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## Safety and Security

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# Safety and Security

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## I. THE NEGLECT OF SECURITY IN POLITICAL PHILOSOPHY

### A. The Trade-off Between Liberty and Security

When people talk, as they often do, about a trade-off between security and liberty—when they say (as many people said after September 11, 2001) that we need to adjust the balance between security and civil liberties<sup>1</sup>—what do they mean by *security*? Talk of a liberty-security balance has become so common that many view it as just an ambient feature of our political environment: “[I]t has become a part of the drinking water in this country that there has been a tradeoff of liberty for security, . . . that we have had to encroach upon civil liberty and *trade* some of that liberty we cherish for some of that security that we cherish even more.”<sup>2</sup> When we spend time discussing the definition of “liberty” and the concept of civil liberties, we try to be clear, because we know it makes a difference to the trade-off what liberties in particular we have in mind.<sup>3</sup> However, we almost never address the question of what “security” means. In fact, when people talk in literature or in court about “the definition of security” what they usually produce is some view about what security requires at a particular time (in the way of legal or political measures).<sup>4</sup> They say nothing

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1. We hear talk of a balance between security and liberty from all sides. We hear it from conservatives, e.g., United States of America Department of State, Free Societies Must Balance Security, Civil Liberties, Bush Says, <http://usinfo.state.gov/dhr/Archive/2005/May/09-927114.html> (last visited July 10, 2006); from liberals, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002) (“In the wake of September 11, we plainly need to rethink the balance between liberty and security.”); and from almost everyone in between, e.g., Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach to Rights During Wartime*, 2 INT’L J. CONST. L. 296, 298 (2004).
  2. James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 403 (2006).
  3. See, e.g., Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 195 (2003) [hereinafter Waldron, *Security and Liberty*] (outlining different meanings of “civil liberties”); *id.* at 205 (discussing the concept of negative liberty).
  4. See, e.g., David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 637 (2005) (“[T]he government has the advantage in FOIA appeals of controlling both the disputed information and—through Exemption 1’s reliance on executive orders—the definition of national security.”).

about the meaning of the concept itself. Although we know that "security" is a vague and ambiguous concept, and though we should suspect that its vagueness is a source of danger when talk of trade-offs is in the air,<sup>5</sup> still there has been little or no attempt in the literature of legal and political theory to bring any sort of clarity to the concept.

## B. Hobbes as a Theorist of Security

When legal scholars write about liberty they can take advantage of an immense literature in political philosophy on the meaning of the term.<sup>6</sup> But it is shocking to discover how little attention has been paid to the topic of security by political philosophers. Historically, the two philosophers who have written most about security are Jeremy Bentham and Thomas Hobbes. In his book *The Theory of Legislation*, Bentham argued that "the care of security" was "the principal object of law."<sup>7</sup> What he meant by security, however, was legal constancy, certainty, and predictability so far as property rights were concerned, and it might be thought that this is of limited interest in our discussion of the liberty-security trade-off in the war on terrorism. In fact that is not the case; later we will find some aspects of Bentham's analysis to be quite useful (even though it is not an analysis which has been picked up on by any modern discussant of security).<sup>8</sup>

If any thinker in the canon of political philosophy could serve as the focus of a modern discussion of security, surely it would be Thomas Hobbes. For Hobbes, as we all know, the whole point of the political enterprise is security. It is for the sake of security—security against each other and security against outsiders—that we set up a sovereign.<sup>9</sup> It is the drive for security that leads us to give up our

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5. In *United States v. United States District Court*, 407 U.S. 297, 320 (1972), the Supreme Court spoke of the "inherent vagueness of the domestic security concept . . . and the temptation to utilize such surveillance to oversee political dissent."

6. The most famous starting point for the modern discussion is ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). For a sampling of this literature, also see the essays collected in *LIBERTY* (David Miller ed., 1991).

7. JEREMY BENTHAM, *Principles of the Civil Code*, in *THE THEORY OF LEGISLATION* 88, 109 (C.K. Ogden ed., 1931).

8. See *infra* notes 43–49 and accompanying text.

9. THOMAS HOBBS, *ON THE CITIZEN* 77–78 (Richard Tuck & Michael Silverthorne eds., trans., Cambridge Univ. Press 1998) (1642) [hereinafter HOBBS, *CITIZEN*] ("[M]en's security requires not only accord but also *subjection* of wills in matters essential to peace and defence; and . . . the nature of a *commonwealth* consists in that *union* or *subjection*. . . . [T]he security of individuals, and consequently the common peace, *necessarily* require that the *right* of using the sword to punish be transferred to some man or assembly; that man or that assembly therefore is necessarily understood to hold *sovereign power* . . . in the commonwealth by right. . . . No greater power can be imagined.")

natural liberty and submit to the sovereign's commands.<sup>10</sup> It is the exigencies of security that determine the scale, the level, the duration, and the quality of organization that is requisite in the political realm.<sup>11</sup> Hobbes was a great analyst of concepts.<sup>12</sup> Yet almost alone among the leading concepts of the political realm, security is not subjected by Hobbes to any extensive analysis. The closest he comes is in a passage from *The Elements of Law*, where he writes:

[A] man may . . . account himself *in the estate of security*, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves; and without that security there is no reason for a man to deprive himself of his own advantages, and make himself a prey to others.<sup>13</sup>

Hobbes says surprisingly little beyond this about what "security" actually means, and he is followed in that by his modern commentators, who do not so much as list the concept in their indexes.<sup>14</sup>

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10. See, e.g., THOMAS HOBBS, *THE ELEMENTS OF THE LAW, NATURAL AND POLITIC* 111 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1640) [hereinafter HOBBS, *ELEMENTS*] ("The end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defence from those to whom he doth so relinquish it.").

11. See, e.g., THOMAS HOBBS, *LEVIATHAN* 118 (Richard Tuck ed. Cambridge Univ. Press 1996) (1668) ("[I]f there be no Power erected, or not great enough for our security; every man will, and may lawfully rely on his own strength and art, for caution against all other men. . . . Nor is it the joyning together of a [small] number of men, that gives them this security. . . . The Multitude sufficient to confide in for our Security, is not determined by any certain number, but by comparison with the Enemy we feare; and is then sufficient, when the odds of the Enemy is not of so visible and conspicuous moment, to determine the event of warre, as to move him to attempt.").

12. *Id.* at 28 ("Seeing then that the *truth* consisteth in the right ordering of names in our affirmations, a man that seeketh precise *truth*, had need to remember what every name he uses stands for; and to place it accordingly; or else he will find himselfe entangled in words, as a bird in lime-twiggs; the more he struggles, the more belimed. . . . So that in the right Definition of Names, lyes the first use of Speech; which is the Acquisition of Science: And in wrong, or no Definitions, lyes the first abuse; from which proceed all false and senseless Tenets. . . .").

13. HOBBS, *ELEMENTS*, *supra* note 10, at 111 (emphasis added). In the same chapter, Hobbes also adds an external dimension:

And forasmuch as they who are amongst themselves in security, by the means of this sword of justice that keeps them all in awe, are nevertheless in danger of enemies from without; if there be not some means found, to unite their strengths and natural forces in the resistance of such enemies, their peace amongst themselves is but in vain.

*Id.* at 112.

14. See QUENTIN SKINNER, *REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS* (1996); RICHARD E. FLATHMAN, *THOMAS HOBBS: SKEPTICISM, INDIVIDUALITY AND CHASTENED POLITICS* (1993); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); GREGORY S. KAVAKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986); LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS: ITS BASIS AND GENESIS* (1963).

Maybe this is because security operates as a sort of *adjectival* value in Hobbes's account. Maybe it is a mistake to look for treatments of it as an end in itself. Hobbes is interested in security of self-preservation, security of life and limb, security against violent death, security of "living out the time, which Nature ordinarily alloweth men to live."<sup>15</sup> Perhaps what we should be looking for in the index is safety, survival or self-preservation, and not security as such. In fact there *is* some discussion in Hobbes's book *On the Citizen* of safety and the sovereign's obligations in respect of his subjects' safety. We are told that "[b]y *safety* one should understand not mere survival in any condition, but a happy life so far as that is possible,"<sup>16</sup> and we are also told that because the sovereign can operate only through general laws, "he has done his duty if he has made every effort, to provide by sound measures for the welfare of as many of them as possible for as long as possible."<sup>17</sup> Both points will be important in what follows.<sup>18</sup>

### C. Drawing a Blank

Whatever hints Hobbes has given us have not been followed up in the political philosophy literature. When asked for articles in two prominent political philosophy journals—*Political Theory* and *Philosophy and Public Affairs*—with the word "security" in the title, Journal Storage: The Scholarly Journal Archive (JSTOR) returned the "No Items Matched Your Search" result. (A search for "liberty" or "freedom" in article titles in the same journals returned seventy results.)<sup>19</sup> With monographs, it is harder to quantify. In this author's library, there are brief discussions of the concept of security in Henry Shue's book *Basic Rights* and in Robert Goodin's book *Political Theory and Public Policy*.<sup>20</sup> Both will be discussed below,<sup>21</sup> but for now it is sufficient to say that these are mainly on the importance and priority to be accorded to security, not on its meaning. There is little or no discussion of security in the main texts of political philosophy.<sup>22</sup> The topic does not so much as rate a mention in Will Kymlicka's introductory

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15. HOBBS, *LEVIATHAN*, *supra* note 11, at 91.

16. HOBBS, *CITIZEN*, *supra* note 9, at 143.

17. *Id.*

18. See *infra* text accompanying notes 67–69.

19. JSTOR: Expert Search, <http://www.jstor.org/search/ExpertSearch> (last visited July 11, 2006).

20. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 20–22 (1980); ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 220–41 (1982).

21. For Goodin, see *infra* text accompanying note 56. For Shue, see *infra* text accompanying note 54.

22. There is also some discussion of topics surrounding security and the obligations of the state in ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 54–146 (1974). This is, however, mostly entangled in a technical discussion of the legitimacy of a minimal libertarian state. For a very recent and helpful discussion of security, also

text<sup>23</sup> or in William Connolly's *Terms of Political Discourse*,<sup>24</sup> while in D.D. Raphael's text, discussion of security is limited to a brief discussion of the state's role in upholding rights.<sup>25</sup>

As for the spate of books that appeared in the years immediately following the terrorist outrages of September 11, 2001, there is constant reference to the liberty-security trade-off. However, although these authors give us all sorts of recommendations and bright ideas about what is likely to promote or enhance security, they offer us little or nothing on what security means.<sup>26</sup>

#### D. Collective Security, National Security, and Human Security

We should be clear about what we are looking for. There is an immense literature on *national security* and also on *collective security* in the theory and study of international relations. There are whole journals called *National Security Outlook* and *Journal of National Security Law and Policy*, and innumerable articles with "collective security" in the title.<sup>27</sup> But these concepts are not quite the same as the security contemplated here.

The idea of *collective security* operates at the wrong level; it concerns security as among the nations of the world (or various subsets of them) determined by institutions, alliances and the balance of power, whereas here we are interested in security conceived as an attribute of individuals and populations. This is not to say that there may not be things to glean from the literature on collective security. The *collective* aspect itself is worth considering. What is striking in that discourse is that security is not understood as something most nations can pursue by and for themselves. It needs to be pursued by groups of nations either acting in concert or by sets of antagonists acting in ways that establish stable equilibria; or it needs to be pursued by the

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see GLYN MORGAN, THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION 97-104 (2005).

23. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990).
24. W.E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE (Princeton Univ. Press 1983) (1974).
25. D.D. RAPHAEL, PROBLEMS OF POLITICAL PHILOSOPHY (MacMillan Press 1976) (1970).
26. See, e.g., PHILIP B. HEYMAN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 158-79 (2003). Heyman devotes a final chapter to "Values and Security" which contains a sophisticated and helpful account of the trade-offs we face between security and democratic liberties; but there is no discussion of the meaning of security.
27. See, e.g., Richard K. Betts, *Systems for Peace or Causes of War? Collective Security, Arms Control, and the New Europe*, 17 INT'L SECURITY 5 (1992); Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783 (1948).

whole community of nations acting in concert. The very concept of security may not entail this—i.e., the need for concert or equilibrium may not be axiomatic. Very powerful countries may sometimes be in a position to pursue their own security unilaterally, by their own energy and resources in the international arena. Still, for most countries most of the time, and even for the most powerful countries some of the time, the pursuit of national security is impossible except in the context of collective security as a structured good enjoyed multilaterally. When we drop down a level from the international arena (where a couple of hundred nations jostle for security) to the interpersonal level (where millions of individuals jostle for safety in a particular political community), we should be open to the possibility that the notion of security appropriate at this level also needs to be considered as a collective rather than an individual good.<sup>28</sup>

What about the concept of *national security*? Here the trouble is that the phrase “national security” conveys ideas about *the integrity and power of the state itself* as an institutional apparatus and that is something which may or may not be related to ordinary citizens’ being more secure.<sup>29</sup> That is probably not the meaning of security that people have in mind when they say they are willing to trade liberty for security. When it is said that liberty must be traded off for the sake of security, what is meant by “security” is *people* being more secure rather than governmental institutions being more powerful. National security agencies are, of course, involved in the struggle to protect us against terrorism, but *their* security is valued for the sake of *our* security. The power of the national security apparatus is not valued as an end in itself. Maybe “*homeland security*” is a better term. “*Human security*” is another phrase in increasingly common usage,<sup>30</sup> and it has the additional advantage of avoiding some of the residual national security connotations of “*homeland security*” in the United States.

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28. See *infra* text accompanying note 107.

29. There is an interesting discussion of the ambiguities of “national security” in Arnold Wolfers, “*National Security*” as an Ambiguous Symbol, 67 POL. SCI. Q. 481 (1952). See also GOODIN, *supra* note 20, at 235 (discussing the meaning and genesis of the term “national security”).

30. See Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619, 623–24 (2005); see also Ved P. Nanda, *Preemptive and Preventive Use of Force, Collective Security, and Human Security*, 33 DENV. J. INT’L L. & POL’Y 7, 10 (2004) (“Over the years, the concept of security—traditionally viewed as state security—has expanded to include human security as well as state security. As the Commission on Human Security articulated in 2003, the international community ‘urgently needs a new paradigm of security.’ The reason given by the Commission is that: ‘. . . The state remains the fundamental purveyor of security. Yet it often fails to fulfill its security obligations—and at times has even become a source of threat to its own people. That is why attention must now shift from the security of the state to the security of the people—human security.’” (footnotes omitted) (quoting COMM’N ON HUMAN SECURITY, HUMAN SECURITY NOW 2 (2003))).



