

## PROJECT ON LAW AND SECURITY



Graffiti on base of bridge in Rock Creek Park, Washington DC.

# Against a Crude Balance:

Platform Security and the Hostile Symbiosis Between Liberty and Security

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“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”

—Benjamin Franklin



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They are perhaps the most famous words ever written about the relationship between liberty and security. They have become iconic. A version of them appears on a plaque in the Statue of Liberty. They are quoted endlessly by those who assert that these two values coexist with one another in a precarious, ever-shifting state of balance that security concerns threaten constantly to upset. Every student of American history knows them. And every lover of liberty has pondered them, knowing that they speak to that great truth about the constitution of civilized governments: that we empower government to protect us in a devil’s bargain from which we will lose in the long run.

Very few people who quote these words, however, have any idea where they come from or what Franklin was really saying when he wrote them.

They appear originally in a 1755 letter Franklin is presumed to have written on behalf of the Pennsylvania Assembly to the colonial governor during the French and Indian War. The letter was a salvo in a power struggle between the governor and the Assembly over funding for security on the frontier, one in which the Assembly wished to tax the lands of the Penn family, which ruled Pennsylvania from afar, to raise money for defense against French and Indian attacks. The governor kept vetoing the Assembly’s efforts at the behest of the family, which had appointed him and did not want its lands taxed.

The “essential liberty” to which Franklin referred was not what we would think of today as civil liberties but, rather, the right of self-governance of a legislature in the interests of collective security. And the “purchase [of] a little temporary safety” of which Franklin complained was not the ceding of power to some government Leviathan in exchange for a promise of protection from external threat; for in Franklin’s letter, the word “purchase” does not appear to have been a metaphor. The governor was accusing the Assembly of stalling on appropriating money for frontier defense by insisting on including the Penn lands in its taxes and thus triggering his intervention. And the Penn family later

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\* I am indebted to my old friend Joseph P. Rhinewine for first articulating the phrase “hostile symbiosis” to me, and to my research assistant, Ritika Singh, for having led me to the discovery that—as the reader will see—it has a remarkable intellectual provenance. More generally, I am indebted to a large group of Facebook friends, to whom I crowd-sourced the question of what metaphor best describes a relationship of simultaneous mutual dependency and mutual threat. This group came up with a long list of thought-provoking ideas that have influenced this paper considerably. The paper has benefited enormously from insightful comments, criticisms, and suggestions from Matthew Waxman, Philip Bobbitt, Peter Berkowitz, and Benjamin Kleinerman.

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offered cash to fund defense of the frontier—as long as the Assembly would acknowledge that it lacked the power to tax the family’s lands. Franklin was thus complaining of the choice facing the legislature between being able to make funds available for defense and maintaining its right of self-government—and he was criticizing the governor for suggesting that it should be willing to give up the latter to ensure the former.

In short, Franklin was not describing a tension between government power and individual liberty. He was describing, rather, effective self-government in the service of security as the very liberty it would be contemptible to trade.<sup>1</sup> Notwithstanding the way the quotation has come down to us, Franklin saw the liberty and security interests of Pennsylvanians as aligned. The difference between what he meant and what we remember him as saying perfectly encapsulates our tendency to mangle intellectually the true relationship between liberty and security.

The idea that liberty and security exist in balance hangs over America’s entire debate about the optimal legal authorities with which to confront security problems. The metaphor of balance—in which some added bit of liberty weighs down the scales and disrupts the security side, or some new security measure must necessarily make the liberty tray move upwards—lives pervasively in our rhetoric. It lives in our case law. It lives in our academic discourse. It lives in our efforts to describe our reality. It lives in our aspirations. It lives in the calls to shift the balance in perilous times by giving up liberty in the name of security, and it lives as well in the calls to restore the balance by abandoning security measures said to injure freedom.

As Philip Bobbitt puts it:

There is a virtually universal conviction that the constitutional rights of the People and the powers of the State exist along an axial spectrum. An increase in one means a diminution of the other. On this spectrum we imagine a needle oscillating between two poles, moving toward the pole of the State’s power in times of national emergency or toward the pole of the People’s liberty in times of tranquility. . . . A corollary to this conviction is the widely held belief that intelligence and law enforcement agencies constitute a threat to civil liberties.<sup>2</sup>

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<sup>1</sup> The letter itself can be found in *The Papers of Benjamin Franklin*, Vol. 6. Ed. Leonard W. Labaree. New Haven, CT: Yale University Press, 1963. For background on the politics of the confrontation between the government and the Assembly, see Chapter 11 of Brands, H.W. *The First American: The Life and Times of Benjamin Franklin*. United States: Anchor Books, 2002. While Brands does not quote the letter in particular, I confirmed my understanding of the history in correspondence with him. See also Chapter 7 of Issacson, Walter. *Benjamin Franklin: An American Life*. New York, NY: Simon & Schuster, 2003.

<sup>2</sup> Bobbitt, Philip. *Terror and Consent: The Wars for the Twenty-First Century*. New York: Alfred A. Knopf, 2008, pg. 241.

The balance metaphor lives, paradoxically enough, even in our attempts to reject it. Opponents of new security measures will often vocally eschew the balance metaphor—insisting that we can be both “safe and free” or, as President Obama put it in his inaugural address, that we can “reject as false the choice between our safety and our ideals.”<sup>3</sup> Indeed, the idea that we retain security by holding fast to our ideals, not by compromising on them, is a recurrent theme in Obama’s rhetoric—and in a lot of rhetoric on the political Left. Yet in these very attempts to reject a “choice” between the two goods and to assert their congruence, Obama tends to end up describing the very balancing he seems to reject. In his speech on the rule of law and security at the National Archives in 2009, for example, Obama said that:

We see . . . above all . . . how the recent debate has obscured the truth and sends people into opposite and absolutist ends. On the one side of the spectrum, there are those who make little allowance for the unique challenges posed by terrorism, and would almost never put national security over transparency. And on the other end of the spectrum, there are those who embrace a view that can be summarized in two words: “Anything goes.” Their arguments suggest that the ends of fighting terrorism can be used to justify any means, and that the President should have blanket authority to do whatever he wants—provided it is a President with whom they agree. Both sides may be sincere in their views, but neither side is right. The American people are not absolutist, and they don’t elect us to impose a rigid ideology on our problems. They know that we need not sacrifice our security for our values, nor sacrifice our values for our security, so long as we approach difficult questions with honesty and care and a dose of common sense.<sup>4</sup>

The balance metaphor has a way of rising out of the ashes of its very rejection.

The image of balance arises especially vividly in the context of surveillance, where every augmentation of government power is said to come at some cost to liberty. The relationship between surveillance and liberty has taken on special importance as the internet has continued its exponential growth and as personal data concerning individuals has proliferated. The question of how aggressively governments can police and monitor the use of communications and other technological architectures has necessarily arisen alongside these platforms—with the balance metaphor invariably hovering over the discussion. Proponents of more aggressive surveillance justify such steps as necessary and imposing

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<sup>3</sup> Barack Obama’s inaugural address, given in Washington, DC on 21 Jan. 2009, is available at <http://www.whitehouse.gov/blog/inaugural-address/>.

<sup>4</sup> Obama’s National Archive speech, given on 21 May 2009, is available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

only allowable costs in light of some compelling governmental or societal security need. Opponents criticize them as excessive enhancements of governmental power, which we take at the expense of freedom or privacy. We seldom stop and ask the question of whether and when our surveillance programs are really coming at the expense of liberty at all; or whether the relationship might be more complicated than that—indeed, whether some of these programs might even *enhance* liberty.

We should ask these questions. For as Bobbitt writes, while “[t]here is something to . . . these intensely and sometimes unthinkingly held assumptions, . . . the spectrum view and its corollaries are . . . radically incomplete. . . .”<sup>5</sup> Indeed, the balance metaphor, as I shall argue in this paper, is incomplete to the point of inducing a deep cognitive error. In this paper, I hope to convince the reader that any crude notion of a “balancing” between security and liberty badly misstates the relationship between these two goods—that in the vast majority of circumstances, liberty and security are better understood as necessary preconditions for one another than in some sort of standoff. The absence of liberty will tend to guarantee an absence of security, and conversely, one cannot talk meaningfully about an individual’s having liberty in the absence of certain basic conditions of security. While either in excess can threaten the other, neither can meaningfully exist without the other either.

