

## The Unbalanced Imagery of Anti-Terrorism Policy

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### Recommended Citation

Macdonald, Stuart (2009) "The Unbalanced Imagery of Anti-Terrorism Policy," *Cornell Journal of Law and Public Policy*: Vol. 18: Iss. 2, Article 5.

Available at: <http://scholarship.law.cornell.edu/cjlpp/vol18/iss2/5>

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# THE UNBALANCED IMAGERY OF ANTI-TERRORISM POLICY

Stuart Macdonald\*

*Balancing the competing demands of security and liberty is commonly said to be the central task of anti-terrorism policy. This Essay begins by distinguishing between the two ways in which the notion of balance is presented—the trade-off thesis and the image of a set of scales—and argues that each is flawed as an analytical aid. The Essay then proceeds to show further limitations of the balancing discourse, noting how it excludes any scope for consideration of issues relating to resource allocation and the effects of a particular measure on security and liberty. Additionally, this balancing discourse focuses on only one strategy for responding to terrorism. The Essay concludes by warning against the use of imagery in complex debates and by asserting that balancing security and liberty is not the sole, or even the central, task of anti-terrorism policy.*

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## INTRODUCTION

Contemporary debates about anti-terrorism policy commonly present security and liberty as competing values. Balancing the demands of these values is said to be the central task facing policy-makers. Such

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thinking holds sway on both sides of the Atlantic. In the United States, the final report of the 9/11 Commission warned that “while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right.”<sup>1</sup> In the United Kingdom, the Government’s review of the criminal justice system in 2006 stressed the need for the system to keep pace with new challenges—including the threat of international terrorism—and concluded that the existing system was deficient because it was imbalanced in favor of liberty.<sup>2</sup>

A number of critiques of this balancing discourse are already in existence. For example, critics have suggested that the binary opposition of security and liberty obscures their complex relationship. A number of commentators have stressed that these values are mutually interdependent, with some urging that security is a necessary prerequisite for liberty and others claiming that the erosion of civil liberty safeguards will jeopardize our security against the state.<sup>3</sup> Others have even suggested that the dichotomization of security and liberty threatens to undermine the very concept of human rights.<sup>4</sup> The balancing discourse has also been criticized for obscuring the distribution of proposed changes in security and liberty. In practice, the diminutions in liberty imposed by anti-terrorism provisions will affect only a small proportion of the population. This reality, coupled with the fact that these individuals are likely to be from ethnic minorities and thought of as presumptive offenders, means that it is important to consider the communal interest in the protection of civil liberties against the demands of security.<sup>5</sup> Furthermore, commenta-

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<sup>1</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 394 (2004).

<sup>2</sup> See HOME OFFICE, REBALANCING THE CRIMINAL JUSTICE SYSTEM IN FAVOUR OF THE LAW-ABIDING MAJORITY: CUTTING CRIME, REDUCING REOFFENDING AND PROTECTING THE PUBLIC 12 (2006), <http://www.homeoffice.gov.uk/documents/CJS-review.pdf> (then follow “CJS Review – English”) (“Only by continuing to look at the whole system together will we be able to rebalance the criminal justice system in favour of the law-abiding majority.”).

<sup>3</sup> See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 155 (2002); Viet D. Dinh, *Foreword: Freedom and Security after September 11*, 25 HARV. J.L. & PUB. POL’Y 399, 406 (2002); Tamar Meisels, *How Terrorism Upsets Liberty*, 53 POL. STUD. 162, 162–65 (2005); Jeremy Waldron *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191 (2003).

<sup>4</sup> See generally Conor Gearty, *Terrorism and Human Rights*, 42 GOV’T & OPPOSITION 340 (2007) (discussing the impact of terrorism on human rights); Gerd Oberleitner, *Porcupines in Love: The Intricate Convergence of Human Rights and Human Security*, 6 EUR. HUM. RTS. L. REV. 588 (2005) (examining the interplay between the concepts of human rights and human security).

<sup>5</sup> See generally Philip A. Thomas, *9/11: USA and UK*, 26 FORDHAM INT’L L.J. 1193 (2003) (analyzing whether the responses to September 11th constitute criminal justice efficiency); Waldron, *supra* note 3; Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J. L. & SOC. 507 (2005) (advocating continued use of structural and procedural safeguards to protect the balance between security and human

tors have suggested that balancing may not be appropriate in the realm of civil liberties because it is consequentialist—it assumes that an increase in the risk to security justifies a commensurate diminution in liberty. And while one might respond to this notion by arguing that rights are at stake on both sides of the balance since potential victims have rights too, this argument merely raises complex philosophical questions about theories of conflicting rights—issues which the balancing discourse is ill-equipped to deal with.<sup>6</sup>

The aim of this Essay is to add to this literature regarding the balancing discourse in two ways. Part I distinguishes two formats in which the notion of balance is presented—the trade-off thesis, which presents security and liberty as competing values so that more of one necessarily means less of the other, and the metaphorical image of a set of scales, where one pan represents security and the other represents liberty. Part I explains why it is important these different presentations of the notion of balance are distinguished and shows why each is inadequate as a tool for analyzing anti-terrorism policy. Part II argues that the analytical frameworks presented by both the trade-off thesis and the image of a set of scales are too narrow in their scope. This obscures an understanding of, and hinders engagement with, issues that are of fundamental importance in contemporary anti-terrorism policy.

## I. THE TRADE-OFF THESIS AND THE IMAGE OF A SET OF SCALES

In his book *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Judge Richard Posner claims that following 9/11 the relative weights of security and liberty changed, resulting in a “disequilibrium in the existing system of constitutional rights.”<sup>7</sup> Posner states that the appropriate response in such circumstances is to “restrike the balance” between security and liberty by calibrating the scope of those rights which could be asserted against government measures for protecting national security.<sup>8</sup> In any particular case, this is done by locating “the point at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty

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rights); Ronald Dworkin, *Terror & the Attack on Civil Liberties*, N.Y. REV. BOOKS, Nov. 6, 2003, at 37; Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, Feb. 28, 2002, at 44.

