

Security and Liberty: The Image of Balance*

JEREMY WALDRON
Law, Columbia University

I.

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

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

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

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

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

II.

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

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

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

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

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

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

III.

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

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

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

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