WHY WE SHOULD ABANDON THE BALANCE METAPHOR: A NEW APPROACH TO COUNTERTERRORISM POLICY

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I. INTRODUCTION

One of the central objectives in counterterrorism policy is commonly said to be to balance the competing demands of security and liberty. This task is often metaphorized using the image of a set of scales, with the pan on one side containing security and the pan on the other side containing liberty. This approach asserts that a change in circumstances may result in an imbalance between these values (or reveal a pre-existing imbalance of which we were ignorant), and so necessitate some redressive action. So, following the attacks of 9/11, the magnitude of which far exceeded all previous terrorist attacks in or on the United States, it was deemed necessary to strike a new balance, reducing the protection of liberty for the sake of increased security.

The utility of the balance metaphor has been questioned by several commentators. Broadly speaking, these critiques have focussed on five different concerns. First, it has been argued that the metaphor's dichotomization of security and liberty obscures the complex relationship between these two values. To some extent, at least, the values are mutually interdependent. Security is needed if we are to be free to enjoy our liberties, whilst seeking to enhance our security against the terrorist threat by eroding civil liberties safeguards could result in diminished security against the power of the state.

Some have even warned that presenting security and liberty as binary opposites could undermine the concept of human rights. Second, the balance metaphor has been criticized for obscuring the distribution of proposed changes in security and liberty. The fact is that new counterterrorism policies will affect only a small minority of American citizens, and so “we need to pay attention to the few/most dimension of the balance, not just the liberty/security dimension.”

1. Aharon Barak, Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy, 116 Harv. L. Rev. 19, 155 (2002) (“Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security.”).

2. Tamar Meisels, How Terrorism Upsets Liberty, 53 Pol. Stud. 162, 164 (2005). See also Viet D. Dinh, Freedom and Security after September 11, 25 Harv. J.L. Pub. Pol’y 399, 406 (2002) (“America’s tradition of freedom thus is not an obstacle to be overcome in our campaign to rid the world of individuals capable of the evil we saw on September 11. It is, rather, an integral objective of our campaign to defend and preserve the security of our nation and the safety of our citizens.”).


be Arabs and followers of Islam\(^6\) and that there is a tendency to think of individual suspects as presumptive offenders,\(^7\) it is important to espouse a communal, as opposed to an individual, interest in the protection of civil liberties.\(^8\) Third, it has been suggested that the balance metaphor is consequentialist—it assumes that an increase in the risk to security justifies a commensurate diminution in liberty—and so may not be appropriate in the realm of civil liberties. Whilst it is possible to argue that potential victims have rights too, so that rights are also at stake on the security side of the balance,\(^9\) this merely raises complex and philosophically controversial questions about conflicting rights which the balance metaphor is ill-equipped to address.\(^10\)

Fourth, the balance metaphor has been criticised for assuming a kind of hydraulic relationship between security and liberty—as the protection of one is increased, so the protection of the other is necessarily eroded, and vice versa. Of particular concern here is the fact that, by equating the erosion of liberties with enhanced security, the metaphor obscures the need to show that a new power will actually increase security and so can produce a readiness to diminish liberties even when it is uncertain whether this will result in security gains.\(^11\)

Fifth, the very concept of balancing has been questioned. It has been suggested that the re-emergence of romantic sensibilities, in particular national honour, means that we cannot think rationally in the manner envisaged by the balancing discourse.\(^12\) Ronald Dworkin, meanwhile, has argued that the task is not to decide where our interest lies on balance, but to determine what justice requires.\(^13\) If we believe that it is necessary to treat suspected terrorists unfairly—in the sense that they should be denied those rights which we deem to be the minimum that we owe to anyone who is accused of a serious crime—then we should have the candour to admit that they are being treated unfairly, insist that government show that unfair treatment is necessary, and mitigate the unfairness as far as possible.

The focus of this essay is on a different aspect of the balance metaphor—the primacy it attaches to deciding the respective weights of security and liberty. In his exposition of the metaphor Posner writes:

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7. See Dinh, supra note 2, at 400–01.
10. Waldron, supra note 3, at 199.
11. Id. at 208; Zedner, supra note 8, at 514.
The proper way to think about constitutional rights in a time such as this is in terms of the metaphor of a balance. One pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time as the weights of the respective interests change. ...\textsuperscript{14}

The difficulty with this is that it assumes a shared understanding of what each pan of the metaphorical scales represents. Yet, this is far from self-evident; people hold widely divergent views on what the demands of both security and liberty actually are and on how these demands would best be met. To suggest that all debates on contemporary counterterrorism policy stem from different views on the respective weights of security and liberty obscures this and hinders engagement with the variety of perspectives held by different people. For example, a person who opposes a measure which others claim is essential to safeguard our security may do so because s/he does not believe that the dictates of security require its implementation, not because s/he attaches less weight to security. Someone who supports the implementation of a security-enhancing measure in spite of protests that it will diminish liberty may do so not because s/he attaches less weight to liberty (and/or more weight to security) than the measure’s opponents, but because s/he does not believe that the measure involves any sacrifice of liberty. Using a number of practical examples, it will be argued that for many disputed issues in contemporary counterterrorism policy, the root cause of the contention is not different views on the relative weights of security and liberty, but different views on what these concepts require. Since the balance metaphor is insensitive to this, this essay seeks to construct a framework which opens up consideration of the variety of different perspectives held by those involved in debates on counterterrorism policy.

The essay begins by focusing on security. This section of the essay starts by affirming the importance of distinguishing between the objective and subjective senses of security by showing the damaging effect a failure to make this distinction has on discussions of counterterrorism policy. It then draws on works from the fields of psychology and sociology to argue that it would be inappropriate to seek to increase subjective security by enacting counterterrorism legislation, and so the aim of counterterrorism legislation should be to increase objective security. This section of the essay finishes by outlining a four-step approach to deciding whether objective security requires the enactment of a particular counterterrorism measure.

Turning to liberty, the next section of the essay argues that there is a fundamental disparity between the discourse surrounding the balance metaphor and statements from those who debate counterterrorism measures which describe what they perceive themselves to be doing. Using the debates over the so-called library provision of the USA PATRIOT Act and the use of torture in emergency situations of grave danger as examples, the essay shows how different people can hold different views on three issues relating to liberty—whether a particular power should ever be vested in the state; what effect a power will actually have on liberty; and whether safeguards are needed to regulate how a power is used—and highlights the balance metaphor's failure to open up consideration of these different perspectives. The essay concludes by advancing an alternative framework for the analysis and evaluation of counterterrorism policy.

II. SECURITY

Security is an open-textured concept. It can be used to describe both a state of being and a means to that end. Since in the context of counterterrorism policy it is primarily used in the first of these two senses, it will be taken here as referring to a state of being. Even then, though, security can still be taken as describing quite distinct objective and subjective conditions. Using recent books by Richard Posner and Bruce Ackerman, this section of the essay begins by showing the damaging effect a failure to make this distinction can have on discussion of counterterrorism policy. Having underscored the importance of the distinction, the essay first focuses on subjective security. Drawing on work from the fields of psychology and sociology, it argues that new counterterrorism laws should not be enacted on the basis that they will make the public feel safer. The final part of this section considers security in the objective sense. It outlines a four-step approach to the discussion of whether objective security supports the enactment of a proposed counterterrorism measure.

A. The Objective and Subjective Senses of Security

It is important to distinguish between objective and subjective security. This is because the two do not always go hand-in-hand; often there can be a discrepancy between how safe people feel and how safe they actually are. For

16. Id. at 155.
17. See id.
18. Id.
19. Id. at 156.
example, in the final quarter of 2001, following the attacks of 9/11, there was a marked decrease (of eighteen percent) in the number of airline passengers compared with the same time period in 2000.\textsuperscript{20} One study concluded that a substantial portion of the flights that were not taken were replaced with (mainly leisure) road trips.\textsuperscript{21} The principal reason for this trend was apparently that people felt unsafe flying.\textsuperscript{22} The feeling of safety individuals gained by changing their travel plans was, however, quite out of sync with the facts.\textsuperscript{23} Even allowing for 9/11, flying is safer than driving.\textsuperscript{24} For any distance that is long enough for flying to be an option, driving on even the safest roads is riskier than flying with the major airlines; for flying to become equally risky, incidents on the scale of 9/11 would have to occur roughly once a month.\textsuperscript{25} Moreover, the study found that the number of traffic fatalities during the final quarter of 2001 rose by 1018 (8.8\%) over the expected frequency.\textsuperscript{26} So, whilst many individuals gained greater feelings of security by changing their travel plans, they were in fact opting for a riskier activity and increasing the riskiness of that activity in the process.

The fact that there can be a disparity between objective and subjective security means that it is essential to distinguish the two when discussing counterterrorism policy. Unfortunately, however, the balance metaphor simply invites us to consider what weight should be attached to security. It is unclear whether this is because the metaphor simply assumes that security refers to either an objective or a subjective condition—in which case, this assumption should be made plain and justified—or because it assumes that the two senses of security invariably pull together. Either way, the failure to distinguish between objective and subjective security diminishes the metaphor’s value as an analytical tool, for a failure to make this distinction obscures discussions of counterterrorism policy. This can be illustrated using two recent examples—Richard Posner’s \textit{Not a Suicide Pact} and Bruce Ackerman’s \textit{Before the Next Attack}.

\begin{itemize}
  \item \textsuperscript{20} Michael J. Flannagan & Michael Sivak, \textit{Flying and Driving After the September 11 Attacks}, 91 (No. 1) AM. SCI. 6 (2003).
  \item \textsuperscript{22} \textit{Id.} at 301.
  \item \textsuperscript{23} \textit{Id.} at 302 (citing Gigerenzer, \textit{supra} note 21, at 287).
  \item \textsuperscript{24} See \textit{id}.
  \item \textsuperscript{25} Flannagan & Sivak, \textit{supra} note 20, at 8.
  \item \textsuperscript{26} Flannagan & Sivak, \textit{supra} note 21, at 303.
\end{itemize}
1. Richard Posner’s *Not a Suicide Pact*[^27]

In *Not a Suicide Pact*, Posner states that following the attacks of 9/11, the nation felt less safe than before.[^28] Employing the metaphor of a balance, he then contends that this increased sense of vulnerability justified some curtailment of individual rights:

The safer the nation feels, the greater the weight that the courts place on personal liberty relative to public safety. When the nation feels endangered, the balance shifts the other way. The nation felt much safer before the 9/11 attacks than after, just as it felt much safer after the Cold War ended than before, and after the Civil War than while it was raging.[^29]

What is striking about this assertion is that the relative weights of public safety and personal liberty are determined by how safe/endangered the nation feels. This is problematic, first, because it assumes that a nation’s increased sense of endangerment automatically translates into a willingness to curtail civil liberties. Yet, many responded to the attacks by insisting that, although the attacks caused them to feel less safe than before, civil liberties should not be sacrificed since to do so would hand the terrorists the victory. The assertion is also at odds with Posner’s rejection of the suggestion that the curtailments of individual rights imposed in the aftermath of the attacks may no longer be justified.[^30] In terms reminiscent of Frank Knight’s distinction between unknowable uncertainty and calculable risk,[^31] Posner contends that, notwithstanding the public’s decreasing sense of vulnerability, such curtailments are still justified since terrorist leaders may be planning an attack on a scale to dwarf 9/11:

With the 9/11 attacks receding in time, forgetfulness and complacency are becoming the order of the day. Are we safer or do we just feel safer? Though scattered by our invasion of Afghanistan and by our stepped-up efforts at counterterrorism, terrorist leaders may even now be regrouping, and preparing an attack that will produce destruction on a scale to dwarf 9/11.[^32]


[^28]: POSNER, supra note 14, at 40.

[^29]: *Id.* A similar passage is also found later in the book: “The safer we feel, the more weight we place on the interest in personal liberty; the more endangered we feel, the more weight we place on the interest in safety, while recognizing the interdependence of the two interests.” *Id.* at 148.

[^30]: *Id.* at 148.


[^32]: POSNER, supra note 14, at 148.
The approach in this passage—neatly captured by Posner's earlier assertion that "[f]or all we know, we may be quite safe. But we cannot afford to act on that optimistic assumption"—is based on some assessment of the actual threat posed to the nation by terrorism. The inconsistency of this—to appeal to how a nation feels following a terrorist atrocity, but then dismiss how the nation feels several years later as forgetful and complacent—is obvious. It also disregards the fact that, whilst the passing of time might conceivably cause a nation to slide towards forgetfulness and complacency, the nation's perception of the terrorist threat is equally (if not more) likely to be distorted in the aftermath of a large-scale attack. This inconsistency is also evident in the following key passage, Posner's statement of the central argument of his book:

The general argument of these chapters is that the scope of constitutional liberties is rightly less extensive at a time of serious terrorist threats and rapid proliferation of means of widespread destruction than at a time of felt safety, but that the degree of curtailment required to protect us is not so great as to impair the feeling of freedom that is so important to Americans.