<sup>6</sup> See Waldron, *supra* note 3; see also Anastassia Tsoukala, *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies*, 54 POL. STUD. 607 (2006) (similarly arguing that since both security and liberty can be couched in terms of freedoms, insisting on the primacy of democratic freedoms does not advance the civil libertarian cause).

<sup>7</sup> RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 147 (2006).

<sup>8</sup> See *id.* at 31.

and a slight contraction would subtract more from personal liberty than it would add to public safety.”<sup>9</sup> This, Posner states, is the “point of balance.”<sup>10</sup> The image which he uses to depict this suggestion is a set of scales.<sup>11</sup> One pan of the scales contains liberty and the other contains security.<sup>12</sup> As the weights of the respective interests change, the balance needs and receives readjustment.<sup>13</sup>

The problem with Posner’s use of this imagery, however, is its disparity with his description of how to locate the point of balance. According to the description, in order to resolve an imbalance in favor of liberty, it is necessary to sacrifice some liberty for an increase in security (and vice versa). In other words, the description assumes a trade-off between security and liberty—what one commentator has described as “a hydraulic relationship between human rights safeguards and the promotion of security, that is that as one goes up the other must go down.”<sup>14</sup> This does not tally with the imagery Posner uses because the metaphor of a set of scales does not assume a trade-off between security and liberty. It is possible to add to or subtract from the contents of one pan in a set of scales without altering the contents of the other pan. This means that where the two pans are imbalanced, it is unnecessary to add to one pan and subtract from the other in order to redress the imbalance.

For example, suppose one unit of either security or liberty confers one unit of welfare. Prior to 9/11, one pan of the metaphorical scales contained twelve units of security and the other contained twelve units of liberty. So there was a balance—the security and liberty pans conferred an equal quantity (twelve units) of welfare. Following 9/11, the weight attached to security increased, so that now one unit of security only confers 0.5 units of welfare.<sup>15</sup> Since the twelve units of security now only confer six units of welfare, there is an imbalance in favor of liberty.<sup>16</sup> One possible way to redress this would be the method envisaged by Posner—to trade off some liberty for increased security. If four units of liberty were traded off for four units of security, the result would be equal quantities of welfare (eight units of liberty equals eight units of welfare, as does sixteen units of security).

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at 148.

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> Andrew Ashworth, *Security, Terrorism and the Value of Human Rights*, in *SECURITY AND HUMAN RIGHTS* 203, 208 (Benjamin J. Goold & Liora Lazarus eds., 2007).

<sup>15</sup> Since the value attached to security has increased, more units of security are required to attain the same level of welfare.

<sup>16</sup> The attacks of 9/11 did not change our level of security overnight, though it did change our perception of our level of security.

But a balance could be achieved in other ways. One approach would be to increase the number of units of security without altering the number of units of liberty. In our example, it is possible to restrike a balance by adding twelve units to the security pan while leaving the number of units of liberty unchanged, since both sides of the scales would then confer twelve units of welfare. Alternatively, instead of a trade-off, a balance could be achieved by changing the number of units of both security and liberty in the same direction. Simultaneously increasing the number of units of security by sixteen to twenty-eight and increasing the number of units of liberty by two to fourteen would strike a balance, since both sides of the scales would then confer fourteen units of welfare. Thus, there is a disparity between Posner's description of how to restrike a balance, which implies the necessity of trading off liberty for security (and vice versa), and the image he uses to illustrate this. In short, his metaphorical scales are inadequate to convey his position.

Therefore, this portion of the Essay considers these two aspects of Posner's work separately. The first part considers his description of how to balance security and liberty—the trade-off thesis. It argues that the assumption of security and liberty existing in an inverse hydraulic relationship is unduly simplistic, and consequently obscures discussion of anti-terrorism policy. The second part focuses on the image of a set of scales. Since this metaphor does not rest on the assumption of an inverse hydraulic relationship—adding to or subtracting from one pan of a set of scales does not affect the contents of the other pan—the second part considers whether the metaphor might be a useful tool for analyzing anti-terrorism policy.

#### A. *The Trade-Off Thesis*

In their book, *Terror in the Balance: Security, Liberty, and the Courts*,<sup>17</sup> Eric Posner and Adrian Vermeule also advance the thesis that there is a trade-off between security and liberty.<sup>18</sup> Using the welfare economics concept of a Pareto frontier—a frontier which identifies a range of points at which no win-win improvements are possible—they claim that there is a “security-liberty frontier.”<sup>19</sup> At this frontier “any increase in security will require a decrease in liberty, and vice versa. The problem from the social point of view is one of optimization: to choose the point along the frontier that maximizes the joint benefits of security and liberty.”<sup>20</sup> Following an event like 9/11, the value placed on security

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<sup>17</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

<sup>18</sup> *Id.* at 21.

<sup>19</sup> *Id.* at 26–28.

<sup>20</sup> *Id.* at 26–27.

increases, so “a rational and well-motivated government will then trade off some losses in liberty for greater gains in increased security.”<sup>21</sup>

The trade-off thesis which Posner describes and which Posner and Vermeule advance rests on two suppositions. The first is that an anti-terrorism measure affecting either security or liberty will also affect the other. Posner and Vermeule defend this supposition by stating that, while “[i]n some situations, rational policymakers can increase security at no cost to liberty, or increase liberty at no cost to security,” it is “plausible to assume that advanced liberal democracies rarely overlook such opportunities.”<sup>22</sup>

Practical examples suggest, however, that it is unjustifiably optimistic to assume that governments seize almost all opportunities to increase security in ways which do not diminish liberty. Port security is one example. Benjamin and Simon have highlighted the vast number of containers that enter the U.S. every year—as many as nine million in 2004.<sup>23</sup> Yet, ninety-five percent of these are not inspected, leading one official to describe them as “the potential Trojan [H]orse of the 21st Century.”<sup>24</sup> Benjamin and Simon describe the Container Security Initiative, under which cargoes are inspected in foreign ports before they depart for the United States, as a “superb concept,” but note the lack of a “workable plan to include ports in poor countries, from which terrorists are most likely to ship their cargoes” and the fact that “only 597 of the 5,000 companies whose applications to the program have been accepted have actually been checked out.”<sup>25</sup>

Other similar examples include efforts to safeguard nuclear materials and materials that could be turned into biological weapons. With respect to the latter, Benjamin and Simon agree with the statement of Richard Falkenrath, former Deputy Homeland Security Adviser, that “there’s no area of homeland security in which the administration has made more progress than bioterrorism and none where we have further to go.”<sup>26</sup> With respect to the former, they explain that “Nuclear terrorism can be avoided . . . . The key is securing loose nuclear material, but current efforts along this path need to be invigorated enormously, some-

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<sup>21</sup> *Id.* at 27.