In general, although there is a massive literature on collective security and national security, it is not complemented by, nor is it able to build upon or presuppose, a similarly rich and copious theoretical literature on security as a domestic political ideal. We philosophers write endlessly about the meaning of liberty; but we have devoted very little attention to the ideal on the other side of the balance—homeland security, human security, people's security—as a primary goal or function of the state. So long as our study remains unbalanced in that way, we can hardly reach an adequate view of the trade-off.<sup>31</sup>

## II. THE PURE SAFETY CONCEPTION AND ITS SHORTCOMINGS

This Essay proposes to begin remedying that situation. It attempts to analyze the concept of security, and tease out of that analysis some important issues that are relevant to clear thinking about the trade-offs we face between security and liberty.

Let us begin the analysis with a modest question: What is the relation between security and personal safety? A person is safe to the extent that she is alive and unharmed. Is a population more secure simply by virtue of people being safer, i.e., simply in terms of a diminution in the prospect of their being killed or harmed? Or should we have in mind a richer notion of security involving elements of well-being other than survival, or a more structured notion (perhaps thinking of security as a certain kind of public good or as a good connoting a certain quality of relationship with others)?

It is surely tempting to associate the “security” that we talk about—when we oppose liberty to security in assessing changes in our laws and practices since September 11, 2001—with the probability that any given one of us will be affected physically by a terrorist outrage. Nobody wants to be blown up. So security might be understood simply as a function of individual safety. We might say, *I* am more secure against terrorist attack when the probability of *my* being killed or harmed as a result of such attack goes down; and *we* are more secure when this is true of *many of us*. This is “the pure safety conception.”

Though it is a very good starting point, we should not be satisfied with the pure safety conception. It is a radically stripped-down idea, and it is worth listing the issues it fails to raise and the concerns (commonly associated with the security side of the liberty-security balance)

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31. The author is as guilty of this as anyone. In a recent article on liberty and security, I took the latter concept for granted. For the closest I came in that article to any serious reflection on the structure of the concept of security, see Waldron, *Security and Liberty*, *supra* note 3, at 204–05 n.23.

that it does not address. Seven issues seem important (though this is by no means an exhaustive list):

- (1) The pure safety conception offers no explanation of why we fear death or injury in some guises and not others—why we orient the notion of safety which we are using to form our conception of security towards *violent* death or injury and perhaps particularly towards violent death or injury at the hands of a particular sort of assailant, namely terrorists.
- (2) The focus of the pure safety conception is bodily survival and bodily integrity. But what about material loss, such as loss of property or economic value? Is a notion of security adequate if it does not take these into account?
- (3) The pure safety conception focuses on the objective facts of death and injury and the actual probabilities of their occurrence. It says nothing about the subjective aspect—fear, for example, considered not just as an emotional response to a diminution in actual safety, but as a mental state that is itself partly *constitutive* of insecurity.
- (4) Similarly, the pure safety conception does not adequately highlight the element of assurance or guarantee that the word “security” connotes. I am secure not just because I happen to be safe, but because I am *sure* of not being killed or harmed.
- (5) The shortcoming referred to in point (4) also means that the pure safety conception does not alert us to the relation between security and the possession of other values that the element of assurance may relate to. It may be inappropriate to think of security as a good in its own right; it may be more sensible to think of it as a mode in which other goods are enjoyed. I enjoy my property or my health securely. I may enjoy certain liberties, such as the practice of my religion or the freedom to express my political views, securely.
- (6) The pure safety conception focuses mainly on the individualized physical facts of death, injury, and loss rather than more diffuse harms to persons and people in general resulting from disruption of their way of life or the interruption of familiar routines. In that regard, it fails to capture the connection between the idea of security and the idea of a social order, which by definition, is something enjoyed by many.
- (7) Finally, being a purely individual measure, the pure safety conception does not yet provide a basis for talking critically about the security of the whole community. It does not adequately confront aggregative or distributive issues. In setting out the pure safety conception we discussed safety as a probabilistic measure of death or injury for individual persons and the most we could say about security for a whole society is that *we* are more secure when the probability of death or injury goes down for many of us. This is very imprecise. We need to consider ways of talking about situa-

tions in which one person's security is enhanced at the cost of another's. In these situations how are we to say whether the security of the whole society has gone up or down?

This Essay does not denigrate or dismiss the pure safety conception, argue that it is incoherent, or propose that we replace it with some more amiable notion of communal solidarity. The hard Hobbesian link between security and survival is without doubt the core of the concept. Moreover, it is not unreasonable for people to be preoccupied with their personal safety, under the heading of "security," when they contemplate trade-offs between liberty and security in relation to the threat from terrorism. The threat from terrorism is deadly, not just disruptive. Again, nobody wants to be blown up. The pure safety conception may be defective, but no attempt to remedy its defects can possibly be adequate if such attempt cuts the concept adrift from the element of physical safety. When people are frightened, the issue of physical safety looms large and it may be difficult to focus on the more sophisticated aspects of security when we are concerned with the immediate prospect of death, injury, or loss. At the same time, it is worth considering what a richer notion of security involves, if only to see how much panic causes us to lose when we become preoccupied with physical safety under the immediate pressure of events.

People occasionally assert that a "deepening" or a theoretical "enrichment" of the notion of security is a trick employed to sneak civil libertarian concerns into the security pan of the liberty-security balance. We are supposed to be balancing liberty against security, they say, and we should not confuse matters with some fancy analysis that shows that security actually requires liberty. These people are right: all such trickery should be resisted. On the other hand, we are not in a position to say that liberty and security are utterly independent values which can be weighed and balanced against each other until we have a clear and honest sense of what security involves. It is possible that analysis of these concepts will reveal some internal connections, in which case we will need to be much more careful in our talk about "balance" and "trade-offs." We cannot casually rule that out. Moreover, if there are important internal connections between the concepts, they are likely to cut both ways in the political debate. Partisans of security may need to face up to the fact that what most people (in this country) want to secure is not just life, but their American way of life, which has traditionally been associated with the enjoyment of certain liberties. Equally, partisans of civil liberties need to face up to the fact that what people want is *secure* liberty, not just liberty left open to abuse and attack. We should not be playing word games. On the other hand we should not dismiss or ignore connections like these simply because they are likely to be misused politically by advocates on the political left or right.

We shall now proceed to consider adding to or enriching the pure safety conception in respect of its *depth* and in respect of its *breadth*. Depth looks to the enrichment of our notion of a person's security; breadth looks to the enrichment of our notion of a whole community's security. In addition we should think of ways in which the two dimensions are connected, for a sense of individual security is not easily separable from a sense of what an entire community has to lose when it is subject to attack.

Inasmuch as this Essay deals with the two dimensions separately, they will be addressed as follows: Under the heading of *depth*, we shall ask several questions: How shallow is an account of individual security which focuses purely on safety? Are there aspects of our personal apprehensions or our sense of what we personally have to lose that a safety focused concept fails to take into account? These questions raise issues (1) through (5) on the list above. Should our estimation of security take into account not just threats to life and limb, but also threats to material and economic well-being or the fear of such threats and the assurance that people crave against such apprehensions? Should the meaning of "security" take into account threats that come from agents other than terrorism, such as threats from hurricanes and other ways in which life and health are endangered? What about threats from the state, perhaps in other countries, where the very organization that is supposed to guarantee security is the main thing that many people fear?

Regarding these questions about depth, it must be emphasized that what we face here are not just choices—*deciding* whether to think about security this way or that—but the exploration of reasons. The pressure to deepen our notion of personal security arises from the fact that many of the reasons that motivate the pure safety conception also seem to point us towards a deeper conception. On the other hand, if we are reluctant to extend our conception of security too far in any of these directions, we need to ask what grounds that reluctance. Is it that deepening of the concept would be politically embarrassing? Or are there are genuine reasons for not budging from the pure safety conception's emphasis on life and limb?

Under the heading of *breadth*, issue (7) in particular invites us to pay attention to ways of talking about safety across the whole range of those who are supposed to be protected by our government's actions. We saw that Thomas Hobbes suggested that because a sovereign can operate only through general laws, "he has done his duty if he has made every effort, to provide by sound measures for the welfare of as many of [his subjects] as possible for as long as possible."<sup>32</sup> Is this satisfactory? Is security a majoritarian concept (like the greatest hap-

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32. HOBBS, *CITIZEN*, *supra* note 9, at 143.

pinness of the greatest number)? Is Hobbes's reason—the generality of law—sufficient to convince us of that? Or should we think of security more as a basic right, to be guaranteed at least at a minimum level to everybody, or perhaps as a primary good, to be subject to principles of distributive justice?<sup>33</sup> There are hard questions to be faced here. We need to explore the possibility that diminutions or enhancements in security may be unevenly distributed, that the government may respond to a threat to the security of some but not to a threat to the security of others. Above all, something must be said about the prospect that the security of some is protected or enhanced only because the security of others has been reduced (and reduced by state activity, not just by neglect). To address these possibilities, we may need to add some *structure* to the pure safety conception, as it applies to a whole community. To be sure, security is not another word for distributive justice. But if it is conceived as a good, then the question of how it is distributed—who enjoys it and who does not enjoy it—cannot be ignored. So, under the heading of *breadth*, we will try to understand security for a whole community as a *complex* function of individual safety—a function that is attentive to the means by which safety is assured and to the relational aspects of the distribution of safety when those aspects are upheld in certain kinds of public order.

The discussion begins with the issues of depth that have been identified. We need to know more about the nature and quality of the good we are considering before we think about the way in which it is provided and distributed. However, this strategy will prove difficult to sustain. The two dimensions—depth and breadth—become quickly entangled. When we start asking ourselves what a person's security consists in beyond his personal safety, we are bound to consider the importance for each person of certain *social* goods, and these may introduce an implicit distributive dimension or a consideration of modes of public provision that short-circuits any tidy separation of issues of depth and issues of breadth. Equally important in our discussion of depth is the mode of assurance associated with each person's security, where we quickly find ourselves considering the idea of *mutual* assurance (the way we look out for each other on these matters), and this too takes us across the tidy border to distributive issues.

The discussion of depth will be divided into two phases. It will first be considered in Part III, where items (2) through (5) will be examined. Part IV will continue with a discussion of *breadth*—distributive issues and issues about the formal provision of security to the members of a society. Here, along with item (7) on the list, we will also address item (1) because the way in which distributive issues arise is often affected by who or what is seen as the threat to security.

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33. For the basic rights approach, see SHUE, *supra* note 20, at 20–22. For the idea of primary goods, see JOHN RAWLS, *A THEORY OF JUSTICE* 90–95 (1971).

Part V returns to issues of depth in light of the discussion of breadth, and that will involve some consideration of item (6)—the importance of security for our whole way of life, which cannot so easily be separated from communal, distributive, and civil libertarian concerns.

### III. DEEPENING THE PURE SAFETY CONCEPTION

#### A. Economic Loss and Mode of Life

Nobody wants to be blown up. People worry about the loss of their lives in relation to terrorist attacks. They also worry about their bodily integrity, about being injured or maimed, even if sheer survival is still their most important concern. Beyond this, what about damage to property—to homes, cars, and the things that people rely on for their ordinary activities? A plan for security that did not propose to protect property would be regarded by most of us as pretty impoverished. It is not just a matter of protecting it as material wealth; it is a matter of protecting the role that people's possessions play in their individual and family mode of life. "Mode of life" means not just daily routines but also the reasonable aspirations people have for their lives: the trajectory of their lives. Each individual has and pursues a mode of living, a life plan (in a very informal sense), for herself and her family members, and an awful lot of things play a part in that. People value and rightly demand the protection of all that under the heading of their security. This does not mean that people are entitled to an assurance of success, but they may well think themselves entitled, as an aspect of security, to protection for the assets they have accumulated for themselves and their families as part of a normal attempt to put an ordinary plan of life into action.

Once we start thinking along these lines, we see that an adequately deep conception of security should aim to protect people's individual and familial modes of living themselves, and not just the life, health, and possessions that are necessary for it. A situation in which lives and property are safe from attack, but modes of life are not (because a lot of time must be spent cowering in sealed rooms, for example), or a situation in which one's daily routines are safe and protected, but at the expense of the ordinary aspirations that most people have for the trajectory of their lives (pursuing a career, raising a family, seeking education, promotions, etc.) would not or should not be regarded as a situation of security. The pure safety conception ignores factors like these, but a deeper notion of security will insist on taking them into account.

#### B. Security and Fear

Each person wants not only protection for his or her life, health, possessions, and mode of living, but also freedom from fear about

these things. (One meaning of the word “security” connotes nothing but the absence of this fear: “Freedom from care, anxiety or apprehension; a feeling of safety or freedom from or absence of danger.”<sup>34</sup>) That the element of fear is not insignificant is indicated by the word “terrorism” itself.<sup>35</sup> It is a mode of attack on people’s lives which is calculated to generate an enormous amount of fear and anxiety, not to mention the anguish and horror that accompany the loss of life and limb associated with terror attacks themselves. Diminishing the objective threat to life, health, possessions, and mode of living—diminishing the probability that they will be harmed or damaged—is one way of securing against this fear. On the other hand, we have to figure what to say about the extent to which the fear and terror associated with insecurity may be disproportionate to the actual likelihood of the events that frighten us.

It is common for cynics to remind people that their chance of death and injury due to road accidents, for example, is much greater than their chances of death or injury due to terrorist attacks, and it is sometimes suggested that people are irrational in not calling for precautions against the former in the same way that they call for precautions against the latter.<sup>36</sup> There is something to this point, but not much. Certainly incidents involving large numbers of deaths—such as in the World Trade Center attacks or the crashing of a hijacked airplane—have a grip on the fearful imagination which is out of proportion to people’s response to the same number of deaths spread out across thousands of ordinary accidents.<sup>37</sup> However, there is actually considerable rationality to the enhanced fear as a result of attacks such as those that took place on September 11, 2001. First, in the months that followed 9/11, nobody knew if these attacks would be repeated on the same or even greater scale; indeed we still do not know whether these were isolated incidents or whether we are going to end up in a

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34. This is the third meaning given for “security” in the *Oxford English Dictionary*. THE OXFORD NEW ENGLISH DICTIONARY 854 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed., 1989).

35. See Samuel Scheffler, *Is Terrorism Morally Distinctive?* 14 J. POL. PHIL. 1, 2–3 (2006); Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 J. ETHICS 5, 8–9 (2004) [hereinafter Waldron, *Terrorism*].