In place of balance, I wish to propose a different, more complicated, metaphor, one drawn not from the scales of justice but from evolutionary biology—albeit from an archaic source in that field. We should think of liberty and security, I shall argue, as existing in a kind of a “hostile symbiosis” with one another—that is, mutually dependent and yet also, under certain circumstances, mutually threatening. This vision of the relationship offers greater analytical clarity than does the balance metaphor. As we shall see, it also offers an important degree of policy guidance as to what sort of enhancements of government security powers will and will not threaten liberty.

In tangible illustration of this point, I want to bring this somewhat theoretical set of observations down to earth and attempt to apply them in the arena of surveillance, where the balance metaphor seems most deeply entrenched and is, in my judgment, arguably most deeply misplaced. Some surveillance, to be sure, is destructive of freedom. But sometimes, the relationship between surveillance and liberty is symbiotic—that is, increasing government surveillance powers can actually be liberty-enhancing. I wish to highlight in practical terms what Bobbitt calls “the apparently paradoxical conclusion that some increases in the power of the State may increase, or at least do not diminish, the liberties of the People.”<sup>6</sup> In particular, I want to posit a category of liberty-enhancing surveillance that involves the securing of platforms for the use of the public for purposes of commerce, recreation, creativity, and communications. And I want to show how

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<sup>5</sup> *supra* note 2, at 242.

<sup>6</sup> *supra* note 2, at 244.

government power is, in these instances, critical to the establishment of baseline conditions of useful liberty.

The paper proceeds in four distinct steps. First, I describe the balance thesis in its various iterations and the variety of critiques of it that have emerged. Second, I explain why I think the balance thesis is, while not quite wrong, entirely inadequate and misses the core of the relationship between these two goods. Third, I propose an alternative vision of the relationship, one based on the “hostile symbiosis.” And finally, I try to apply these various observations to the case of surveillance, and specifically to the surveillance of platforms, arguing that even quite muscular exercises of governmental power can nonetheless *increase* human liberty by making insecure platforms safe for public use.

## The Balance Thesis and Its Discontents

The notion of a balance between liberty and security is quite old. It endures because it captures with a simple image a tension between two key objectives of enlightened government that arises, at times, acutely. It has become pervasive in our political rhetoric. We heard it, to cite almost random examples, from Michael Ignatieff on September 13, 2001, when he declared that “As America awakens to the reality of being at war—and permanently so—with an enemy that has as yet no face and no name, it must ask itself what balance it should keep between liberty and security in the battle with terrorism.”<sup>7</sup> We heard it from President Bush’s White House Counsel—and later attorney general—Alberto Gonzales, when he said in 2004 that “President Bush, like other Presidents during times of war, has taken strong, sometimes difficult, action to protect American lives and preserve the long-term survival of this country” but acknowledged that “a few people . . . are uncomfortable with the balance struck by this Administration between protecting our country and preserving our freedoms.”<sup>8</sup> We heard it from legal intellectuals—both those arguing for greater restraints on government counter-terrorism powers and those arguing for lesser.<sup>9</sup> We have heard it from

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<sup>7</sup> Ignatieff, Michael. “Assault on America: Paying for Security with Liberty.” *Financial Times*. 13 Sept. 2001.

<sup>8</sup> Gonzales, Alberto R. *Remarks to the American Bar Association Standing Committee on Law and National Security*. Washington, DC, 24 Feb. 2004.

<sup>9</sup> For an example of the former, see Rosen, Jeffrey. “The Difficult Balance Between Security and Liberty.” *New York Times*. 6 Oct. 2002. Available at

<http://www.nytimes.com/2002/10/06/opinion/the-difficult-balance-between-liberty-and-security.html>. Rosen writes: “public opinion tends to be emotional and unreliable in trying to balance liberty and security in times of great anxiety. Is it too much to expect the court to do better?”

For an example of the latter, see Taylor, Stuart Jr. “Balancing Security and Liberty.” *National Journal*. 6 Dec. 2008. Available at

[http://www.nationaljournal.com/njmagazine/or\\_20081206\\_8703.php](http://www.nationaljournal.com/njmagazine/or_20081206_8703.php). Taylor writes, “If Obama strikes judicious balances between security and liberty, the ACLU and its allies may hysterically

the left, right, and center.

We have heard it from Justice Antonin Scalia, writing for himself and Justice John Paul Stevens, who reminded us that “The Founders well understood the difficult tradeoff between safety and freedom,” and that “Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*” (in times of war the law is silent).<sup>10</sup>

The balance thesis presents itself in several different forms, though these forms overlap and some expressions of the thesis reflect more than one of them. At its most basic, the balance thesis is an analytical point—an empirical argument that liberty and security exist in tension with one another and that enhancing one necessarily means detracting from the other. This claim appears most boldly in Eric Posner’s and Adrian Vermeule’s book *Terror in the Balance: Security, Liberty, and the Courts*, where the authors write:

There is a straightforward tradeoff between liberty and security. ... At the security-liberty frontier, any increase in security requires a decrease in liberty; a rational and well-functioning government will already be positioned on this frontier when emergency strikes, and will adjust its policies as the shape of the frontier changes over time, as emergencies come and go. If increases in security are worth more than the corresponding losses in liberty, government will increase security; but if reductions in security will produce greater gains from increased liberty, government will relax its security measures.<sup>11</sup>

Posner and Vermeule argue that short of the frontier, it is possible for policy changes to increase one value without injuring the other—even to increase both at the same time. But they insist that ultimately there are tradeoffs. And on this point, they are from alone. Indeed, while few commentators express the analytical point so bloodlessly as they do, the idea that, as an empirical matter, an inherent tension exists between liberty and security lies beneath a great deal of work on the subject. For example, Geoffrey Stone opens his book on civil

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accuse him (as they would certainly accuse any Republican president) of trashing the Constitution. But the vast majority of voters understand that the Constitution is not a suicide pact.”

<sup>10</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Scalia, J., dissenting).

<sup>11</sup> Posner, Eric A., and Adrian Vermeule. *Terror in the Balance: Security, Liberty, and the Courts*. USA: Oxford University Press, 2007, pg. 12. Posner and Vermeule actually don’t mean this statement quite as starkly as it reads. They acknowledge, after all, that liberty and security have a zero-sum relationship only at the frontier, and that at many points short of that frontier, one can increase liberty without compromising security, vice versa, or even increase both at once. The drama of their position thus depends on how much policy-making space they believe exists short of the frontier. To the extent there is a lot of space, their claim amounts to little more than the observation that liberty and security sometimes conflict and sometimes do not. By contrast, if, as their tone often suggests, they believe that we generally live at the frontier of which they speak or that the space short of it is very limited, the observation has much more dramatic implications.

liberties in wartime by stating that “The war on terrorism has posed fundamental questions about the appropriate balance between individual liberty and national security.”<sup>12</sup> For Stone, the idea that we are trading off these goods against each other is here so obvious that it requires no argumentation, no establishing. It is the color of his wallpaper. The only question is whether this balancing has been done appropriately.

A corollary of the observation that liberty and security exist in balance is the notion that the balance in question shifts during crises. As former Chief Justice William Rehnquist put it in his own book about civil liberties during wartime, “In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.”<sup>13</sup>

The second version of the balance thesis presents a normative argument—the idea that there *should be* a balance, often accompanied by the concern that we have failed to achieve that balance or that things, in practice, have slipped away from the balance we ought to have. Commentators vary in their senses of the direction in which we have strayed from balance, but the idea of balance as the ideal to which we aspire recurs throughout the literature. The sentence that immediately precedes the above-quoted one in Rehnquist’s book reads, “In any civilized society, the most important task is achieving a proper balance between freedom and order.” Former Senator Russell Feingold, the lone senator to vote against the USA PATRIOT Act, explained his vote saying that “The administration went too far and made the mistake of not taking the historic moment to get the balance right.”<sup>14</sup> Similarly, Stone urges that “We have made progress over time. But progress is fitful, uneven, and fragile. In order for us to strike a more thoughtful, more mature balance between liberty and security in our own time, we need a deeper understanding of ourselves and our history.”<sup>15</sup> Conversely Richard Posner urges a return to balance by protecting liberty *less* rigorously: “The challenge to constitutional decision making in the era of modern terrorism is to restrike the balance between the interest of liberty from government restraint or interference and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation’s security.”<sup>16</sup>

An interesting variant of this presentation of the thesis energetically rejects a “choice” between security and freedom and, either explicitly or implicitly,

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<sup>12</sup> Stone, Geoffrey R. *War and Liberty - An American Dilemma: 1790 to the Present*. USA: W.W. Norton & Company, 2007, pg. xiii.