<sup>22</sup> *Id.* at 26.

<sup>23</sup> DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE GLOBALIZATION OF JIHAD* 249 (2005).

<sup>24</sup> Robert C. Bonner, Commissioner, Customs and Border Protection, Remarks before the Council on Foreign Relations (Jan. 11, 2005), *available at* [http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches\\_statements/archives/2005/01112005\\_foreign\\_rel.xml](http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2005/01112005_foreign_rel.xml) (last visited Mar. 12, 2009).

<sup>25</sup> BENJAMIN & SIMON, *supra* note 23, at 250.

<sup>26</sup> *Id.* at 248.

thing that does not look likely in the near term.”<sup>27</sup> In spite of his criticisms of the war on terror and his assertion that the likelihood of terrorists acquiring nuclear weapons is very low—not least because of the enormous practical difficulties involved in building a nuclear device capable of producing mass destruction—John Mueller agrees that the destructive capacity of nuclear weapons demands that the world’s supply of fissile material be carefully controlled.<sup>28</sup> He also urges the importance of protecting vulnerable targets like chemical plants.<sup>29</sup> Pointing to the alleged sabotage of a chemical plant in Bhopal, India, in 1984, and the way in which, on 9/11, existing objects were transformed into weapons, he warns that chemical plants must be secure from “deliberate and diabolical manipulation by knowledgeable and dedicated insiders.”<sup>30</sup>

Experience also suggests that it is unrealistic to assume that governments will rarely overlook opportunities to increase liberty in situations where doing so involves no decrease in security. For example, in December 2004, the House of Lords held that the power under Part IV of the Anti-Terrorism, Crime and Security Act of 2001<sup>31</sup> (ATCSA) to indefinitely detain foreign nationals suspected of being terrorists—a power that the British Parliament created in the aftermath of 9/11—was incompatible with the European Convention on Human Rights<sup>32</sup> (ECHR).<sup>33</sup> While Article 15 of the ECHR gives Member States a limited right to derogate from some of the Convention’s articles during times of war or other public emergencies threatening the life of the nation, the majority of the Law Lords ruled in favor of quashing Parliament’s derogation to the Article 5 right to liberty.<sup>34</sup> Although a majority of the Law Lords were willing to accept the existence of a public emergency threatening the life of the nation,<sup>35</sup> they ultimately held that the power of indefinite

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<sup>27</sup> *Id.* at 133; see also GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 67–86 (2004).

<sup>28</sup> JOHN MUELLER, OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM 15–17 (2006).

<sup>29</sup> See *id.* at 20.

<sup>30</sup> *Id.*

<sup>31</sup> Anti-Terrorism, Crime and Security Act, 2001, c. 24 (U.K.).

<sup>32</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222.

<sup>33</sup> A v. Secretary of State for the Home Department, [2004] UKHL 56 (appeal taken from Eng.).

<sup>34</sup> Of the nine Law Lords, only Lord Walker upheld the Human Rights Act 1998 (Designated Derogation) Order 2001 (Statutory Instrument 2001/3644). *Id.* ¶ 194, at 85.

<sup>35</sup> Lord Hoffman alone held that there was no public emergency threatening the life of the nation. *Id.* ¶ 96, at 52. On this issue, Lords Bingham, Scott, and Rodger confessed to “misgiving,” “very great doubt,” and “hesitation” as to whether there was a public emergency threatening the life of the nation. *Id.* ¶ 26, at 16, ¶ 154, at 70–71, ¶ 165, at 74–75. However, because it was principally a matter of political judgment, and because the European Court of Human Rights has afforded national authorities a very wide margin of appreciation on this issue, the Law Lords chose to accept that such a state existed. *Id.* ¶ 118, at 58–59. By con-



detention failed to satisfy the Article 15 requirement that Member States only derogate from the Convention to the extent strictly required by the exigencies of the situation. Their conclusion stemmed from the fact that British authorities did not use indefinite detention without trial to deal with the threat British nationals suspected of involvement in international terrorism posed. Their Lordships thus concluded that quashing the derogation order and vindicating the detainees' Article 5 right to liberty would not jeopardize the nation's security. As Baroness Hale pithily remarked, "If it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners."<sup>36</sup>

This example, which describes a situation where a government failed to take steps to increase liberty—specifically, the liberty of foreign nationals suspected of being terrorists—even though doing so would not have involved any cost in terms of diminished security, provides an answer to Posner and Vermeule's question, "Why exactly would government adopt a policy, from among the alternatives, that places unnecessary restrictions on liberty?"<sup>37</sup> Following the House of Lords' judgment, both the Prime Minister and the Home Secretary insisted that their primary responsibility was to protect the nation's security, adding that they wanted to dismiss the possibility of being accused of not doing more to protect the public in the event of a successful terrorist attack.<sup>38</sup> Based on this approach, a government would not be inclined to remove a restriction on liberty even though the restriction does not confer any marginal increase in security if its removal would create the perception that the government is not doing everything within its power to safeguard the security of its citizens.

The second supposition underlying the trade-off thesis is that where a measure does affect both security and liberty, the effect on one will be the converse of the effect on the other. Posner and Vermeule defend this supposition by stating that while it is theoretically possible "that there are

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trast, Lord Hope stated that there was "ample evidence" to support the Government's assertion that a public emergency threatening the life of the nation existed. *Id.* at 58–59; see also David Dyzenhaus, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, 68 M.L.R. 673–76 (2005); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 M.L.R. 655–68 (2005); Stephen Tierney, *Determining the State of Exception: What Role for Parliament and the Courts?*, 68 M.L.R. 668–72 (2005); Adam Tomkins, *Readings of A v. Secretary of State for the Home Department*, [2005] PUB. LAW 259–66 (offering additional commentary on the case).