36. It has been suggested that 350 excess deaths were caused after September 11, 2001, by Americans using their cars instead of flying to wherever they were going. Gerd Gigerenzer, *Dread Risk, September 11, and Fatal Traffic Accidents*, 15 PSYCHOL. SCI. 286, 287 (2004); Jon Elster, *Fear, Terror, and Liberty: A Conceptual Framework* 8–9 (Mar. 22, 2006) (unpublished manuscript, on file with the author).

37. See, e.g., Neil Feigenson et al., *Perceptions of Terrorism and Disease Risk: A Cross-National Comparison*, 69 MO. L. REV. 991 (2004) (suggesting that this effect is quite localized depending on the vividness of recent experience in a given country); see generally Amos Tversky, *Assessing Uncertainty*, 36 J. ROYAL STAT. SOC’Y SERIES B (METHODOLOGICAL) 148, 149–52 (1974) (discussing illusions and faulty reasoning in regard to fear under conditions of uncertainty).

situation like that of modern Israel, in which terrorist outrages occur weekly or monthly, with a constant drumbeat of death and injury.<sup>38</sup> It is as though a car accident suddenly involved a hundred or a thousand deaths, with no guarantee that accidents would not continue happening on that scale. Secondly, the risk of death or injury from terrorist threats is not an *alternative* to the threat of death or injury on the roads (as though we could choose one or the other). The threats are cumulative. Thirdly, it is just not true that we have taken no efforts to address carnage on a similar scale on the roads. An immense amount of effort has been devoted to making our roads safer and our driving safer, and the effort continues.<sup>39</sup> However, despite our best efforts, a number of accidents resulting in death and injury will probably keep occurring. The point about terrorist attacks on the mainland of the United States is that they represented a *new* kind of threat, and new restrictions were thought necessary to meet them (just as new restrictions were thought necessary with the advent of the automobile). People are understandably very frightened while we take the measure of this new threat. Fourthly, people are rightly worried about intentional threats, particularly intentional threats which seem to aim to target people in their ordinary peaceful activities (as opposed to in military conflict where intentional threats are expected). Partly this is because it is harder to guard against intentional threats: road accidents are not *trying* to penetrate our defenses. It is also partly because, in a way that is not always easy to explain, it is somehow intrinsically worse to face a prospect of death in a deliberate attack than to face a prospect of accidental death.<sup>40</sup>

Still, fears are not always rational. They do not always conform to the objective probabilities or follow them up or down in any orderly fashion. Inasmuch as fear of attack does not correspond exactly to probability of attack (e.g., with fear remaining high even when probability diminishes) it may be thought that the reduction of fear ought to be regarded as an additional and independent element of security. In other words, fear is not just a response to something called insecurity; it is partly constitutive of insecurity. A given degree of fear may not be a rational response to a given probability of death or injury, but we must still treat the fear as significant for security in its

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38. In the fifty-nine-month period between September 11, 2001, and June 4, 2006, Israel has endured more than 98 suicide bombings and other outrages, resulting in 627 deaths and injuries to more than 3,463 people. Israel Ministry of Foreign Affairs, *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles* (Sept. 1993), <http://www.mfa.gov.il/mfa/go.asp?MFAH0i5d0>.

39. See National Highway Traffic Safety Administration, <http://www.nhtsa.gov/> (last visited Sept. 24, 2006) (describing various safety measures); see also GLEN C. BLOMQUIST, *THE REGULATION OF MOTOR VEHICLES AND TRAFFIC SAFETY* (1988).

40. For a discussion of this point, see P.F. STRAWSON, *Freedom and Resentment*, in *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 5 (1974).



own right.<sup>41</sup> Fear itself is something to be dreaded inasmuch as it can have a psychologically debilitating effect.<sup>42</sup>

Regarding fear as an aspect of insecurity in itself gives rise to all sorts of dangers. Suppose Americans experience a level of fear of terrorist attack in 2006 that is rationally appropriate to the actual frequency of attack in Israel but not to the actual frequency of attack in the United States. Should the American government respond to that insecurity with measures that would be appropriate to the Israeli situation, in the hope that this will allay Americans' fears to some extent? If we say "no," it sounds as if the government is not taking people's fear seriously; it is condescending to those who are afraid for the government to tell them that it will respond only to rational fears, not to the debilitating fear that they actually experience. On the other hand, we need to remember that pandering to these exaggerated fears may also involve adverse effects on others. What if people's irrational fears will not be allayed unless we incarcerate all young Muslim men in our cities? Certainly there will be objections to doing this from the civil liberties side of the balance, but are we clear what to think about this from the security side?

Someone might respond that all of this provides a good reason for keeping the discussion of security simple, for keeping it focused on objective facts about safety, by tying it down (if need be) to the pure safety conception. If we try to enrich it with psychology, we get into these terrible conundrums about what security requires in regard to irrational fears. This simplification is a mistake. We should not define our concepts just to avoid hard questions. We did not begin with any guarantee that the concept of security was straightforward or morally unproblematic. Our task in analyzing the concept is to find out whether that is so. It is better to say up front that there is an inherent reference to levels of subjective fear in our concept of security and that therefore the pursuit of security is fraught with moral difficulty, than to try sanitizing the concept and pretend that all its difficulties arise exogenously from competition with other values.

### C. Security and Assurance

Connected with the above points about fear are some points about the relation between security and assurance and our view of the future. Earlier the work of the early nineteenth-century utilitarian theorist Jeremy Bentham was mentioned.<sup>43</sup> In his writings on civil law,

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41. For the suggestion that security has a subjective as well as an objective sense, see Wolfers, *supra* note 29, at 485 ("[S]ecurity in an objective sense, measures the absence of threat to acquired values, in a subjective sense, the absence of fear that such values will be attacked.")

42. See Waldron, *Terrorism*, *supra* note 35, at 14–16, 22–23.

43. See *supra* text accompanying note 7.

Bentham invited us to "consider that man is not like the animals, limited to the present . . . but . . . susceptible of pains and pleasures by anticipation; and that it is not enough to secure him from actual loss, but it is necessary also to guarantee him, as far as possible, against future loss."<sup>44</sup>

Expectation is crucial to human life, according to Bentham: "It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not isolated and independent points, but become continuous parts of a whole."<sup>45</sup> The need to secure expectations was the basis of Bentham's conception of property. He argued that if people do not have an assurance projected into the future that what they have they can hold, the enjoyment of property and the incentives that are supposed to derive from that enjoyment will simply evaporate. "When insecurity reaches a certain point, the fear of losing prevents us from enjoying what we possess already. The care of preserving condemns us to a thousand sad and painful precautions, which yet are always liable to fail of their end."<sup>46</sup> Bentham also recognized that in the field of property, expectation is entirely the work of law: "I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me."<sup>47</sup> Now, this sort of security faces a threat from law itself, if expectations are overturned with too-frequent legal change.<sup>48</sup> But there are external threats as well:

Fraud and injustice secretly conspire to appropriate [labor's] fruits. Insolence and audacity think to ravish them by open force. Thus security is assailed on every side—ever threatened, never tranquil, it exists in the midst of alarms. The legislator needs a vigilance always sustained, a power always in action, to defend it against this crowd of indefatigable enemies.<sup>49</sup>

To sustain security, therefore, it is not enough that threats of this kind be repelled. There must be an *assurance* that they will be repelled, an assurance that people can count on and build upon in advance of the outcome of any particular attack.

Bentham made his points about property but analogous points might be made about safety. It is not enough that we turn out to be safe. We are not really secure unless we have an *assurance* of safety. We need that assurance because we want not only to *have* our lives

44. BENTHAM, *supra* note 7, at 110.

45. *Id.* at 111.

46. *Id.* at 116.

47. *Id.* at 112.

48. "As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced." *Id.* at 113.

49. *Id.* at 110.

and limbs but to *do* things with them, make plans and pursue long-term activities to which an assurance of safety is integral.<sup>50</sup> Our safety is not just an end in itself, but an indispensable platform or basis on which we will enjoy other values and activities. It cannot serve those other values unless it is assured. We may be thankful for our survival, but we cannot use our safety if survival is simply the fortuitous outcome of a long process of shivering terror.

#### D. Security and Other Goods

Should we therefore follow Bentham's lead and detach security from considerations of survival altogether? Bentham's property owner, who craves security of expectation so that he can give himself up to the cultivation of a field "with the sure though distant hope of harvest,"<sup>51</sup> does not necessarily have his *survival* at stake (though of course in some cases his subsistence may depend upon his plan for cultivation). What he wants security *of* is the enjoyment of the fruits of his labor. Security is oriented to enjoyment not to safety. Similarly, a professor values his tenure, not because it gives him security of life and limb; he may be perfectly able to survive if he is fired. He wants security of tenure so that he can be assured that his controversial writings will not endanger his scholarly career. People want security, in this sense, for all sorts of things. Pursuing this line of thought, we can see that security is not so much a good in and of itself, but (as I said earlier) something "adjectival"—a mode of enjoying other goods, an underwriting of other values, a guarantor of other things we care about.<sup>52</sup>

Some of these goods might be liberties. We might think of ourselves as secure (or insecure) in the privacy of our homes, secure (or insecure) against arbitrary incarceration, secure (or insecure) in our religious freedom. A demand for civil liberties is often a demand for security in this regard. Does this show that the connection between security and liberty is internal, so that talk of a balance or trade-off is inappropriate, since it is usually independent values that we balance

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50. We might develop a similar point on the basis of Hobbes's claims about all the human goods that will be unattainable if there is no assurance against war and violent death.

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 commodious 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, continual feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

HOBBS, *LEVIATHAN*, *supra* note 11, at 89.

51. BENTHAM, *supra* note 7, at 112.

52. See *supra* text accompanying notes 15–18.

and trade-off against one another? That conclusion would be too hasty. There is certainly a *sense* of "security" which refers to a mode of enjoying liberty (and other goods), and *in that sense* it might be inappropriate to talk of a liberty-security trade-off, but that does not mean there cannot be trade-offs between liberty and security in another sense of security that is tied more closely to safety. Some examples might be security of life, limb, and property, security in relation to one's ordinary expectations and way of life, and security from the fear that might imperil one's enjoyment of all that.<sup>53</sup>

This is a delicate point. We do need to deepen our notion of security so that it is not just a matter of probability of bodily harm; and any reasonable notion of security has to attend to issues of confidence or assurance in regard to the goods it protects. However, deepening the concept and paying attention to the element of assurance should not be a way of evacuating the concept of its distinctive content. Those who want to persist with talk of a liberty-security trade-off may be perfectly happy to talk, in more complicated terms, about a trade-off between assurance (or security) of liberty and assurance (or security) of safety, and we should not play word games to obstruct this.

On the other hand, we have to remain open to the possibility that there are substantial, as opposed to purely verbal, internal connections between security (or security of safety) and liberty (or security of liberty). Henry Shue defends such a position in his book *Basic Rights*, where he argues that security against the threat of attack is absolutely necessary for the enjoyment of any right:

No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical security are among the most serious and—in much of the world—the most widespread hindrances to the enjoyment of any right. . . . In the absence of physical security people are unable to use any other rights that society may be said to be protecting without being liable to encounter many of the worst dangers they would encounter if society were not protecting the rights.<sup>54</sup>

Note, however, that Shue concentrates on security against threats actually targeted at the enjoyment of one's rights. It is a further question whether his argument applies for security generally. Suppose a person is insecure because of the danger of terrorist attack. Let us assume that the terrorists simply intend to kill and wound a large number of people (perhaps including him) and do not really care either way about other rights enjoyed or exercised by the potential victims of their attacks. Is it still true that the enjoyment of rights is debilitated by insecurity in that sense? Perhaps, but the argument would be less direct than the argument Shue provides. The argument would be that security in this sense is a condition for rights inasmuch as our hypo-

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53. See *infra* Part VI.

54. SHUE, *supra* note 20, at 21.

thetical insecure person needs to be able to concentrate on his exercise of rights and make plans utilizing his rights, and he cannot do this if he is distracted by terror.

If we accept anything like Shue's argument, then it looks as though defenders of rights should be hesitant about voicing rights-based complaints against increases in security, since security is the *sine qua non* for the enjoyment of their rights. However, even if security is the necessary condition for the enjoyment of rights, it does not necessarily follow that security should have absolute priority. For one thing, a necessary condition for X is worth supplying only if there is a practicable possibility of securing sufficient conditions for X; if there is no such possibility, then we should forget about the necessary conditions for X.<sup>55</sup> More importantly, there is something perverse about giving absolute priority to security over rights if security is valued only for the sake of rights. Surely we do not want to devote all our resources and energy to fulfilling a necessary condition for something we value, and nothing at all to the thing that we value. We need to find some balance between the conditions for securing a value and the (perhaps sometimes precarious) enjoyment of the value itself.<sup>56</sup>

In any case, though Shue's point is no doubt important, it is probably a mistake to think of physical security only as a basic condition for the enjoyment and exercise of rights.<sup>57</sup> People value their safety and their physical survival in and of itself, and they will fight to preserve their lives long after it has become evident that for them a life of enjoyment and autonomy is unavailable. It may seem odd to some of us that life should be clung to apart from its quality, or that bodily integrity should be valued apart from the freedom to decide what to do with our bodies, but there it is: many people's values work in this way and an understanding of security should be sensitive to that.<sup>58</sup>

#### IV. PUBLIC GOODS AND THE DISTRIBUTION OF SECURITY

Having completed an initial deepening of the pure safety conception, we turn now to questions of breadth. The aim in this Part is to consider the application of the term "security" to the conditions of life

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55. This can be illustrated with an analogy. A necessary condition for me to visit the moon is that I should begin astronaut training right now, but even assuming that my visiting the moon is highly desirable, the necessary condition for it is simply of no interest since *it is not going to happen*. See Waldron, *Security and Liberty*, *supra* note 3, at 208–09.

56. See GOODIN, *supra* note 20, at 233.

57. Shue recognizes this when he says, "*Regardless of whether the enjoyment of physical security is also desirable for its own sake, it is desirable as part of the enjoyment of every other right.*" SHUE, *supra* note 20, at 21 (emphasis added).

58. For a very interesting discussion of different ways of reckoning the value of life, see RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 81–101 (1993).

of a whole population as opposed to one individual. Everything that we have established in Part III should be assumed in what follows. From now on when individual security is discussed, more than just a reference to improbability of harm to life and limb is intended; security now comprises protection against harm to one's basic mode of life and economic values, as well as reasonable protection against fear and terror, and the presence of a positive assurance that these values will continue to be maintained into the future. What is needed now is to discuss how we should think about the application of that somewhat deeper notion of security across a whole population of millions or hundreds of millions of individuals. Only by doing this is it possible to think about security as a social and political goal, as opposed to an individual goal.

