer is no, then the price tag for that war gets added as an indirect cost of 9/11, and that price tag is huge. Original estimates were ludicrously low—some as low as \$2B—with even the more "conservative" ones coming in at \$100B-\$200B. The actual cost will be at least ten times that, and potentially as high as \$3T. Linda J. Blimes & Joseph E. Stiglitz, *The Iraq War Will Cost Us \$3 Trillion, and Much More*, WASH. POST, Mar. 9, 2008, B01.

Nevertheless, there is something misleading about adding its costs to the 9/11 ledger, especially if that ledger is meant to indicate the costs of terrorism: the Bush Administration

Included in these costs are the damages of the attacks—both direct and indirect—as well as the counterterrorism measures that they spawned. These can be usefully separated insofar as such a separation helps us get clear on what we are spending to protect against something else. For fiscal year (FY) 2003, additional spending of \$48B was proposed for national defense, as well as \$38B more for homeland security.<sup>65</sup> The defense budget has continued to rise since 9/11—with wars in Iraq and Afghanistan playing a significant role—and certainly some of this can reasonably be said to go to counterterrorism.

But the best focus is probably on the Department of Homeland Security (DHS), which was largely created to defend against terrorism.<sup>66</sup> This Department serves other functions as well (e.g., security against illegal immigration), but terrorism is a principal focus. A detailed analysis has been carried out elsewhere,<sup>67</sup> but some key results are worth noting. For example, the cost of homeland security spending increased from \$56B in 2001 to \$99.5B in 2005. The federal outlays, which are easier to track the money coming from other sources, are somewhere around half of the total in 2005 (\$53.4B), which represents 0.4% of the gross domestic product

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did not have to pursue Operation Iraqi Freedom and, regardless, its costs are more appropriately assigned to counterterrorism than to terrorism. (This is not to say that such costs can be neatly assigned to either). I only raise this issue briefly because the Iraq war is an elephant in the room as pertains to the consequences of 9/11; for the discussion that follows, nothing substantive hangs on whether we count it as a cost thereof or not.

Operation Enduring Freedom (Afghanistan) also tallies a significant expense, though probably only about 10% that of Operation Iraqi Freedom; estimates for the military efforts in Afghanistan are just under \$200B from 2001-2009. AMY BELASCO, CONG. RESEARCH SERV., RL33110, *THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11* 2 (2008.)

<sup>65</sup> Looney, *supra* note 62, at 2-3.

<sup>66</sup> Its strategic plan, for example, says that the Department “was created to secure our country against those who seek to disrupt the American way of life,” though it makes the further provision that “our charter also includes preparation for and response to all hazards and disasters.” *One Team, One Mission, Securing Our Homeland: U.S. Department of Homeland Security Strategic Plan Fiscal Years 2008-2013*, U.S. DEP’T OF HOMELAND SEC., 1, 2 (2008), <https://www.fdle.state.fl.us/Domestic-Security/Documents/DHSSstrategicPlan2008-2013.aspx>. Elsewhere, it continues: “We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation. We will secure our national borders while welcoming lawful immigrants, visitors, and trade.” *Id.* at 3.

<sup>67</sup> Bart Hobijn & Erick Sager, *What Has Homeland Security Cost? An Assessment: 2001-2005*, Federal Reserve Bank of New York, 13 *CURRENT ISSUES IN ECONOMICS AND FINANCE* 2, 1-7 (2007).

(GDP); this represents a doubling since 2001 (0.2%) and a four-fold increase from the period 1996-2001 (0.1%).<sup>68</sup>

Of the FY 2005 spending, approximately 8% went directly to domestic counterterrorism, though much of the rest of the budget funds related areas: protecting critical infrastructure and key assets (34%); defending against catastrophic threats (15%); emergency preparedness and response (11%); and intelligence and warning (1%). Only border and transportation security (31%) is not majorly tied to counterterrorism, but rather reflects the absorption of Immigration and Naturalization Services by the DHS in 2003. Still, even this spending is relevant to counterterrorism insofar as it funds our ability to keep terrorists out of the country in the first place. Given this data, let us therefore conclude that, from 2001-2005, the US was spending somewhere around \$50B-\$100B/year on counterterrorism, not including the wars in Iraq and Afghanistan.<sup>69</sup> As the range clearly indicates, this estimate is not meant to be precise, but rather aims to give us some broad sense—at least within an order of magnitude—on what counterterrorism costs us. And therein lies the question: is it worth it?