<sup>36</sup> *A v. Secretary of State for the Home Department*, [2004] UKHL 56, ¶ 231, at 99. The Law Lords went on to hold that, since the power of indefinite detention only applied to foreign suspected terrorists, the detainees' Article 14 right to be free from unjustifiable discrimination had also been violated. *Id.*

<sup>37</sup> POSNER & VERMEULE, *supra* note 17, at 33.

<sup>38</sup> See, e.g., JOINT COMMITTEE ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL, 2004–5, H.C. 334, at 6–7, available at <http://www.publications.parliament.uk/pa/jt200405/jt-select/jtrights/68/68.pdf>.

policies, other than the ones that government adopts, that would increase both security and liberty," this is seldom the case in practice.<sup>39</sup> They claim:

Real-world examples are few and far between . . . One does not often see a coalition between the American Civil Liberties Union and equivalent pro-security groups to oppose government policies. The reason is probably that most liberal democratic governments are not so dysfunctional as to adopt or retain policies that are unanimously opposed by groups on all sides of security debates."<sup>40</sup>

The difficulty with this assertion is that it fails to account for what Posner and Vermeule label "libertarian panics"—whereby individuals "overestimate the threat of civil liberties violations and underestimate the security benefits of governmental policies."<sup>41</sup> Libertarian panics might cause civil liberties organizations to oppose a government policy even though the actual effect of the policy is to increase both security and liberty. Posner and Vermeule discuss section 215 of the USA PATRIOT Act<sup>42</sup>—a power that the American Civil Liberties Union (ACLU) decries as "misguided, dangerous, and unconstitutional"<sup>43</sup>—as an example. They argue that the power section 215 confers on courts—to order the production of "business records in national security investigations"—merely "codifies a power that grand juries (typically dominated by prosecutors) have long exercised without judicial oversight. Measured from that baseline, as opposed to some imaginary libertarian one, the addition of judicial subpoenas looks no worse, *and possibly better*, from the point of view of targets and defendants."<sup>44</sup> According to Posner and

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<sup>39</sup> POSNER & VERMEULE, *supra* note 17, at 26.

<sup>40</sup> *Id.* at 33.

<sup>41</sup> *Id.* at 77; see also Adrian Vermeule, *Libertarian Panics*, 36 *RUTGERS L.J.* 871, 871 (2005).

<sup>42</sup> The Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>43</sup> ANN BEESON & JAMEEL JAFFER, AM. CIVIL LIBERTIES UNION, UNPATRIOTIC ACTS: THE FBI'S POWER TO RIFLE THROUGH YOUR RECORDS AND PERSONAL BELONGINGS WITHOUT TELLING YOU 1 (2003), available at [http://www.aclu.org/FilesPDFs/spies\\_report.pdf](http://www.aclu.org/FilesPDFs/spies_report.pdf).

<sup>44</sup> POSNER & VERMEULE, *supra* note 17, at 80 (emphasis added). There is a considerable body of literature on § 215. See e.g., Susan N. Herman, *The USA Patriot Act and the Sub-majoritarian Fourth Amendment*, 41 *HARV. C.R.-C.L. L. REV.* 67 (2006); Michael O'Donnell, *Reading for Terrorism: Section 215 of the USA Patriot Act and the Constitutional Right to Information Privacy*, 31 *J. LEGIS.* 45 (2004); James B. Perrine, *The USA Patriot Act: Big Brother or Business as Usual?*, 19 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 163 (2005); Christopher P. Raab, *Fighting Terrorism in an Electronic Age: Does the Patriot Act Unduly Compromise Our Civil Liberties?*, 2006 *DUKE L. & TECH. REV.* 3; Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 *DUQ. L. REV.* 663 (2004); Michael J. Woods, *Counterintel-*

Vermeule, therefore, section 215 had the potential to not only increase security, but also to improve the protection of liberty.

Debates over legal thresholds for exercising investigative powers also suggest that those debating anti-terrorism policy might overlook opportunities to simultaneously increase both security and liberty. Consistent with the trade-off thesis, such debates tend to be couched in terms of a clash between security and liberty, with security requiring the threshold to be loosened as much as possible, and liberty requiring the threshold to be tightened as much as possible, where those debating anti-terrorism policy must strike a balance between these competing demands. However, this overlooks the possibility that there may be an optimum point beyond which further loosening of the legal threshold will reduce security, not enhance it.

For example, in his review of Posner and Vermeule's book, Mark Davies rejects the Foreign Intelligence Surveillance Act (FISA) Court—"judicial review writ small" in Posner and Vermeule's words<sup>45</sup>—as "a possible model for judicial review in the terrorism context," arguing instead that "ordinary judicial review of agency action should obtain."<sup>46</sup> Significantly, Davies's argument is not based on libertarian grounds; rather, his concern is to "get the best possible performance from our security agencies."<sup>47</sup>

Davies uses the case of Brandon Mayfield as an example, arguing that "if we are seeking a model of judicial review that advances security, there is little reason to think that the FISA Court, at least as currently set up, advances that goal."<sup>48</sup> The FISA Court authorized electronic surveillance of Mayfield following the terrorist attacks in Madrid in March 2004, only for the Federal Bureau of Investigation (FBI) to admit two weeks later that no real evidence linked Mayfield to the bombings.<sup>49</sup> The Justice Department's Office of the Inspector General conducted a review of the case, which "found, at bottom, a lack of FBI rigor."<sup>50</sup> Similarly, Stephen Schulhofer has expressed concern about the expansion of government surveillance powers post-9/11.<sup>51</sup> He argues that more rigor-

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*ligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SEC. L. & POL'Y 37 (2005).

<sup>45</sup> POSNER & VERMEULE, *supra* note 17, at 208.