The fundamental problem with this passage is that it fails to distinguish between the objective and subjective senses of security. Posner contrasts "a time of serious terrorist threats and rapid proliferation of means of widespread destruction" (lack of security in the objective sense) with "a time of felt safety" (security in the subjective sense) as if the two are mutually exclusive, contending that "the scope of constitutional liberties is rightly less extensive" in the former situation than in the latter. But flitting between the objective and subjective senses of security in this way ignores the possibility that there may be a disparity between how secure people are and how secure they feel. This error is especially stark given that Posner himself argues that, although terrorist leaders may even now be planning large-scale attacks, forgetfulness and complacency are contributing to a growing sense of safety. If this argument is correct, then the contemporaneous situation is both "a time of serious terrorist threats" and "a time of felt safety." Posner's statement of the central argument of his book, thus, implodes.

33. Id. at 6.
34. Id. at 10–11.
35. Id. at 11.
36. Id.
2. Bruce Ackerman’s *Before the Next Attack*

A failure to distinguish between the objective and subjective senses of security has an equally damaging effect on Bruce Ackerman’s *Before the Next Attack*, in which he argues for the creation of an emergency constitution which could be triggered following a terrorist attack on (at least) the scale of 9/11. To understand the merger of the objective and subjective senses of security in Ackerman’s proposal, it is necessary to trace its evolution.

Prior to the publication of *Before the Next Attack*, Ackerman outlined his thinking in an exploratory essay. His declared purpose was to “design a constitutional framework for a temporary state of emergency that enables government to discharge the reassurance function without doing long-term damage to individual rights.” Having argued that it would be inappropriate to discharge this “reassurance function” using the concept of a war, Ackerman asserted that it cannot be achieved using the criminal law either. Following a terrorist attack the state’s effective sovereignty is in doubt and so “government must act visibly and decisively to demonstrate to its terrorized citizens that the breach was only temporary and that it is taking aggressive action to contain the crisis and to deal with the prospect of its recurrence.”

The criminal law is ill-suited for this task because it “presupposes broad-ranging confidence in the government’s general capacity to discharge its sovereign functions.”

Ackerman’s emphasis on reassuring the public—on promoting security in the subjective sense—led to his proposal being criticized. One of the principal features of his suggested emergency constitution is preventive detention. The notion that preventive detention might be warranted to reassure a panicked public was strongly criticized by David Cole:

> In light of the disastrous precedents of the Palmer and Ashcroft raids and the Japanese internment, it is striking that all Ackerman can say

37. *See generally* Bruce Ackerman, _Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism_ (2006).

38. *Id.* at 4.


40. *Id.* at 1037.

41. War, he asserted, is a “state of belligerency between sovereigns.” Moreover, the opacity of the concept of a war on terrorism “predictably leads to sweeping incursions on fundamental liberties.” *Id.* at 1032.

42. *Id.* at 1037.

43. *Id.*

44. In his original exploratory essay Ackerman stated that the government would be authorized to “detain suspects without the criminal law’s usual protections of probable cause or even reasonable suspicion ... for a period of forty-five to sixty days.” Ackerman, *supra* note 39, at 1037, 1077; In *Before the Next Attack* he recoiled somewhat, saying that “[n]obody will be detained for more than forty-five days, and then only on reasonable suspicion.” *Id.* 37, at 4.
in favor of his preventive detention scheme is that it might ‘reassure’ a panicked public. Nowhere does he claim that preventive detention will in fact make us safer.\footnote{David Cole, The Priority of Morality: The Emergency Constitution’s Blind Spot, 113 YALE L.J. 1753, 1796 (2004).}

In response, Ackerman suggested that Cole’s criticism “may be a product of misunderstanding.”\footnote{Bruce Ackerman, This is Not a War, 113 YALE L.J. 1871, 1880 (2004).} Drawing attention to his own statement that the aim of the emergency constitution is “to reassure the public that the situation is under control, and that the state is taking effective short-term actions to prevent a second strike,”\footnote{Ackerman, \textit{supra} note 39, at 1031.} Ackerman insisted that he had expounded “a two-prong test, and Professor Cole entirely ignore[d] the second prong.”\footnote{Ackerman, \textit{supra} note 46, at 1880.} The problem with this response, as Cole pointed out, was that the precondition in the second prong of the statement was not based on actually making the public safer; it stated “only that the purpose is to ‘reassure the public’ that the state is taking effective steps, not to ensure that the steps are actually effective.”\footnote{Cole, \textit{supra} note 45, at 1797.}

Following this exchange, Ackerman reformulated the reassurance interest in \textit{Before the Next Attack}, stating that the “[r]eassurance takes two forms: symbolic and functional.”\footnote{ACKERMAN, supra note 37, at 45.} As in his earlier essay, the symbolic form of reassurance is concerned to increase subjective security in the aftermath of a terrorist attack.\footnote{Ackerman writes that the emergency constitution is designed to confront the “pervasive uncertainty throughout the country about our collective capacity to maintain the fabric of public order” that follows a terrorist attack. \textit{Id.} at 45. It is premised on the assumption that a successful second strike “will grievously demoralize the general public,” which could in turn “[pave] the way for a new cycle of political demagoguery.” \textit{Id.} at 46–47.} By contrast, the functional form of reassurance is concerned with safeguarding objective security. Its aim is to “prevent a devastating second strike.”\footnote{Id. at 45.} Its premise is that the terrorist strike has generated bureaucratic confusion and that the initial strike “greatly increases the probability of a second major attack.”\footnote{Id. at 46.} But whilst this insistence on both symbolic and functional reassurance may seem to address Cole’s criticism of the original exploratory essay, it unjustifiably assumes that objective and subjective security necessarily pull in the same direction. This flaw is at the root of a number of the criticisms which have been leveled at Ackerman’s proposal. For example, it is unclear whether there is any place within Ackerman’s scheme for measures which provide one form of reassurance

\footnote{Id. at 45.}
(symbolic/functional), but not the other. Tribe and Gudridge have questioned whether there is any role within Ackerman's proposal for "the thankless work of the plain-vanilla variety that needs to get done."54 In terms of preventing recurrence of a terrorist attack, changing how information is processed, translated and collated may, they argue, be among the "most effective responses" possible.55 Yet since these changes are "not nearly dramatic enough to reassure any but the least emotional among us,"56 it is unclear how such measures can be squared with the symbolic rationale of Ackerman's emergency constitution. The declaration of an emergency may, in itself, have some symbolic value, but in the absence of some headline-grabbing powers it is likely to ring hollow.

Conversely, there may be some measures which provide great symbolic reassurance, but have little effect on objective security. Given his original essay's emphasis on symbolic reassurance and its focus on preventive detention, it may be inferred that Ackerman believes that a campaign of preventive detention will increase subjective security. But would such a campaign actually be effective in helping prevent a second terrorist strike? Ackerman's premise that one successful terrorist strike increases the probability of a second is based on the assumption that the terrorists are well-organized and so "have probably prepared the way for a series of strikes;"57 but if they are as well-organized as Ackerman supposes, it is likely that they will have also made plans to avoid being swept up in the preventive detention dragnet. It is, thus, entirely possible that the preventive detention campaign will have little bearing on any plans the terrorists might have for a second strike. This is all the more likely given the lack of success enjoyed by previous campaigns of preventive detention in the United States. As Cole points out, for example, the preventive detention campaign which followed the 9/11 attacks was "spectacularly unsuccessful."58 Let's suppose, however, that Ackerman's assertion that, whilst the "dragnet will undoubtedly sweep many innocents into detention ... it may well catch a few key actors: disrupting the second strike, saving lots of lives, and deflecting a body blow to the body politic"59 is correct. Even if such a dragnet did catch a few key actors, it does not follow that the public's concern about its safety will be relieved. Vermeule argues that an emergency constitution will have little or no effect on the public's concern about its

55. Id. at 1813.
56. Id.
57. ACKERMAN, supra note 37, at 46.
58. Cole, supra note 45, at 1753.
59. ACKERMAN, supra note 37, at 47 (emphasis added).
safety, \(^{60}\) "[w]aving the Constitution at the public will not help when the public believes that the Constitution itself is being threatened; much less will a mere framework statute provide a barrier against widespread panic"\(^{61}\)—whilst Tribe and Gudridge warn that “[a]ny declaration of emergency may be perceived as a sign of panic or as a political stunt rather than as a sign that the government has everything under control.”\(^{62}\) Strikingly, Ackerman offers no empirical evidence in support of his assertion that the declaration of a state of emergency and the deployment of a campaign of preventive detention, will reassure the public. In fact, what evidence there is suggests that resorting to the emergency constitution could exacerbate the public’s fears, not relieve them.\(^{63}\) Given that when people discuss a low-probability risk their concern rises even if the discussion consists mostly of apparently trustworthy assurances that the likelihood of harm is infinitesimal (a point which will be explored further below),\(^{64}\) publicizing the fact that the emergency constitution has been invoked could increase public concern. This would mean that the functional and the symbolic dimensions of Ackerman’s proposal actually conflict; the prevention detention campaign might assist in preventing a second terrorist strike, but would do so at the cost of increased public anxiety.

So, at the heart of Ackerman’s proposal lies a tension caused by his simplistic welding together of the symbolic and functional forms of reassurance. His assertion that the “functional argument is entirely compatible with the symbolic aspect of the state of emergency”\(^{65}\) offers little guidance on the role within his proposal of measures which offer only one of these forms of reassurance, and overlooks the possibility that the two forms of reassurance could actually conflict. Like Posner, his work is thus marred by a failure to clearly distinguish between objective and subjective security.

B. Security in the Subjective Sense

Having established the importance of distinguishing between objective and subjective security, this part focuses on the question whether counterterrorism laws should be enacted on the basis that they will increase subjective security. Jeremy Waldron, for one, has doubted whether increased subjective security is capable of justifying draconian responses to terrorist attacks, “[n]o doubt the


\(^{61}\) Id.

\(^{62}\) Gudridge & Tribe, supra note 54, at 1814.

\(^{63}\) Id.


\(^{65}\) ACKERMAN, supra note 37, at 47.
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."\(^{66}\)

Yet, there are understandable reasons for wanting to dispel fear in the aftermath of a terrorist atrocity. Official definitions of terrorism recognize that one of its central objectives is to provoke fear and anxiety. The United Nation's (UN) Security Council Resolution 1566, for example, states that the purpose of terrorism is to "intimidate a population or compel a government or an international organization to do or to abstain from doing any act."\(^{67}\) Moreover, the feelings of anxiety experienced in response to recent attacks such as 9/11 are intensified by their theatricality and vividness, whilst twenty-first century technology ensures that the images of such attacks have a global reach.\(^{68}\) Responding to a terrorist attack by seeking to reduce fear, is thus, central to dealing with terrorism. And while, as will be explained below, the hysteria generated by a terrorist attack might cause the public to overreact, in some situations it could be rational to legislate to relieve even irrational fear. As Cass Sunstein has explained:

> Fear, whether rational or not, is itself a cost, and it is likely to lead to a range of other costs, in the form of countless ripple effects, including a reluctance to fly or to appear in public places. . . . If, for example, people are afraid to fly, the economy will suffer in multiple ways; so too if people are afraid to send or to receive mail. The reduction of even baseless fear is a social good.\(^{69}\)

Notwithstanding these arguments, the contention of this essay is that it is inappropriate to pursue this objective through the enactment of new laws. This is not to say that it is not desirable to reduce public anxiety about terrorism. It is simply to say that counterterrorism legislation should not be enacted on the ground that it will increase subjective security. This is for three reasons: first, cognitive evidence suggests that passing such legislation is unlikely to have this effect; second, the aim of reducing anxiety about terrorism is at odds with the politics of fear which characterizes contemporary society; and third, the enactment of new laws nurtures a vulnerability-led approach to terrorism which exacerbates public anxiety.