### A. Breadth and Distribution

When "the pure safety conception" was introduced, we observed that it barely moves beyond a Hobbesian individual measure. It provides no basis for thinking about *the security of the community* as opposed to the security of this or that individual (at a given time). The pure safety conception treats security as a probabilistic measure of death or injury for individual persons. The most we could say in Part II about the application of the pure safety conception to the security of a whole society is that *we* are more secure when the probability of death, injury, or loss goes down *for many of us*. That is both imprecise and unsatisfactory.

So we must turn now to questions of breadth. How do we think about the provision of security across a whole population? Survival and safety refer to individual life and limb. How do we move from there to talk of the security of a society as a whole? Readers will recall that our direct interest is not in what is called "national security," for that seems to refer to the integrity and power of the state apparatus.<sup>59</sup> We are interested instead in what national security is *for*—namely, the security of the *people* of the nation. Our question is thus, How do we move from talk about one person's security to talk about the security of a population comprising 300 million people? Remember that security for each person is a matter of more or less, and that our discussion of depth has indicated that this "more or less" might have to be assessed across various dimensions. How are we to think about cases where some individuals could be made much more secure (in some dimensions) by making others somewhat less secure? What are the implications of such possibilities for our talk of the security of a whole population? When we talk about security for a whole population, are we implying anything about the distribution across that pop-

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59. See *supra* text accompanying note 29.

ulation of security as enjoyed by individuals? If we are, is that implication purely aggregative (as Hobbes suggests with his talk of “sound measures for the welfare of as many of them as possible”),<sup>60</sup> or does it have an egalitarian component (i.e., “equal protection”)? Are we committed to maximizing security or paying attention to the equity of its enjoyment?

## B. Policy and Definition

In thinking about this, it is not always easy to distinguish questions of definition from questions of policy. As a matter of security policy, we might ask questions like the following: Should the government pay attention to the equality or inequality of the security enjoyed by individuals? Should it aim to see that the security of all its members is above a certain threshold, and regard itself as having failed if any significant number of people fall below that threshold? Or should it take its task to be purely additive—to make as many people as secure as possible, even if that means accepting the endangerment of some for the sake of the security of the greater number? We might return answers to these policy questions, on various grounds, without any reference to the meaning of the word “security” as applied to whole populations. We might think that analysis of meanings does not help us very much with these questions, or we may reject the idea of being dictated to in matters of policy by conceptual analysis.

Still, we should not rule out the possibility that as applied to whole populations, the word “security” has a meaning which inclines towards one of these policy options and not the others. Many of the value concepts of our political philosophy are structured to incorporate implicit distributive assumptions. In some cases this is obvious: when we consider whether a given society is *democratic*, we must consider how the franchise is distributed among the members of the society. Democracy implies political equality and it is simply not compatible with a situation in which the formal political power of some individuals is much greater than others. Similarly, when we consider whether a society enjoys the rule of law, we must pay attention to the distribution of access to legal services (at least in a formal sense) and to the generality of the laws’ applicability across the whole array of citizens. In both cases, an understanding of the concept rules out certain approaches to the distribution of the goods that the concept protects. A society does not enjoy the rule of law by virtue of most people being treated as legal subjects with legal rights; it requires that they *all* be treated as legal subjects with legal rights. Similarly, a society does not enjoy democracy by virtue of most citizens having the vote; unless *all* adult citizens have the vote, the society is not a democracy. We

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60. See *supra* text accompanying note 17.

ought to consider the possibility that security is like democracy and the rule of law in also being structured by some such implicit distributive assumption.

A further intimation along these lines comes by way of analogy with the liberty side of the liberty-security trade-off. We know that *liberty* may be differentially distributed,<sup>61</sup> but we also know that the very idea of liberty is associated with some firmly established views about what that distribution ought to be. Though liberty is mainly a good to the individuals who have it, there are strong principles in the liberal tradition about ensuring that each person's liberty is made compatible with an *equal* liberty assigned to everyone else. The systematic equalization of liberty or its maximization subject to an equality constraint—"the most extensive basic liberty for each compatible with a similar liberty for all," in Rawls's formula—has been a powerful Kantian theme in the history of liberal thought.<sup>62</sup> Most liberals say that pure maximization of aggregate liberty or average liberty is out of the question: it would be quite wrong to try to secure greater liberty for some by restricting the liberty of others. To try that would be to act, absent some special explanation,<sup>63</sup> as though the others

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61. And we know also that the real impact on liberty of measures designed to enhance security—like those in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act—may be differentially distributed. As stated in Waldron, *Security and Liberty*, *supra* note 3, at 200, "Most of the changes in civil liberties [since September 11, 2001,] are aimed specifically at suspected perpetrators or accomplices or persons who might be thought to have information about past or future terrorist actions, and most Americans imagine that persons in these categories will look quite different from themselves." In fact, leaving aside increased searches at airports, then as Ronald Dworkin has argued,

None of the administration's [security] decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offenses, or have our houses searched without our knowledge, or find ourselves brought before military tribunals on grave charges carrying the death penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.

Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44, 48.

62. RAWLS, *supra* note 33, at 250; see IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 231 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797); RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 128 (2000). Also see BERLIN, *supra* note 6, at 124–27, for a slightly different formula calling for the equalization of liberty subject to an individual adequacy constraint.

63. One obvious area that requires more discussion is the special position, with regard to liberty, of those accused or suspected of crime. Plainly, there is some differentiation between the level of liberty thought appropriate for them and the level of equal liberty appropriate for members of the community generally. However, these differentiations are treated with great caution and organized in a way that is as closely commensurate with the principle of equal respect as possible. We do not think ourselves entitled to differentiate casually, simply because we



were not worthy of respect or did not count in society so far as the government was concerned. It is certainly never enough to say, therefore, that the loss of liberty for these few is made up for by the greater liberty of all other individuals, or that liberty is better off on average, or that we are better off in some other dimension as a result of restricting some people's liberty. So strong is the association between the value of liberty and this principle for its appropriate distribution that the very word "liberty" is sometimes used in a way that suggests that the distributive principle is incorporated into the concept.<sup>64</sup> A demand for liberty that is incompatible with this principle of equal liberty is sometimes seen as a demand for *license*, not liberty.<sup>65</sup> So far as security is concerned, however, this is just an analogy; it does not tell us much. However, when the good being weighed against security has this distributive structure, we should not be surprised if security turns out to have a structure of this kind as well.

### C. Maximization: The Greatest Security of the Greatest Number?

We could treat the security of a whole society in a straightforwardly aggregative way, simply summing or averaging over individual safety to define a measure of security for society as a whole. That is, we might say that a whole community is less secure when the average probability of individual death, injury, or loss among the members of the community goes up. This aggregative approach would take account of variations in the impacts of security measures on different individuals, and it would enable us to define something analogous to the economist's social welfare function—a social *security* function—

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think some of us will be better off if others' liberty is restricted. The principle of equal respect impacts in at least three ways on the appropriate manner in which suspects of serious crime or danger are treated: (i) it requires us to stay open to the possibility that they may be innocent; (ii) it constrains the means we use to determine guilt or innocence; and (iii) it constrains the way we deal with—including the way we punish—those who we are sure are attackers, criminals, or terrorists. Though, in each of these regards, there may well be an issue of lesser liberty, still the according of lesser liberty to someone suspected of criminal activity, or even to someone convicted of it, is always to be done in a way that is compatible with underlying principles of respect. The traditional civil liberties add up to a system that is supposed to effect that compatibility. No doubt such systems require adjustment from time to time, to reflect the greater dangers that we face. But the adjustment must never lose touch with the underlying principle of respect in regard to suspects and convicts. We are not entitled to readjust the system of civil liberties simply to make ourselves safer. If we are concerned to make ourselves safer, any readjustment must be filtered through the medium of this principle.

64. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 128–31 (2000) (arguing that liberty as a compelling political ideal presents itself as an ideal of equal liberty).

65. *Id.* at 126.

that took all those disparate impacts into account. On the basis of this sort of conception of security, which we shall call "the maximizing model of security," we would then be in a position to talk more precisely about trade-offs. Would this be satisfactory? Is this the way to arrive at an adequate conception of security for a whole society?<sup>66</sup>

We saw earlier that Thomas Hobbes adopted something like the maximizing model of security. The sovereign, he said, should provide for the security of as many people as possible for as long as possible, and this may be compatible with some people doing badly for the sake of the majority.<sup>67</sup> Whether or not this is the right position, it is certainly not supported by the argument that Hobbes provides for it. Hobbes's argument for this sort of maximization is that "[t]he sovereign as such provides for the citizens' safety only by means of laws, which are universal."<sup>68</sup> In fact, Hobbes provides no argument for the position that the sovereign is not sometimes empowered to act directly on the basis of discretionary intervention; that is, he provides no argument against the use of what John Locke would later call "prerogative power" for security purposes.<sup>69</sup> Further, if we confine ourselves to general laws, the fact is that general laws can be oriented either to the maximizing of security or to equal protection. Generality as such does not prejudice that issue.

There are all sorts of reasons for being hesitant about the maximizing model. None of them is conclusive, but they should put us on alert to the likelihood that this approach is to be rejected as wrong-headed.

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66. This raises the question of whether a pure aggregate or average measure of security can be defended as a distributive principle, along the lines of John Harsanyi's response to Rawls's "original position" argument. In other words, the argument in John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594 *passim* (1975), to the effect that people in Rawls's original position would choose average utility as their best bet for a society in which they did not know what place they would occupy. See also RAWLS, *supra* note 33, at 161. The answer is "probably not." Harsanyi's argument depends on the notion that a distribution of security with the highest average offers the best bet for a person who does not know which place he will occupy in the society; the notion of a best bet for such a person makes most sense when people can think of themselves as repeat players (like a person choosing strategy for a whole evening of poker) and least sense when people think of themselves as making a one-off bet. But the distribution of security, with its arguably mortal consequences, is perhaps the least plausible candidate for such a stochastic approach. Rawls's comment here is apposite: "We must not be enticed by mathematically attractive assumptions into pretending that the contingencies of men's social positions and the asymmetries of their situations somehow even out in the end. Rather, we must choose our conception of justice fully recognizing that this is not and cannot be the case." *Id.* at 171.

67. HOBBS, CITIZEN, *supra* note 9, at 143.

68. *Id.*

69. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374-75 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

- (i) The first set of reasons comprises general worries about this form of consequentialism. Over the last thirty years or so, moral philosophers have become convinced that there is something deeply wrong with a position that attempts to maximize important values without any attention to their distribution.<sup>70</sup> This scepticism is particularly focused on utilitarianism, in the sense of maximizing welfare, but it would not be surprising if it also applies to a utilitarianism of security.
- (ii) Another reason for thinking that the distribution of security should not be governed by the maximizing model, but rather should be governed and constrained by egalitarian principles similar to those with which we control the distribution of liberty, concerns the relationship between security and human rights. As we have seen, in *Basic Rights*, Henry Shue argues that physical security is an indispensable prerequisite for the enjoyment of any right; it is, in that sense, a *basic* right.<sup>71</sup> Since the general principle of the distribution of human rights is equality, it is not unreasonable to infer that the distribution of this very basic prerequisite to the enjoyment of human rights should be distributed on that basis as well.
- (iii) Defenders of a security-liberty trade-off have to be able to respond adequately to the point that since civil liberties are rights and rights are trumps, civil liberties are not supposed to be traded off easily against other goods. The best response to this point is for the defenders of security to say that rights are also at stake on their side of the balance: there is a right to life and a right to safety which we are balancing against rights to various liberties.<sup>72</sup> That is not implausible. But if security is going to be treated as a right, then it has to have the distributive structure of rights and that structure is egalitarian, not maximizing.
- (iv) The maximizing model does not measure up as a description of our practice. Often we assign resources to the protection of some individual from an extraordinary threat to an extent that would make no sense if we were simply trying to maximize the overall amount of security in the population. The sustained campaign by British police and security forces to protect Salman Rushdie

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70. For the modern consensus against this sort of maximizing consequentialism, see RAWLS, *supra* note 33, at 27 ("Utilitarianism does not take seriously the distinction between persons."). See also NOZICK, *supra* note 22, at 32–33 ("[T]here is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. . . . Talk of an overall social good covers this up."); see generally CONSEQUENTIALISM AND ITS CRITICS (Samuel Scheffler ed., 1988).

71. SHUE, *supra* note 20, at 20–22.

72. See Waldron, *Security and Liberty*, *supra* note 3, at 195–99.

after a fatwa was issued against his life in 1988 is a clear example. The resources assigned to Rushdie's protection involved an enormous and sustained expense for many years, and there was no reason to suppose that making him more secure made anyone else more secure. Quite the contrary—cutting him loose and leaving him to his fate might well have reduced the danger to others, especially his police bodyguards. The only explanation is that the British authorities found it unacceptable that any one individual's security should suddenly be reduced, by external threats, to a level so far below the security of most other Britons. This is not to say that their aim was equality of security,<sup>73</sup> but it evidently involved qualifying a maximizing approach with the principle that no one's security should be allowed to drop drastically below a certain minimum level.

#### D. Does Sheer Survival Trump Distributive Justice?

It may be thought that the area of security is one in which we should not pursue issues of distributive justice too fastidiously. Issues of security involve brutal questions of primal survival. In the last resort, people must be expected to simply do what they can to guarantee their own safety and that of their families in circumstances of imminent mortal threat. They cannot reasonably be expected to attend fastidiously to fine points of distributive equity under these circumstances. This point was made (about justice) by David Hume:

Suppose a society to fall into such want of all common necessaries, that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery; it will readily, I believe, be admitted, that the strict laws of justice are suspended, in such a pressing emergence, and give place to the stronger motives of necessity and self-preservation. Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property? Or if a city besieged were perishing with hunger; can we imagine, that men will see any means of preservation before them, and lose their lives, from a scrupulous regard to what, in other situations, would be the rules of equity and justice? The use and tendency of that virtue is to procure happiness and security, by preserving order in society: but where the society is ready to perish from extreme necessity, no greater evil can be dreaded from violence and injustice; and every man may now provide for himself by all the means, which prudence can dictate, or humanity permit.<sup>74</sup>

This is not a convincing argument in the present context, however, for two reasons. First, if it works at all, the Humean argument works only in the face of the most imminent, focused threat—*clear and pre-*

73. *But cf.* Gregory Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41, 49–50 (Jeremy Waldron ed., 1984).