<sup>13</sup> Rehnquist, William H. *All the Laws But One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998, pg. 222.

<sup>14</sup> Feingold, Russ. “Why I Oppose the PATRIOT Act.” *Protecting What Matters: Technology, Security, and Liberty since 9/11*. Ed. Clayton Northouse. Washington, DC: Brookings Institution Press, 2006, pg. 179.

<sup>15</sup> *supra* note 12, at xvii.

<sup>16</sup> Posner, Richard A. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. New York, NY: Oxford University Press, 2006, pg. 32.



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proposes “balance” instead. This is the language of the Obama administration—including in the passage quoted above. The refusal to choose appears to assert a uniform congruence between American values and American security interests. But the tool for avoiding choice is almost invariably some form of balance, though Obama does avoid the use of the specific word. A more straightforward example of this view of balance comes in Gabriella Blum’s and Philip B. Heymann’s recent book, *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism*, which states in its opening page that:

It is common to hold, as the Bush administration did, that these interests are necessarily in tension, if not in direct conflict, with one another, especially when it comes to reconciling security needs with liberal democratic values. And further, that in the name of national security, traditional American values as embodied in domestic and international law and institutional arrangements must be set aside, far aside. As we will argue in this book, more often than not this tension is contrived or misconceived.<sup>17</sup>

What do Blum and Heymann propose in lieu of the contrived tension? “Throughout this book we have argued for balance and reason as methods of government in a world in which terrorist attacks come in all guises and sizes, can never be completely prevented, and will continue to be a real threat for decades to come,” they say in their conclusion: “By ‘balance’ we mean that we must reconcile our concerns for our security with our concerns for a bundle of other values: civil liberties, the human rights of others, historically accepted limits on executive power, and our leadership among democratic nations.”<sup>18</sup> Like Obama, in other words, Blum and Heymann propose “balance”—a word they, unlike Obama, do invoke explicitly—in place of a choice between absolutes.

There is, to be sure, a dissident movement that rejects the metaphor. Like Blum and Heymann and Obama, the dissidents argue that the apparent tension between liberty and security is less zero-sum than it often appears. Yet unlike them, the dissidents do not propose balancing as a means of reconciling that tension that does exist.

Just as there is more than one iteration of the thesis, there is more than one iteration of the critique too, and the rejection of the balance thesis—like the articulation of it—tends to blend normative and descriptive points that are really distinct.

The descriptive point is the observation that liberty and security cannot truly be said to be in balance or tension with one another, since costs to liberty do not always pay dividends in security and benefits to security do not always come at

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<sup>17</sup> Blum, Gabriella, and Philip B. Heymann. *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism*. Cambridge, MA: MIT Press, 2010, pg. xii.

<sup>18</sup> *Ibid.* at 187.

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the costs of liberty. In his review of the Posner-Vermeule book, David Cole argues that, “There is in fact no necessary relationship between the two values. One can increase security in many ways without sacrificing liberty at all.” On the other hand, Cole contends, “one can sacrifice liberty without gaining much in the way of additional security” and, indeed, “Sacrifices of liberty can also often have negative effects on security.”<sup>19</sup> Laura Donohue, in her book *The Costs of Counterterrorism: Power, Politics, and Liberty*, makes a similar point:

Security . . . may be undermined by inroads into rights, making it not a choice between security or freedom, but rather a decision to safeguard security through freedom. In Northern Ireland, the use of coercive questioning heightened support for republican paramilitaries. Aggressive questioning techniques in Guantanamo Bay, Abu Ghraib, and elsewhere increased support for Islamist movements and alienated important allied and nonallied countries that the United States needed to respond to a global threat. Antiterrorist finance initiatives drove remittances away from countries like Yemen, where the United States wanted a strong civil society to counter efforts by al Qaeda to gain ground.

Perhaps the best example comes from the free speech realm. Efforts to stifle microbiologists from publishing or transferring knowledge may hurt both countries’ ability to respond to natural disease outbreaks—as well as to biological attack.<sup>20</sup>

Similarly, Bruce Schneier argues that:

Security and privacy are not opposite ends of a seesaw; you don't have to accept less of one to get more of the other. Think of a door lock, a burglar alarm and a tall fence. Think of guns, anti-counterfeiting measures on currency and that dumb liquid ban at airports. Security affects privacy only when it's based on identity, and there are limitations to that sort of approach.

Since 9/11, two—or maybe three—things have potentially improved airline security: reinforcing the cockpit doors, passengers realizing they have to fight back and—possibly—sky marshals. Everything else—all the security measures that affect privacy—is just security theater and a waste of effort.

By the same token, many of the anti-privacy “security” measures we're seeing—national ID cards, warrantless eavesdropping, massive data

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<sup>19</sup> David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. Chi. L. Rev. 1329 (2008), 1335-1339.

<sup>20</sup> Donohue, Laura K. *The Cost of Counterterrorism: Power, Politics, and Liberty*. New York, NY: Cambridge University Press, 2008, pg. 30.

mining and so on—do little to improve, and in some cases harm, security. And government claims of their success are either wrong, or against fake threats.<sup>21</sup>

Such empirical claims that liberty and security do not necessarily conflict often merge with a normative claim: that we *should not* balance liberty against other values. We should insist, rather, on living our values and should trust that security will flow from that decision. Obama often sounds this note rhetorically, though—as we have seen—he also then goes on to describe balancing. Attorney General Eric Holder too rhetorically rejects a tension, insisting that we do not compromise on our values. “I do not believe there is tension between our quest for liberties and our desire to keep our nation safe,” he said in one speech. “We can be a nation that is true to the values that makes us best among all the nations in the world.”<sup>22</sup> Though it has fewer conflicting interests than does the federal government—and thus less need to revert to balancing in practice—this is also the position of the American Civil Liberties Union, which rejects tradeoffs in the name of security and insists that adherence to its strict vision of constitutional protections will “Keep America Safe and Free.”<sup>23</sup> In this vision, one should not balance liberty and security because the tension between them is merely an illusion; we can have our cake and eat it too if we merely believe in what the ACLU terms “our most treasured values.”

The normative version of the critique is simply an ideological position—a statement both that liberty *should* win out to whatever extent there exists a conflict and an insistence that there’s no tension anyway. It is roughly similar to the view of those who support tax cuts in all circumstances, arguing both that they represent a transcendent good in and of themselves and that all other goods—including increased revenue—will flow from them. Yet even this fierce rejection of balancing paradoxically internalizes some elements of the balance thesis. For while the ACLU denies the propriety of balancing the value of new security measures against cherished liberties, it does generally assume that new security measures will come *at the expense of those liberties*. So while it seems to reject balancing, it does accept that attempts at security gains will have liberty costs.<sup>24</sup>

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<sup>21</sup> Schneier, Bruce. “What Our Top Spy Doesn't Get: Security and Privacy Aren't Opposites.” *Wired*. 24 Jan. 2008. Available at [http://www.wired.com/politics/security/commentary/securitymatters/2008/01/securitymatters\\_0124?currentPage=all](http://www.wired.com/politics/security/commentary/securitymatters/2008/01/securitymatters_0124?currentPage=all).

<sup>22</sup> Stevenson, Tommy. “Holder Sees no Tension between Security, Liberty.” *Tuscaloosa News*. 22 Sept. 2010. Available at <http://www.tuscaloosanews.com/article/20100922/NEWS/100929882>.

<sup>23</sup> “Keep America Safe & Free.” *American Civil Liberties Union*. Available at <http://www.aclu.org/keep-america-safe-free>.