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66. Waldron, supra note 3, at 209.
1. The Cognitive Evidence

Cognitive research suggests that counterterrorism legislation is actually unlikely to assuage public fears about terrorism. First, there are a range of qualitative factors which can make particular risks a special cause of concern. Since people show a disproportionate fear of risks which are unfamiliar and which are hard to control, terrorists acts are liable to cause a reaction which is unjustified by the actual magnitude of the risk. Second, when "thinking about risks, people rely on certain heuristics . . . which serve to simplify their inquiry." One of these is the availability heuristic, which involves the assessment of the magnitude of risks by asking whether examples readily come to mind. Given the intrinsic nature of terrorism and the publicity that terrorist acts attract, exaggerated risk perceptions are likely in the period following a terrorist attack. Attempting to reassure the public by describing steps taken to prevent further attacks sustains the availability and salience of examples of previous attacks, and so operates to reinforce exaggerated perceptions of the risk posed. Third, people are insensitive to variations in low probabilities. So even if counterterrorism legislation succeeds in reducing the statistical threat posed by terrorism—which, as will be explained below, should not simply be assumed—it does not follow that this will affect people's perception of the risk. Fourth, people are prone to "probability neglect." This is where their attention focuses on the bad outcome itself, and as a result they are inattentive to the fact that it is unlikely to occur. Since this is especially acute when emotions are intensely engaged, probability neglect is highly likely in the aftermath of terrorism. So, publicizing the legislative steps taken to combat terrorism could perpetuate fear, by reminding people of the horror of terrorist attacks, thereby engaging their emotions and causing them to disregard the issue of probability altogether.

Sunstein also identifies some social influences which impact on human cognition. Social "cascades" or "bandwagons" occur where details of a salient event are passed from one person to another so that the event becomes available

70. Id.
71. Id.
74. Id.
75. See, e.g., id. at 93–94.
77. Sunstein, supra note 73, at 39.
78. Id.
to increasingly large numbers of people. 79 “Group polarization” describes the fact that, “[w]hen like-minded people deliberate with one another, they typically end up accepting a more extreme version of the views with which they began.” 80 This means that if several people who fear terrorism speak to one another about it, “their fear is likely to increase as a result of internal discussions.” 81 As well as describing the influences which operate when ordinary people interact with one another, these processes capture the role played by media coverage of fear-inducing events. 82 The intense media coverage devoted to terrorism ensures that terrorist attacks retain their salience and availability in the minds of the public, exacerbating the effects of the features of human cognition—particularly the availability heuristic and probability neglect—outlined above. Against this background, Sunstein poses the question “can government officials effectively provide assurance and dampen concern?” then continues:

If officials want to reduce fear, the best approach may well be simple: Alter the public’s focus. I have noted that discussions of low-probability risks tend to heighten public concern, even if those discussions consist largely of reassurance. Perhaps the most effective way of reducing fear of a low probability risk is simply to discuss something else and to let time do the rest. 83

In terms of increasing subjective security, the cognitive evidence suggests that grand-sounding declarations about the steps being taken to protect the public are unlikely to alleviate public anxiety. To the extent that they are designed to have a symbolic effect, new laws aimed at reassuring the public would, thus, be misguided.

2. The Political Construction of a State of Fear

The question whether government officials can effectively provide assurance and dampen concern assumes that they actually desire reductions in public levels of anxiety about terrorism. But the reality is that politicians frequently seek to justify their counterterrorism policies by referring to past terrorist atrocities in order to trigger both availability and salience, drawing on the features of human cognition outlined above to amplify the terrorist threat. Noting this trend, one commentator has succinctly asserted that, “rather than

79. Id. at 95.
80. Id. at 98.
81. Id. at 99.
82. SUNSTEIN, supra note 73, at 102.
83. Sunstein, supra note 69, at 131.
assuaging fear, Homeland Security incites and reinforces its own spurious necessity."

Using the 9/11 attacks in this way is the politics of fear. David Altheide explains that "[t]he politics of fear results when social control is perceived to have broken down and/or a higher level of control is called for by a situation or events, such as a ‘terrorist attack.’" It is "decision makers’ promotion and use of audience beliefs and assumptions about danger, risk, and fear in order to achieve certain goals." Employing this technique, political leaders promote fear in their media messages and strive to sound tougher than their rivals. A stark example is the reaction to a New York Times interview with Democrat challenger John Kerry during the 2004 presidential campaign. In an apparent lapse (given the tenor of the rest of his campaign), Kerry said that "[w]e have to get back to the place we were, where terrorists are not the focus of our lives, but they’re a nuisance," adding that—like other law enforcement problems such as prostitution, illegal gambling and organized crime—terrorism will never be completely eliminated, so the objective should be to "reduce it . . . to a level where it isn’t on the rise [and] isn’t threatening people’s lives every day, and fundamentally, it’s something that you continue to fight, but it’s not threatening the fabric of your life." Republicans responded immediately by strongly condemning these remarks—Bush’s campaign chairman described them as “a pre-9/11 view of the world” while the Republican Party chairman said they demonstrated “a disconcerting pre-September 11 mindset that will not make our country safer” whilst Democrats refuted suggestions that Kerry believed the terrorist threat had been overblown, instead insisting that he would fight the war on terror more vigorously (and successfully) than Bush had done.

Altheide himself stresses that he is not suggesting that fear itself is intrinsically bad. Sometimes fear can be beneficial, such as where it “supplies motivation that can overcome preexisting inertia.” Rather, Altheide’s argument is that fear “is promoted and exploited by leaders for their own survival and policies rather than that of their audiences.” For present purposes, the important point is the incongruity between this politics of fear and

86. See id. at 208.
87. See id. at 4–6.
88. See id. at 4–6.
91. ALTHEIDE, supra note 85, at 5–6.
92. Vermeule, supra note 60, at 634.
93. ALTHEIDE, supra note 85, at 8.
the enactment of new laws ostensibly designed to increase subjective security. There is little point in passing new laws with the avowed purpose of assuaging the public’s concern about terrorism if the politics of fear will be employed to establish that such legislation is needed.

3. The Contemporary Emphasis on Safety

What makes the politics of fear so effective is the importance which contemporary society places on safety. Ulrich Beck contends that, whilst the central issue in industrial society was distribution in a society of scarcity, the new modernity—risk society—revolves around the management of technoscientifically produced risks.94 Although risk is of course “not an invention of modernity,”95 technological progress has given risk a different character. Unlike the localized risks common to industrial society, the dangers of the risk society are neither spatially limited nor temporally limited.96 They are often imperceptible to the senses.97 They are global in nature, threatening even “self-destruction of all life on Earth.”98 One of the features of the risk society described by Beck which is of particular relevance here, is its emphasis of safety:

The dream of class society is that everyone wants and ought to have a share of the pie. The utopia of the risk society is that everyone should be spared from poisoning. . . . The driving force in the class society can be summarized in the phrase: I am hungry! The movement set in motion by the risk society, on the other hand, is expressed in the statement: I am afraid! The commonality of anxiety takes the place of the commonality of need.99

Some have taken issue with Beck’s central claims. British sociologist Frank Furedi rejects the connection between risk and advances in science and knowledge, asserting that people in contemporary Western societies in fact enjoy an unprecedented level of personal safety.100 Nonetheless, he agrees that “[s]afety has become the fundamental value of our times.”101 In contemporary society, he claims, there is a pervasive sense of being at risk, which is caused

95. Id. at 21.
96. See id. at 22.
97. See, e.g., id. at 27.
98. Id. at 21.
99. Id.
101. Id. at 1.
by growing uncertainty about human relationships and a weakening of trust in society and which means that there is "a heightened state of readiness to react to whatever danger is brought to the attention of the public." This pervasive sense of being at risk results in a vulnerability-led response to the terrorist threat, so that instead of asking the question of "what do we know?" we speculate and ask the "what if?" question. The problem with this approach is that even "previously untroubled aspects of life [can be] transformed into a speculative risk." This is illustrated by the fact that, by 2004, the number of potential terrorist targets on the list compiled by the Department of Homeland Security reached 80,000, including some miniature golf courses and Weeki Wachee Springs, a roadside water park in Florida. Furedi laments:

It is interesting to note that the traditional anti-terrorist declarations from politicians, that terror will not be allowed to succeed in preventing us from going about our daily business, are less in evidence following the September 11th attacks. Instead, there appears to be a tendency to embrace the idea of society under threat and treat it as a welcome organizing principle for political and social life.

Pointing out that a vulnerability-led approach "threatens to further inflate public anxiety" and also "provides an opportunity for those promoting intentional risks," he urges the need to balance vulnerability with resilience. In a similar vein, Philip Heymann has urged that policy-makers responding to events such as 9/11 should consider the value Americans place on courage and decency.

So, if the goal is to increase public levels of reassurance, the most promising strategy would seem to be to alter the public's focus whilst emphasizing the importance of resilience and courage. This is not incompatible with efforts to increase security in the objective sense; such work should of course continue (and if it is successful it should consolidate efforts to shift the public's focus). To attempt to increase subjective security by enacting new laws would, however, be counterproductive. Not only would the necessity of

102. Id. at 20.
103. FRANK FUREDI, REFUSING TO BE TERRORISED: MANAGING RISK AFTER SEPTEMBER 11TH 13 (2002).
104. Id.
106. FUREDI, supra note 103, at 19 (emphasis original).
107. Id. at 21.
such laws be established using the politics of fear, triggering the availability and salience of previous terrorist attacks, but passing such laws would merely reinforce the vulnerability-led approach to terrorism. For this reason, the goal of counterterrorism legislation should be regarded as increasing security in the objective sense by actually making the public safer.

C. Security in the Objective Sense

Even if we take security as it is used in the balance metaphor in the objective sense of actually making people safer, problems remain. The metaphor simply invites us to consider what weight should be attached to security. On this approach, those who oppose a proposed counterterrorism measure either—because they believe it will be unsuccessful in combating terrorist activity or it will have incidental effects that will result in diminutions in security and/or opportunity costs in terms of other efforts to enhance our security which outweigh any security gains likely to be procured by the measure under consideration—are unjustifiably presented as attaching less weight to security than the measure’s proponents. Where a counterterrorism measure is being debated, this essay accordingly proposes a four-step approach to (objective) security. First, it should be a necessary prerequisite that the measure will prevent or impede terrorist activity. Second, any incidental effects of the proposed measure which will result in diminutions in security must be considered. Third, any opportunity costs in terms of other measures to combat the terrorist threat must be assessed. Fourth, it must be asked whether the measure has other opportunity costs in terms of our efforts to combat other threats to our security.

1. Will the Measure Prevent or Impede Terrorist Activity?

The starting point for discussion of a proposed counterterrorism measure should be to assess whether it will prevent or impede terrorist activity. This assessment should include consideration of both the extent of the expected preventive/impedimentary effect and the likelihood of such effect occurring. If the measure will have no preventive/impedimentary effect, or the effect will be no more than *de minimis*, it should not be enacted. This assertion might seem trite, but the fact is that there is more uncertainty than certainty over the effectiveness of counterterrorism programs. A Campbell systematic review of counterterrorism evaluation research which surveyed over 20,000 works (articles, books, government and technical reports, online documents, websites, unpublished material) related to terrorism and political violence found just seven studies which satisfied the reviewers’ requirement of being a moderately
rigorous evaluation study of a counterterrorism program. Meta-analysis of the eighty-six findings contained in these seven studies showed that many of the strategies which have been evaluated did not have a statistically discernible effect on reducing terrorism across time, and in some cases actually led to increases in terrorism. Of course, there are a number of factors which may help explain why there is this dearth of evaluative work. But, as this study suggests, it is also the case that there is a common tendency to unjustifiably assume that particular measures will improve our security. One particularly stark example of this relates to legal thresholds for the exercise of investigative powers; it is frequently assumed that loosening such thresholds will necessarily increase our security against the terrorist threat. The balance metaphor fortifies this assumption, since it predicates a connection between eroding civil liberties safeguards and enhancing security. The possibility that there might be an optimum point, beyond which further loosening of the legal threshold will actually reduce security, not enhance it, is ignored.