Some people clearly think not. For example, Jessica Wolfendale argues that “we should fear counterterrorism more than we fear terrorism.”<sup>70</sup> Her argument has two prongs: first, she argues that the risk of terrorism simply is not that great and, second, that the costs of our counterterrorism measures are higher than we think. On her thinking, once we adequately understand the (lesser) costs of terrorism and the (higher) costs of counterterrorism, we will see that the latter are not justified; they just do not provide a positive return. She takes issue with the hubris of, for example, President George W. Bush and Colin Powell, who have said, respectively, that terrorism threatens not only our lives but also “our way of life” and our “civilization.”<sup>71</sup> But does it? Consider:

On average only 420 people are killed and another 1249 are injured each year from transnational terrorist attacks.

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<sup>68</sup> *Id.* at 1-2.

<sup>69</sup> Again, for a more rigorous economic analysis of the worldwide costs of terrorism see SANDLER, *supra* note 62 and Blomberg, *supra* note 62.

<sup>70</sup> Jessica Wolfendale, *Terrorism, Security, and the Threat of Counterterrorism*, 30 *STUD. IN CONFLICT & TERRORISM* 75, 75-92 (2007).

<sup>71</sup> *Id.* (quoting RICHARD JACKSON, *WRITING THE WAR ON TERROR: LANGUAGE, POLITICS, AND COUNTER-TERRORISM* 99 (Manchester University Press, 2005)).



Nevertheless, the public in rich countries views transnational terrorism as one of the greatest threats. This is rather ironic since over 30,000 people die on US highways annually, yet highway safety is not as much of a public concern.<sup>72</sup>

Or, more viscerally:

. . . the estimated 1,000-7,000 yearly deaths from terrorism pales in to insignificance next to the 40,000 people who die every *day* from hunger, the 500,000 people who are killed every year by light weapons and the millions who die annually from diseases like influenza (3.9 million annual deaths), HIV-AIDS (2.9 million annual deaths), diarrhoeal (2.1 million annual deaths) and tuberculosis (1.7 million annual deaths).<sup>73</sup>

Or, economically:

Since 2001, the Global Fund to Fight AIDS, Tuberculosis, and Malaria, funded by all willing governments and devoted to combating diseases that kill about 6 million people each year, has committed about \$6.9 billion and spent about \$4.4 billion. This expenditure comes to roughly \$120 per fatality. Between 2001 and 2006, the US Government alone has spent \$438 billion on the war on terror. This amount comes to roughly \$146 million per US fatality—over a million times more per fatality.<sup>74</sup>

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<sup>72</sup> SANDLER, *supra* note 62.

<sup>73</sup> Wolfendale, *supra* note 70, at 77 (citation omitted) (quotations omitted) (emphasis in original).

<sup>74</sup> Thomas Pogge, *Making War on Terrorists—Reflections on Harming the Innocent*, 16 J. OF POL. PHIL. 1, 1-2 (2008). See also Belasco, *supra* note 65. Note that Belasco's sum does not include all the costs of 9/11, but only money that Congress has approved "for military operations, base security, reconstruction, foreign aid, embassy costs, and veterans' health care for the three operations initiated since the 9/11 attacks: Operation Enduring Freedom (OEF) Afghanistan and other counter terror operations; Operation Noble Eagle (ONE), providing enhanced security at military bases; and Operation Iraqi Freedom (OIF)." Belasco, *supra* note 64, at 2. In other words, Belasco provides only a partial accounting of our counterterrorism spending.

These statistics are meant to show that terrorism poses less of a threat than we think it does, or at least that the threat from terrorism pales in comparison to various other threats that we seem to care a lot less about. How then can our substantial response to terrorism be justified?