<sup>46</sup> Mark S. Davies, "Quotidian" Judges vs. *Al-Qaeda*, 105 MICH. L. REV. 1107, 1111–12 (2007).

<sup>47</sup> *Id.* at 1111.

<sup>48</sup> *Id.* at 1112.

<sup>49</sup> *See id.* at 1111.

<sup>50</sup> *Id.*

<sup>51</sup> Stephen J. Schulhofer, *At War With Liberty*, AMERICAN PROSPECT, Mar. 1, 2003, at 1, available at [http://www.prospect.org/cs/articles?article=at\\_war\\_with\\_liberty](http://www.prospect.org/cs/articles?article=at_war_with_liberty) (last visited Mar. 12, 2009).

ous accountability measures “need not impair the usefulness of the new powers but, if well designed, would actually enhance them.”<sup>52</sup>

Another example stems from the wealth of information<sup>53</sup> accumulated following the USA PATRIOT Act’s expansion of the FBI’s authority to obtain information through National Security Letters (NSLs)<sup>54</sup> and the Bureau’s desire to avoid criticism in the aftermath of any future terrorist attack.<sup>55</sup> As the FBI’s response, in December 2003, to intelligence suggesting a New Year’s Eve attack in Las Vegas illustrates,<sup>56</sup> the FBI’s current desire to avoid blame for the occurrence of a terrorist attack apparently leads the Bureau to expend substantial resources on licentious searches for information involving individuals only tenuously linked with the subject of an investigation. Against this background, it is plausible to ask whether a tighter legal threshold for the issuance of NSLs might increase security by channeling the FBI’s efforts.

### B. *The Image of a Set of Scales*

Unlike the trade-off thesis, the image of a set of scales does not assume an inverse hydraulic relationship between security and liberty. It is possible to alter the contents of one pan of a set of scales without changing the contents of the other pan. This raises the question whether this image might be a useful aid for analyzing anti-terrorism policy.

Posner states that the change in the relative weights of security and liberty following 9/11 resulted in a disequilibrium, and that the task in such a situation is to restrike the balance.<sup>57</sup> So in terms of his metaphor of a set of scales, prior to 9/11, the pans of the scales were balanced, and the attacks of that day threw this out of kilter by changing the weight attached to security relative to liberty. The challenge afterwards was to return the pans to a level balance. If this is the objective, it follows that

<sup>52</sup> *Id.* at 2.

<sup>53</sup> The Justice Department’s Office of the Inspector General conducted a review of the FBI’s use of National Security Letters (NSLs), which found that the FBI issued approximately 8,500 NSL 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. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S REVIEW OF NATIONAL SECURITY LETTERS 37 (2007).

<sup>54</sup> See The Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272 (2001); see also USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 115–118, 120 Stat. 192 (2005) (including an explicit provision that a NSL may be judicially reviewed and 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).

<sup>55</sup> Barton Gellman, *The FBI’s Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1.

<sup>56</sup> *Id.* (describing efforts by the FBI to gather guest lists from Las Vegas casinos using NSLs).

<sup>57</sup> See POSNER, *supra* note 7, at 31.

even if a measure would not succeed in restriking a level balance, the measure should nonetheless be enacted if its effect would be to reduce the imbalance between the security and liberty pans.

Where a set of scales is imbalanced, the magnitude of the imbalance is determined by how the total quantity of weight is distributed between the two pans of the scales—in other words, by the relative weight of each pan. Thus, in order to determine whether or not a change to the number of units of security and/or liberty will reduce the imbalance between the two pans, it is necessary to calculate what proportion of the total quantity of welfare derives from each pan. To return to our previous example, where the twelve units of security in one pan of the scales confer six units of welfare and the twelve units of liberty in the other pan confer twelve units of welfare, there is an imbalance of one-third (there is a total of eighteen units of welfare; two-thirds of these derive from the liberty pan and only one-third from the security pan). This is thus a greater imbalance than where there are twenty-four units of security in one pan of the scales (equaling twelve units of welfare) and eighteen units of liberty in the other pan (equaling eighteen units of welfare). Although the numerical difference between the number of units of welfare conferred by each pan is the same in each example (six), in the latter example there is only an imbalance of one-fifth (of the thirty total number of units of welfare, three-fifths derive from the liberty pan and two-fifths derive from the security pan).

Since the image of a set of scales makes no assumption of an inverse hydraulic relationship, it follows that the image envisages an anti-terrorism measure having one of nine different effects on security and liberty. Each of these will be considered in turn:

1. No Effect on Either Security or Liberty

According to the image of a set of scales, since a measure which has no effect on either security or liberty will do nothing to redress the existing imbalance, there is no reason why it should be enacted.

2. No Effect on Liberty; An Increase in Security

The image of a set of scales would support the enactment of a measure which increases the number of units in the security pan while leaving the number of units in the liberty pan unchanged, provided that the increase in the number of units in the security pan is not so great as to result in an imbalance in favor of security that is equal to, or even greater than, the initial imbalance in favor of liberty.

3. No Effect on Liberty; A Decrease in Security

The image of a set of scales tells us that since a measure which diminishes the number of units in the security pan and has no effect on the number of units in the liberty pan will result in an even greater imbalance in favor of liberty, the particular measure should not be enacted.

#### 4. No Effect on Security; An Increase in Liberty

According to the image of a set of scales, a measure which increases the number of units in the liberty pan and has no effect on the number of units in the security pan should not be enacted since the measure would merely result in an even greater imbalance in favor of liberty.

#### 5. No Effect on Security; A Decrease in Liberty

The image of a set of scales would support the enactment of a measure which diminishes the number of units in the liberty pan while leaving the number of units in the security pan unchanged since the measure would reduce the imbalance in favor of liberty—provided that the decrease in the number of units in the liberty pan is not so great as to result in an imbalance in favor of security that is equal to, or even greater than, the initial imbalance in favor of liberty.