A useful example in this regard is section 505 of the USA PATRIOT Act, which amended the FBI’s national security letter (NSL) authority over records from communications services, financial institutions and credit agencies. Prior to the USA PATRIOT Act, the FBI could only access such records if the Director, or a designee in a position not lower than Deputy Assistant Director, certified that the information sought was relevant to an authorized foreign counterintelligence investigation and that there were specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertained was a foreign power or an agent of a foreign power. Section 505 extended the power of approval to include a designee at Bureau headquarters or a Special Agent in charge of a bureau field office designated by the Director. It replaced the “specific and articulable facts” standard with a requirement that the Director—or his designee—certify that the records requested were relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, with the proviso

109. Leslie W. Kennedy, Cynthia Lum & Alison Sherley, Are counter-terrorism strategies effective? The results of the Campbell systematic review on counter-terrorism evaluation research, 2 J. EXPERIMENTAL CRIMINOLOGY 489, 495 (2006). The search ran up to the end of December 2004. Id. Note that, since the Campbell process tends to focus on quantitative evaluations, it is possible that useful qualitative evaluations exist.
110. Id. at 508.
111. Id. at 510–11.
114. USA PATRIOT ACT, supra note 112, at 365.
115. Id.
that an investigation of a United States person could not be conducted solely on the basis of activities protected by the First Amendment to the Constitution.\textsuperscript{116} When the USA PATRIOT Act was reauthorized in March 2006, the USA PATRIOT Improvement and Reauthorization Act\textsuperscript{117} purported to address concerns about the breadth of the power conferred by section 505 by, amongst other things: explicitly providing that a NSL may be judicially reviewed; explicitly providing that the recipient of a NSL may disclose receipt to those to whom such disclosure is necessary to comply with the request and/or to an attorney in order to obtain legal advice or legal assistance with respect to the request; providing that a nondisclosure order does not automatically attach to a NSL; and providing for judicial review of a nondisclosure order attached to a NSL.\textsuperscript{118}

One of the principal criticisms of section 505 was that it loosened the legal threshold for the issuance of a NSL; it replaced the "specific and articulable facts" standard with the lower standard of relevance, and it removed the requirement that the records pertain to a foreign power or an agent of one, thus permitting the collection of information about persons who were not the target of an investigation.\textsuperscript{119} The balance metaphor pitches this debate over the threshold for the making of a NSL as a straightforward clash between the values of security and liberty. The assumption is that security requires the threshold to be loosened as much as possible, liberty requires the threshold to be as tight as possible, and the task is to strike a balance between these competing demands. But this is unduly simplistic. First, it is erroneous to suggest that someone who supports a looser threshold necessarily attaches less weight to civil liberties. As will be explained below, people who attach equal importance to liberty may nonetheless differ over how to satisfy the demands of this value. Second, it is mistaken to assume that loosening the threshold for the exercise of an investigative power will invariably improve the protection of our security. Sometimes, of course, some relaxation of the legal threshold for the exercise of an investigative power might aid investigators seeking to safeguard our security. For example, Michael J. Woods, former chief of the FBI's National

\textsuperscript{116} Id. at 367.
\textsuperscript{118} As far challenges to nondisclosure orders are concerned, note that the Act provides that if the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI (or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of such department, agency, or instrumentality) certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith. The same applies to recertifications. Id. at 212.
\textsuperscript{119} See Timothy Edgar & Witold Walczak, We Can Be Both Safe and Free: How the Patriot Act Threatens Civil Liberties, 76 Pa. B. Ass'n Q. 21, 27 (2005); Raab, supra note 113, ¶ 21.
Security Law Unit, has asserted that, in the context of counterintelligence operations, the "specific and articulable facts" threshold is too high, "[a] clear goal of counterintelligence is to identify spies and international terrorists. If an investigator has specific and articulable facts that a target is an international terrorist, she has already achieved that goal." 120

It would be mistaken to suppose that relaxing the legal threshold for the exercise of an investigative power will necessarily result in investigators being more effective in their efforts to protect our security. Such a view assumes that legal thresholds invariably hinder investigators' efforts and hamper their effectiveness. Not only does this perpetuate the erroneous dichotomy between legal rules and discretion—an issue which we will consider further in Part III.B.1 below—but it also ignores the possibility that legal thresholds could have a beneficial effect. It is quite conceivable that, by structuring investigators' discretion and promoting high standards of scrutiny, diligence and professionalism, a legal threshold for the exercise of an investigative power could sometimes result in investigators being more effective in their attempts to safeguard our security than if a looser threshold were in place. 121 Whether this is the case in any particular context is, of course, an empirical question which would need to be addressed. The point is that the balance metaphor obscures this by equating the erosion of civil liberties safeguards with enhanced security.

As noted above, section 505 significantly expanded the FBI's preexisting authority to obtain information through NSLs, by providing that records relating to individuals who are not the subject of an investigation may be obtained as long as the information is relevant to an authorized investigation. 122 Case agents are thus able to access information about individuals who are several steps removed from the subject of an investigation. 123 This broader power, coupled with how the FBI has responded to the criticism it received for failing to prevent the 9/11 attacks—senior FBI officials have been reported as saying that the Bureau now casts a much wider net in an effort to pre-empt any future attack 124—has resulted in an enormous increase in the number of NSL requests, as the FBI try to generate leads as well as pursue them. 125 The review of the FBI's use of NSLs conducted by the Justice Department's Office of the Inspector General (OIG) found that the FBI issued approximately 8500 NSL

121. See Stephen J. Schulhofer, At War With Liberty, 14 (No. 3) AM. PROSPECT (2003), at A5.
122. USA PATRIOT ACT, supra note 112; see Barton Gellman, The FBI's Secret Scrutiny, WASH. POST, Nov. 6, 2005, at A10.
123. Id.
124. Id.
125. Id.
requests in 2000 (the year prior to the introduction of the USA PATRIOT Act), compared to 39,000 in 2003, 56,000 in 2004 and 47,000 in 2005.\textsuperscript{126} Moreover, after the initial review by the case agent who sought it, the information derived from a NSL is retained.\textsuperscript{127} It may be disseminated among federal agencies, and is used by Field Intelligence Groups (FIGs) in analytical intelligence products such as "link analysis."\textsuperscript{128} The combined effect of section 505's loosening of the legal threshold for the issuance of a NSL and the FBI's desire to avoid criticism in the aftermath of any future attack has thus been the accumulation of a vast sea of information. The FBI's response in December 2003 to intelligence hinting at a New Year's Eve attack in Las Vegas—intelligence which caused the Department of Homeland Security to issue an orange alert on the twenty-first of that month—provides a stark example.\textsuperscript{129} The chief of the FBI's Proactive Data Exploitation Unit was charged with the task of assembling a real-time census of every visitor to the city over a two-week period—a total of roughly one million possible suspects.\textsuperscript{130} An interagency task force sought to pull together the records of every hotel guest, everyone who rented a car or truck, every lease on a storage space, and every airplane passenger who landed in the city.\textsuperscript{131} But the operation uncovered no suspects, and the orange alert ended on January 10, 2004.\textsuperscript{132} In fact, when asked for an example of an occasion where expanded surveillance powers had made a difference, one assistant FBI director doubted whether "such an example exists."\textsuperscript{133} Against this background, and doubts about the effectiveness of data mining more generally,\textsuperscript{134} it is plausible to ask whether a tighter legal threshold for the issuance of NSLs might, by channeling the FBI's efforts, actually increase our security. At present the FBI's desire to avoid blame should a terrorist attack

\textsuperscript{126} U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS xvi (2007). The Report states that, given the inaccuracies it found in the FBI's Office of the General Counsel's (OGC's) database, these figures in fact understate the actual number of NSL requests. \textit{Id.} at xvii. Note also that, although in 2006 the FBI modified its guidance to require that an agent indicate whether the NSL request is for a person other than the subject of an investigation or in addition to that subject, the information for previous years on the OGC's database does not capture information on whether the target of the NSL was the subject of the underlying investigation or another individual. The FBI cannot, therefore, estimate the number of NSL requests relating to persons who were not investigative subjects during this period. \textit{Id.}

\textsuperscript{127} \textit{Id.} at 25.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} Gellman, supra note 122, at A11.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at A10.

\textsuperscript{134} See MAUREEN WEBB, ILLUSIONS OF SECURITY: GLOBAL SURVEILLANCE AND DEMOCRACY IN THE POST-9/11 WORLD 147–84 (2007).
occur leads it to expend much resource on licentious searches for information on individuals only tenuously linked with the subject of an investigation. Such channeling would help encourage the FBI to concentrate on pursuing identified leads instead of speculatively searching for new ones. In this sense, then, the changes introduced by the USA PATRIOT Improvement and Reauthorization Act—in particular the provision that a NSL may be judicially reviewed and that the recipient of a NSL may disclose receipt to an attorney in order to obtain legal advice with respect to the request\(^1\) may, notwithstanding any value they have as civil liberties safeguards, be a step in the right direction in security terms. But the balance metaphor discounts this possibility out of hand. Just as it erroneously equates the erosion of civil liberties safeguards with enhanced security, the metaphor assumes that the introduction of provisions designed to further protect civil liberties will diminish security.

2. Does the Measure Have Incidental Effects Which Will Diminish Our Security?

Determining whether a proposed counterterrorism measure will prevent or impede terrorist activity is only the first step. It is a necessary, but not sufficient, condition. A measure which will prevent/impede some terrorist activity could in other respects have security costs. For example, it has been suggested that “the global surveillance dragnet alienates the very communities from whom intelligence agencies currently need assistance, making it difficult to get crucial tips from them and difficult to recruit the law-enforcement and intelligence officers needed from their ranks.”\(^3\) The argument here is not that we should attach less weight to security, nor that surveillance initiatives will never prevent or impede any terrorist activity; rather, it is that any security gains achieved by this surveillance are outweighed by the reduction in security caused by the loss of human intelligence and recruitment to the intelligence agencies from minority communities.\(^3\) By the same token, whilst austere measures might have some value in combating terrorist activity, they can also foster resentment and ultimately increase the number of people who support, and are willing to commit, terrorist acts—a point which has been underscored by Martha Minow:

National security in a democracy entails not only protecting borders and citizens from physical threat, but also promoting democratic accountability and respect for human rights. This broader conception . . . rejects the assumption that the nation must sacrifice human rights

135. USA PATRIOT ACT 2005, supra note 117, at 197.
136. WEBB, supra note 134, at 240.
137. See id.
for security and instead treats both physical security and human rights as indispensable to national security.\(^{138}\)

The second step of the proposed approach to security is thus to consider whether the measure in question has any incidental effects, such as these, which will diminish our security.

3. Are There Any Opportunity Costs in Terms of Other Measures to Combat the Terrorist Threat?

Expending time and resources on some initiatives necessarily means diverting resources away from others. Maureen Webb has strongly criticized the volume of resources invested in global surveillance initiatives since 9/11, stating that this has "[diverted] crucial resources and efforts away from the kind of investments that would make people safer."\(^{139}\) "Good information about specific threats," she states, "is usually obtained through human not technological intelligence, by agents capable of infiltrating the circles where these threats exist."\(^{140}\) She argues that "these were the kind of critical resources that were lacking in U.S. security agencies" at the time of 9/11.\(^{141}\) Not only was there a dearth of agents on the ground collecting human intelligence, but translators were lacking too—the al-Qaeda messages reportedly intercepted the day before the attacks ("[t]omorrow is zero hour," "[t]he match is about to begin") were not translated until days later, and three years after the attacks more than 120,000 hours of recorded telephone calls had yet to be translated by the FBI.\(^{142}\) So it does not follow that a measure should be enacted simply because it will prevent/impede some terrorist activity. As well as possible incidental reductions in security, consideration must also be given to whether particular measures have opportunity costs within the counterterrorism context.

4. Are There Any Opportunity Costs in Terms of Measures to Combat Other Threats to Our Security?

As well as opportunity costs within the sphere of counterterrorism, consideration must also be given to whether the measure in question has opportunity costs in other contexts. There are many different threats to our security; to focus exclusively on the threat from terrorism would be to ignore


\(^{139}\) WEBB, supra note 134, at 239 (emphasis original).

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Id. at 239–40.
other threats which are also significant. This has been highlighted by John Mueller. He contends that the threat from terrorism has been "overblown"\textsuperscript{143} asserting that "terrorism, in reasonable context, actually causes rather little damage, and the likelihood that any individual will become a victim in most places is microscopic."\textsuperscript{144} To illustrate this, he points out that the number of Americans killed by international terrorism since the late 1960s is about the same as the number of people killed during the same period by lightning, or by accident-causing deer, or by severe allergic reaction to peanuts.\textsuperscript{145} In fact, he adds, in almost all years the total number of people worldwide who die at the hands of international terrorists is not much more than the number who drown in bathtubs in the United States.\textsuperscript{146}

Using statistics for years gone-by to assess the extent of the threat from terrorism at present and in the future is problematic, for it fails to take into account the way in which terrorism is changing. Philip Bobbitt explains that "terrorism derives its ideology in reaction to the \textit{raison d'etre} of the dominant constitutional order, at the same time negating and rejecting that form's unique ideology but mimicking the form's structural characteristics."\textsuperscript{147} So, as the market state has superseded the nation state as the dominant constitutional order, a new form of terrorism—market state terrorism—has emerged, "of which the group called al-Qaeda is the initial, disturbing example."\textsuperscript{148} Whilst one might question whether, instead of couching the concepts "nation state" and "market state" in ontological terms, they should instead be presented as Weberian ideal types—the claim is not that the nation-state existed in a pure form and is now passing away to be replaced by another form of constitutional order; the claim is that a fundamental change in the constitutional order is occurring and that these concepts are useful analytical tools which enable us to see and to expound the nature of this change more clearly—Bobbitt's account does usefully draw out some of the principal features of the emerging market state terrorism.\textsuperscript{149} It "will be just as global, networked, decentralized, devolved and rely just as much on outsourcing and incentivizing as the market state."\textsuperscript{150} And, importantly, it will be more lethal than the nation state terrorism which preceded it; the oft-cited remark that "[t]errorists want a lot of people watching