The answer to this question depends on what terrorism threatens. The statistics are, most directly, about the number of lives that stand to be lost, whether through terrorism, highway safety, hunger, war, or disease. But certainly terrorism threatens more than just lives; we should not merely observe that terrorism comes up short on the “ledger of lives” and thereafter deprioritize our response to it. As indicated above, the economic costs of 9/11 are staggering, way more than the 30,000 lives lost to highway accidents. Economic costs are one sort of value and lives are another; even if you think, as actuaries might, that these latter values can be rendered economically, this picture is still radically incomplete.<sup>75</sup>

In particular, it fails to appreciate other critical costs of terrorism: its symbolic costs. A few thousand people died on 9/11, and the economic impact of that day was catastrophic. Lives and dollars aside, though, that day cost us much more than those numbers could express. The terrorists destroyed the World Trade Center, a central icon of our economic strength. They crashed into the Pentagon, a building that represents our military strength. And, were it not for the brave passengers who helped crash United 93 in rural Pennsylvania, a plane probably would have hit either the White House or the Capitol, buildings that embody the strength of our government. These symbolic attacks against our economy, military, and government were chosen precisely because of that symbolism; as many or more lives—and perhaps similar economic damages—could have as easily been exacted through other targets.

While many Americans are personally unaffected by the tragedy of 30,000 annual highway deaths, few of us could say the same of 9/11. It adversely affected our collective sense of safety. It took away our sense of place in the world. It left us vulnerable at the individual, institutional, and national levels. Even a cynic who belabors the failings of American culture, our inappropriate smugness, our inappropriate relationship with the rest of the world, or our arrogance must nevertheless acknowledge that our collective suffering, even if ill-founded, is a substantial harm. And, again, this is not to deny that we should care more about, for example, pharmaceuticals in the developing world, or even that we have a moral

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<sup>75</sup> And Wolfendale agrees. Wolfendale, *supra* note 70, at 80-2.

obligation to support poor countries. Rather, the point is simply that terrorism takes more than lives and dollars.

Nevertheless, there is a hazard in developing an account of terrorism or counterterrorism that depends too strongly on 9/11: this is, at least in terms of lives and excluding military bombings during war, perhaps the most spectacular single-day terrorist attack ever.<sup>76</sup> We must be careful not

<sup>76</sup> Other significant transnational terror attacks include:

Date	Event	Perpetrator	Deaths
July 22, 1946	Bombing of local British military headquarters at King David Hotel, Jerusalem	Irgun Zai Leumi	91
August 2, 1980	Bombing of Bologna railway station	Armed Revolutionary Nuclei	84
October 23, 1983	Suicide truck bombing of US Marines' barracks, Beirut	Hezbollah	241
June 23, 1985	Downing of Air India 182, en route from Montreal to London	Sikh extremists	329
December 21, 1988	Downing of Pan Am 103, en route from London to New York	Libyan intelligence agent	270
September 19, 1989	Downing of Union des Transports 772, en route from Brazzaville (Republic of the Congo) to Paris	Hezbollah	171
March 12, 1993	Thirteen bombings in Bombay	Pakistani agents	317
August 7, 1998	Simultaneous bombings of US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania	Al-Qaeda	223
September 11, 2001	Four suicide hijackings that crashed into the World Trade Center, the Pentagon, and a field in Pennsylvania	Al-Qaeda	2,974 (plus 19 hijackers)
October 12, 2002	Two bombs outside Bali nightclubs	Jemaah Islamiyah	202
March 11, 2004	Bombing of Madrid commuter trains and stations during morning rush hour	Al-Qaida	190
September 1, 2004	Barricade hostage seizure of school children and parents in Belan, North Ossetia-Alania (Russia)	Chechen rebels	344

ALLHOFF, *supra* note 61, at 33 n.40 (adapted from SANDLER, *supra* note 62). See also Chris Quillen, *A Historical Analysis of Mass Casualty Bombers*, 25.5 STUD. IN CONFLICT &

to exaggerate the (ongoing) risks of terrorism by appeal to a singular event and one that will probably not recur, regardless of our counterterrorism strategies. Or, to put it another way, how likely is it that our investment in counterterrorism since 9/11 prevented anything like it from happening since? Or even some constellation of attacks that would collectively approximate 9/11's damage? This is a hard question, and the associative counterfactual reasoning—i.e., what would have happened had we not done such and so—is perilous.<sup>77</sup> Nevertheless, at least a few substantive points can be made.