#### 6. An Increase in Both Security and Liberty

Whether or not the image of a set of scales supports the enactment of a measure which will increase the number of units in both the security and liberty pans will depend on the extent of these increases. Using our previous example, if the number of units in the liberty pan is increased from twelve to twenty-one (so that this pan confers twenty-one units of welfare) and the number of units in the security pan is increased from twelve to fourteen (so that this pan confers seven units of welfare), the result will be an even greater imbalance in favor of liberty (three-quarters of the units of welfare will derive from the liberty pan and one-quarter from the security pan, giving an imbalance of one-half compared to one-third initially). Similarly, an even greater imbalance (this time in favor of security) will result if the effect of the measure is to add sixty-six units to the security pan and one unit to the liberty pan (three-quarters of the total units of welfare will derive from the security pan, giving an imbalance of one-half). Thus, the image supports the

enactment of a measure which will increase the number of units in the security and liberty pans provided that the effect of the increases is to reduce the initial imbalance.

#### 7. A Decrease in Both Security and Liberty

Removing units from both pans of the scales could have the effect of reducing the initial imbalance. In our previous example, reducing the number of units in the liberty pan from twelve to six and the number of units in the security pan from twelve to eight would reduce the imbalance to one-fifth (of the total of ten units of welfare, six would derive from the liberty pan). Provided that the effect of the measure is to decrease the initial imbalance, the image of a set of scales would support its enactment.

#### 8. An Increase in Security; A Decrease in Liberty

Increasing the number of units in the security pan of the scales while simultaneously reducing the number in the liberty pan will reduce the imbalance in favor of liberty. The image thus supports the enactment of a measure which will have this effect, provided that it will not result in an equal, or even greater, imbalance in favor of security.

#### 9. An Increase in Liberty; A Decrease in Security

Decreasing the number of units in the security pan while simultaneously increasing the number in the liberty pan will inevitably result in a greater imbalance than initially. So according to the image of a set of scales, a measure which will have this effect should not be enacted.

A purview of these nine different scenarios demonstrates that the image of a set of scales has no value as an analytical aid. The demands of security and liberty do not compete in any of the first seven scenarios, and so it is possible to resolve them using common sense. In these scenarios, the rational objective is to maximize the total quantity of security and liberty. But because of its fixation with achieving a level balance, the image of a set of scales only arrives at the common sense conclusion in two of the seven scenarios. What the image tells us in these two scenarios is that there is no reason to enact an anti-terrorism measure which has no effect on either security or liberty (Scenario 1), and that a measure which reduces security and has no effect on liberty should not be enacted (Scenario 3). These are both negative conclusions, in that they merely tell us something we should not do, and in any event an analytical aid is

hardly needed to arrive at them. In the other five of the first seven scenarios, the metaphor arrives at the perverse conclusion that a measure which will increase liberty without having any effect on security should not be enacted (Scenario 4). Furthermore, the metaphor countenances the enactment of those measures which will decrease liberty without any impact on security (Scenario 5) and decrease both security and liberty (Scenario 7), and it provides only conditional support for those measures which will increase security without any impact on liberty (Scenario 2) and increase both security and liberty (Scenario 6).

Of the nine scenarios, it is the last two which involve difficult assessments. Here, one would expect some assistance from an analytical aid. Yet in one of the scenarios (Scenario 9), the metaphor cursorily dismisses the enactment of the measure without inviting any further consideration of the increase in liberty and concomitant decrease in security. It might be that the increase in liberty is substantial and certain and the decrease in security is slight and speculative. As for the other scenario (Scenario 8), the metaphor offers no guidance on how to assess whether the increase in security justifies the diminution in liberty. It merely issues the trite warning not to create an even greater imbalance in favor of security.

So even if it is possible to quantify security and liberty in the manner envisaged by the image of a set of scales,<sup>58</sup> the image is of no value as an analytical aid. Applying the metaphor merely produces statements of the obvious, perverse conclusions, and a dearth of useful guidance when difficult assessments need to be made.

## II. THE LIMITED SCOPE OF THE BALANCING DISCOURSE

Having used the assumption of an inverse hydraulic relationship to distinguish between the trade-off thesis and the image of a set of scales, and shown the flaws inherent in each, this Essay proceeds to identify three respects in which both these presentations of the balancing discourse are too narrow in scope. First, these presentations simply refer to increases and decreases in liberty and security without initially assessing the effect that a particular measure will have on security and liberty. Second, they exclude any scope for consideration of issues relating to resource allocation. And third, they focus on only one particular strategy for increasing welfare.

### A. *Assessing a Measure's Effect on Security and Liberty*

Although they refer to increases and decreases in security, the trade-off thesis and the image of a set of scales exclude any scope for consider-

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<sup>58</sup> See POSNER & VERMEULE, *supra* note 17, at 28.



ing the effect of a particular measure on security.<sup>59</sup> This is significant, since a measure which might improve security in some respects could also harm security in others. For example, one of the concerns that have been expressed about the proliferation of electronic surveillance is that it hampers efforts to obtain human intelligence. Maureen Webb argues 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.”<sup>60</sup> A similar concern, which was repeated on numerous occasions during the Parliamentary debates on the Prevention of Terrorism Bill (now Act 2005)—the legislation which set in place the Control Orders regime to replace the power of indefinite detention of foreign suspected terrorists—is that laws which are perceived as unjust might produce resentment and generate more terrorists.<sup>61</sup> During the debates, for example, the shadow Home Secretary warned:

If, however, the Government insists on rushing these measures through, I fear that they may do the opposite of what they want. They will create a sense of injustice among many British citizens, and do what I warned when we first discussed this: for every known terrorist that the Home Secretary confines, he may create 10 unknown terrorists, free to do harm to our people and to our nation.<sup>62</sup>

Suppose an anti-terrorism measure will in one respect increase security by X, but a corollary of the measure will reduce security in another respect by Y. When the trade-off thesis and the metaphorical scales refer to exchanging an increase in security for a reduction in liberty, it is unclear whether the projected increase in security refers to the simple increase produced by the measure (X), or the measure’s net effect (X minus Y). If the reference is the former, this raises the question of where exactly the expected security loss (Y) falls to be considered. Since the

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<sup>59</sup> It also does not make clear whether security is to be taken in the objective or subjective sense. This Essay assumes that in this context security should be taken in the objective sense. For a defense of this position, see Stuart Macdonald, *Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy*, 15 ILSA J. INT’L & COMP. L. 95–146 (2008).