\textsuperscript{143.} See generally MUeller, supra note 105.
\textsuperscript{145.} Id.
\textsuperscript{146.} Id.
\textsuperscript{147.} BOBBITT, supra note 68, at 26.
\textsuperscript{148.} Id. at 44.
\textsuperscript{149.} Id. at 44–63.
\textsuperscript{150.} Id. at 45.
and a lot of people listening, and not a lot of people dead"\textsuperscript{151} will no longer hold true. Bobbitt’s account resonates with Beck’s application of his risk society thesis to the context of terrorism.\textsuperscript{152} Beck states that “the dangers from terrorism increase exponentially with technical progress,”\textsuperscript{153} adding: “all the risk conflicts that are stored away as potential could now be intentionally unleashed.”\textsuperscript{154} Every advance from gene technology to nanotechnology opens a ‘Pandora’s box’ that could be used as a terrorist’s toolkit.”\textsuperscript{155}

In spite of this difficulty with using statistics for years gone-by to calculate the magnitude of the present and future terrorist threat (which Mueller himself does concede),\textsuperscript{156} the basic point remains that there are a number of other significant threats to our security. Investing time and money in new counterterrorism initiatives may have an opportunity cost in terms of the expended resources which could have been used to combat these other threats. For example, the increases in the FBI’s budget post-9/11 have been insufficient to pay for all the terrorism work it is now required to do. This has resulted in funds being shifted from other programs, such as fighting crime. Some police chiefs have consequently attributed the rise in the rate of violent crime in 2005 in part to the pressure to divert resources and personnel to counterterrorism efforts.\textsuperscript{157} Similarly, inept governmental measures to deal with the results of Hurricane Katrina in 2005 may have been partly attributable to the relatively small sum made available in grants to improve preparedness for natural disasters compared to terrorism.\textsuperscript{158} Moreover, it has been suggested that the Federal Emergency Management Agency’s failed performance in New Orleans was the result of its assimilation within the Department of Homeland Security,
which "reduced its preparedness by pushing it away from a focus on natural
disasters towards postures more appropriate for a civil defense role in the War
on Terror." And whilst, in February 2006, the president's fiscal year 2007 budget increased the funding allocated to the Departments of Homeland Security (by between five and seven percent) and Defense (by five percent, plus an additional $120 billion towards the wars in Afghanistan and Iraq), it made cuts to Medicare and a host of domestic spending programs. This tendency to focus on the threat from terrorism at the expense of other threats to our security may partially be explained by the cognitive finding that people are more willing to tolerate familiar risks than unfamiliar risks, even if they are statistically equivalent. In Government, however, it is exacerbated by an attitude known colloquially as CYA—"cover your ass." One commentator has described this as a fear "of being blamed after an attack for having vetoed, opposed, or shortchanged precisely the program that might, after the fact, be determined as the measure that could have prevented it, had it only been implemented as proposed." It "operates within regular departments, the intelligence community, the military, and law enforcement agencies throughout the country, to weaken and slow our system's capacity to distinguish useful from wasteful activity." Such an attitude disregards consideration of the opportunity costs of diverting resources to counterterrorism initiatives.

In summary, when assessing a proposed counterterrorism measure, consideration must be given to:

i) whether the measure will prevent or impede terrorist activity;
ii) whether the measure has incidental effects which could diminish our security against terrorism;
iii) whether the measure has opportunity costs in terms of our efforts to combat the terrorist threat; and
iv) whether the measure has other opportunity costs in terms of efforts to combat other threats to our security.

The balance metaphor does not make clear exactly what is placed in the security pan. One interpretation could be that, of the four considerations just outlined, only (i) is placed in this pan. The difficulty with this is that the image of the scales suggests that the only costs of a counterterrorism measure are diminished liberties, thereby precluding an assessment of considerations (ii), (iii), and (iv) above. An alternative interpretation could be that the

159. LUSTICK, supra note 90, at 86.
160. Id. at 22.
161. See SUNSTEIN, supra note 73, at 36.
162. LUSTICK, supra note 90, at 90.
163. Id. at 89.
metaphorical scales are only utilized where the gain in security under consideration (i) exceeds any loss under considerations (ii), (iii), and (iv), and that what is placed in the security pan is this net benefit. If this is the case, however, this needs to be made plain. To simply state that the task in counterterrorism policy is to decide what weight we attach to security (relative to liberty) obscures this. As we have seen, individuals may hold widely diverging views on each of the four considerations above. The four-step approach outlined in this essay would open up consideration of these different perspectives.

III. Liberty

If, having applied the four-step approach outlined, the conclusion is reached that (objective) security supports the enactment of the proposed counterterrorism measure, consideration must then turn to liberty. Using the balance metaphor, it is commonly supposed that measures which increase security inevitably involve a decrease in liberty. This assumption finds expression in a variety of colloquialisms—trading off liberty for security, sacrificing liberty for increased security, or making inroads on liberty for the sake of enhanced security. But this assumption is not shared by all. Those on all sides of counterterrorism debates regularly claim that the measures for which they are arguing will make us safer without diminishing our civil liberties. Consider the following statements, all taken from debates in the House of Representatives in October 2001 in the run-up to the USA PATRIOT Act\textsuperscript{164} being signed into law:

I believe it [the Bill] now responsibly addresses many of the shortcomings of the current law and improves law enforcement's ability to prevent future terrorism activities and the preliminary crimes which further such activities while preserving the civil rights of our citizens.\textsuperscript{165}

Mr. Speaker, I rise today as a supporter and original cosponsor of the PATRIOT anti-terrorism bill. This is a powerful piece of crime-fighting legislation. It gives the FBI additional tools to go after terrorists. It creates criminal penalties for people who harbor terrorists. At the same time, it respects the civil liberties of our citizens.\textsuperscript{166} [It strikes] a balance that gives the resources to the agencies of this government to protect the American people while at the same time protects us from any trespass against our liberties.\textsuperscript{167}

\textsuperscript{164} USA PATRIOT ACT, supra note 112.


\textsuperscript{166} 147 CONG. REC. at H6762 (statement of Rep. Keller) (emphasis added).

\textsuperscript{167} 147 CONG. REC. at H6768 (statement of Rep. Armey) (emphasis added).
To similar effect is former Attorney-General John Ashcroft’s insistence that “[t]he lives and liberties of Americans are protected by the Patriot Act. . . . I would not and I will not support or invite any change that might restrict or endanger the individual liberties and personal freedoms of Americans.” 168 The same is also true of critics of the USA PATRIOT Act, as article titles such as ‘We Can Be Both Safe and Free’ 169 illustrate. Indeed, in their report *Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, Philip Heymann and Juliette Kayyem state “[w]e believe that the competing concerns of national security and democratic freedom can largely be reconciled by the intelligent use of legislative and judicial processes to both support and constrain executive branch authority.” 170 In short, the assumption that increases in security necessarily involve some sacrifice of liberty is out of sync with what those who debate counterterrorism policy perceive themselves to be doing.

Of course, with many of these statements there is an element of not ceding the rhetorical ground. The aim of this section of the essay, however, is to show that this disparity is as much attributable to the fact that the balance metaphor fails to account for different people holding different views of what the dictates of liberty are and how these dictates would best be satisfied. Take an example involving an investigative power (X) which, it has been determined, will increase (objective) security, and a procedural safeguard (Y), which some claim it is necessary to impose. The discussion of what liberty requires in this situation can be divided into three stages. First, opinions might differ on whether power X is one which should ever be vested in the state. While one person might feel that it would be morally indefensible to ever introduce the use of the power, another might regard it as a regrettable but necessary evil. Second, opinions may differ on the effect of power X on liberty. One person might regard it as a grave incursion, while another might feel that it involves at most minimal intrusion. Third, opinions may differ on whether safeguard Y is needed to regulate how power X is used and keep its exercise within the permitted bounds. In one person’s eyes it might be an essential restriction, while in another’s it could be an unnecessary and counterproductive impediment which hinders the work of investigators. The balance metaphor would reduce discussion of power X and safeguard Y to simplistic statements about how much weight one attaches to the values of security and liberty. Yet someone who believes that the level of

169. See generally Edgar & Walczak, supra note 119.
intrusiveness of power X is *de minimis* would not, in their eyes, be sacrificing/attaching less weight to civil liberties. Neither would the person who believes that safeguard Y is not needed to keep the exercise of power X within its permitted bounds, since they do not believe that the absence of safeguard Y will result in power X being abused. Conversely, someone who believes that safeguard Y is necessary to prevent power X being abused, and that its imposition does not entail any other costs,171 would not in their eyes be sacrificing/attaching less weight to security, since the intended effect of safeguard Y is merely to keep the exercise of power X within the permitted bounds. The balance metaphor thus hinders engagement with the wide variety of perspectives held by those who discuss counterterrorism policy. Instead of opening up discussion of these diverse issues, it shoehorns them into an analytical straitjacket.

This section of the essay works through each of the three stages just outlined. For each stage, the inadequacy of the balance metaphor will be illustrated using an example. First, the debate surrounding the use of torture in emergency situations of grave danger will be used to illustrate how different views on the dictates of liberty can result in different opinions on whether vesting particular powers in the state can ever be justified. Second, the controversy surrounding section 215 of the USA PATRIOT Act will be used to demonstrate that there can be widely divergent views on the actual effect of a power on liberty. Section 215 will also be used to show, thirdly, how different perspectives on a proposed regulatory safeguard can stem from different views of what is needed to satisfy the liberal concern to prevent abuses of state power. At each stage, the essay will sketch the contours of a theoretical framework for analyzing counterterrorism policy which is capable of accommodating consideration of this variety of different perspectives.

A. Does Liberty Require an Absolute Prohibition?

The first issue to consider is whether the dictates of liberty demand that the power in question never be vested in the state. A helpful example of how views may differ on this issue is the use of torture. It is commonly said that liberty requires an absolute prohibition on the use of torture.172 This is the position that has been adopted by different international treaties. This United Nations Convention Against Torture forbids the use of torture in all

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171. See infra Part III.C.
172. David Cole, for example, has described such a prohibition as “integral to civilized society.” Cole, *supra* note 27, at 1741. See also Cole’s comments on Alan Dershowitz’s proposed torture warrants, saying that “[t]he fundamental constitutional problem with torture is one of substantive due process, not procedural due process. Torture violates core norms of human decency and respect, and no amount of procedural protections can justify it.” Cole, *supra* note 45, at 1795.
circumstances, expressly providing that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' The European Convention on Human Rights contains a similar provision. Subject to certain reservations, the United States has ratified the first of these treaties. The Long-Term Legal Strategy Project report on counterterrorism strategies found no compelling reason for the United States ever to violate its obligations under this treaty, recommending that they be respected without exception. However, it is possible for others to hold different views on this issue, as David Luban has explained. He outlines five possible motives for torture—to celebrate military victory, to terrorize a population, to punish an offender, to extract a confession, and to gather intelligence. Torture perpetrated for the first four of these motives is, he says,


174. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5 (stating, unequivocally, that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

175. The reservations include a more restrictive definition of torture than the one contained in Article 1 of the Convention:

[T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Constitution Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratification by the U.S. of America and Accession by Ga., art. II, ¶ 1, Oct. 21, 1994, 1830 U.N.T.S 320.


178. Id. at 1432–36. Luban explains that he is using the word "liberalism" in the broad sense used by political philosophers from John Stuart Mill onwards. Id. at 1426.
denounced by the liberal as cruel and tyrannical—"it aims to strip away from its victim all the qualities of human dignity that liberalism prizes." But once the possibility of torture motivated by these considerations is discounted, so that the only possible justification for torture is to gather intelligence in gravely dangerous situations, it becomes plausible to see "torture as a civilized, not an atavistic practice." Viewed in this way, it "might conceivably be acceptable to a liberal":

Now, for the first time, it becomes possible to think of torture as a last resort of men and women who are profoundly reluctant to torture. And in that way, liberals can for the first time think of torture dissociated from cruelty—torture authorized and administered by decent human beings who abhor what circumstances force them to do. Torture to gather intelligence and save lives seems almost heroic. For the first time, we can think of kindly torturers rather than tyrants.

Although Luban ultimately dismisses this "liberal ideology of torture," his account does demonstrate that individuals may hold different views on whether liberty requires an absolute prohibition on torture. Whilst for some the dictates of liberty require that the state never resorts to the use of torture whatever the circumstances, others construe liberty as regarding torture as a grave incursion on the integrity of the individual, but one that may be countenanced in exceptional circumstances.