74. DAVID HUME, *An Enquiry Concerning the Principles Of Morals*, in *ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 167, 186 (L.A. Selby Bigge ed., 2d ed. 1902) (1777).

*sent danger to the individuals concerned.* That is not what is being considered here. This Essay is not about how individuals should respond personally to an immediate threat to themselves or their families, but rather about how the law and politics of a large organized community like this one should respond to a threat level that is elevated overall, but still quite small for each individual. Under these circumstances, it is not unreasonable to insist on some degree of distributive sensitivity.

Secondly, even in the circumstances to which it applies, Hume's argument is not a reason in favor of a maximizing approach. It is a reason for taking no interest in the social dimension of the matter at all. It is thus no help for our discussion of security as a social or political ideal. Perhaps from the point of view of a Hobbesian individual, egoistically obsessed with his own survival, there is no basis for thinking about the proper distribution of security for others.<sup>75</sup> I am interested in my survival and you are interested in yours; it is not clear on Hobbesian grounds why anyone should be interested either in equal protection or in the security of the majority, except to the extent that they personally benefit from the implementation of one or other of these distributive options.<sup>76</sup> If it *is* possible to take a point of view that transcends that of particular individuals, however, then there is a distributive question to be faced that is not trumped by the urgent impulsion of individual survival. Hobbes's sovereign necessarily must adopt such a perspective in order to figure out his duty "since governments were formed for the sake of peace, and peace is sought for safety" and "a commonwealth is formed not for its own sake but for the sake of the citizens."<sup>77</sup> It may be true that Hobbes makes a mistake in thinking that the sovereign's duty is to maximize security, but it is not a mistake to assume that the sovereign must devote attention to the principle on which security is to be supplied to the citizens. The inherent urgency of security, the fact that it is a matter of life and death, does not show that this consideration of a principle for breadth is inappropriate. The sovereign is constrained by the fact that it exists to promote the safety of *all of us, in a given community*, not just of *me alone*. Maybe as a Hobbesian man, I am preoccupied with what the sovereign provides for *me*, but *the state* cannot be preoccupied with

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75. See HOBBS, CITIZEN, *supra* note 9, at 27 ("[E]ach man is drawn to desire that which is Good for him and to Avoid what is bad for him, and most of all the greatest of natural evils, which is death; this happens by a real necessity of nature as powerful as that by which a stone falls downward. . . . Therefore the first foundation of natural *Right* is that *each man protect his life and limbs as much as he can*. . . . By natural law *one is oneself the judge* whether the means he is to use and the action he intends to take are necessary to the preservation of his life and limbs or not.").

76. The author is grateful to George Kateb for pressing this point.

77. HOBBS, CITIZEN, *supra* note 9, at 143.

this to the exclusion of all else. Even if I am entitled to act in certain circumstances as though the safety of others does not matter as much as my safety does, the sovereign cannot act as if my safety mattered more than other people's safety (and I cannot reasonably ask it to). I know that the sovereign must have in mind its impact on their safety too.

Another way of putting this is to say that even if security is a desperate issue of life and death from the individual's point of view, the individual has to recognize that there are limits on what he can expect the state to do for his security. Maybe the individual will fight tooth and nail, with little regard for others, to protect his life and that of his family, but he cannot expect the *state* to fight for him and his family *with little regard to others*. The state must have regard to all of those whose security it is bound to protect and that necessarily qualifies what it can do for any one of us. So again, each of us must consider what the appropriate principle is, equal protection or a maximizing principle, for the state to supply security across the whole population. Only then will we be in a position to articulate reasonable and responsible demands of the state on our own behalf.

### E. Security as a Public Good

Perhaps there is another way of avoiding the distributive issue. It is possible that we might avoid some of these issues about aggregation and distribution by treating security, insofar as it applies to a whole society, as a *public good*. If something is a public good, then by definition any member of the public gets the benefit of it and so the distributive question is put to rest. We need to proceed carefully with this suggestion, however, because the phrase "public good" is used in a number of ways in political and economic theory. It is used to refer to (a) goods provided in a society as a matter of public responsibility; (b) goods whose enjoyment by and provision to individuals has certain distinctive features; and (c) goods enjoyed communally or collectively.<sup>78</sup> Of these, (a) is a rather loose sense, and it will not be our concern here, though often it is said that goods are public in sense (a) on account of their being public in sense (b). Sense (c) we shall consider later in the discussion, in Part V of this Essay.<sup>79</sup> At this stage, the focus will be on sense (b), goods whose enjoyment by and provision to individuals has certain distinctive features

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78. For an example of sense (a), see Jane Mansbridge, *On the Contested Nature of the Public Good*, in *PRIVATE ACTION AND THE PUBLIC GOOD* 3, 3 (Walter W. Powell & Elisabeth S. Clemens eds., 1998). For an example of sense (b), see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 14 (1965). For an example of sense (c), see Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 844 (1987).

79. See *infra* text accompanying notes 107-110.

The term "public good" is used by economists in sense (b) to refer to goods whose provision and enjoyment has one or both of the following characteristics:

- (b-i) the good is *noncompetitive*, in the sense that one person's enjoyment of it does not diminish the amount of it available for enjoyment by anyone else; and/or
- (b-ii) the good is *nonexcludable*, meaning that if it is made available to anyone in a given group (such as a whole society) it is necessarily made available to all members of that group.<sup>80</sup>

Publicness in either sense diminishes the importance of distributive issues raised in this section. Goods that are nonexcludable are hard to guarantee to some but not others, and goods that are noncompetitive do not really pose distributive issues at all; these are goods which we all enjoy without anyone's enjoyment having to be traded off against anyone else's.

In *The Logic of Collective Action*, Mancur Olson observed that security and national defense are public goods, at least in sense (b-ii):

The basic and most elementary goods or services provided by government, like defense and police protection, and the system of law and order generally, are such that they go to everyone or practically everyone in the nation. It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police, and the courts to those who did not voluntarily pay their share of the costs of government. . . .<sup>81</sup>

The idea is that if the government provides a national defense to stop our enemies from attacking our homeland, then it provides it willy-nilly to all members of the nation. There is no way any particular person can be excluded from its benefits (say, for refusing to pay a specific fee or tax). You cannot sell tickets for national defense. We might also say that defense is a paradigm case of noncompetitiveness: the benefit to any American of being protected from invasion by the Russians is not reduced by any other American's enjoyment of this good. We can neither exclude nor crowd others out of this benefit. Of course, the government might choose to provide this good for none of us or provide it for us all only at an unacceptable level, and that in itself might be an issue of justice. Once it is provided, however, there do not seem to be any distributive issues with regard to its provision. Accordingly, we might be able to avoid the distributive issues about security which were raised at the beginning of this section under the heading of "breadth."

Unfortunately, the economist's characterization of security as a public good is a bit of a cheat. What we all enjoy, nonexcludably and

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80. A lighthouse is a public good in senses (b-i) and (b-ii); an encrypted radio signal (whose content is enjoyable only by those who have paid for a key) is public in sense (b-i), but not sense (b-ii); and fresh air in a large sealed chamber is public in sense (b-ii) for those in the chamber, but not in sense (b-i).

81. OLSON, *supra* note 78, at 14.

noncrowdably, in regard to national defense is the benefit of being a member of a nation that is not attacked by its enemies. This makes the good public more or less by definition. However, it leaves unclear whether security, in the sense of individuals' *safety* being actually secured against the threat posed by enemy attack, is provided equally and in the same way.

There are certainly elements of a public good in the state's anti-terrorist policy. If we assume that the terrorists attack large targets and that there are a small number of them, out of proportion to the number of their intended victims, then frustrating any one terrorist or any one terrorist cell may protect many people against large-scale and repeated attacks. When a cell is taken down, a large number of people benefit from the elimination of a threat to life and limb and of a source of fear; and the enjoyment of this good by some who would otherwise be threatened is not affected by the enjoyment of it by others.

On the other hand, it is evident that security is far from a perfect example of publicness. First, people may be differently situated with regard to a given threat. Some regions may be more vulnerable than others. This is true of classic wartime security: the British government sent children out of the main cities in the Second World War, reasoning that this was something they could do to keep them safer from air attack than others whose presence in the cities was required. The same is true of security against internal threats. Some people may be forced into situations where they are more likely than others to be victims of terrorist attack (e.g., poor people in Israel who have no choice but to use buses).

Secondly, the authorities may attempt to secure members of the community against some threats but not others, or they may act for the sake of some people's safety and not others' and so people may benefit differentially from state action. Even under "normal" circumstances, it is notorious that police treat certain minority neighborhoods as "no-go" areas, entering them only to pursue fugitives or make arrests, but not to aid or enhance the safety of those who live there. If police or anti-terrorist resources are scarce, then people and communities may quarrel over them and their allocation will pose issues of distributive justice.<sup>82</sup>

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82. At the time of writing, there are serious disputes in the United States about the allocation of Homeland Security funding. See, e.g., Eric Lipton, *Security Cuts for New York and Washington*, N.Y. TIMES, June 1, 2006, at A18 ("After vowing to steer a greater share of antiterrorism money to the highest-risk communities, Department of Homeland Security officials on Wednesday announced 2006 grants that slashed money for New York and Washington 40 percent, while other cities including Omaha and Louisville, Ky., got a surge of new dollars. The release of the 2006 urban area grants, which total \$711 million, was immediately condemned by leaders in Washington and New York. 'When you stop a terrorist,



Third, some of the actions by which the government provides security may in fact compromise the safety of some members of the population. When a government shoots on sight those it suspects of participation in terrorist attack, then people who match closely the profile of terrorist suspects may be much less secure against deadly attack than other members of the society (taking into account the prospect of deadly attack by the government as well as the prospect of deadly attack by terrorists).

For these reasons, it is a mistake to assume that, as a matter of fact, security is always provided equally, even-handedly, noncompetitively and nonexcludably by the government. Later we shall consider whether security or any aspect of security can be regarded as a public good in the more diffuse sense of a communal good; sense (c) of those identified above.<sup>83</sup> For the time being, however, it is a mistake to think that the notional designation of security as a public good solves or preempts any issue about distribution. We have no choice but to address the various ways in which security might be unevenly provided across a given population.

#### **F. Diminishing the Security of Some to Enhance the Security of Others**

The previous section noted the possibility that some of the actions by which the government provides security may in fact compromise the safety of some members of the population. We shall now devote some time particularly to that possibility, because it brings issues of breadth and distribution acutely into focus. We are familiar with the idea that measures taken to increase security may adversely impact liberty since that is the starting point of our discussion. However, we also need to consider the possible adverse impact *upon security* of measures intended to enhance security (or measures defended on the basis that they will enhance security).

Consider the measures that are commonly used against internal or quasi-internal enemies of the state, supposedly to secure the safety of citizens. Israel's response to terrorist activity by members of the Palestinian community is a good example. The Israeli measures include (or have included in the past): targeted assassination of those suspected as terrorist leaders; physical violence against those suspected of aiding terrorists; abusive interrogation sometimes amounting to torture of non-terrorists to obtain information about terrorists; detention, concentration, and incarceration without trial of some of those suspected as terrorists or terrorist accomplices; armed incursions into

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they have a map of New York City in their pocket,' Mayor Michael R. Bloomberg of New York said. 'They don't have a map of any of the other 46 or 45 places.'").

83. See *infra* text accompanying notes 107–110.

communities that are suspected of sheltering terrorists; and destruction of houses and property as collective punishments, or as deterrents, or to make certain communal areas more amenable to surveillance and incursion by the state.<sup>84</sup>

In all these cases, state action, motivated by a desire to enhance public safety, may also threaten the safety of certain members of the public. Suppose, for example, that a terrorist threat comes from a certain reasonably geographically or ethnically well-defined section of the community. Then members of that section of the community, including innocent members, may be particularly vulnerable to actions of the kind listed above. In some cases, innocent people will be vulnerable to collateral damage from actions intended to harm the guilty. In other cases, they will be vulnerable as the intended targets of actions motivated by a desire to raise the costs of terrorist activity or lower the costs of combating it. It is true that the innocent members of the section of the community in question may also benefit from any reduction in the threat posed by terrorists which results from these measures. However, there is no guarantee that they faced the same threat as the rest of the public in the first place, nor is there any guarantee that they will receive the benefit of anti-terrorist measures to the same extent as other members of the public. Regardless, the enhanced threat to their safety as a result of the state's measures might well outweigh whatever enhancement of security they receive as a result.

Anticipating that there will be objections to this way of describing trade-offs between the security of some and the security of others, we shall consider and respond to three of them.

- (i) We are supposed to be talking about the security of a community as a political goal for the state which is in charge of that community, but in our discussion in this section we have focused on its relation to those who are arguably outsiders. Perhaps this makes the Israeli-Palestinian example a special case. It might have been better had we focused, for example, on the situation in Northern Ireland in the 1970s to 1980s, where all the participants were citizens of the United Kingdom. However, just because of its difficulty, the Israeli example does highlight certain issues that need to be faced about whose security a state should concern itself with. Palestinians in the West Bank and Gaza Strip are not Israeli citizens, but until recently all of them were Israeli subjects, subject to the power and authority of the Israeli

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84. This is not to say that these measures are unjustified. Some may be; some may not; many are prohibited by relevant provisions of Israeli and international humanitarian law. If we were to consider their justification, we would have to take into account (among other things) the threat to the existence of the State of Israel and the toll of death and injury from terrorist outrages referred to *supra* note 38.

state, and many of them still are. A case can be made that a state is required to concern itself with the security of all those who are in the territory it occupies and subject to its authority. Shortly we will see that there are important connections between security and state legitimacy, and legitimacy certainly relates to the way in which a state deals with all its subjects and not just to the way in which it deals with the subset of subjects it calls its citizens. International law also supports this conclusion. A state is responsible for the physical security of those it takes as prisoners, and it is also responsible for the physical security of the inhabitants of lands that it occupies (whether the occupation is lawful or unlawful).<sup>85</sup>

- (ii) A second objection might protest against describing these actions taken by the state as actions threatening its subject's *security*. The conventional trade-off is between security and liberty, and it may be thought that we should file these costs of the struggle for security, suffered by those who are shot, beaten, or tortured, under the heading of liberty. Some of the costs borne by subject populations surely can be described in that way: restrictions on freedom of movement, detention, incarceration, and surveillance can all be understood as denials of freedom. However, not all such costs can be understood as denials of freedom. Beatings and torture directly implicate the issue of safety from violence, as do death and injuries suffered as collateral damage or as a result of targeted assassination or forced incursions.<sup>86</sup> These are matters of safety and we have no choice but to factor them into whatever matrix of safety we are going to use to describe our conception of security (as a matter of breadth). It is all too easy to think lazily about this. Consider torture, for example. The fact that torture is sometimes said to be justified for the sake of security does not

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85. For prisoners of war, see Geneva Convention Relative to the Treatment of Prisoners of War art. 19, Aug. 12, 1949, 6 U.S.T. 3316 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."); *id.* art. 23 ("No prisoner of war may at any time be sent to or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations. Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population."). For occupations, see Regulations Respecting the Laws and Customs of War on Land Annexed to the Hague Convention art. 43, Oct. 18, 1907 ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.").