First, 9/11 was so bad that any individual or constellation of attacks even an order of magnitude off from it would still be heinous. If, for example, our counterterrorism has prevented an aggregated 10% of 9/11's losses, this is very substantial. Second, there were semi-regular terrorist attacks against the U.S. over the two decades preceding 9/11. Marines' barracks in Beirut were targeted by two truck bombs (1983); two-thirds of the victims of Pan Am 103 were American (1988); two U.S. embassies

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TERRORISM 279, 279-92 (2002) (providing data from which this chart was adapted); Chris Quillen, *Mass Casualty Bombings Chronology*, 25.5 *STUD. IN CONFLICT & TERRORISM* 293, 293-302 (2002)) (same).

Note that the bombings in Jerusalem (1946) and Beirut (1983) were against military installations, so it is questionable whether these bombings should count as terroristic. The American soldiers in Beirut were mostly Marines, ostensibly there on a peacekeeping mission; some Lebanese Muslims instead saw them as a faction in the ongoing civil war. Whether peacekeeping or humanitarian forces are properly understood as noncombatant lies outside the scope of this project, but an argument in the affirmative can certainly be made. The bombing of Jerusalem's King David Hotel was carried out by the Irgun, an underground Zionist organization that was responding to British action under Operation Agatha (or "Black Saturday"); the British coordinated searches and arrests in various Jewish cities and settlements, as well at the Jewish Agency (i.e., the pre-state Jewish government). While the British forces were headquartered in the hotel, so were various other administrative and government contingents. At least some of the casualties were therefore noncombatants, though some were clearly military command. In either case, determinations as to whether the bombings were terroristic does not matter for present purposes, but provocative issues are raised in both.

ALLHOFF, *supra* note 61, at 33 n.40.

<sup>77</sup> For discussion of a sophisticated attempt, see SANDLER, *supra* note 62.

were bombed (1998); and then came 9/11 (2001).<sup>78</sup> The bombings of the Federal building in Oklahoma City killed 168 people (1995), though this attack was different in the sense that it was domestic—as opposed to transnational—terrorism; regardless, the effects were as real. All told, this is five serious attacks from 1983-2001. In fact, there was not a single successful attack between 9/11 and the Boston Marathon bombings;<sup>79</sup> this was the longest period of safety that we had enjoyed in thirty years.<sup>80</sup> The paucity of successful attacks since the proliferation of our powerful counterterrorism campaign can hardly be a coincidence.

So let us now assume that our counterterrorism campaign has worked, without committing ourselves to any substantive view about whether it is optimal; surely nothing in the real world is. This then brings us to the second of Wolfendale's concerns, which is that the costs of counterterrorism, even if successful, are nevertheless high. And these costs are not just the economic ones previously discussed, which we might charitably assume are reasonably justified. Rather, there are all sorts of other potential costs, such as the hazards pertaining to the sort of people and nation that we have become in responding to terrorism.<sup>81</sup> As discussed in § 2, we have restricted liberties, of which the USA PATRIOT Act and aviation security are only the most visible examples. This is at least *prima facie* bad, no doubt. But the central question is whether such harms—

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<sup>78</sup> It is worth acknowledging that, while these four attacks were primarily against Americans, three of them took place abroad. How effective would our counterterrorism campaign—especially under the auspices of the Department of *Homeland Security*—been in preventing them?

<sup>79</sup> While discussion of the Boston Marathon bombings would take me too far afield, there are various ways in which this attack is particularly worrisome from a security perspective. If the Tsarnaev brothers acted independently, their bombings might portend a new era of grass-roots and low-tech terrorism (e.g., garage-made bombs). There are various ways in which this sort of terrorism is harder to combat than terrorism perpetuated by broader networks, the most obvious being simply knowing who the adversary is. A multiplicity of de-centralized adversaries makes surveillance much harder, including acquisition of informants, monitoring of financials, and so on.