Applying the balance metaphor to the debate over the use of torture in the popular ticking-bomb scenario—in which investigators are sure that an individual they have detained knows the location of a bomb which is set to explode imminently and, if it does explode, will kill hundreds of people (or more)—illustrates its inadequacy as an analytical tool. The metaphor tells us that those who support an absolute prohibition on the use of torture attach more weight to liberty than those who propose crafting exceptions to cater for such extreme cases and/or that they attach less weight to security. Both of these

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179. Id. at 1430.
180. Id. at 1436.
181. Id.
182. Id.
183. See also Michael Moore, Torture and the Balance of Evils, 23 ISR. L. REV. 280, 333 (1989) (concluding, after advancing his complex agent-relative view of morality—which, when applied to the use of torture in emergency situations, holds that the moral norm 'never torture' "applies less firmly to those who culpably cause the need for torture by planting the bomb that needs removal . . . [and] those who could remove the threatened harm at little cost to themselves . . . "—that the torture of those who possess life-saving information but refuse to divulge it (whether terrorists or not) should not flatly be banned).
conclusions would be unjustified. For example, although Luban concludes that there should be an absolute prohibition on torture, it cannot be said that he attaches less weight to security than those who favor crafting an exception for the ticking-bomb scenario. Luban argues that the scenario is an over-simplistic, seductive example that is "built on a set of assumptions that amount to intellectual fraud . . ." It stipulates that "the bomb is there, ticking away, and that officials know it and know they have the man who planted it"—conditions which in practice "will seldom be met." In other words, he contests the claim that creating an exception to the prohibition on the use of torture for ticking-bomb type situations would increase our security; in his eyes, then, he is not attaching less weight to security because any purported gains in security from creating such an exception are highly speculative, even illusory.

The assertion that those who propose creating such an exception attach less weight to liberty than those who support an absolute prohibition is equally unjustified. While the latter regard torture in all its forms as cruel and tyrannical, and so argue that liberty requires an absolute prohibition, Luban's essay demonstrates that it is possible to hold a different view of the demands of liberty. On this view, the element of tyrannical cruelty evaporates when torture is used in emergency situations of grave danger. Absent these elements of cruelty and tyranny, the use of torture, although still a grave evil, can be countenanced. The balance metaphor ignores this; it assumes that there is uniform understanding of what liberty requires, and by doing so it obscures analysis. Consider further Eric Posner and Adrian Vermeule's argument that those forms of coercive interrogation which amount to torture should be treated by the law in the same way as other coercive governmental practices (like the use of deadly force by police officers and preventive detention)—by subjecting them to a "set of [legal] regulations defined ex ante." To accuse Posner and Vermeule of attaching too little weight to liberty relative to security would be

184. There is also a further difficulty. The balance metaphor tells us that, if the relative weight attached to security increases, the balance between security and liberty should be redressed. Applying this to the issue of torture, the metaphor simply assumes that exceptions to the prohibition of torture which will have the effect of increasing security are permissible, if this is what redressing the security-liberty balance requires. It thus implicitly rejects the absolutist stance that the state should never resort to the use of torture. This is symptomatic of a broader failure; by placing all standards which are associated with liberty on one side of the balance, and weighing them against security, the metaphor ignores the prior question of whether some of these standards are so fundamental that they should be deemed non-derogable.

185. See Luban, supra note 177, at 1442.
186. Id. at 1427.
187. Id. at 1442.
188. See id. at 1427.
189. See id. at 1439.
to simply assume that the dictates of liberty demand that torture be regarded as so distinctly abhorrent that an absolute prohibition is required, and so would ignore the underlying normative question—whether liberty does require the use of torture to be singled out from these other coercive practices, which are, as Posner and Vermeule point out, also grave evils.191

It is essential that any theoretical framework for the analysis of counterterrorism policy opens up discussion of these different perspectives. If, following such discussion, it is decided that the demands of liberty do not dictate that the power in question never be vested in the state, discussion of whether the proposed counterterrorism measure should be enacted should focus on the remaining two issues in this section of the essay—the impact of the power on liberty and the necessity of regulatory safeguards. But even if it is decided that liberty does demand an absolute prohibition on the power in question, it does not follow that the power should not be enacted. The expected gain in security must be placed alongside the departure from the demands of liberty, and an assessment must be made of the importance of these respective interests. If it is felt that the security gain that will be procured by enactment of the power takes priority over the incursion on the demands of liberty then, ceteris paribus,192 the power should be enacted.

B. What Will the Impact of the Power be on Liberty?

If it is decided that liberty does not require an absolute prohibition on the power in question, the next step is to consider what impact the power in question will actually have on liberty. This too is an issue on which opinions may differ markedly, as the debate over section 215 of the USA PATRIOT Act193—the so-called library provision—illustrates. Whilst some have condemned section 215 as a grave invasion on liberty, others have claimed that it actually involves little or no incursion.

Section 215 replaced and expanded the business records provision in Title V of the Foreign Intelligence Surveillance Act (FISA).194 The FISA provision

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191. Id. at 707.
192. Other considerations, such as operational efficiency and fiscal management, may also need to be considered at this stage. For example, it has been found that one of the variables affecting the probability that a person favors targeted screening at airports is waiting time. See, e.g., W. Kip Viscusi & Richard J. Zeckhauser, Sacrificing Civil Liberties to Reduce Terrorism Risks, 26 J. RISK & UNCERTAINTY 99, 104 (2003) (finding that, given a choice between targeted screening and a random screening process involving delays for all passengers, support for targeting increased as the expected delays for all passengers rose; the probability that an individual supported targeting was nineteen percent higher when the expected delay for all passengers was 1 hour than when it was ten minutes).
193. USA PATRIOT ACT, supra note 112, at 287-88.
allowed the FBI to seek "an order authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession . . . ." Section 215 expanded this power, first, by replacing the word "records" with the far broader "any tangible things (including books, records, papers, documents and other items)," and, second, by removing altogether the limitation on the businesses which could be required to release records. It is thus a broad power, not limited to travel documentation as the FISA provision effectively was, nor to library records, as its colloquial title suggests.

Section 215 generated a great deal of comment. One of its most contentious aspects was the legal threshold for the making of an order. Under FISA it was necessary to produce "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power." Section 215 lowered this standard, instead requiring that an application for an order "specify that the records concerned are sought for an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."

196. USA PATRIOT ACT, supra note 112, at 287.
198. Also highly contentious was the gag order provision, according to which all individuals, including the recipient of the section 215 request, were prohibited from disclosing "to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section." USA PATRIOT ACT, supra note 112, at 218. This provision meant that the target of the order would never learn of its issuance (unless and until a criminal prosecution was brought). It also contained no exception for the recipient to consult with a lawyer. The Reauthorization Act now provides that the recipient may consult with an attorney "to obtain legal advice or assistance with respect to the production of things in response to the order . . ." and that such advice/assistance that has been sought need not be communicated to the FBI. USA PATRIOT ACT 2005, supra note 117, at 197. The Act also expressly provides that the recipient of the order may challenge the legality of the order, and includes enhanced oversight provisions. Id. at 198.
199. Intelligence Authorization Act, supra note 194, at 2411.
200. USA PATRIOT ACT, supra note 112, at 288.
insertion of the lower standard of relevance, this alteration was criticized for removing the requirement that the records pertain to a foreign power or an agent of one, since this permitted the collection of information about persons who are not the target of an investigation. When the USA PATRIOT Act was reauthorized in March 2006, an attempt was made to address these concerns by amending the threshold for the making of an order, so that an application for an order today must include:

[A] statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

i) a foreign power or an agent of a foreign power;

ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or

iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation . . .

The American Civil Liberties Union (ACLU) decried section 215 as "misguided, dangerous, and unconstitutional." It claimed that, by "allowing the government to search and seize your personal records or belongings without a warrant and without showing probable cause," the provision violated the Fourth Amendment. However, it is hard to reconcile this claim with Fourth Amendment jurisprudence. Although in *Katz v. United States* the Supreme Court declared that the Fourth Amendment protects "reasonable expectations of privacy," in the subsequent case *United States v. Miller* the Court held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. A seven Justice majority accordingly held that Miller—whose financial records had been obtained from his bank by the government—had no legitimate expectation of privacy because he had voluntarily conveyed the information in question to the bank and thereby

201. USA PATRIOT ACT 2005, supra note 117.
202. Id. at 196.
203. ACLU, supra note 197, at 1.
204. Id. at 7.
exposed it to the bank employees. This approach was later applied to telephone records; in *Smith v. Maryland* the Court held the Fourth Amendment does not apply where the government obtains records from a telephone company of the numbers an individual has received calls from and/or the numbers an individual has called. There was no legitimate expectation of privacy because the information had voluntarily been disclosed to the telephone company, and Smith had thereby assumed the risk that the company would reveal that information to the government. Although it may be possible to construct arguments supporting a limited reading of *Miller* and *Smith* in respect of at least some of the records covered by section 215—some commentators, for example, have argued that *Miller* and *Smith* should not apply in the context of the Internet—on a straightforward application of these cases it is difficult to sustain the claim that the section engages the Fourth Amendment. For this reason Susan Herman has recently called on the Supreme Court to renovate its “submajoritarian” approach to defining the scope of the Fourth Amendment, sketching three steps by which it might craft for itself “some meaningful role in evaluating the reasonableness of government surveillance.”

The fact that section 215 does not seem to implicate the Fourth Amendment does not settle the question of whether it can be described as liberty-diminishing. In Hohfeldian terms the Constitution and its Amendments are a list of immunities, not privileges (liberties). As Andrew Halpin has

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207. *Id.* at 442.


209. *Id.* at 744.

210. *See, e.g.*, Patricia L. Bellia, *Surveillance Law Through Cyberlaw’s Lens*, 72 GEO. WASH. L. REV. 1375, 1412 (2004) (arguing that to conclude, on the basis of *Miller* and *Smith*, that a subscriber lacks an expectation of privacy in communications an Internet service provider stores on his/her behalf would be “fundamentally inconsistent with *Miller*’s doctrinal underpinnings, with *Katz*, and with case law in analogous areas.”); Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1559 (2004) (outlining three principles which, she claims, should limit the reach of the business records cases, and proposes revising ECPA “to establish appropriate privacy protections that respect individuals’ expectations and constitutional requirements.”). *See also* O’Donnell, *supra* note 197, at 67 (proposing an alternative approach to challenging section 215, and arguing that there is a Constitutional right to information privacy, and that this “provides a plausible basis for litigants to challenge this harmful provision.”).


explained, Hohfeld in fact defined the concept privilege in two distinct ways—as the equivalent of a no-duty (where X is under no obligation to Y to act or omit to act in a certain way), and as the protection afforded by the law to permit X to do, or refrain from doing, some act. Access to, and use of, public libraries is a privilege (liberty) in the second of these two senses. As Halpin explains, a privilege in this sense is not, contrary to Hohfeld’s claim, a fundamental legal conception, since it is reducible to a set of rights with correlative duties. As far as the privilege (liberty) to access and use public libraries is concerned, one of these rights-duties concerns privacy. Although the effect of Miller and Smith seems to be that access to library records does not implicate the Fourth Amendment—something which a Justice Department apologia of section 215 has stressed—almost all states have passed legislation which protects the privacy of patrons’ library records. But opinions differed markedly on the extent of the effect that section 215 had on this right to privacy. Some, like the ACLU, denounced the provision as a grave invasion of civil liberties. For them, it posed a serious threat to First Amendment activities, allowing investigators to intrude into the world of ideas by discovering what people have been reading. They also warned that the section would have a severe chilling effect. These concerns were exacerbated still further by the removal of the requirement that the records being sought pertain to a foreign power or an agent of one—a development which critics described as a license to go on fishing expeditions through the records of individuals who are not even the target of an investigation. But these concerns were not shared by all. Others believed that the threat to First Amendment activities had been overblown, pointing out that section 215 expressly forbids investigations of a United States person which are solely based upon “activities protected by the first amendment to the Constitution of the United States.” They also stressed that section 215 had only a minimal

214. Id. Halpin also explains that the first sense of privilege is not a fundamental concept, since it is simply the negation of a duty. Id. In fact, he argues, six of Hohfeld’s conceptions are reducible in terms of the other two (rights and duties). Id. at 47.
216. Martin, supra note 197, at 289 n.37.
217. ACLU, supra note 197, at 2. See also Edgar & Walczak, supra note 119, at 27; Klinefelter, supra note 197, at 220; Martin, supra note 197, at 291.
218. ACLU, supra note 197, at 2.
219. Martin, supra note 197, at 291.
220. Id. at 300.
marginal effect on the privacy of library patrons' records, explaining that most of the state statutes protecting patrons' privacy already contained exceptions covering court orders, that investigators and prosecutors had long been able to use grand jury subpoenas to compel libraries to produce patrons' records in criminal investigations, and that since 9/11 the FBI had received information from libraries on a voluntary basis. They thus claimed that critics of the section were guilty of what Posner and Vermeule have described as a sort of baseline error: "Civil libertarians ascribe to the PATRIOT Act 'deprivations' of civil liberties as measured from some baseline set of entitlements that either never existed, or that was changed in the relevant respects long before the PATRIOT Act was passed."224

Although the previous paragraph focused on library records, since it is this aspect of section 215 which has generated the greatest comment, the basic point is of general application. While some claimed that section 215 was unjustifiably intrusive and so amounted to a sacrifice of liberty, others felt that the provision actually had little or no effect on liberty. The balance metaphor is insensitive to these different perspectives; it tells us that those who opposed section 215 attached more weight to liberty (and/or less weight to security) than proponents of the section. But in their own eyes the section's proponents were not attaching less weight to liberty than its opponents because they did not consider themselves to be advocating a sacrifice of liberty. The balance metaphor obscures this, unjustifiably equating a belief that any reduction in liberty will be minimal with a willingness to attach less weight to liberty.