<sup>24</sup> This point is also true of less ideological moral critiques of balancing reasoning. See, for example, Chapter 1 of Jeremy Waldron’s *Torture, Terror, and Trade-Offs* (Oxford: Oxford University Press,

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The critique of the empirical iteration of the balance thesis, by contrast, states an observation, not a prophecy. And the observation clearly has merit, even if one rejects some of the specific examples that critics pose of measures that are supposedly ineffective yet nonetheless liberty-killing. Ironically, however, the critique itself is very modest, focusing almost entirely on the twin facts that not all diminutions of liberty will enhance security and that some will even erode it. These claims are certainly correct, but they are only half of the picture. The other side of the picture is that not all increases in government security powers are privacy- and liberty-eroding. Some, to the contrary, will actively enhance freedom. Donohue nods to this point, noting that:

it is entirely conceivable that measures that seemingly violate individual rights may simultaneously preserve them more effectively. Thus, identity cards and biometric tracking may, by clearly establishing that a suspect was or was not present in the course of a robbery, make more efficient and fair the operation of the criminal justice system. In this way, security can advance liberty.<sup>25</sup>

But Donahue does not develop this point, which is actually critical to understanding the complexity of the liberty-security relationship. Only when one truly appreciates the many axes along which these two values interact can one fully appreciate how inadequate the balance thesis really is. Cole's, Donahue's, and Schneier's critiques are correct as far as they go. But they don't go nearly far enough.

Bobbitt goes further, insisting that "If we are to protect our civil rights and civil liberties against such threats [as terror], the aggressive use of informants, surveillance, wiretaps, searches, interrogations, and even group-based profiling must be measured not only against the liberties these practices constrict, but also with respect to the liberties they may protect."<sup>26</sup> The key question for Bobbitt is not whether liberty decreases in time of war. It is, rather, whether:

the rights of the People [are] greater or lesser than they *would otherwise have been* if the decision to go to war had not been taken? It is obvious, but no less a half-truth for being obvious, that the rights of the British people were less in 1940 than in 1936, owing to the decision of their government to oppose Nazi aggression in Europe. The appropriate analysis, however, asks whether the rights of the British were less in 1940, not than they

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2010). Waldron critiques, though does not dismiss, what he terms "The Image of Balance," but he assumes throughout his essay that measures taken to increase security will have costs to liberty.

<sup>25</sup> supra note 20, at 31.

<sup>26</sup> supra note 2, at 245-6.

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were in 1936, but than they would have been in 1940 if their government had decided to give Hitler a free hand in Europe (emphasis in original).<sup>27</sup>

For Bobbitt, vigor in government can be essential to preserving liberty; indeed, supporting human liberty is the core of what makes strong government legitimate. This idea is also old. Bobbitt rightly links it back to the Federalist Papers and the Declaration of Independence. Indeed, as we shall see, it animates much of the Enlightenment and Founding Era thought on the relationship between liberty and security. But it is not in vogue today. The balance thesis does not capture it, and Bobbitt is a remarkable exception among the thesis's discontents, very few of whom capture it either.

## The Inadequacy of the Balance Thesis

The balance thesis has two elements of truth at its core. The first is that civil liberties tend to diminish during wartime in the name of public safety—a fact amply born out by centuries of history. Alexander Hamilton commented in Federalist 8 that:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.<sup>28</sup>

Second and more generally, public safety measures often have implications for liberties. The power to imprison criminal suspects, for example, and to conduct certain types of surveillance are powers that are ripe for abuse and require vigilant checking and oversight. This much is uncontroversial.

Of course, to take two examples almost at random, it is also the case that, historically at least, taxes tend to go up during wartime, and some public health measures (compulsory vaccinations, say, or requiring people to purchase health insurance) can also negatively impact people's liberty. Yet we don't describe a general tension between security and fiscal responsibility, or between public health and liberty. And similarly, it does not follow from the fact that some

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<sup>27</sup> supra note 2, at 244.

<sup>28</sup> Hamilton, Alexander. "The Federalist No. 8: The Consequences of Hostilities between the States." *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States*. Ed. Roy P. Fairfield. Baltimore: Johns Hopkins University Press, 1981.

security measures, particularly in crisis situations, will stress civil liberties that security and liberty are *generally* in tension with one another or that increases in one will *generally* come at the other's expense. The notion of such a crude set of tradeoffs is not merely simplistic. It is, most of the time and with respect to most exercises of government power, just wrong.

The more sophisticated articulations of the balance thesis actually acknowledge this. Posner and Vermeule, for example, restrict their dramatic claim of a “straightforward tradeoff between liberty and security” to policymaking “at the security-liberty frontier,” thus acknowledging that in circumstances short of the frontier, balancing may not apply. Stated thus, their formulation of the thesis is unobjectionable, but it is also obvious to the point of meaninglessness—really just an intellectually elegant way of saying that security and liberty are in tension except when they are not. One might just as well speak, to use my earlier example, of a public-health-liberty frontier, that spectrum of points where one has exhausted all of the policy options to enhance public health that do not encumber freedom and thus have entered a zone in which the relationship becomes zero-sum. At some point, any two goods will conflict. The decision to plot them against one another is only interesting if one believes that the frontier lies sufficiently close to the zone of actual policymaking that measures to maximize one good will in general negatively impact the other.

With respect to liberty and security, Posner and Vermeule clearly do believe this, writing that “it is plausible to assume that advanced liberal democracies rarely overlook . . . opportunities [to enhance both values]. Only a very dysfunctional government would decline to adopt policies that draw support from both proponents of increased security and proponents of increased liberty.”<sup>29</sup> If one believes that the advanced liberal democracy lives its life at or close to the liberty-security frontier, Posner's and Vermeule's thesis becomes hard to distinguish in practice from the more conventional version of the balance thesis.

To illustrate rather vividly that simple balance is the wrong metaphor to describe the general relationship between these values, let us start with a point that is so obvious that it tends to get overlooked: The least free countries are not the most secure, and the freest countries are not the least secure. One could, I suppose, demonstrate this with social-scientific data showing the comparative likelihood of violent death in free and totalitarian societies, but a simple impressionistic gut check will suffice for present purposes. Freedom House lists among the freest nations in the world, to name just a few, Australia, Austria, the tiny island nations of Kiribati and Palau, New Zealand, the United States, the Scandinavian countries, the Bahamas, and Uruguay. By contrast, in its least free category are, among others, Burma, Libya, North Korea, Somalia, Sudan, and

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<sup>29</sup> *supra* note 11, at 26.

Uzbekistan.<sup>30</sup> In which group of countries would you feel safer? The question answers itself. In truth, the relationship between the aggregate level of liberty in a society and the aggregate level of security is dramatically closer to a direct relationship than to an inverse one. This fact alone suggests a profound defect in any metaphor that assumes some generalized tradeoff between the two goods.

This gestalt observation about the contemporary world meshes nicely with the observations of Enlightenment political theorists—not to mention the writings of the Founders. As far back as the 17th Century, Thomas Hobbes considered baseline conditions of security—imposed by government power—as a prerequisite for the meaningful exercise of liberty. The condition of what Hobbes described as unrestrained liberty is one in which one’s liberty, though total, is worthless. As he famously put it:

Whatsoever therefore in consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, that what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodius Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.<sup>31</sup>

We have seen Hobbesian worlds—places where the total absence of government authority creates anarchy. They exist today in Somalia, parts of Yemen, Afghanistan, and Pakistan; we have seen them recently in Iraq. They are not free in any sense that a rational person would understand the term. They are some of the most terrifying places in the world. Without what Hobbes called “a Common Power, to keep them in awe, and to direct their actions to the Common Benefit,” there is no way to enforce agreements, resolve disputes, or to force people to live peaceably.<sup>32</sup> Only through the ceding of some measure of individual liberty to that state power, he argued, could one’s residual liberty be made worth anything.

Hobbes’ diagnosis stood the test of time better than his famously-autocratic prescription. But other Enlightenment philosophers figured out that just as liberty required security to have value, so too did security require liberty to be

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<sup>30</sup> “Combined Average Ratings – Independent Countries.” *Freedom House*. 2011. Available at [http://www.freedomhouse.org/uploads/fiw11/CombinedAverageRatings\(IndependentCountries\)FIW2011.pdf](http://www.freedomhouse.org/uploads/fiw11/CombinedAverageRatings(IndependentCountries)FIW2011.pdf).

<sup>31</sup> Hobbes, Thomas. *Leviathan*. Ed. Ian Shapiro. USA: Yale University Press, 2010, p. 78.