86. Sometimes costs of the two kinds are bundled together: people are incarcerated (which is a loss of liberty) and then beaten or tortured (which is a loss of security). But we can still distinguish the various costs from one another, even when they are bundled together in this way.

mean it has to be regarded as an element of liberty in the great liberty-security trade-off.<sup>87</sup> Recall that we are regarding as an open question the view that a liberty-security trade-off might be too simplistic to capture the moral issues involved in the war against terrorism. Similarly, the fact that civil libertarians oppose torture does not mean that torture is in itself a diminution of liberty (though usually people's liberty has to be restricted in order to torture them); what it means is that civil libertarians defend a number of rights over and above liberty rights. Liberty is an expansive category, but it is a mistake to assume that every harm, or every imposition of death or pain, can be rendered as a threat to liberty for the purposes of an overly simplistic liberty-security categorization.<sup>88</sup>

- (iii) One might think that we should avoid this factoring in of threats from the state because these prospects of death or violence do not come at the hands of the right agent. After all, the security we want is security *against terrorists*, not against death or injury as such (irrespective of its source). The state is not a terrorist organization; it is not the sort of entity we seek security against.

There is something to this point, but not much. As mentioned above, it is true that people do discriminate among different prospects of death. We are all mortal and we all face illness, disease, and accidents of various sorts; and though we do our best to postpone death and fight illness and be vigilant against accidents, we do not think it is the function of the Department of Homeland Security to promote longevity as such, nor do we think that the success of anti-smoking or traffic safety measures should be factored into our reckoning of such an agency's effectiveness.<sup>89</sup> However, the threats to safety involved in beatings, torture, collective punishment, collateral damage, and so forth, when they are suffered at the hands of the state, are much more like threats to safety from terrorism than like road accidents or cancer. They are violent and they are inflicted by a human agency. This

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87. It is also important to remember that the most powerful objections (moral and legal) to torture may have nothing to do with liberty and nothing to do with security: they are direct objections based on its extreme inhumanity. For an account of the most powerful moral objection, see David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1 (2005).

88. For a useful discussion along these lines of the analytic relation between liberty and harm, see H.L.A. Hart, *Rawls on Liberty and its Priority*, 40 U. CHI. L. REV. 534, 547-48 (1973). Also see SHUE, *supra* note 20, at 187-88, for a criticism of the tendency to treat security as an aspect of liberty rather than as something important for liberty.

89. Philosophically these discriminations are something of a mystery: Why does Hobbesian man fear violent death more than death as such? Mercifully they are not our subject here. It is interesting that in the United States, the Department of Homeland Security has responsibility not just for protection against terrorist threats, but also for protection against natural disasters like Hurricane Katrina.

is not to argue for any sort of moral equivalence as between suicide bombings and military brutality or as between Hamas or Hezbollah and the Israeli state, or as between Al Qaeda and the present jailers at Guantánamo Bay. Moral equivalence is not the issue. The aim at the moment is to consider only which enhanced prospects of death, injury, or loss should be factored into our understanding of security, particularly for the purpose of determining how to approach the distributive question which envisages not a simple trade-off between liberty for all and security for all, but a trade-off of the liberty of a few for the sake of the enhanced security of some and the diminished security of others.

### G. States, Security, and Political Legitimacy

At this stage, it is worth pausing to say a little more about why it is appropriate to consider threats to safety originating from the state when characterizing security as a basic value that states are required to promote. It is true that states are not terrorist organizations, but in a number of respects, this confident assertion needs to be qualified.

Some states, rogue states, for example, may fail and lapse into terrorist or quasi-terrorist organizations.<sup>90</sup> There was concern that this might be true of Iraq; it was certainly true of Afghanistan prior to 2002.<sup>91</sup> In figuring out whether this has happened, we look at what the allegedly terrorist state is doing so far as the security of outsiders is concerned. But it is also appropriate to consider, in this connection, the threat that it poses to its own subjects. No doubt even a terrorist or quasi-terrorist state seeks the security of some of its members. It may threaten the security of others, however, and most people believe that there is a vaguely defined tipping-point in which we should say that the entity in question no longer qualifies as a legitimate state. Conversely, we know that many organizations formerly condemned as terrorist can become legitimate states, by assuming powers of government and using those powers to promote security for all its subjects, rather than using terrorist powers to promote the insecurity of, for

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90. This is different from the point—which is also correct—that some states (including states widely regarded as legitimate) may use terror as a means of waging war or as a means of political control. See Waldron, *Terrorism*, *supra* note 35, at 18–20.

91. See Yochi J. Dreazen & Philip Shishkin, *Mideast Peril: Growing Concern: Terrorist Havens In 'Failed States'*, WALL ST. J., Sept. 13, 2006, at A1; see also Thomas D. Grant, *Partition of Failed States: Impediments and Impulses*, 11 IND. J. GLOBAL LEGAL STUD. 51, 81–82 (2004) (noting a list of states that fall along a continuum of failure and observing that failed states are believed to provide sanctuary for terrorists); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule Of Law,"* 101 MICH. L. REV. 2275, 2280 (2003) (arguing that the restoration of failed states, like Iraq and Afghanistan, has been motivated by desire to avoid growth of terrorism in those areas).

example, the members of a colonial regime.<sup>92</sup> It will be impossible to chart this transition without essaying a sort of security calculus which can weigh the threat that the erstwhile terrorist organization poses to the security of some of the people in the territory against the protective functions it performs, or which can weigh the threat that a rogue state poses to its subjects and balance that against the residual security functions that it still manages to discharge.

To go into this matter in slightly greater detail, think of two paramilitary organizations, the Irish Republican Army (IRA) and the Ulster Defence Force (UDF), in Belfast, Northern Ireland, in the 1980s. These organizations aimed to inflict violence on each others' members and on members of each others' communities, the loyalist community and the nationalist community, respectively. They also sought to protect members of their home communities against these attacks: the IRA undertook to protect members of the nationalist community against attacks by the UDF and vice versa. Each claimed a sort of legitimacy for its endeavors, as an alternative to what it regarded as the indifference or oppression of the (British) state in Northern Ireland. The measures taken by each organization, however, included measures *against* members of its own community: members suspected of collaborating with its rival or even just suspected of giving insufficiently enthusiastic support to their own side's campaign. It also included measures designed to deter collaboration and whip up enthusiasm and measures designed just to make their operations easier. If we were wondering about the legitimacy of one of these organizations, we would have to ask whether the security of members of its community was actually enhanced by its activities. In that inquiry we should have to take into account not just the benefit to members of the relevant community of measures taken against the other paramilitary group, but also the effect, both beneficial and detrimental, of measures taken by the organization against members of the very community it claimed to be protecting.

We ought to consider the actions performed by a government in exactly the same way. We should consider the positive effects of some-

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92. See Clive Walker, *Cyber-Terrorism: Legal Principle and Law in the United Kingdom*, 110 PENN ST. L. REV. 625, 657 (2006) ("The idea that 'once a terrorist, always a terrorist' is belied by history, including the life stories of at least one Prime Minister of Israel (Begin), one President of Cyprus (Makarios) and one President of South Africa (Mandela). . . ."); see also Ron Walters, *The Black Experience with Terrorism*, 6 HOW. SCROLL: SOC. JUST. L. REV. 77, 79 (2003) ("The first time I read the word 'terrorist,' it was in connection with the Mau Mau uprising in Kenya in the late 1950s. Jomo Kenyatta, associated with this group, which attempted to make Kenya ungovernable by the British, was referred to as a terrorist and was hunted down by the British colonial authorities and jailed as such."). For a good general discussion, see CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (2005).

thing that calls itself a government on the safety of the individuals in its territory and balance those effects against the negative effects of this entity on the safety of the individuals in its territory. Some individuals will be affected one way, some the other way, and some both ways. Only if we consider all these effects are we in a position to talk about the government's contribution to security generally for the people in the territory it controls. (We still have not addressed the question of how to assess these individual effects for the purposes of arriving at an overall verdict on the entity's contribution to the security of the population under its control. At this stage, the point is that we must assemble all the information that is available about its positive and negative effects on individual safety in order to begin that assessment.)

Once again, some readers will protest that it is wrong to reach this conclusion on the basis of an analogy between legitimate governments and paramilitary terrorist organizations like the IRA. But one of the things that makes the analogy between governments and paramilitary organizations inappropriate—when it *is* inappropriate—is that a legitimate government takes care in regard to security. A legitimate state takes care in regard to the safety of those in the territory it dominates, whereas an illegitimate regime is either careless of their safety or solicitous of the safety of some of them but not others. Legitimacy has to be earned, and one important dimension in which it is earned is in regard to the pattern of impact of a regime's actions on the persons subject to its power. Assuming then that the impact of a government's actions on people's safety may be uneven and in some cases harmful, we need to ask whether it is possible to articulate any constraints on the extent of the unevenness for the purposes of a conception of security that pays proper attention to this question of breadth. How uneven can the impact be while the government is still claiming credibly to promote *security*, as opposed to acknowledging that it promotes only the safety of a few favored clients or of a delimited class of people in its territory?

## H. Breadth and the Logic of Legitimacy

If we pursue this connection between security and legitimacy, we might be able to make progress in our thinking about issues of breadth, so far as security is concerned. We might proceed, very modestly, by saying that a regime counts as a legitimate government only if it has some positive impact on the safety of all of those it claims as its subjects. I shall call this the "egalitarian model of security." This is unlikely to be a sufficient condition of legitimacy, but it might be sufficient for legitimacy so far as safety is concerned. Perhaps the word "security" is defined in a way that marks this point. No government is legitimate if it does not promote security, and we may say that

the word "security" captures the pattern of impact on safety that governments are supposed to have so far as that elementary legitimacy is concerned. The idea is that the government has an elementary obligation to promote security (if it fails in that obligation it undermines its legitimacy) and what security means in this context is, at the very least, some positive impact on the safety of all of its subjects.

On this account, a regime is illegitimate if there is some person or class of persons who would be better off without it, so far as their safety is concerned, irrespective of what the positive impact on others' safety might be. We might frame this account in two ways, either by insisting that a legitimate regime must bring each person's safety up to at least a certain level, or by insisting that the regime must make a substantial positive difference to each person's safety even though the actual level of safety for each may vary according to background circumstances and baseline (i.e., how safe each might be in these circumstances absent any reasonable government).

The egalitarian model of security will seem exasperating to a certain hard-headed pragmatic mentality. From this point of view, the person-by-person evaluations that the account requires are prissy and over-demanding. How can we ever be sure that there is not someone who is left out when "everyone's" security is improved? How can we possibly leave political legitimacy for a nation of 300 million souls at the mercy of a criterion as demanding as this?<sup>93</sup> As Hobbes reminded us, governments have to design their security strategies in broad terms, taking account of the overall impact of what they do. They cannot be expected to undertake the detailed evaluations that this account requires, when they are addressing the safety of a quarter billion people. For this reason, it may be said that we should abandon the egalitarian model in favor of the maximizing model of security. The same may be true of external assessments of legitimacy. Our distinction between legitimate and illegitimate governments, effective states and failed states or rogue states, in international law is very broad-brush, and again it might be thought that the maximizing model captures it more adequately than the egalitarian model.

These pragmatic points are not as convincing as they sound. It is true that our assessments of legitimacy are rough and ready and may

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93. It might also be objected to on the account that it fails to leave room for two important options that should not be ruled out at the level of definition. The first is that it may sometimes be necessary to destroy an individual who poses a threat to the security of others; the second is that it may be necessary, in certain circumstances, to require some to lay down their lives (e.g., in combat) for the sake of the security of others. But while it is true that we need a theory of security that does not preclude *a priori* either conscription or capital punishment, it is also the case that the logic of conscription and capital punishment presupposes that we are already in possession of a concept of security defining what these practices might be set up to defend.



not be as fine-grained as a literal application of the egalitarian model might require. But they are also not as fine-grained as the maximizing model, read literally, might require. The question is, when we deploy a rough-and-ready understanding of the security-legitimacy requirement, what is it a rough-and-ready version of? In at least some of the cases alluded to in the previous paragraph, it seems that we work with a rough-and-ready version of the egalitarian model, not the maximizing model. For example, when we assess the legitimacy of regimes from the outside, we do not rest content with a rough showing that the safety of more people is advanced than harmed. We look also at the situation of minorities, and we often hold regimes illegitimate on account of their failings in regard to the safety of minorities, sometimes quite small minorities, irrespective of the benefits that accrue thereby to the safety of members of the large majority.

The most powerful argument in favor of the egalitarian model is based on the elementary logic of political legitimacy. The basic theory of political legitimacy is individualistic, not collective. Its starting point is the fact that political regimes make demands upon individuals one-by-one: I must pay my taxes and you must pay yours; I must obey each of the laws and so must you. The government does not countenance individual disobedience or failure to pay on the ground that most others are complying. If the individual challenges the legitimacy of these demands, some response on behalf of the regime must be given to *him or to her*.<sup>94</sup> A government's response will normally be along these lines: "You are better off in certain respects (e.g., safer) as a result of the existence and activities of the regime. That is why it is reasonable that we make these demands upon you."

This logic is most vivid in the contractarian approach to political legitimacy. People enter society in order to provide greater security for themselves than they could get by their own efforts. "[N]o rational Creature," wrote John Locke, "can be supposed to change his condition with an intention to be worse,"<sup>95</sup> and no one can be deemed willing to accept that his own security is properly neglected for that of others. Perhaps this is not an argument for pure equality of security, but it is certainly an argument against the position that governments are entitled to neglect the security of some for the sake of the greater security of others or that they are entitled to negatively impact the security of a few purely for the sake of the security of the majority.

We have ended a long discussion of breadth. The upshot is that the issue of breadth presents many difficulties when we consider the application of the term "security" to a whole society or a population. Our discussion considered whether it is appropriate to take a maximizing

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94. See BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 3-6 (2005).