Any theoretical framework for the analysis of counterterrorism policy needs to open up discussion of these different perspectives. Following such discussion, if it is decided that: (a) applying the four-step approach to security outlined earlier in the essay, the power in question will lead to a net gain in security; and (b) that the impact of the power in question on liberty will be no more than de minimis, then, ceteris paribus, the power should be enacted. The issue of whether safeguards are needed to regulate how the power is exercised will then need to be considered (see Part III.C.). If, on the other hand, it is decided that the power does involve an incursion on liberty, it does not follow that the power should not be enacted. The anticipated gain in security will need to placed alongside the diminution in liberty, and an assessment made of the

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222. See Perrine, supra note 197, at 187; Poluka, supra note 197, at 38.


importance of these interests. In making this assessment, it should be remembered that where a power will affect a particular sub-group disproportionately, an individual outwith that sub-group will be less likely to place the costs of that provision on-screen. In such circumstances, it would be easy simply to indulge fear. Every effort must be made to avoid this. If, heeding this warning, it is decided that the gain in security takes priority over the diminution in liberty, the power should, ceteris paribus, be enacted.

C. Should Safeguards be Enacted to Regulate the Use of the Power?

Although protecting individuals from abuses of state power is generally understood to be one of the dictates of liberty, opinions can vary markedly on what is needed to prevent a specified power from being abused. The starting point for discussion of whether particular safeguards should be enacted must therefore be whether they are necessary to regulate how the power in question is used. Examination of the debates over section 215 demonstrate that this question can be as (if not more) controversial than determining the impact a power will have on liberty.

Although some supported the use of the relevance standard of proof in section 215, critics urged that a more stringent legal threshold should be deployed. Some called for the restoration of the “specific and articulable facts giving reason to believe” standard that had been contained in Title V of FISA, and the ACLU even insisted that the Fourth Amendment standard of probable cause should apply. As explained above, the Reauthorization Act made some effort to address these concerns. Also of concern to the critics was subsection (c)(1) of section 215, which provided that: “Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.”

The Reauthorization Act sought to clarify this provision, by making it plain that the judge hearing the application must find that the preconditions for the making of an order have been met. Before this clarification, critics had worried that the effect of subsection (c)(1) was to eviscerate the proceedings before the FISA Court of any meaningful judicial oversight; they construed the combined effect of this subsection and subsection (b)(2) to be that the judge hearing the application would have to grant an order as long as the FBI

225. Sunstein, supra note 73, at 208.
226. See, for example, the proposals that were contained in the SAFE Act (usefully summarized in Edgar & Walczak, supra note 119, at 31).
227. ACLU, supra note 197, at 17.
228. USA PATRIOT ACT, supra note 112, at 288.
229. USA PATRIOT ACT 2005, supra note 117, at 196.
specified that the requirements of the section were met. For critics, this limited degree of judicial oversight, coupled with the relevance standard of proof, meant there was a real possibility that the section 215 power could be misused. Others, by contrast, dismissed the critics' concerns as ill-founded. Underlying these different points of view were different perspectives on three important issues: what constitutes an improper use of state power; how likely it is that state power will be abused; and what is needed to prevent abuses from occurring.

First, what constitutes an improper use of state power? The review of the FBI's use of section 215 orders conducted by the Justice Department's OIG found two instances of "improper use." In the first instance, the field office had obtained an order for a pen register/trap and trace device on a telephone that was no longer used by the subject, which resulted in the FBI receiving unauthorized information between March 2005 and October 2005. The FBI explained that the case agent had inadvertently overlooked documents in the file indicating that the telephone number no longer belonged to the target of the investigation. A new case agent discovered the problem, reported the overcollection, and sequestered and destroyed the improperly collected data. In the second instance, the FBI inadvertently collected certain telephone numbers pursuant to a pen register/trap and trace order because the telephone company had not advised the FBI that the target had discontinued using the telephone line until several weeks after the fact. During this time the telephone number had, for a short period, been issued to someone else. The FBI identified the improperly collected information, removed it from its databases, and provided it to the Department's Office of Intelligence Policy and Review (OIPR). In his response to the report, former Attorney-General Alberto Gonzales challenged the description of these incidents as "improper uses" of the section 215 authority—stressing that in both cases the errors were inadvertent, had been identified and reported to the Intelligence Oversight Board and to the Court and that the data collected had been sequestered or destroyed—and concluded that the OIG's "characterization is not apt." So while for the OIG

230. ACLU, supra note 197, at 5.
231. Id. at 13.
233. Id. at 41–42.
234. Id. at 42.
235. Id.
236. Id. at 43.
238. Id. at 44.
239. Id. at app.
the over collection of data constituted an improper use of state power, for the Attorney-General the inadvertent nature of the over collection, coupled with its subsequent detection and rectification, purged the mistake of any impropriety.

Second, the likelihood of state power being abused. Critics have stressed the possibility that the FBI could abuse the power vested in it by section 215. After detailing instances of previous abuses of other powers, the ACLU has posed the question “can we really afford to let this agency police itself?” while Timothy Edgar and Witold Walczak have stated that “[l]aw enforcement agents make mistakes . . . and, as we know from history, can misuse their powers.” The insinuation that the FBI cannot be trusted to exercise its investigative powers responsibly was strongly rejected by former Attorney-General John Ashcroft:

If you were to pay too much attention to some in Washington you might conjure up harrowing images of agents working around the clock. Like in the X-Files, they are raincoated, dark suited, and sporting sunglasses. But unlike the X-Files, their subjects aren’t treacherous space aliens but readers and librarians. And no one escapes their grinding interrogation. In a dull Joe Friday monotone, they ask: ‘Why were you at the library? What were you reading? Did you see anything suspicious? Just the facts, ma’am. Just the facts.’ This image is fanciful, but the hysteria behind it is very real. The fact is, with just 11,000 FBI agents and over a billion visitors to America’s libraries each year, the Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans. No offense to the American Library Association, but we just don’t care.

Michael O’Donnell described Ashcroft’s approach as “bel[y]ing an American ethos of healthy skepticism of governmental interference in citizens’ liberty—one that Mr. Ashcroft’s Justice Department has provided ample grounds for maintaining.” By contrast, Michael McCarthy has suggested that the powers conferred by the USA PATRIOT Act could have been the result of a “measured conclusion that . . . changed assumptions about the nature of the threat to domestic security . . . [meant that] prior political conceptions about executive authority were no longer apt.” As these statements illustrate, the contrasting views on the likelihood of the power conferred by section 215 being

240. ACLU, supra note 197, at 9, 11.
241. Edgar & Walczak, supra note 119, at 22.
242. Ashcroft, supra note 168.
abused were influenced by different perspectives of executive power. While Ashcroft's comments evidence a benevolent view of the FBI, critics adopted a distrustful stance, urging the possibility of abuse.

Third, what is needed to prevent abuses from occurring? While critics called for a more stringent legal threshold and enhanced judicial oversight, others pointed to extra-legal constraints on the exercise of the section 215 power. Paul Rosenzweig, for example, not only asserted that the critics overlooked the "second order effects of judicial review"—in particular the deterrent effect of the obligation to swear an oath of truthfulness, with the attendant perjury penalties for falsity— but also claimed that their concerns "presuppose[d] the absence of any internal, administrative mechanisms in order to check potential misuse of the subpoena authority." The influence of these bureaucratic constraints was also emphasized by Michael Woods, who stated that "FBI counter-intelligence actually functions within a highly regulated environment, and the language of § 215 explicitly invokes such oversight." In a similar vein, Amitai Etzioni has argued that accountability mechanisms should play a primary role in the regulation of new technologies.

Through an understanding of the different opinions on these three issues, and an appreciation of the interplay between them, one is able to see that the different views on the appropriate level of the legal threshold and degree of judicial oversight were influenced by different perspectives on how best to satisfy the liberal concern to prevent abuses of state power. Critics considered the safeguards in section 215 to be inadequate. Adopting a distrustful attitude towards executive power, they asserted that there was a grave danger that FBI agents would abuse the widely-drafted power and that the FBI's internal processes for preventing any such abuses would prove ineffectual, and accordingly insisted that greater legal constraints on the section 215 power were necessary. Such constraints would also safeguard against the inadvertent over collection of data, something which they insisted should never occur and which after-the-fact efforts to rectify cannot compensate for. In stark contrast to the critics, someone who believes that the FBI will exercise its powers responsibly will regard the danger of individual agents intentionally abusing their authority as slight. Plus, if they have confidence in the FBI's internal processes, they will expect instances of intentional abuse to be weeded out before an application for a section 215 order is approved. The same applies to

245. Rosenzweig, supra note 197, at 694.
246. Id.
247. Woods, supra note 120, at 66.
249. See, e.g., ACLU, supra note 197, at 1.
250. See, e.g., id. at 2.
inadvertent mistakes. Whilst even the most ardent supporter of the FBI would concede that inadvertent mistakes do sometimes happen, they would expect any such mistakes to be swiftly identified. And even if it was discovered that data had been inadvertently collected without lawful authority, this can be rectified by acknowledging the mistake and dealing with the mistakenly collected data accordingly. On this view, a heightened legal threshold and enhanced judicial oversight are unnecessary.

Any framework for discussion of counterterrorism policy must engage with these different perspectives. Taking as their starting point the view that executive power should be seen with suspicion, some jurists have expounded what Kenneth Culp Davis labeled the "extravagant version of the rule of law."251 The foundation of this version of the rule of law is the belief that government, in all its actions, should be bound by rules fixed and announced beforehand—a sentiment well captured by the slogan "wherever law ends, tyranny begins."252 Given the stark reality that no legal system can operate without significant discretionary power,253 proponents of the extravagant version of the rule of law seek to eliminate as much discretion as possible from the legal sphere.254 Beyond this they urge the need to "bring such discretion as is reluctantly determined to be necessary within the 'legal umbrella' by regulating it by means of general rules and standards and by subjecting its exercise to legal scrutiny...."255 However, this approach proceeds on the mistaken assumption that there is a neat dichotomy between rules and discretion. As Keith Hawkins has explained, "[d]iscretion is heavily implicated in the use of rules,"256 and "rules enter the use of discretion: much of what is often thought to be the free and flexible application of discretion by legal actors is in fact guided and constrained by rules to a considerable extent. These rules, however, tend not to be legal, but social and organizational in character."257 The extravagant version of the rule of law also overlooks the fact that the exercise of discretion may be beneficial. It allows complex issues to be addressed on a case-by-case basis, and avoids undue rigidity. Moreover, the various dangers associated with discretionary decision-making can only be expressed in general terms, and so, as Nicola Lacey warns, their application in

252. JOHN LOCKE, TWO TREATIES OF GOVERNMENT, § 202 (1690).
253. DAVIS, supra note 251, at 33 (citing FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 213 (1960)).
254. DAVIS, supra note 251, at 33.
257. Id. at 13.
a particular context should not be accepted as "unproblematic truth." Rather, one must engage in the "social science project of detailed examination of discretion in particular contexts informed by an appreciation of the agents' own understandings and the experiences of clients and other participants" in order to determine whether or not any of these concerns apply in a particular context. The balance metaphor repeats many of the mistakes of the extravagant version of the rule of law. To say, regardless of context, that the tighter the legal threshold one supports, the more weight one attaches to the value of liberty, is to assume that there is always a danger of abuse and that legal rules are always necessary to guard against that danger. Yet, as has been explained, in a discussion of whether a particular safeguard should be enacted it is quite possible that those opposing the safeguard do so because they regard it as unnecessary. This might be because they believe the dangers warned of by the safeguard's proponents are in fact slight—perhaps the result of a "libertarian panic"—or that they believe that there are already sufficient extra-legal constraints in place to regulate how the power is exercised. Issues such as these need careful scrutiny. Instead of acting as a catalyst for examination of these issues, the balance metaphor obscures them.