<sup>32</sup> *Ibid.* at 104.

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secure—and that it was thus important to individual security to limit sovereign power and apply law not only to people but also to government. Montesquieu defined “political liberty in a citizen [as] that tranquillity of spirit which comes from the opinion each one has of *his security*, and in order for him to have this liberty the government much be such that one citizen cannot fear another citizen” (emphasis added). This is impossible, he wrote, when legislative and executive power are fused, “because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.” Similarly, if “the power of judging” is combined with either legislative or executive power, liberty is impossible. “All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers”<sup>33</sup>—and liberty would be lost precisely because the totalizing power would deprive those beneath the sovereign of *security from him*.

Locke makes the same point in his Second Treatise of Government, when he writes that:

For he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, no appeal lies open to anyone who may fairly and indifferently, and with authority, decide, and from whose decision relief and redress may be expected of any injury or inconveniency that may be suffered from the prince or by his order.<sup>34</sup>

The origins, in other words, of our modern notion of separation of powers flows from a sense of liberty and security as bound up in one another—indeed, as defined in terms of one another.

In more recent literature, the lack of individual security is part of the very definition of what it means to lack freedom. This theme runs, for example, throughout *1984* and other dystopic visions of totalitarianism. Orwell in several places explicitly links the absence of physical security with the absence of freedom:

he began thinking of the things that would happen to him after the Thought Police took him away. It would not matter if they killed you at once. To be killed was what you expected. But before death (nobody spoke of such things, yet everybody knew of them) there was the routine of confession that had to be gone through: the groveling on the floor and screaming for mercy, the crack of broken bones, the smashed teeth, and bloody clots of hair. Why did you have to endure it, since the end was always the same? Why was it not possible to cut a few days or weeks out of your life? Nobody ever escaped detection, and nobody ever failed to

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<sup>33</sup> Montesquieu. *The Spirit of the Laws*. Ed. Anne Cohler et. al. Great Britain: Cambridge University Press, 1989, pg. 157.

<sup>34</sup> Locke, John. *Political Writings of John Locke*. Ed. David Wootton. USA: Mentor, 1993, pg. 306.



confess. When once you had succumbed to thoughtcrime it was certain that by a given date you would be dead. Why then did that horror, which altered nothing, have to lie embedded in future time?<sup>35</sup>

The close link in both Orwell and the Enlightenment theorists between the extreme physical insecurity of the individual—who faces certain torture and death—and his lack of liberty dovetails perfectly with the Freedom House list of countries that are not free. For just as we have seen Hobbesian lands and noticed that they are not free in any meaningful sense, we have also seen Orwellian lands—and we notice that the North Korean individual is not secure.

The Framers of the Constitution, like the Enlightenment theorists, had no doubt that the dominant relationship between meaningful liberty and security was not one of tension, but one of mutual dependency and congruence. The Constitution’s Preamble envisions that it will at once “insure domestic Tranquility, provide for the common defense, . . . and secure the Blessings of Liberty” —linking the security and freedom values up as a package, not setting them off against each other.<sup>36</sup> And this interrelation and interdependence pervades the Federalist Papers too. Hamilton in *Federalist 1* warns his readers not to forget that “the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government.”<sup>37</sup> Similarly, Hamilton’s warning, quoted earlier, that war “will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights” comes in the context of an argument for *greater*, not lesser, government power. Hamilton’s point is that absent a strong central government, there is a greater likelihood of war between the states—war that would then produce terrible erosions of liberty. In the absence of a central government powerful enough to ensure peace, he argues, “we should, in a little time, see established in every part of this country the same engines of despotism which have been the scourge of the Old World.”<sup>38</sup> Similarly, in *Federalist 51*, Madison—clearly channeling Hobbes and Locke—argues that a government can only guarantee liberty to the extent that it “guard[s] one part of society against the injustice of the other part.” In a country, he writes,

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<sup>35</sup> Orwell, George. 1984. USA: Signet Classic, 1950, pg. 103.

<sup>36</sup> U.S. Const., preamble.

<sup>37</sup> Hamilton, Alexander. “The Federalist No. 1: Introduction.” *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States*. Ed. Roy P. Fairfield. Baltimore: Johns Hopkins University Press, 1981.

<sup>38</sup> *supra* note 28.

Under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.<sup>39</sup>

Madison sought a government divided enough structurally not to become an oppressor itself and ruling over a sufficient diversity of interests that the many would not be able to gang up on the few. Yet he did not lose sight of the fact that that government needed to be powerful enough to restrain the “violence of the stronger.” Hamilton went so far in *Federalist 70* as to argue for a strong executive *in the name of liberty*. “Energy in the executive is a leading character in the definition of good government,” he writes. “It is essential . . . to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”<sup>40</sup> One strains to find any semblance in the *Federalist* of the crude version of the balance thesis that is now so common.

There was, to be sure, a group of people in the Founding Era who talked in modern-sounding language suggestive of zero-sum tradeoffs between liberty and security. But it wasn’t the Founders. It was the Anti-Federalists—those who argued against adoption of the Constitution. Their arguments were a mishmash of concerns, from the absence of a Bill of Rights in the Constitution submitted for ratification—a matter the First Congress later addressed—to the erosion of state authority to the benefit of a central power. But a broad, unifying theme of their complaint was that augmenting federal power in the name of security would necessarily come at the expense of individual and state liberty. As one alarmed writer put it:

our situation is represented to be so critically dreadful that, however reprehensible and exceptionable the proposed plan of government may be, there is no alternative, between the adoption of it and absolute ruin. My fellow citizens, things are not at that crisis, it is the argument of

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<sup>39</sup> Madison, James. “The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.” *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States*. Ed. Roy P. Fairfield. Baltimore: Johns Hopkins University Press, 1981.

<sup>40</sup> Hamilton, Alexander. “The Federalist No. 70: The Executive Department Further Considered.” *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States*. Ed. Roy P. Fairfield. Baltimore: Johns Hopkins University Press, 1981.

tyrants. . . . For remember, of all possible evils, that of despotism is the worst and most to be dreaded.<sup>41</sup>

The dissenting members of the Pennsylvania ratifying convention complained—sounding remarkably like modern civil libertarians in the post-September 11 environment—that “Whilst the gilded chains were forging in the secret conclave, the meaner instruments of despotism without, were busily employed in alarming the fears of the people with dangers which did not exist, and exciting their hopes of greater advantages from the expected plan than even the best government on earth could produce. . . .”<sup>42</sup>

The simplistic image of scales balancing these goods describes reality about as badly today as it did in the 18th century. At their cores, liberty and security cannot exist without one another. There are certainly times when exertions of government power can and will erode liberty—say, when government seeks to arrest or spy on political dissidents—and restraint from such exertions will augment liberty. But there are also times when exertions of government power will enhance liberty—say, when government seeks to identify and arrest serial killers—and restraint from such exertions will erode it. Similarly, there are times when, as the balance thesis would suggest, augmenting privacy or liberty will erode security—as when, for example, one disallows valuable surveillance activity. But there are also times when augmenting privacy will *enhance* security—as, for example, when one better protects individuals’ online data from falling into the hands of identity thieves. The relationship here is not as crude as balance. It is far more complicated and multivariate than that.

## A Different Relationship

In 1929, the evolutionary biologist Julian Huxley, the science fiction writer H.G. Wells, and Wells’ son, G.P. Wells, jointly authored a nine-book, three-volume treatise on the life sciences and evolution. Entitled *The Science of Life*, the work is primarily of historical interest nowadays. It contains a ferocious defense of evolution, contending that it is a fact beyond reasonable argument. It reflects a skeptical attitude toward vogue racial attitudes of the time. It also contains an embarrassing enthusiasm for the eugenics movement. And buried in this lengthy tome is the following paragraph:

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<sup>41</sup> Bryan, Samuel. “Centinel, Number 1.” *The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and the Compromises that gave Birth to our Form of Government*. Ed. Ralph Ketcham. USA: Signet Classic, 2003.

<sup>42</sup> Bryan, Samuel. “The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents.” *The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and the Compromises that gave Birth to our Form of Government*. Ed. Ralph Ketcham. USA: Signet Classic, 2003.