<sup>80</sup> The Fort Hood shootings are one potential exception. However, I doubt that the shooter, Dr. Nidal Malik Hasan, was acting on any ideological grounds and was instead just disturbed about his pending deployment to Afghanistan. Absent ideological aims, I would not classify this act as terroristic. For more discussion, see ALLHOFF, *supra* note 62, at §1.5.

<sup>81</sup> A particular concern in this regard is the loss of innocent life effected by counterterrorist operations. See, e.g., Jane Meyer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER (Oct. 26, 2009), [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer?printable=true](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true).

whether against liberty and more generally (e.g., catalyzing of anti-American sentiment, inchoate terrorist threats, etc.)—can be justified given countervailing benefits.

#### IV. BALANCING LIBERTY AND SECURITY

In § 1, the tension between liberty and security was adjudicated by conceiving of them as commensurable and then seeking to balance their competing interests against each other. Roughly speaking, if a small infringement on liberty were worth a large gain in security, that infringement could be justified. Conversely, a large infringement on liberty that only provided a small benefit to security would not be justified. Of course, different people would reasonably disagree about the relative weights to assign to these infringements and benefits. Therefore, the political process is tasked with aggregating the values of its polity and rendering an outcome (i.e., counting up the chips and seeing which side has more).<sup>82</sup> The key to this approach is that benefits to security must be balanced against losses to liberty; the trick is attaching values to each—though note the heuristic model suggested in § 1—not in what knowing to do with those values once they are discerned.

Such an approach has been criticized, and, in this last section of the paper, some engagement with those criticisms is owed. Most generally, the disagreement comes from rights theorists. Their move is to say that liberties stand outside a broader calculus under which those liberties can be traded for other social goods. Rather, it is inherent in the very nature of liberties that they are trumps<sup>83</sup> (or side constraints)<sup>84</sup> against competing social goods. In other words, liberties inevitably win out in a conflict because of what liberties *are*; to hold otherwise substantially misunderstands their very nature.<sup>85</sup>

For example, imagine some restaurant with a racist clientele. And further imagine that the racist proclivities of this clientele pit the economic

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<sup>82</sup> For a skeptical view, see generally Mark Neocleous, *Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics*, 6 CONTEMPORARY POLITICAL THEORY 131 (2007).

<sup>83</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, xi (Harvard University Press, 1977).

<sup>84</sup> Nozick, *supra* note 5, at 28-33.

<sup>85</sup> Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. OF POL. PHIL. 196 (2003). For more discussion, see Kleinig, *supra* note 1, at 372-373; STANLEY I. BENN, *A THEORY OF FREEDOM* (Cambridge University Press, 1988).

prospects of the restaurant against the accommodation of minorities; at most, one of these values can be realized.<sup>86</sup> At least for many, no balancing test is due the economic interests against the anti-discrimination interests. Rather, the anti-discrimination interests trump—and are therefore incommensurable with—the economic interests. If this analysis sounds right here, what distinguishes the security context?<sup>87</sup>

First, the conclusion of the analysis can still be accommodated under a balancing approach, which would be my preference. On this approach, the economic interests of the restaurant pale in comparison to anti-discrimination, so the restaurant gets forcibly integrated against its owner's wishes.<sup>88</sup> Second—as we saw in § 3—security portends far deeper values than mere economic ones. So, even if the economic values lose to liberties here, it does not follow that liberties always win (i.e., as against weightier values). Robert Nozick famously championed the priority of rights, but was far more agnostic about their preeminence in cases of “catastrophic moral

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<sup>86</sup> For somewhat similar fact pattern, see *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that that Civil Rights Act of 1964 could be upheld under Congress's commerce power). Our discussion, however, is more broadly normative than legal.