<sup>60</sup> MAUREEN WEBB, ILLUSIONS OF SECURITY: GLOBAL SURVEILLANCE AND DEMOCRACY IN THE POST-9/11 WORLD 240 (2007).

<sup>61</sup> 431 PARL. DEB., H.C. (6th ser.) (2005) 158, available at [www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050222/debtext/50222-06.htm](http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050222/debtext/50222-06.htm) (last visited Mar. 12, 2009).

<sup>62</sup> *Id.*; see also Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 M.L.R. 935, 936 (2006) (“There is a well established ‘social movement’ literature . . . suggesting that the state’s response . . . may function as a stimulus to the mobilisation of its violent challengers.”).

balancing discourse only refers to a reduction in liberty, the discourse seems (on this interpretation) to exclude consideration of any collateral security losses. If the reference is the latter, it needs to be made plain that the net effect of the measure on security should be assessed before issues pertaining to liberty are even considered. There is no sense in diminishing liberty in exchange for a measure whose net effect will also be to reduce security.

The trade-off thesis and image of a set of scales also fail to consider the effect a measure will have on liberty. Such a framework is necessary since different individuals hold widely diverging views on what the dictates of liberty require and how these demands should be met. Imagine an example involving a proposal to introduce a new investigative power (Power A) and a procedural safeguard (Safeguard B), which some claim is needed to regulate how Power A is used.

There may be different opinions on at least three issues.<sup>63</sup> First, there may be different views on whether Power A is one which should ever be vested in the state. One person might believe that it would be morally indefensible to ever introduce the use of the power, and so would oppose introducing the power regardless of the projected security gains, while another might regard the power as a regrettable but necessary evil, and so would be willing to countenance the incursion on liberty in exchange for a significant increase in security. Second, there may be different views on the effect Power A will actually have on liberty. One person might believe that the power involves a grave incursion on liberty, whereas another might believe that the power involves no sacrifice of liberty since its level of intrusiveness is *de minimis*. Third, there may be different views on whether Safeguard B is necessary to prevent Power A from being abused. The person who believes Safeguard B is necessary to regulate the use of Power A will believe that non-implementation of the safeguard involves a sacrifice of liberty, whereas the person who believes Safeguard B is unnecessary to regulate the use of Power A will not.

Before asserting whether a particular measure will increase or decrease liberty, it is important to engage with the variety of different perspectives held by those debating anti-terrorism policy. The trade-off thesis and metaphorical scales are insensitive to the fact that many disagreements stem not from different views on whether a reduction in liberty should be accepted in exchange for an increase in security, but from whether the measure in question involves a reduction in liberty at all.

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<sup>63</sup> See Macdonald, *supra* note 59.

### B. Resource Allocation

According to the balancing discourse, the value attached to security increases following an event like 9/11. Thus, in order to optimize social welfare, the government will diminish some liberty in exchange for greater gains in security. This framework discounts the possibility that by increasing spending on anti-terrorism measures, security could be enhanced without any sacrifice of liberty.

Posner and Vermeule note how “civil libertarians suggest that . . . government can increase security, without any reduction in liberty, simply by increasing funding for security measures.”<sup>64</sup> They reject this suggestion, saying that it “makes things too easy by supposing that free lunches can be had.”<sup>65</sup> Instead they assume a “budget constraint,” i.e., that the security-liberty frontier cannot simply be pushed farther out by increased government spending.<sup>66</sup> What this overlooks, however, is that as well as impacting the weight attached to security relative to liberty, changes in circumstances over time will also affect: (1) the weight attached to governmental efforts to safeguard our security relative to other forms of government spending and activity, and (2) the weight attached to governmental efforts to safeguard our security against terrorism relative to efforts to safeguard us against other threats to our security.

As greater weight is placed on security in general, and on security against terrorism in particular, a reallocation of resources is to be expected. Indeed, by early 2006, the Bush administration claimed that since 2001, it had more than tripled spending devoted to non-defense homeland security.<sup>67</sup> To assume that budgetary constraints will preclude the security-liberty frontier being pushed farther out is too insular, for it ignores the likelihood that the change in circumstances which led to the increase in the weight of security relative to liberty will also have caused the government to reallocate its limited resources.

Posner and Vermeule are right, though, to say that increasing spending on anti-terrorism measures is not a free lunch. Diverting resources carries with it an opportunity cost. For example, although the FBI’s budget has increased since 9/11, this increase has been insufficient to pay for all the anti-terrorism work it is now required to do.<sup>68</sup> As a result, funds have had to be shifted from its other programs, such as crime-fighting.<sup>69</sup> Sixty-seven percent of FBI agents working on criminal inves-

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<sup>64</sup> POSNER & VERMEULE, *supra* note 17, at 35.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See OFFICE OF MGMT. & BUDGET, DEP’T OF HOMELAND SEC., BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007 (2006), available at <http://www.whitehouse.gov/omb/budget/fy2007/dhs.html> (last visited Mar. 12, 2009).

<sup>68</sup> MUELLER, *supra* note 28, at 32.

<sup>69</sup> *Id.*

tigations were reassigned to anti-terrorism work, and some police chiefs attributed the rise in the rate of violent crime in 2005 in part to the pressure to divert resources and personnel to antiterrorism efforts.<sup>70</sup> Moreover, 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.<sup>71</sup> Similarly, commentators have 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 [FEMA's] 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."<sup>72</sup> And while in February 2006, the President's 2007 fiscal year budget increased the funding allocated to the Departments of Homeland Security (by somewhere between five and seven percent) and Defense (by five percent, plus an additional \$120 billion towards the wars in Afghanistan and Iraq), the budget made cuts to Medicare and a host of domestic spending programs.<sup>73</sup>

As these examples illustrate, when changes in circumstances cause greater stress to be laid upon security from the terrorist threat, the government will reallocate resources to the anti-terrorism sphere—resources which could have been used to combat other threats to our security, or to finance other areas of public spending—and so it is important to consider the opportunity cost of the resources that will be expended. Such discussion is forestalled by assuming that budget constraints mean expenditure on anti-terrorism policy cannot be increased and focusing exclusively on a measure's impact on security and liberty.