If it is concluded that a specified safeguard is not necessary to regulate how a power is used, it follows that—in the absence of other reasons to implement it—the safeguard should not be introduced. And even if it is agreed that a particular safeguard would provide meaningful regulation, this does not necessarily mean that it should be implemented. First, an assessment would have to be made of the repercussions introduction of the safeguard would have on security, using the four-step approach outlined in Part II above. For whilst (as argued in Part II.C.1) stricter procedural safeguards may sometimes

258. Lacey, supra note 255, at 371.

259. Id.

260. The metaphor also obscures analysis by depicting government as acting on our behalf in striking the right balance, thereby suggesting a beneficent view of the state. More generally, studies have found that public trust in government increased in the aftermath of 9/11. Virginia A. Chanley, Trust in Government in the Aftermath of 9/11: Determinants and Consequences, 23 POL. PSYCHOL. 469, 469 (2002). And in the immediate aftermath of the attacks, the media tended to unquestioningly support the government's response to them. Lisa Finnegan Abdolian & Harold Takooshian, The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion, 30 FORDHAM URB. L.J. 1429, 1436–37 (2003).

261. Adrian Vermeule, Libertarian Panics, 36 RUTGERS L.J. 871, 871 (2005). Vermeule explains that the heuristics which can cause security panics are also capable of producing libertarian panics—"Panic can produce a widespread and unjustified suspicion of governmental responses to genuine security risks." Id. at 875.

262. For example, if exercising the power in question involves a significant invasion of liberty, then tighter preconditions for the exercise of the power could be supported if the effect of the preconditions would be to reduce use of the power. As explained in supra Part II.C.1, it is also possible that the introduction of a safeguard could increase security.
have the potential to increase security, in other situations they might result in reductions in security, perhaps by reducing the expediency with which the power in question can be exercised, or by having a chilling effect on investigators’ willingness to employ the power in question.\(^{263}\) They might also reduce security by making it difficult, perhaps nigh impossible, for an investigator to resort to using the power unlawfully in situations where s/he feels there is an urgent need to do so.\(^{264}\) Bruce Ackerman has been criticized for failing to recognize this point in *Before the Next Attack*; Adrian Vermeule has accused him of being “obsessed with minimizing executive abuses to zero, no matter what the collateral costs,” adding that “executive abuses should be optimized, not minimized; they are an inevitable by-product of the optimal security regime and should be weighed against the offsetting benefits, such as saving people’s lives.”\(^{265}\) Legal journalist Stuart Taylor Jr.’s statement that “I would take some FBI abuse to stop a few bombings that kill hundreds of people, let alone thousands of people”\(^{266}\) expresses a similar sentiment.

As well as considering the security repercussions, thought should also be given to whether there are liberty-based objections to introducing the proposed safeguard. Whilst enhanced safeguards might help regulate the use of the power, the incidental effect could be to legitimate, and encourage greater use of, a power that involves a grave invasion of liberty.\(^{267}\) A useful example is Alan Dershowitz’s suggestion that judicial torture warrants be introduced, the granting of which would allow the use of non-lethal torture in ticking-bomb

\(^{263}\) See, for example, Amitai Etzioni’s assertion:

Deficient accountability opens the door to government abuses of power, and excessively tight controls make agents reluctant to act. Thus, a case can be made that under most of Hoover’s reign, the FBI was insufficiently accountable. One could also argue that under the new rules adopted following the Church Commission report, the FBI was excessively limited in its ability to conduct communications surveillance. Agents, fearing reprimands and damage to their careers, may have been too reluctant to act.


\(^{264}\) To borrow the title of Michael Ignatieff’s book, it could be argued that the unlawful use of a power in such situations would be “the lesser evil.” See *MICHAEL IGNA\TIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004). The malleability of this phrase has led some to argue that Ignatieff’s book offers an intellectual apologia for the practices of the Bush administration. For a rebuttal of this claim, see Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134 (2005).

\(^{265}\) Vermeule, *supra* note 60, at 643.

\(^{266}\) Stuart Taylor, Jr., Panel Discussion, *The USA PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties after September 11?*, 39 AM. CRIM. L. REV. 1501, 1510 (2002).

\(^{267}\) It has been pointed out that “enjoying the benefits of due process does not rule out ending up in Hell.” ANDREW RUTHERFORD, *PRISONS AND THE PROCESS OF JUSTICE* 25 (1984) (referring to an observation from legal scholar Alexander Bickel).
Dershowitz argues that, since "a formal, visible, accountable and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under-the-radar screen nonsystem" the "formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects." This claim has been doubted by Oren Gross: "Realizing that courts are likely to assume a highly deferential attitude when asked to issue torture warrants, and seeking to have such warrants as a shield against potential claims and charges, officials will have positive incentives to take an increasing number of cases to the courts."

Gross asserts that Dershowitz failed to consider an alternative possibility—to maintain an absolute legal prohibition on torture whilst recognizing that there may be "extreme" or "catastrophic" cases where public officials may act extralegally. In such cases, he argues, the public should decide ex post facto whether to ratify the official's actions. Since in such a system "officials must put themselves in the line of fire and act at their own peril," torture will be resorted to less often than in a system of ex ante judicial warrants which "shifts the burden and risk to the courts." What this exchange illustrates is that it is possible to opine that, on balance, the dictates of liberty militate against safeguards which it has been agreed will regulate how a power is used. While Gross agrees that the procedure for obtaining a judicial torture warrant would regulate how the power to torture is used—in the sense that he considers it unlikely that in a system of ex ante judicial torture warrants officials would torture a suspect without first obtaining a warrant—in his view the dictates of liberty require that a judicial torture warrant not be introduced, for such a system would cause torture to be resorted to more frequently.

So if it is agreed that a particular safeguard will regulate how the power in question is used, consideration should then turn to whether the safeguard has costs in terms of security and/or liberty. If so, it must then be asked whether the

269. Id.
271. Id. at 1535.
272. Id. at 1535-36. Gross' proposal is similar to the one advanced by Henry Shue. See Henry Shue, Torture, 7 PHILO. & PUB. AFF. 124, 125 (1978) (arguing that, whilst the legal prohibition on torture should not be relaxed, it should be open to investigators to violate this prohibition in exceptional cases. Afterwards, the torturer should then be required to "convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied"). Id. at 143.
274. Id. at 1538-40.
275. Id. at 1541-42.
liberal concern to prevent abuses of state power should take priority over these other costs.

IV. CONCLUSION

The balance metaphor's image of a set of scales fails to capture the complexity of the task of analysing counterterrorism policy. One of the principal reasons for this is that it assumes a shared understanding of what each pan of the metaphorical scales represents, and so fails to engage with the variety of perspectives individuals hold on what the demands of security and liberty actually are, and on how these demands would best be met. A new framework, which opens up discussion of these different perspectives, is thus needed. The appendix to this essay sets out such a framework. Couched in the form of a flow diagram, the framework begins by setting out as a necessary precondition for the enactment of any proposed counterterrorism measure the requirement that it will prevent or impede terrorist activity. This reflects this essay's argument that new counterterrorism laws should not be enacted on the basis that they will increase subjective security. The next box incorporates the four-step approach to objective security outlined in Part II.C. The demands of objective security only support the enactment of a measure if the effect it has in preventing/impeding terrorist activity is greater than the sum of: any incidental effects the measure will have which will diminish security; any opportunity costs in terms of other measures to combat the terrorist threat; and any opportunity costs in terms of efforts to combat other threats to our security. If this is the case attention then turns to liberty. The first question—whether liberty demands an absolute prohibition on the power in question—opens up discussion of situations like the use of torture in emergency situations of grave danger. Part III.A showed that, whilst some feel that liberty requires an absolute prohibition on the use of torture, it is possible to construe the demands of liberty differently, so that in exceptional circumstances it is regarded as a grave incursion on liberty, but one which may be countenanced. If liberty is construed as not requiring an absolute prohibition on the power in question, it must then be asked what the power's actual impact on liberty will be. This too is an issue on which opinions may diverge markedly, as the discussion of section 215 of the USA PATRIOT Act demonstrated. If it is concluded that liberty does require an absolute prohibition on the power in question, or that the power will have a significant impact on liberty, it must be asked whether the security gain that will be procured takes priority over the incursion on liberty. If not, the power should not be enacted. If so—or if it is decided that the power will have no more than a de minimis impact on liberty—consideration then turns to the issue of safeguards. Here the first question is whether it is possible to devise safeguards to regulate how the power is used. For many
counterterrorism powers, such as those in the realm of intelligence, it may simply not be possible to adopt legal regulatory safeguards. Where this is the case, it must be asked whether the lack of safeguards will result in the power being abused. If not, the power should be enacted. If so, it may be that the potential for the power to be abused means that it should be abandoned altogether. Where it is possible to devise regulatory safeguards, the next question is whether the power will be abused without these safeguards. As the discussion of section 215 in Part III.C illustrated, this can be a contentious issue which is obscured by simple questions about how much weight a person attaches to liberty (relative to security). Even if it is decided that the power will not be abused without the safeguards, it may be that there are other reasons for enacting them. For example, the discussion of NSLs in Part II.C.1 showed that tightening the legal threshold for the exercise of an investigative power may have security benefits. Where there are reasons for enacting the safeguards, it must then be asked whether the safeguards have any security related costs (such as reducing the expediency with which the power in question can be exercised or exerting a chilling effect on investigators’ willingness to employ the power) and/or any liberty related costs (e.g., the discussion of judicial torture warrants in Part III.C showed that, where the enactment of safeguards will result in more frequent recourse to a power, the dictates of liberty may militate against their enactment). If so, it must be asked whether the reasons for enacting the safeguards take priority over the costs. If they do (or if the safeguards do not have any costs) the power should be enacted with the safeguards in question. If not, it may be that the lack of appropriate safeguards means that the power should be abandoned altogether. Here the risk of the power being abused must be placed alongside the preventive/impedimentary effect the power will have on terrorist activity, and an assessment made of the relative importance of these concerns.

Whilst primarily aimed at the legislative task of drafting new counterterrorism laws, the proposed framework could also be applied at other levels, e.g., executive decision-making. It could, for example, be used to explicate Gross’ suggestion that in extreme situations officials should resort to the use of torture—the framework could be applied to the legislative decision whether to condone the use of torture, and then applied again to the extralegal decisions of individual officials to resort to torture. It should also be pointed out that the framework is designed to be used in those areas of counterterrorism policy which raise issues relating to liberty, and so is not intended to be used in those areas—such as port security—which have little or no bearing on liberty. Moreover, even where liberty is in issue, other considerations such as

operational efficiency and fiscal management can also influence counter-terrorism policy,\textsuperscript{277} and so may need to be factored in at appropriate stages of the flow diagram.

Political opponents commonly seek to outflank one another by proposing the sternest, most biting, counterterrorism initiatives. Ironically, in this climate protests from civil liberties organisations can be perceived as desirable, for they serve to underline the strong-handedness of the proposed measures. The presentation of security and liberty as binary opposites epitomized by the image of a set of scales thus has a certain political appeal. Nonetheless, the balance metaphor is inadequate as an analytical framework. A new approach is needed. The framework advanced in this essay should be adopted.

\textsuperscript{277} \textit{See supra} text accompanying note 192.
V. APPENDIX: THE ALTERNATIVE FRAMEWORK FOR ANALYSIS OF COUNTERTEERRORISM POLICY

Will the measure prevent or impede terrorist activity?  
If no → Do not enact

Is the measure's preventive/impedimentary effect greater than the sum of:
(a) any incidental effects of the proposed measure which will result in diminutions in security;
and (b) any opportunity costs in terms of other measures to combat the terrorist threat;
and (c) any opportunity costs in terms of our efforts to combat other threats to our security?

If yes → Do not enact
If no

Do the dictates of liberty demand an absolute prohibition on the power in question?
If yes → Do not enact
If no

What impact will the power actually have on liberty?

The impact will be de minimis

Is it possible to devise safeguards to regulate how the power is used?
If yes → Do not enact
If no

Will the power be abused if regulatory safeguards are not enacted?
If yes → Do not enact
If no

Are there other reasons in terms of security and/or liberty for enacting the safeguards?
If yes → Do not enact
If no

Do the reasons for enacting the safeguards (preventing abuse and/or any other security/liberty related benefits) take priority over the safeguards' security/liberty related costs?
If yes → Do not enact
If no

The power should be enacted with the regulatory safeguards

Do the potential abuses of the power mean that it should be abandoned altogether?
If yes → Do not enact
If no

Will the lack of regulatory safeguards result in the power being abused?
If yes → Do not enact
If no

Are there other security/liberty related costs?
If yes → Do not enact
If no

The power should be enacted without regulatory safeguards

Given the lack of appropriate safeguards, should the power be abandoned altogether?
If yes → Do not enact
If no