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The phrase “hostile symbiosis” has been used to describe the state of our own tissues—all of the same parentage, all thriving best when working for the common good, and yet each ready to take advantage of the rest, should opportunity offer. There is a profound truth embodied in the phrase. Every symbiosis is in its degree underlain by hostility, and only by proper regulation and often elaborate adjustment, can the state of mutual benefit be maintained. Even in human affairs, partnerships for mutual benefit are not so easily kept up, in spite of men being endowed with intelligence and so being able to grasp the meaning of such a relation. But in lower organisms, there is no such comprehension to help keep the relationship going. Mutual partnerships are adaptations as blindly entered into and as unconsciously brought about as any others. They work by virtue of complicated physical and chemical adjustments between the two partners and between the whole partnership and its environment; alter that adjustment, and the partnership may dissolve, as blindly and automatically as it was entered into.<sup>43</sup>

This passage seems to me to capture the essence of the relationship between liberty and security—one of profound mutual dependence yet, simultaneously, mutual danger and hostility. An adjustment to one partner in the symbiosis may aid both, may harm both, may advantage one with respect to the other. It may cause the relationship to adjust, to reformulate, or to dissolve. But like the symbiosis between the sea anemone and the clown fish, the relationship is not one of simple balance. Whatever hostility there may be, there is too much dependency for that.

In considering any step that may alter the equilibrium between the two partners in this symbiosis, one has to consider several questions we tend to blur together but which are actually distinct from one another. The first question is whose liberty and whose security stand to be affected by the step. An individual’s liberty and security interests will almost always align rather precisely; relatively few measures will make Person X more secure but also make her less free. Rather, most measures that enhance the security of Person X will also enhance her liberty, and vice versa, for the simple reason that Person X is freer to do as she pleases if she is more physically secure. There are exceptions to this rule, of course. But they are actually rare. The far more common clash between liberty and security is that the same measure that makes Person X more secure and free will come at the expense of the liberty and security of Person Y. That is, we are not trading off an individual’s liberty against security. We are trading off one person’s liberty and security against another’s; by making Person Y *less safe* and *less free*, we hope to make Person X more so. In other words, while we often talk about liberty and security *in general*, this formulation is actually

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<sup>43</sup> Wells, Herbert George, Julian S. Huxley, and George Philip Wells. *The Science of Life*. New York: Doubleday, Doran & Co., 1939, pg. 932.

mischievous and tends to skate over important choices concerning whose liberty and whose security we in fact care about and whose we are willing—even eager—to throw over the side of the boat.<sup>44</sup>

To cite an extreme example, let's say that Person Y is a serial rapist and that Person X is a member of the universe of potential rape victims in Person Y's community. In this situation, the liberty and security interests of both individuals will be congruent with one another. Person Y will be freer and more secure if he is not caught. Person X will be freer and more secure if he is. Their interests, however, are also diametrically opposed to one another's. Society simply has to choose for whom it has solicitude. Decent societies make the choice that Person Y's liberty and security is an evil *insofar as it endangers the liberty and security of Person X and all other persons like her*. In such a case, the choice presents an easy call.

That call becomes far less easy when we consider the same question without having positively identified Person Y as a serial rapist but if, say, we merely suspect him of being one. Then we are considering the liberty and security interests of, on the one hand, the universe of possible criminal suspects against the liberty and security interests of, on the other hand, the universe of possible rape victims. Here we face hard choices between the interests of different groups in society for whom we have genuine and competing concerns—the wrongly-accused and the potential victims of the rightly-accused. And this is, indeed, a project of balancing. But critically, it is not chiefly a project of balancing liberty against security. It is, rather, again a project of balancing *one person's* liberty-and-security against another's, and that balancing is hard not because liberty and security are in conflict but because our information is insufficiently perfect to enable confident decision-making as to whom we want to protect more rigorously.

Second, while we often speak of liberty and security as simple quantities, both goods are multivariate and can be assessed across a number of different axes. A plethora of different things can threaten either. To be precise when we speak of what a given measure is likely to do to the relationship, in other words, we need to identify *what liberty* is threatened and *what sort of security* we are attempting to augment. For example, it is relatively common for street crime to be low in totalitarian countries. The individual may thus face no security threat in the form of mugging or murder but a very great one in the possibility of being sent to a labor camp. Conversely, in a society with very weak government, a person may face no threat of political oppression yet receive no protection either from non-state predatory forces like drug trafficking gangs or religious extremists. Meanwhile, a strong government that keeps order domestically and does not oppress its people may yet have inadequate military power to prevent foreign invasion and the conquest of its cities, and thus may ultimately protect

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<sup>44</sup> For a useful discussion of the moral dimensions of this sort of distribution of protection for liberty and security, see *supra* note 24, at 33-39.

neither the liberty nor the security of its citizens all that well. (This is the scenario that Bobbitt was implicitly describing in the above-quoted passage in which he envisioned 1940 in a Britain that chose not to confront Hitler.) It is thus possible for a given step to increase security in some respects while making people more vulnerable in others or to augment liberty in some ways while constricting it in others.

Third, the granularity with which one looks at the relationship matters a great deal when one speaks of either liberty or security, and the same security measure might legitimately be said to affect liberty positively or negatively depending on the focal length of the lens through which one views it. That is, are we primarily concerned with the liberty and security of individuals or are we primarily concerned with the aggregated liberty and security of society in general? Consider, for example, an aggressive enhancement of government surveillance powers—one that offers intelligence operatives significant new leads in pursuing terrorists but that also produces as a necessary byproduct a certain degree of snooping on innocent people. One might, I suspect, respond to this program very differently—whether one is inclined to oppose it or to defend it—if one is primarily thinking about individuals than if one is primarily concerned with a more gestalt vision of the security and liberty of society at large. In the former case, one would tend to see the question in terms of a conflict between the liberty and security of the surveillance subjects, on the one hand, and the liberty and security of potential victims of terrorism, on the other. One might ask: Is the imposition on the liberty and security of the former group worth the added protection it offers to the latter group? In the second case, by contrast, one would tend to look at more macro questions of the scope of government power: Do we feel freer and safer in a society in which government has this power or in one in which government lacks it? Those are very different questions, and they may not produce the same answers.

Another way of thinking about this point is that while we tend to evaluate the liberty of a society in terms of its protection of individual rights and, indeed, tend to conflate individual rights and aggregate liberty, these are not quite the same thing. The summary execution of the serial rapist would likely increase aggregate liberty in some meaningful sense, but it is not the act of a society that respects individual rights. Perhaps oddly, the law does not concern itself with aggregate liberty—the ability of the public in general to do as it pleases—but with the specific rights of individuals. In American constitutional law, for example, free speech does not exist as a general right of the public to communicate as much or as widely as it desires but as an individual right not to have government restrict one's speech. Similarly, the Fourth Amendment does not protect privacy in the way that many Europeans think of the term but restricts government from engaging in certain conduct with respect to individuals. The result is that it is possible, common even, for a step both to enhance the general liberty of a society and to conflict with the specific guaranteed rights that society promises to some individual. In such instances, it

may be proper to talk about balancing, but once again, we are not really balancing liberty against security; we are, rather, balancing societal liberty against an individual's rights.

In short, how liberty and security interact in their hostile symbiosis will depend not merely on whose liberty and whose security one values but on the threats to each that one perceives as salient. Sometimes, the problem will be that government is too strong, but the converse problem will often arise as well. And the impact of a given security measure on liberty will often differ depending on the manner in which one measures it, the time frame, and the granularity of the inquiry. None of this looks much like a balance scale or, as Bobbitt derisively puts it, "a needle oscillating between two poles."

## The Case of Surveillance and the Security of Platforms

Debates over surveillance powers and programs tend inexorably to lapse into the language of balance. This perhaps reflects the state of Fourth Amendment doctrine, which by asking questions of reasonableness, lends itself to judgment calls—which, in turn, often operationalize in law as balancing tests. But for whatever reason, surveillance seems particularly prone to balancing-type thinking. Whether the issue is the NSA's warrantless wiretapping program, the Patriot Act, or airport security screening, we fall very quickly into a zero-sum discussion. We reflexively assume that a given surveillance activity will encroach upon our liberty and privacy and ask whether that encroachment is one we ought to tolerate in exchange for some greater security good or whether it is one we should regard as an unwarranted infringement on liberty for the security it promises to deliver. And this framework, to be sure, certainly describes *some* surveillance disputes, and some aspects of a great many more.