### C. *Strategies for Increasing Welfare*

According to the balancing discourse, the weight attached to security increases following an event like 9/11. The increased weight attached to security means that a greater quantity of security is needed than before to attain the same level of welfare. So, in our example, twelve units of security now only confer six units of welfare, whereas previously they had conferred twelve units. The balancing discourse seeks to respond to this change in circumstances by increasing the level of security which individuals enjoy. Of course, this may be an entirely appropriate response—particularly if (as argued previously) the changes which will enhance security involve no diminution in liberty (or will even increase

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> IAN S. LUSTICK, TRAPPED IN THE WAR ON TERROR 86 (2006).

<sup>73</sup> *See id.* at 22.

liberty). But it should be recognized that this is only one form of response. Another strategy for boosting overall levels of welfare would be to improve the security to welfare ratio, so that a greater quantity of welfare is derived from every unit of security enjoyed.

Official definitions of terrorism, including those found in the U.S. Federal Criminal Code,<sup>74</sup> the U.K. Terrorism Act 2000,<sup>75</sup> and U.N. Security Council Resolution 1566<sup>76</sup> recognize that one of its principal objectives is intimidation. By instilling fear and anxiety, terrorist attacks cause individuals to derive less welfare from the level of security that they enjoy. Thus, seeking to quell this fear is an effective way of responding to terrorism. However, cognitive research suggests that publicizing new anti-terrorism legislation is unlikely to achieve this goal.

One heuristic which people use when thinking about risks is the "availability heuristic," i.e., "they assess the magnitude of risks by asking whether examples can readily come to mind."<sup>77</sup> Given the nature of terrorism and the media attention devoted to it, the availability heuristic means that an exaggerated perception of the terrorist threat is likely following an attack. Publicizing new anti-terrorism legislation will merely reinforce this perception by sustaining the attack's availability and salience.<sup>78</sup> It will also exacerbate probability neglect.<sup>79</sup> This is where individuals focus on the badness of an outcome without considering the fact that it is unlikely to occur, and is something which is especially acute following a highly emotive event like a terrorist attack.<sup>80</sup> Contemporary responses to terrorist attacks also tend to be vulnerability-led, focusing on the "what if" question and encouraging an attitude of pessimism and dread by turning previously untroubled aspects of life into a "speculative risk."

If public anxiety is to be assuaged, policy-makers must recognize that "an important part of the handling of intentional risk concerns the management of response and potential response, rather than managing the threat itself."<sup>81</sup> Instead of embracing the idea of society under threat,

<sup>74</sup> See 18 U.S.C. § 2331 (2007).

<sup>75</sup> Terrorism Act, 2000, c. 11, § 1(1)(b) (U.K.).

<sup>76</sup> S.C. Res. 1566, U.N. Doc. S/RES/1566 (October 8, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement> (last visited Mar. 12, 2009).

<sup>77</sup> CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 36 (2005).

<sup>78</sup> See *id.* at 36–39.

<sup>79</sup> See *id.* at 39–41.

<sup>80</sup> See *id.*; see also CASS R. SUNSTEIN, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 127–28 (2003), available at <http://www.springerlink.com/content/k38h7v8724424463/fulltext.pdf>.

<sup>81</sup> FRANK FUREDI, *REFUSING TO BE TERRORISED: MANAGING RISK AFTER SEPTEMBER 11TH*, at 19 (2002), available at [http://www.terrorismresearch.net/docs/gobal\\_futures01.pdf](http://www.terrorismresearch.net/docs/gobal_futures01.pdf).

which provides an opportunity for those promoting intentional risks, policy-makers should promote a resilience-led approach. Beyond this, Cass Sunstein suggests the following:

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.<sup>82</sup>

None of this is to suggest that there should not be attempts made to increase the level of security. On the contrary, the two strategies should prove mutually reinforcing. If security is increased, and attempted terrorist attacks are pre-empted and prevented, this will facilitate efforts to shift the public's focus and encourage resilience. The problem with the balancing discourse is that its focus on increasing welfare by improving security neglects the importance of increasing welfare by assuaging public fear.

### CONCLUSION

Through examining the notion of balance which tends to dominate contemporary discussions of anti-terrorism policy, this Essay has questioned the use of imagery in complex and emotionally-charged debates. Having considered two manifestations of the balancing discourse, we have concluded that neither has any value as an analytical aid. The trade-off thesis is premised on unjustified suppositions, and the image of a set of scales offers no useful guidance and is capable of producing perverse conclusions. While their simplicity may be attractive, these images must be abandoned as analytical aids and a more prosaic and complex set of issues must be addressed.

It has also become apparent that balancing the demands of security and liberty is not the sole, or even the central, task of contemporary anti-terrorism policy. Practical experience suggests that one priority should be to identify ways in which security may be increased without diminishing liberty (and vice versa). Thought should also be given to whether there are contexts in which reforms may be introduced which will increase both security and liberty. Such work should be complemented by strategies aimed at assuaging the fear and anxiety which terrorists seek to generate. This will only be achieved if resilience is encouraged and the

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<sup>82</sup> Sunstein, *supra* note 80, at 131.

politics of fear is rejected.<sup>83</sup> And the opportunity cost of the resources expended to combat the terrorist threat must be considered. Such resources could also be used to tackle other threats to our security, or in other areas of Governmental spending. These tasks, which are obscured by the simplistic imagery of balancing security with liberty, are all of fundamental importance in the formulation of anti-terrorism policy.

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<sup>83</sup> The term “politics of fear” is taken from DAVID L. ALTHEIDE, *TERRORISM AND THE POLITICS OF FEAR* ix (2006) (noting that the “politics of fear” is a “decision makers’ promotion and use of audience beliefs and assumptions about danger, risk, and fear in order to achieve certain goals”).