<sup>87</sup> Waldron uses a somewhat different example to make the same point. He imagines having made a promise to meet with a student, then being invited by a friend to lunch. Waldron, *supra* note 85, at 195-96. According to Waldron, how delicious the lunch would be is *irrelevant* to whether the promise to meet with the student can be broken. *Id.* Per below, I just disagree with this analysis; the promise is kept because its value almost always outweighs the value of (even a really delicious) lunch, not because promises are lexically prior to lunches. On my view, were Waldron to be whisked from his office at NYU up to midtown for lunch at Per Se, he *might* be justified in breaking a casual commitment (i.e., if lunch mattered a lot and the promise did not), a possibility that his analysis forecloses. See also JOSEPH RAZ, PRACTICAL REASONS AND NORMS 37 (1999) (siding with Waldron).

<sup>88</sup> Of course, we can develop hypotheticals to make this a closer case. Suppose a racist, wealthy patron offers a \$1M catering contract on the sole condition that the owner excludes some particular minority client from the event. Furthermore suppose the owner is \$1M in debt and faces imminent foreclosure; the catering contract—and its Faustian bargain—is the only opportunity to evade bankruptcy.

Furthermore, the anti-discrimination context can be broader than just race-based discrimination. The United States Supreme Court granted certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n.* 137 S.Ct. 2290 (2016). In this case, Jack Phillips, the proprietor of a Christian bakery, has refused to make cakes for gay weddings. After losing subsequent litigation, Phillips no longer makes cakes for *any* weddings and has claimed financial hardship as a result. Of course this case introduces another axis (*viz.*, religious liberty) beyond the two already mentioned here (*viz.*, economic interests and anti-discrimination).

horror,”<sup>89</sup> which are exactly the cases that terrorism threatens. Being able to accommodate other important values does not diminish the value of liberties. Rather, it only recognizes that, at least in some contexts, other values reach their maximal expression.

More specifically, Jeremy Waldron finds the balancing approach to liberty and security wanting, particularly if it entails a commitment that, post 9/11, those “who care about civil liberties need to realign balances between security and freedom.”<sup>90</sup> This thinking implies that we learned something on 9/11 that we did not know on 9/10, namely that greater value is due our security than we previously thought, and that value is to be redeemed at the expense of our liberties.<sup>91</sup> Waldron finds this realignment problematic for four reasons. First, as above, he is skeptical of a calculus that integrates liberty and security. Second, he worries as to how the burdens on liberties are distributed; a harm may arise if those burdens are differentially absorbed.<sup>92</sup> Third, he says that restrictions on liberties may have unintended effects, including adverse effects on security. And, fourth, he cautions that symbolic—as opposed to substantive—consequences for security are inadequate to license infringements on liberty.<sup>93</sup>

Having already commented on the first concern, let me briefly comment on the second and third before spending more time on the fourth. With regards to the second, of course the distribution of burdens matters; this issue arose in § 2.2 with regards to aviation security (*cf.*, differential treatment of ethnic and religious minorities), and I was sympathetic. However, this consideration can easily be accounted for in the balancing approach: distributive inequities are costly. Recall that my balancing approach is pluralistic, countenancing both economic and non-economic costs; these inequities carry (at least) a moral cost and that counts against

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<sup>89</sup> Nozick, *supra* note 5, at 30.

<sup>90</sup> Waldron, *supra* note 85, at 192 (quoting Nicholas Kristof, *Liberal Reality Check: We Must Look Anew at Freedom vs. Security*, PITTSBURGH-POST GAZETTE (June 2, 2002) at A09).

<sup>91</sup> Waldron, *supra* note 85, at 192-93. Kleinig argues that the problem prior to 9/11 was not a lack of balance between liberty and security, but rather the lack of functionality of extant security mechanisms. Kleinig, *supra* note 1. In other words, security need not come at the expense of liberty, but rather can be improved independently. Surely this is correct, and I agree that we should not burden liberty if gains to security can otherwise be realized. However, the present focus is on when the tension between the two really is irreconcilable and one can only be had at the expense of the other.

<sup>92</sup> See also Kleinig, *supra* note 1, at 374.