But it does not describe all. And it will, in particular, obscure the impact on both liberty and security of a particular category of surveillance activity that will, I suspect, only grow in importance as technological development creates endless new venues for human creativity, commerce, and communications—and, along the way, for mayhem, crime, terrorism, and other security problems. The category at issue is surveillance to ensure the security of what I call platforms. Platform security and platform surveillance are not terms of art in surveillance law. To the extent that the law thinks in the terms I am going to describe here, it is through the so-called "special needs" search doctrine, which tends to suffer from balancing-type thinking itself.<sup>45</sup> But in my view, we ought to understand

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<sup>45</sup> See, for example, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), in which Justice Anthony Kennedy describes the doctrine as follows: "where a Fourth Amendment intrusion serves special governmental needs beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine

platform surveillance—at least under certain circumstances—not merely as not in tension with liberty, but as fundamentally liberty-enhancing.

Surveillance is different from other exercises of government security power in that it can be exceedingly gentle. While surveillance can involve the grossest sort of invasions of people’s freedom and privacy, it does not always. An arrest always implicates the freedom of the detained individual and, similarly, a deportation or a seizure of someone’s property or assets is never without consequences to his liberty. The range of possible impacts of surveillance, by contrast, is far broader. Some types of surveillance—placing guards in public spaces, for example—involve no significant diminution of anyone’s freedom to engage in lawful conduct. It is thus possible to imagine cases, and I would argue that platform surveillance often presents such cases, where the benefits of surveillance activity to the liberty and security of individuals far exceed the often-vanishing small negative impacts on those individuals’ freedom.

Think of a platform as some sort of technological or organizational base for human activity. Here I am only concerned with what we might call public platforms—that is, platforms that are open to public use. A public platform might be publicly owned or it might be owned entirely by private entities, or it might be a mix. A playground is a platform for children to play on. The network of airports together constitutes a platform for commercial air travel. The internet is a platform for global communications in a great many different forms, though an individual business’s local area network is not a public platform. The postal service provides a platform for written communications and package transmission—as do numerous private companies. The technology to make up a public platform, as these examples show, can be crude or sophisticated. The defining feature is that some organization, private or governmental, is making available to the public some infrastructure for activity—that is, a base off of which the public can do things, can exercise freedom.

People will not trust or use platforms that are insecure, at least not for things they care about. The playground in a crime-ridden neighborhood goes unused by children, for example, and restoring public confidence in airline security after September 11 was a great challenge for a number of governments. Fear of identity theft and insecurity of information could yet erode confidence in the internet. And the Postal Service experienced a significant dropoff in usage during the 2001 anthrax attacks.<sup>46</sup> Although platforms may be privately owned or operated, and might thus have complicated legal statuses, they operate socially very much like city streets. They require a measure of patrolling if we want people to feel safe enough to use them. That patrolling may be intrusive, as

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whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”

<sup>46</sup> See, for example, “Postal Facts 2011,” USPS, pg. 6. Available at <<http://about.usps.com/future-postal-service/postalfacts-2011.pdf>>. See also “Transformation Plan: April 2002,” USPS, pg 4. Available at <<http://about.usps.com/strategic-planning/2002transformationplan.pdf>>.



in the case of airport security—where we tolerate behavior (groping, for example) that in other contexts might reasonably trigger criminal prosecution for sexual misconduct. It also may be mild to the point of insignificance. The key point is that when we value the freedom that those platforms enable, we tolerate the surveillance because it enables our freedom to use those platforms.

One of the tricks we use to avoid dealing with the liberty-enhancing quality of certain types of surveillance is linguistic: We often avoid calling it surveillance. When we station a police officer on that inner-city playground, we call it “community-oriented policing.” When we scan letters for anthrax spores, which the U.S. Postal Service began doing at the time of the anthrax attacks, we call it “screening,” a word we also use to describe airport security measures. The trick is comforting but mindless. Platform surveillance is no less surveillance than is wiretapping. But in the hostile symbiosis between liberty and security, it triggers a different sort of interaction between the two partners than wiretapping does. And we thus often react to it very differently than we do to surveillance directed at individuals. Communities will actively demand greater police presences in public spaces like playgrounds precisely because they have made choices about whose liberty they care about on these platforms, and they unsurprisingly decide that they care more about the liberty of their children to play securely at them than they do about the liberty of the drug dealers who have taken them over in the absence of police presence and turned them into open-air markets.

This is not to say that anything goes in the name of platform security. But we do seem to tolerate a lot, and we tolerate it precisely because we don’t perceive ourselves as balancing our liberty against the security it offers—that is, we don’t perceive one as coming at the cost of another. We perceive, rather, the surveillance as enhancing our freedom. Like Franklin and Hamilton in their day, we see the interests as aligned.

But this, in turn, raises an important question: *When* do we regard our liberty and security interests in platform surveillance as symbiotic and when do regard them as hostile? There are surely forms of platform surveillance we would not tolerate, after all. Can we identify the conditions in which we perceive such surveillance as enhancing freedom and the conditions in which we won’t tolerate measures even in the name of making platforms safe for public enjoyment and use?

We are, I think, not entirely consistent on this point, and our legal doctrine certainly offers no clear answers—in part because it does not speak in the language of platform surveillance or security at all. The “special needs” search doctrine, which permits certain warrantless surveillance and searches that are “beyond the normal need for law enforcement” and for which the “probable-cause requirement [is thus] impracticable”<sup>47</sup> has provided a basis for upholding certain practices that represent species of platform surveillance. Most notably, for

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<sup>47</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

example, the Supreme Court has upheld sobriety checkpoints on roads and drug testing of railway employees as special needs searches.<sup>48</sup> But the special needs doctrine is not limited to the security of platforms; it has also been used, for example, to justify supervising probationers and searches of students in schools.<sup>49</sup> Nor does platform surveillance necessarily involve what we would consider a search under modern Fourth Amendment law. The cop watching the playground is not, after all, engaged in any kind of Fourth Amendment search. Platform security is really about patrolling spaces—real and metaphorical spaces, some publicly owned or some privately owned or operated—that are open for public use.

What’s more, the special needs doctrine by its nature does not attempt to identify when a given platform security measure will enhance freedom. The doctrine’s assumption, rather, is that freedom will be—to one degree or another—lost because of the measure, and it asks courts to weigh this loss against some putative security gain.

For all of these reasons, the special needs doctrine describes the case of platform surveillance only glancingly and incompletely, and it does not really answer the question of when we do or should feel that platform surveillance is liberty-enhancing and when it is liberty-eroding.

In my view, at least, the answer to this question should hinge—and it often does hinge—on several interrelated factors. The most important is that the surveillance does not target any particular individual. The cop on the playground is watching everyone. The anthrax mail screening system does not look specifically at whether *your mail* is giving off spores; it looks at whether *mail in general* is exuding spores and only then identifies the offending packages.<sup>50</sup> Everyone goes through a minimum level of airport screening. The surveillance, in other words, is, programmatically speaking, surveillance *of the platform and its use*, not surveillance of any particular person using the platform. While surveillance of the platform may come to focus on individuals and may involve significant invasions of individual privacy, the individual is not really its concern.

Second, platform surveillance is not concerned with investigation but with deterring and stopping activity that threatens public use of the platform. The cop does not patrol the playground in order to investigate a crime. He does it to establish presence and make the playground an unattractive site for criminal activity. Airport security screeners are not investigating any particular plot; they

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<sup>48</sup> See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) and *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602 (1989).

<sup>49</sup> See *Griffin v. Wisconsin*, 483 U.S. 868, 875–77 (1987) and *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

<sup>50</sup> See Davis, Lois M. et. al. *The Role of the United States Postal Service in Public Safety and Security: Implications of Relaxing the Mailbox Monopoly*. USA: The Rand Corporation, 2008. Available at <<http://about.usps.com/universal-postal-service/rand-report.pdf>>.

are preventing people from bringing dangerous materials onto airplanes. Again, platform surveillance may result in investigations. If, for example, the cop on the beat has with him a dog trained to sniff for explosives or drugs and that dog gets excited about a particular person, that fact might justify a search of that person, and that search might, in turn, lead to an arrest. Similarly, if airport screeners find weapons in a screened bag, the result might be the arrest and investigation of the individual carrying the bag. But the purpose of the screening is not to build a criminal case against anyone.

