

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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