<sup>93</sup> Waldron, *supra* note 85, at 194-95.



them. If the facts on the ground came out a certain way, maybe this cost could be sustained as against greater benefits, but that hardly carries us down the road to *Korematsu*.<sup>94</sup>

With regards to the third, the unintended and adverse effects of security matter, but so do the unintended and adverse effects of liberty; one only has to think of the travesties in Aurora and Newtown to see liberty gone awry.<sup>95</sup> Waldron considers just one side of the coin in this regard, which ends up skewing his results. In other words, granting Waldron's point that unintended effects complicate the balancing approach, such complications can be marshaled against liberty as well as in its favor. Furthermore, there is no principled reason to think that liberty should be asymmetrically privileged as against security in this regard. Overall, though, there need not be any particular disagreement between Waldron and me on these two issues; maybe we tally things up differently, but we can otherwise agree.

With regards to his fourth concern, the disagreement is more substantial. His condescension for the public is palpable:

[In response to terrorist attacks,] people want to feel that something is being done....People are less interested in the effectiveness of these [responses] 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.<sup>96</sup>

For one, Waldron makes an empirical claim with no apparent empirical

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<sup>94</sup> See Kleing, *supra* note 1.

<sup>95</sup> See, e.g., Jennifer Brown, *12 Shot Dead, 58 Wounded in Aurora Movie Theater during Batman Premier*, DENVER POST, (July 20, 2012), [http://www.denverpost.com/news/ci\\_21124893/12-shot-dead-58-wounded-aurora-movie-theater](http://www.denverpost.com/news/ci_21124893/12-shot-dead-58-wounded-aurora-movie-theater) (discussing the mass shooting in Aurora, CO). See also James Barron, *Children Were All Shot Multiple Times with a Semiautomatic, Officials Say*, N.Y. TIMES, (Dec. 16, 2012), <http://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html> (discussing the mass shooting in Sandy Hook, CT); Michael Waldman, *The Second Amendment: A Biography* (2004) (discussing contemporary gun violence, including the mass shootings in Aurora, Colorado and Sandy Hook, Connecticut).

<sup>96</sup> Waldron, *supra* note 85, at 209 (emphasis in original).

basis, namely that people are more interested *that* something be done in response to terrorism than that it be *effective*. Why think this is true? Of course people want there to be a response to terrorism, but, for all Waldron says, they could be *completely indifferent* as to whether that response was effective or not; its mere existence placates. This has to be a non-starter since indifference between an ineffective response and an effective one is not even psychologically viable.

More substantively, he wonders whether psychological assurance constitutes a moral gain. So imagine here that people somehow feel safer from a terrorist threat, but that, in reality, they are not. It is hard to know what sort of facts could vindicate this premise; in general, the two would track together. But, for the sake of argument, suppose that liberties are restricted, people feel safer, and yet they are not. Apparently, the balancing test gets this wrong and justifies the restriction on liberties. But why? What is being balanced is liberty and *security*; if there is no security, then the liberties should not be restricted.

Or so goes one reply to Waldron. My preference is to be more ambitious and to allow that psychological reassurance counts toward the value of security. Security therefore has two components, both objective and subjective. And it finds its maximal expression when people *are* safe, and *believe* themselves to be. From this maximal expression, it would be *worse* if either they were less safe, or if they believed they were. It is therefore indeterminate which is better: (1) people who are not safe, but believe they are; or (2) people who are safe, but believe they are not. Since security—whether objectively or subjectively—is more appropriately measured on a spectrum than bivalently, we can imagine myriad interplays between these two dimensions. In any case, I reject Waldron’s dubiousness than psychological reassurance matters.

All told, even Waldron concedes that his arguments are not dispositive against a balancing approach, only that such an approach merits “care and caution” moving forward.<sup>97</sup> With this, I agree. Restrictions on liberty should not be taken lightly, whether for the sake of security or otherwise. Liberties matter, as do the distributions and unintended effects of their curtailment. When we restrict liberties, we should do so only for good reason. Waldron and I might disagree as to what those reasons are—e.g., whether subjective security counts—but there need not be any disagreement on the broader methodology.

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<sup>97</sup> *Id.*