Third, platform surveillance has to be conducted in a non-discriminatory manner. It will lose legitimacy when it is abused or comes to focus on some group or other; airport security officials are constantly fending off allegations that Muslims or people from particular countries get a tougher look, and police forces get pressured when they give disproportionate attention to those “driving while black.” Platform surveillance only gets accepted when it is perceived to focus in a nondiscriminatory fashion on all platform users, not on specific categories of them—particularly not when those categories are suggestive of invidious discrimination or are not reasonably suggestive of individuals who pose some high risk to the platform.

Fourth, the intrusion on the individual has to be reasonably calibrated to the goal of protecting the security of the platform. If the threat to the platform does not justify the intrusion, people will not feel as though the liberty and security they have given up to government by subjecting themselves to the surveillance facilitates some greater liberty and security in their use of the platform. This is why people who believe that the threat to air travel is mostly hype tend to be more offended by airport security measures than people who believe the threat is real. Similarly, a policeman patrolling a playground in a crimeless neighborhood will not seem nearly as protective of freedom as that same policeman will in a high-crime neighborhood; he may even seem like an oppressive presence put there to discourage lawful behavior (like teenagers’ kissing) or to keep minorities out the neighborhood. In other words, for platform surveillance to have legitimacy, the public has to believe that it is necessary in order to make the platform safe for general use.

Yet when platform surveillance takes place under these circumstances—that is, when authorities monitor the use of the platform for non-investigative purposes in a non-discriminatory fashion that is not targeted at individuals or groups and that people believe is necessary for the platform’s safe use—it often gives rise to a social comfort level with surveillance we might otherwise find troubling under the Fourth Amendment or other privacy norms. And critically, it engenders this social comfort level precisely because we do not perceive our liberty and security interests as clashing with one another. We, rather, perceive ourselves as having all agreed to give up a little of each in order to garner some greater liberty and security: the ability to use the platform securely for purposes of our own.

As applied to some platforms, like the streets or the playground, this comfort level is sufficient that we do not even think of the patrolling as surveillance at all. As applied to other platforms, however, platform surveillance still generates considerable controversy. Airport security screening, for example, is a constant irritant in the relationship between authorities and the public. And consider the nascent dispute over cybersecurity and whether the government might reasonably install sensors to screen internet traffic—including private email traffic transiting over private networks—for malware and attack agents.<sup>51</sup> Such a system, which would look for malicious code but not otherwise examine the content of communications, is much more similar to than different from the anthrax scanning of physical mail. Yet for a variety of reasons, such ideas are treated with horror by many in the business and civil liberties communities, who regard this sort of surveillance as per se threatening to privacy.<sup>52</sup>

If my analysis is correct, we will not in the long-run come to the conclusion that this type of surveillance is per se in tension with liberty. Rather, we will insist that such systems not focus on any individual or group. We will insist that they operate to protect the network, not as part of any specific investigation. We will insist that they not discriminate against users but treat everyone's traffic the same way. We will ask ourselves questions about the chances of false positives and the consequences of them. We will ask whether the system is prone to abuse, and whether the protections against abuse are adequate. And we will ask whether the surveillance is reasonably calibrated to a genuine threat to the platform. And if we satisfy ourselves as to the answers to these questions, we will perceive this system as fundamentally enhancing of our liberty, not compromising it either intolerably or in a price we are willing to pay to stay safe online.

The broad point is that the proper amount of surveillance to maximize freedom is not zero. It may not even be small. And when contemplating a given surveillance program, we should not begin with the operative assumption that it will cost us freedom. We should begin, rather, by *asking* whether in the hostile symbiosis between liberty and security, this new program or activity will tend to enhance both, diminish both, or enhance one at the expense of the other. In other words, we should not assume that it will bring out the hostility in the symbiosis, though we should certainly be aware of—and vigilant about—that possibility.

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<sup>51</sup> Goldsmith, Jack. "The Cyberthreat, Government Network Operations, and the Fourth Amendment." *Future of the Constitution Series*. The Brookings Institution, 8 Dec. 2010. Available at <[http://www.brookings.edu/~media/Files/rc/papers/2010/1208\\_4th\\_amendment\\_goldsmith/1208\\_4th\\_amendment\\_goldsmith.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/1208_4th_amendment_goldsmith/1208_4th_amendment_goldsmith.pdf)>.

<sup>52</sup> Gorman, Siobhan. "U.S. Plans Cyber Shield for Utilities, Companies," *Wall Street Journal*. 8 Jul. 2010. Available at <<http://online.wsj.com/article/SB10001424052748704545004575352983850463108.html>> .

## Conclusion

Having opened this paper with a famed quotation on the liberty-security relationship that, in context, means something very different from the meaning its many quoters assume, let me conclude with another: Justice Robert Jackson's warning that "There is danger that, if the [Supreme] Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

Jackson's quotation is often cited as a kind of flip side of Franklin's—with Franklin assumed to have been warning that one should not give up liberty in the name of security and Jackson assumed to have been warning conversely that one protects liberty too strongly at great risk to security. The trouble is that just as Franklin was saying something else entirely, Jackson was not saying anything this crude either—which is probably why the rest of his remarkable passage tends to get left out of the quotation.

Jackson wrote this line in the last paragraph of his dissenting opinion in a free speech case called *Terminiello v. Chicago*—which the court handed down in 1949, a few years after Jackson returned from his stint as chief prosecutor at Nuremberg. The question of how civilized societies should deal with totalitarians was still very much on his mind when he confronted the case of a fascist-leaning priest who had given a vile and fire-breathing speech to a group of sympathizers at an event which communists had turned out to protest. The event had nearly turned into a riot, with the two mobs squared off against one another, and the priest had been charged with disorderly conduct and fined \$100. The Supreme Court overturned the judgment on free speech grounds, on the theory that all Terminiello had done was speak. Jackson saw things differently.

"[U]nderneath a little issue of Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order," he wrote. "This court seems to regard these as enemies of each other, and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order."

For Jackson, the issue was that two totalitarian movements that did not believe in liberty were squaring off against one another, and for liberty to exist, the police in a democratic culture simply had to have the authority to prevent things from spiraling out of control into mob violence. He quoted Goebbels concerning how the Nazis made use of democratic freedoms but "declared openly that we used democratic methods only in order to gain the power, and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in the times of [our] opposition." And Jackson insisted that confronted with such movements, "No liberty is made more secure by holding that its abuses are inseparable from its enjoyment." Free speech, in other words, will not be made stronger by protecting

it so rigidly that:

that the population can have no protection from the abuses which lead to violence. . . . We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty, and that the factions engaged in this battle are not interested permanently in either. What would it matter to Terminiello if the police batter up some communists or, on the other hand, if the communists batter up some policemen? Either result makes grist for his mill; either would help promote hysteria and the demand for strong-arm methods in dealing with his adversaries. And what, on the other hand, have the communist agitators to lose from a battle with the police?

Jackson then concluded with the following:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds, and that all local attempts to maintain order are impairments of the liberty of the citizen. *The choice is not between order and liberty. It is between liberty with order and anarchy without either.* There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.<sup>53</sup>

In other words, like Franklin, Jackson was actually denying a stark balancing of liberty interests and security interests and asserting an essential congruence between them. He was, in fact, critiquing the court for assuming that allowing the government leeway would necessarily come at the expense of meaningful freedom. His critique of the court was that by denying authorities the ability to maintain minimal conditions of order, it was empowering people who disbelieved in both freedom and order. The suicide pact to which he referred was the choice of anarchy with neither liberty nor security over a regime of ordered freedom. That's actually much more similar to than different from what Franklin was asking for two hundred years earlier. Both were, after all, arguing for the ability of local democratic communities to protect their security—and liberty—through reasonable self-government.

First Amendment law has long-since passed by Jackson's specific point about what sort of utterances should and should not trigger liability for their propensity to cause violence. But his larger point stands. In the hostile symbiosis between liberty and security, one doesn't maximize one partner at the other's expense. They are locked together—embracing, choking, supporting each other, endangering each other. The doctrinaire embrace of one to the other's detriment will always ultimately disserve both.

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<sup>53</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949).

## About the Author

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