95. LOCKE, *supra* note 69, at 353.

approach to security (the greatest security of the greatest number) or whether it is appropriate to organize the pursuit of security as a political goal around some idea of *equal* protection or the attaining of at least a minimum security for everyone. Our discussion here has not been conclusive, though powerful arguments based on political legitimacy and also on the connection between security and rights have been adduced against the pure maximizing approach. What is clear, however, is that the distributive issues raised under this heading of breadth—Whose security is protected or enhanced? Whose security is neglected or diminished, perhaps for the sake of the security of others?—cannot be ignored or finessed if security is to be treated as a political goal.

## V. BREADTH AND DEPTH TOGETHER

So far we have considered security as an array of individual goods. From a social point of view, it is also necessary for each of us to consider the relation between our own security and that of others, because attention to one person's security may distract from attention to another's or security may be enhanced for some only at the expense of others. These are the familiar problems of competition, aggregation, and distribution that we dealt with in Part IV. So far, however, we have not explored any *positive* connections between one person's security and another's. We have not looked at ways in which one person's security may actually depend on that of another, or ways in which one person's security may be an ingredient in another person's security. This will be the topic of the second phase of our exploration of *depth* in relation to the concept of security. Because it involves a deepening of individual security by taking into account its positive relation to the security of others, our account at this stage will combine considerations of what we have been calling till now breadth and depth.

Earlier, when the various shortcomings in the pure safety conception were set forth, it was mentioned that that conception fails to give adequate accounts of the relation between security and fear, between security and assurance, and between security and the idea of social order. People don't just want to be safe if they are merely surviving, terrified, in a sealed room. They want some assurance of safety which allows them to go about their business and deal with one another while following familiar routines. In Part III, we discussed the *modes of life* of individuals and families and about the fears that they may have in relation to their modes of life and their need for assurance.<sup>96</sup> Now we are going to explore some connections between that and wider issues of the social distribution of such assurance.

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96. See *supra* section III.A.

### A. Fear and Identity

Given that each of us thinks of our safety not just momentarily but projected into the future, we may be concerned about what happens to others as prefiguring what may happen to us. This is a matter of anxiety and assurance. If something happens to another person which diminishes his safety (perhaps in order enhance my safety at a particular time), I cannot necessarily detach, from my sense of safety at that time, the threat that what happened then to the other person (for my sake) may happen to me at some later time for someone else's sake.<sup>97</sup>

A critic might respond that in the real world, one often *can* have such an assurance based upon ethnicity. If I am white, if I look, sound, and behave like a native-born American, there is little chance that I will suffer the impact of measures designed to combat terrorism. To the extent that this is so, then I can regard my security as independent of others' security. Even if my security is being upheld by diminishing the security of, for example, Arab-Americans, there is no reason here for apprehension on my part, since there is little likelihood that the tables will be turned and people like me will be incarcerated or tortured to maintain the security of others.

Notice, however, how this may already represent a cost to me in terms of political identity. Instead of organizing my sense of security around my identity as an American, I have to retreat to some narrower (and in other contexts more invidious) sense of identity because now I am secure on account of my identity as a white American or my identity as an American who does not look Arabic. Because of terrorism, or because of the state's response to terrorism, I now have to change the way I think about the connection between identity and security. That may compromise something that an appropriately deep conception of security would be concerned about.

### B. Security and Markets

If a deeper notion of security is conceived of as offering a platform on which we might securely enjoy other goods, exercise other rights, and participate in activities other than the mere avoidance of danger, then this has important consequences for our relations with others in

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97. This reminds us of the famous Martin Niemoller poem: "When the Nazis came for the communists, I remained silent; I was not a communist. / When they locked up the social democrats, I remained silent; I was not a social democrat. / When they came for the trade unionists, I did not speak out; I was not a trade unionist. / When they came for the Jews, I did not speak out; I was not a Jew. / When they came for me, there was no one left to speak out." The exact form and original source of this poem is a matter of controversy. For a useful survey, see Harold Marcuse, Niemoller, Origin of Famous Quotation, <http://www.history.ucsb.edu/faculty/marcuse/niem.htm> (last visited July 11, 2006).

society. If I am to participate and flourish in the order of everyday life, I will want to be able to deal with others, and in many of these dealings with others it will be important that they are as secure as I am. No doubt there are some exceptions to this. Some people may flourish from dealing with others' insecurities. For example, those who sell bottled water may be able to profit from a lack of security. However, one suspects that for the most part, people's personal safety is a platform on which they can deal with others whose safety is equally assured whether in a market fashion or in some other sociable fashion. People's willingness to produce the commodities needed to purchase, produce or consume depends on their being undistracted by terror and anxiety about their personal safety

It was once said that "the only thing we have to fear is fear itself."<sup>98</sup> Most people acknowledge that widespread fear or widespread insecurity is something for them to fear even if they do not share the first-order fear or insecurity themselves. In a modern market economy the situation of any one actor is exquisitely sensitive to the climate of confidence generally. For example, one noticeable effect of the September 11 terrorist attacks in the United States was a short-term collapse (and the exacerbation of a longer term downturn) in economic activity. The Dow Jones index lost 7.1% of its value in the first day of trading after September 11 and continued to fall in the week that followed.<sup>99</sup> Another example is the collapse of the tourist trade in Israel, a decline of 50% or more, in the wake of recent suicide bombings.<sup>100</sup> These economic effects may be attributable to widespread fear that outrages of the sort that have already occurred are likely to continue—that is, they are symptoms of general insecurity. Beyond that, and particularly true of the Dow Jones decline, they are also the result of feedback of people's apprehensions about the pervasiveness of the fear occasioned by the individual outrages into the system of mutual

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98. Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), available at <http://www.gutenberg.org/etext/104> ("So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.").

99. See Bill Barnhart, *Dow Drops 684 Points as Trading Resumes*, CHI. TRIB., Sept. 17, 2001, at 1 ("The Dow Jones industrial average closed down more than 684 points, or more than 7 percent, closing below the 9000 mark at 8921, according to preliminary figures, on extraordinarily heavy New York Stock Exchange volume. That pushed the Dow to its lowest close since December 1998."); see also Stephen King, *Latest Declines Already the Worst Since 1973 Crash*, INDEP. (London), Sept. 24, 2001, at 17 ("The collapse in equity prices over the last few days has been extraordinary by any standards.").

100. Daniel Ben-Tal, *Booking our Brethren*, JERUSALEM POST, Oct. 15, 2004, at 5 ("Tourism to Israel peaked in 2000 when an unprecedented 2,672,000 foreign visitors entered the country. But, the beginning of the Al-Aqsa Intifada in September that year and the ensuing wave of terrorist attacks, decimated the local tourist market. Hotel stays by foreign tourists plummeted by 80% between October 2000 and October 2001.").

confidence generally. Even if frequent occurrences of this kind are not expected, fear itself still becomes something to be feared, particularly in a society like ours for which prosperity depends on a cheerful bullish mentality among consumers and investors.<sup>101</sup>

### C. Our Way of Life

In Part III, we discussed the importance to individuals and families of their mode of life.<sup>102</sup> There is obviously a connection between individuals and families valuing (on the one hand) their own routines, their own mode of life, and their own reasonable aspirations for the trajectory of their lives, and (on the other hand) their valuing a whole way of life for the society. Usually people's mode of life is both an instance of and dependent upon the broader way of life that the members of society treasure in general. When we think about our own way of life, we relate it to the ways of life practiced generally in the society, and even if our mentality is not conformist, still as social beings we look for some sort of congruence between what we are doing with our lives and what others around us are doing with their lives. Many of the activities we pursue make no sense except as pursued in a wider social context. We have just seen that this is true for market activity, but it is also true for countless other activities in work, leisure, romance, and worship. We live together with others and even if we feel relatively secure, we cannot cut ourselves off from others' insecurities.

At the very least, we rely on the existence of something called "public order," which is a securing of the basic conditions of action and interaction in public places, parks, sidewalks, streets, and highways. But it is also much more than this. Our social actions make sense when we play roles in narratives that assign roles to others as co-workers, customers, neighbors, babysitters, teachers, teammates, and so on. The disruption of such narratives by danger or the fear of danger can leave us unsure of what to do or what our actions amount to. In a society like the United States, we go cheerfully about most of our business in public places, such as shopping malls, restaurants, schools, colleges, churches, sports fields, and cinemas, with minimal attention to security issues. Imagine the extent, though, to which that would change if America were to experience bombings in these places at the rate of one or two a week, each causing the sort of casualties that recent suicide bombings have caused in Israel, and each publicized as a national tragedy with the full panoply of media coverage. In responding to this, even ordinary prudence on the part of millions of individuals would radically alter the way that life is lived in this coun-

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101. Terrorists are of course strongly focused on these possibilities. See Waldron, *Terrorism*, *supra* note 35, at 22-23.

102. See *supra* section III.A.

try. We have had a taste of it with the enhancement of security at airports, but we have to imagine that similar precautions would be introduced into *all* public spaces in which people gather by the scores or hundreds: malls, soccer fields, schools, movie theatres, etc. People would be afraid, but the point right now is not the quality of the fear itself. The point is the likely emergence of a new sort of ethos governing choices about "going out *versus* staying home," an attenuation of large-scale social interaction, and a marked degradation in the collective practices and routines of our society. It is possible that we would all soldier on, putting our children on school buses, going to the mall, catching movies, eating at McDonald's, etc., with just a few extra security guards. It is not unimaginable, however, that there would be a catastrophic disruption in the routines of everyday social life.

Of course, we have to be careful with this. Protecting security is not the same as protecting a way of life in the same spirit as those who talk about cultural rights like the preservation of traditions,<sup>103</sup> but there are some important analogies. Pervasive and society-wide disruption of the routines and fabric of ordinary life that we find after a terrorist attack is quite like the longer term cultural disruption that indigenous peoples are said to experience as a result of colonial incursion and settlement.<sup>104</sup>

#### D. Legal and Constitutional Routines

The routines of ordinary life whose security we value are not just first order routines like shopping, schooling, and soccer; but also secondary routines that respond to what might be thought of as routine problems. There are fires, crimes, and accidents; there are threats from nature and sometimes threats from outsiders; there are disagreements about what ought to be done in response to these. Among our repertoire of mechanisms for dealing with danger, disorder, and dissensus, we have fire brigades, hospitals and police forces; we have a legal system, courts, and prisons; we have FEMA and the national guard; we have our political system, at municipal, state, and federal levels; and we have our Constitution, our fundamental rights, and our settled obligations under human rights law.

The existence and the effectiveness of these mechanisms is also crucial to the assurance that security in normal times involves. Disruption of them may enhance our anxiety and undermine our security, and sometimes the appropriate response may be to strengthen them or transform them so that they become more effective against the dangers they are supposed to protect us from even at the cost of other values they are supposed to embody.

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103. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 135-37 (1989).

104. See *id.* at 147-49.

However, these mechanisms are also valued in and of themselves as parts of our way of life and our social routines. As such, they are valued for the way they reconcile the demands of security and other values. We like knowing that searches cannot be conducted without warrant, that those who are arrested must be read their *Miranda* rights, that they are entitled to legal representation and an early hearing, and that there are limits on what can be done to people, not just to us, but to anyone, under the auspices of our crime-control system. If these mechanisms are transformed in an emergency to make them more effective against threats then that transformation may itself be experienced as a disruption of the very way of life we say we are trying to protect. The detention and indefinite incarceration of citizens, the prison at Guantánamo Bay, changes or suggested changes in our legal system to permit inhuman and degrading treatment during interrogation, and the widespread use of extraordinary means of surveillance and wire-tapping may all be justified, but they are undoubtedly transformative and disruptive of many people's expectations as to how their society and legal system operates.

It is not clear how far we should factor this into the concept of security. It is sometimes thought that terrorists aim to undermine our legal and constitutional arrangements by attacking us.<sup>105</sup> Or it is said that they want to force the state that they are attacking to drop the pretence of legality and civil liberties and "show its true colors" as a repressive entity.<sup>106</sup> The fact that terrorists want to force a change in our legal and constitutional arrangements, however, does not by itself show that such arrangements are part of our security, especially since the change they are trying to force is change by the state they are attacking, rather than change by their own terrorist acts. Clearly if we do regard our legal and constitutional routines as part of what we value under the heading of our security, then we undermine any simple talk of a trade-off between security and constitutional rights. This issue will be addressed in Part VI. On the other hand, there are costs in not regarding the integrity of these mechanisms (including the integrity of legal, constitutional and human rights guarantees) as part of what people value under the heading of security, or as part of what they have to lose under the impact of terrorist attack. Since there is obviously some connection between security and our way of life, any such exclusion has to draw a rather artificial line, and it

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105. See George W. Bush, *Freedom at War with Fear*, Address to a Joint Session of Congress (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> ("Americans are asking, why do they hate us? They hate what we see right here in this chamber—a democratically elected government. Their leaders are self-appointed. They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.")

106. See Waldron, *Terrorism*, *supra* note 35, at 32.

would not be satisfactory to draw that line simply for the sake of underwriting the simplicity of our ordinary talk about a security-liberty trade-off.

### E. Security as a Collective Good

Very early in this Essay the idea of *collective security* was mentioned.<sup>107</sup> It was said that in the discourse of international power politics, security is not understood as something most nations can pursue by and for themselves. It needs to be pursued by groups of nations acting in ways that establish stable equilibria or it needs to be pursued by the whole community of nations acting in concert. When we drop down a level from the international arena, we should be open to the possibility that the notion of security also needs to be understood as something we provide together. In one sense this is obvious: we rely on a collective mechanism for much of our actual protection. We also rely on a set of mutual restraints to maintain each other's security in everyday life. In a richer sense, however, we also act together to secure the way of life and the patterns of interaction in which our security partly consists. After terrorist attacks, people often act cooperatively and publicly to show that they are determined to maintain their way of life, even in the face of great anxiety or great anger.<sup>108</sup> When this sort of action takes place, it is a clear instance of collective provision of security; of security being maintained by a whole community showing its determination not to degenerate into a disaggregated set of terrified individuals. It illustrates a general point about the relation between security and mutual assurance. Security is something we provide for each other by enjoying together the social order of activity and interaction that defines our way of life and by acting in solidarity with one another to ensure that the benefit of this system is available to all.

A number of different uses of the term "public good" were mentioned earlier. As well as the technical economist's sense of the term, i.e., a good enjoyed nonexcludably and/or non-crowdably, the idea of a good enjoyed communally was mentioned.<sup>109</sup> Many goods that are public in the economist's sense are enjoyed individually; even when they are non-crowdable and nonexcludable, they are still individual

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107. See *supra* text accompanying notes 28–29.

108. See, e.g., Theda Skocpol, *Will 9/11 and the War on Terror Revitalize American Civic Democracy?*, 35 POL. SCI. & POL. 537, 537 (2002) ("Seventy percent of Americans reportedly gave time or money to charities attempting to help the victims of 9/11. . . . Anonymous commuter suburbs in New Jersey suddenly organized to provide constant care for dozens of families who lost loved ones. In the days and weeks after 9/11, more than four-fifths of Americans displayed the U.S. flag on homes, cars and trucks, and clothing.").

109. See *supra* section IV.E.



goods. For example, clean air is an individual good in the sense that its ultimate benefit is to the lungs and respirations of individuals one by one. Not all goods are enjoyed individually, however. Some goods are communal in the sense that their enjoyment by any one person depends on their enjoyment in common with her by others. Conviviality at a party is a clear example; other examples may include certain aspects of the good of language or culture.<sup>110</sup> Many social institutions and the realization of many social aims and ideals are public goods in this sense: their enjoyment, nonexcludably and non-crowdably, by many people at a time is not a contingent factor of the technicalities of their provision, but an essential part of their social existence.<sup>111</sup> The good of a tolerant society, a cultured society, or a society which exercises self-determination are all examples of communal or noncontingent public goods.<sup>112</sup>

Should we regard security as a public good in this sense? In a recent article on policing, Ian Loader and Neil Walker have made a suggestion to this effect.<sup>113</sup> They want to emphasize “the irreducibly social nature of what policing offers to guarantee,” and they say we should think of this not just in terms of individualized safety but also in terms of a communal good.<sup>114</sup> Citing this author’s earlier work on communal goods, they refer to goods which are valuable for human society without their value being adequately characterizable in terms of their worth to any or all of the members of the society considered one by one.<sup>115</sup> They ask about policing and security: “Is this a public good in this thicker, communal sense?” Their answer is “unequivocally in the affirmative.”<sup>116</sup> They argue that “public safety is inexorably connected with the quality of our association with others” and that it “depends upon the texture of social relations and the density of social bonds.”<sup>117</sup> The implication of this argument is that while some of us might be safer under a regime of very aggressive policing our security would be degraded as a public good by distributive degradation in our scheme of civil liberties.<sup>118</sup>

There is some plausibility to Loader and Walker’s argument. Security is certainly connected with the public enjoyment of public order and we have seen that it involves aspects of our shared way of life. It

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110. See JEREMY WALDRON, *Can Communal Goods be Human Rights?*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–91, at 339, 354–59 (1993).

111. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 198–99 (1986).

112. See *id.* at 198–209.

113. Ian Loader & Neil Walker, *Policing as a Public Good: Reconstituting the Connections Between Policing and the State*, 5 THEORETICAL CRIMINOLOGY 9, 11 (2001).

114. *Id.*

115. See *id.* at 25 (citing WALDRON, *supra* note 110, at 358–59).

116. *Id.* at 26.

117. *Id.*

118. See Waldron, *Security and Liberty*, *supra* note 3, at 204–05 n.23.

would be wrong, however, to exaggerate the communal element or pretend that it exhausted the content of the concept. Much of the work in this Essay has sought to deepen and broaden what is called the pure safety conception of security. From the beginning, however, it has been said that it is important for the concept of security to remain anchored in the physical safety of individual men and women. That anchoring is irreducible and non-negotiable. For the last time: Nobody wants to be blown up, and security in the end is about elementary matters of harm and survival. It may have communal aspects and it may be something that we provide jointly and mutually for one another in various ways, but most of the complications developed here have attempted to show that security is a complex and structured function of individual safety, not an amiable communal alternative to it.

## VI. COMPLICATING THE TRADE-OFF

The analysis of security undertaken in this Essay is done partly as an end in itself, to fill the disgraceful gap in political philosophy in the analytic treatment of the main goals, principles, and values of politics. Security is an enormously important goal. It is fundamental to our thinking about legitimacy. It is deceptively simple on the surface, but as we have seen, it is quite complex underneath. It is a matter of shame for political philosophy that it has not been subject to greater analytic attention. Conceptual analysis, at its best, is a collective enterprise; others see sometimes what we do not see or defects in our account that we have become insensitive to. This Essay is just a beginning and it is far from perfect. It is hoped that it will elicit some responses from others who are interested in this analytic project.

The task of establishing a clear understanding of security, sensitive to its conundrums and complexities, is particularly important in these troubled times, when security is constantly invoked as a reason for diminishing the extent of other values, such as liberty, or the application of other principles, such as other individual rights. If we face a trade-off between liberty and security, then it is as important to know what security is as it is to know what liberty is, so we can see what is at stake on both sides of the balance.

Elsewhere, this author has expressed doubts about the more simple-minded versions of the liberty-security trade-off.<sup>119</sup> However, this study of security was not undertaken specifically to undermine this talk of a trade-off. Throughout this Essay, it has been said that we should be alert to the possibility that the relation between liberty and security is more complicated than it at first appears.

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119. See *id. passim*.

One set of complications is that we are not talking about trade-offs among abstract homogenous values, but about values that may be distributed unevenly across a population. We already know that this is true for liberty because even if liberty starts out being roughly equal in the community, the changes that are envisaged as a result of the trade-off are not evenly spread through everyone's liberties, but involve a diminution in the liberties of some against a general background in which most citizens' liberties are unaffected.<sup>120</sup> In this Essay, we have seen that this is also true for security. Some of the changes that are advocated and undertaken for the sake of security actually have an uneven impact on security. They protect the security of some while neglecting or actively undermining the security of others.<sup>121</sup> To point this out, with regard to liberty and security, is not to deny that changes might need to be made, and that these changes might be justified for security's sake. We must not think childishly about the changes, however. It is not a case of everyone giving up a few liberties so that everyone can be more secure. Some are making a slight sacrifice of liberty, others are making a very considerable sacrifice of liberty, and a few are actually losing their security, so that most can be more secure. If we plan on justifying this, we should not do so insouciantly using the discourse of a simple trade-off between liberty and security. Instead we should think in terms of (1) a distributive matrix of liberty or civil liberties, involving values spread unevenly across different people or categories of people (e.g., majorities and minorities) facing (2) a distributive matrix of security, again with values spread unevenly across different people or categories of people. We should also think about the prospect of various changes in the values arrayed in the two matrices. If we can begin thinking like that—thinking in terms of *whose* liberty, *whose* security is being enhanced or diminished—then we will have made some progress.<sup>122</sup>

As well as distributive issues, we need to think about the impact of our substantive analysis on the idea of a trade-off between liberty and security. The idea of a trade-off between liberty and security makes

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120. See *supra* note 61 and accompanying text; see also Waldron, *Security and Liberty*, *supra* note 3, at 200–04.

121. See *supra* Part IV; see also *supra* text accompanying notes 82–84.

122. In conversations on these matters, I have found that those who think in economic and rational-choice terms about trade-offs between two commodities—using indifference curves and so on—are enormously resistant to this point. Because they know how to diagram simple intrapersonal trade-offs (between, say, milk and oranges), they will tend to regard any situations that do not conform to that image as deviant or marginal. But the features that distinguish the trade-offs we face from the simple trade-offs diagrammed using indifference curves—features like considering the loss of liberty for some for the sake of an increase in security for others—are morally crucial and absolutely salient to the politics of the war on terror. The familiarity of economists and rational-choice theorists with a certain sort of diagram is not an adequate reason for ignoring this.

clearest sense if we think of liberty and security as separate values, logically independent of one another, and related in a sort of inverse way: the more liberty there is, the less security you are likely to have, and the more security you desire, the more liberty you are going to have to give up. If we find, however, that liberty and security are not logically independent but that there are important internal relations between them, or if conceptual analysis indicates that they stand sometimes in a direct rather than in an inverse relation to one another, then talk of a trade-off will be complicated, if not undermined.

Some ways of making this point are more sophisticated than others. In a recent article, Thomas Powers observes that “the point of security is liberty,”<sup>123</sup> and he quotes Montesquieu as saying that “[p]olitical liberty consists in security or, at least, the opinion one has of one’s security.”<sup>124</sup> He then makes the following observation:

Every threat, from whatever source, is as much a threat to our liberty . . . as to our security. . . . American democracy would be done a service if we would use exclusively either the language of security or the language of liberty. A debate, for example, over how to weigh the threat military tribunals pose to the liberties of war-crimes suspects against the threat terrorists pose to the liberties of citizens would be more clear-sighted than is our current division of these issues along liberty versus security lines. Similarly, sorting out the impact of new police powers under the USA PATRIOT Act in terms of security against terrorism on the one hand, and security against errors of state prosecution or police abuses on the other, would more accurately capture what is at stake. What we need is to reframe our discussion around the decidedly unglamorous task of balancing one threat to liberty against other threats to liberty, one threat to security against other threats to security. I do not wish to suggest that recasting the question in these terms will easily settle the many difficult choices that must be made in the war on terror, but it would permit us to face them more clearly and without fearing that we are being either unprincipled or soft-headed.<sup>125</sup>

The points that Powers makes are interesting and they recall earlier themes in our discussion. On the one hand, his proposal reminds us of a suggestion which we considered earlier: we might detach the term “security” from its specific connection with safety and use it to refer to the assured possession and enjoyment of any value, including liberty.<sup>126</sup>

On the other hand, his proposal reminds us of a suggestion which we rejected: that threats to life and limb, or the infliction of harm and pain, can be reclassified as threats to liberty.<sup>127</sup> We considered and rejected that with regard to the costs that are imposed on certain people when the state seeks to enhance security by killing or torturing

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123. Thomas Powers, *Can we be Secure and Free?*, PUB. INT., Spring 2003, at 3, 5.

124. *Id.* at 22 (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* 188 (Anne Cohler et al. eds., 1989) (1748)).

125. *Id.* at 22–23.

126. *See supra* text accompanying notes 52–53.

127. *See supra* text accompanying notes 85–87.

some of those subject to its authority. We should also reject it with regard to the damage that terrorists are seeking to inflict upon us. Perhaps one could say that they intend to attack our liberties because “[t]hey hate our freedoms.”<sup>128</sup> But that is a misleading way of talking if it is supposed to describe the direct and murderous intention they have against our lives and other aspects of our safety. The language of security is not reducible to safety, but it *is* firmly anchored to safety and we should not flinch from saying that this is what the terrorists are trying to attack and this is what we are trying to protect. Here, for all its complexity, the language of security is more apposite than the language of liberty. By the same token, the language of liberty is sometimes more useful than the language of security to describe many of the costs that are being imposed in the war against terrorism. Some of those costs are security costs (as when some individual is shot or tortured by agents of the state), but many of them are liberty costs. Those who are incarcerated at Guantánamo Bay have suffered a drastic loss of liberty, and the same is true of some United States citizens, like Yaser Esam Hamdi.<sup>129</sup> Their liberty has been radically diminished to make us more secure against murderous attack. No amount of word play, provocative though it may be in Powers’s article, can take away the fact that someone’s liberty is being traded off against someone’s security in these instances.

At the beginning and toward the end of this Essay, we considered whether security should be taken to comprise people’s individual, familial, and social way of life.<sup>130</sup> President Bush has said that our way of life is certainly a target for terrorism: “These terrorists kill not merely to end lives, but to disrupt and end a way of life.”<sup>131</sup> While that in itself does not mean that the maintenance of our way of life is comprised in our security, it is pretty clear that security would be impoverished without taking this aspect into account. In the course of that discussion we considered whether *in this regard* security might be thought to comprise some reference to aspects of our civil liberties. Certainly our way of life consists in part in our constitutional traditions and the pathways of our legal system. But again, we need to be very careful with this. Instead of saying that we have identified an overlap between security and liberty, we might say that the partisans of security just like the partisans of liberty identify important aspects of our way of life that they want to emphasize, but they emphasize them in different ways and in light of somewhat different concerns.

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128. George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001), in *WASH. POST*, Sept. 21, 2001, at A24.

129. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004).

130. See *supra* section III.A (individual and familial); *supra* text accompanying notes 111–12 (social).

131. Bush, *supra* note 128, at A24.

Our way of life is a common reservoir of values, common to both sides in this debate. The civil libertarians emphasize the liberties that matter to us, and certainly it is right to point out that those liberties require security for their meaningful exercise. The partisans of security point out that they are trying to protect our way of life (as well as our lives themselves) against attack, and certainly it is right to point out that you cannot do that if you treat our liberties as unimportant. But still there is a genuine trade-off. Even if it is not a trade-off between one set of values and another quite distinct set of values, it is a trade-off between the importance of protecting certain values in one way and the importance of vindicating certain values in another way.

## VII. CONCLUSION

In this Essay, I have tried to complicate and enrich our sense of what security involves, and that involved exploring some internal connections between security and liberty and between security and constitutional values. But I have tried to respect the idea of security as an important array of concerns that cannot be wished away or turned into something else. I have tried to preserve the core connection between security and safety, while noting the various ways in which that connection is not the whole story about security. And I have tried to do what the pure safety conception by itself cannot do: provide an account of security not just as an individual value but as an articulate social concern.

Analytic philosophers are fond of quoting Bishop Butler's aphorism: "Everything is what it is and not another thing."<sup>132</sup> And that may be said of security: security is what it distinctively is. It is not a site where we try to cram together a lot of other disparate values. But that does not relieve us from the task of analysis and from exploring connections with other values if there are any, connections which are important to the notion of security, connections whose suppression would misrepresent and impoverish the concept. The philosopher W.K. Frankena added a mischievous gloss to Butler's aphorism. He wrote: "Everything is what it is and not another thing; unless of course, it *is* another thing, in which case that is what it is."<sup>133</sup> That is how I believe we should think about security. We should keep faith

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132. JOSEPH BUTLER, FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL, at xxix (4th ed., London, 1749). G.E. Moore used this aphorism as the motto for *PRINCIPIA ETHICA* (1903), to express his position that even if goodness is consistently associated with some property like pleasantness, still that is a correlation rather than an identification: goodness and pleasantness remain distinct properties. Isaiah Berlin used a version of it in his discussion of liberty. See BERLIN, *supra* note 6, at 125 ("Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.").

133. W.K. Frankena, *The Naturalistic Fallacy*, 48 *MIND* 464, 472 (1939).

with its distinctiveness as a political ideal, but not take that as a license for simple-mindedness about what it involves. Certainly, we should never take its distinctiveness as a reason for avoiding or denying aspects of security itself just because they are troubling to our strategies in the war on terror or just because they reproach or expose as inadequate some of what we propose to do to protect our people and their country.