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# THE PROCESS OF BALANCING

Oren Gross\*

Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge U. Press 2008). Pp. 512. \$84.00.

James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge U. Press 2007). Pp. 418. \$26.44.

## I

The metaphor of balancing is a dominant feature in legal discourse. It has become so ubiquitous that some have identified “a transition from ‘balancing’ as a feature within fundamental rights adjudication to ‘balancing’ as an emblematic characteristic of entire legal systems and cultures.”<sup>1</sup> The perceived inevitability of the need to engage in some sort of balancing has rendered balancing as a conceptual methodology and form of constitutional interpretation, reasoning, and adjudication that identifies competing interests and then values and compares them – almost unchallengeable.<sup>2</sup> We may continue to debate about particular outcomes of balancing, but there seems to be little, if any, point in arguing about the need *to* balance.<sup>3</sup> It has even been suggested that the concept of balancing constitutes an element of the “ultimate” rule of law.<sup>4</sup> Indeed, since the terrorist attacks of September 11, 2001, the metaphor of balancing has been invoked so regularly to explain the need for a trade-off between liberty and security that it has become an “ambient feature of our political environment.”<sup>5</sup> Much public and academic attention has been devoted to such questions as: how to allow government sufficient discretion, flexibility, and powers to meet terrorist threats while maintaining limitations and control over governmental actions so as to prevent, or at least minimize, the danger that such powers would be abused; how to allow government to act responsibly (i.e., “with sufficient vigor to meet the nation’s challenges, but without intruding on protected

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1. Jacco Bomhoff, *Balancing, The Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 *Hastings Intl. & Comp. L. Rev.* 555, 556 (2008).

2. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 945 (1987).

3. A “weaker” version is offered by the former President of the Israeli Supreme Court, Aharon Barak, when he writes that “ ‘balancing’ and ‘weighing,’ though neither essential nor universally applicable, are very important tools in fulfilling the judicial role.” Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *Harv. L. Rev.* 16, 93 (2002).

4. David M. Beatty, *The Ultimate Rule of Law* (Oxford U. Press 2004).

5. Jeremy Waldron, *Safety and Security*, 85 *Neb. L. Rev.* 454, 455 (2006).

liberties”<sup>6</sup>); and how to balance national security and individual liberty and rights.

If the metaphor of balancing has become dominant in legal and constitutional discourse, the terminology of utilitarian cost-benefit analysis has come to dominate, at least in the United States, the exercise of balancing tests.<sup>7</sup> Balancing rhetoric suggests that balancing is the product of a process of rational decision making by actors who possess both the requisite information and the capacity to assess the potential outcomes and consequences of their actions and decisions. In other words, those engaged in the act of balancing are able to estimate accurately both the benefits and harms that are involved and the probabilities of uncertain outcomes.

Yet, balancing tests are based on the ability of the relevant decision makers to identify correctly competing interests, to assign each of them appropriate weight, and to compare the respective weights of the relevant interests. However, determining which interests and what factors are relevant in any given case and which ought to be balanced against each other may prove highly problematic,<sup>8</sup> leading, according to some, to outcomes that are inevitably “subjectiv[e]”<sup>9</sup> and “manipulable.”<sup>10</sup>

Resorting to a scientifically sounding, cost-benefit balancing analysis in the context of responding to violent crises is particularly problematic. Cognitive theory of individual decision making under conditions of uncertainty and theories of collective and institutional decision making processes raise significant concerns about balancing tests and their outcomes under such circumstances.<sup>11</sup> When faced with violent exigencies, the public and its leaders are unlikely to be able to assess accurately the risks facing the nation. In those circumstances, an act of balancing between security and liberty is likely to be biased in ways that ought to be recognized and accounted for. The pressures exerted in such circumstances on decision makers (and the public at large), coupled with unique features of crisis mentality and group thinking, are likely to result in a systematic undervaluation of one interest (liberty) and overvaluation of another (security) so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties. Our ability to analyze and measure risk accurately is prone to suffer from endemic distortions, and the systematic nature of those biases suggests that failure to address them may turn mistakes and errors into “cognitive pathologies” – that is, decision methods that are not only “mistaken” but “irrational.”<sup>12</sup>

Furthermore, much of the existing cost-benefit analysis in the context of violent crises, in general, and terrorist threats, in particular, is premised, whether explicitly or

6. Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L.Rev. 2673, 2673 (2005).

7. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051, 1062-1063 (2000); Jonathan S. Masur, *Probability Thresholds*, 92 Iowa L. Rev. 1293, 1299 (2007).

8. See Aleinikoff, *supra* n. 2, at 977; Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 Hastings L.J. 785, 786 (1994).

9. *Blakely v. Wash.*, 542 U.S. 296, 307 (2004).

10. *Id.* at 308.

11. For fuller discussion, see Oren Gross, *Security vs. Liberty: An Unbalanced Balancing*, De Lege 283 (2009).

12. Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, in *Behavioral Law & Economics* 325, 327 (Cass R. Sunstein ed., Cambridge U. Press 2000).

implicitly, on the belief in our ability to separate crises from normalcy, counterterrorism measures from ordinary legal rules and norms. In other words, it is premised on a static view of the relationship between normalcy and crisis, ignoring, as noted below, the dynamic interrelationship between the two.

I argued elsewhere that the assumption of separation between the normal and the exception is facilitated and sustained by various mechanisms of separation, while at the same time reinforcing those very mechanisms.<sup>13</sup> Normalcy and the exception are seen as occupying “alternate, mutually exclusive, time frames.”<sup>14</sup> “Normalcy exists prior to crisis and is reinstated after [that crisis] is over.”<sup>15</sup> Violent “[c]rises constitute brief intervals in the otherwise uninterrupted flow of normalcy.”<sup>16</sup> Similarly, different legal principles, rules, and norms may be applied in distinct geographical areas - such as Great Britain and Northern Ireland, France and Algeria, or the United States and Guantanamo Bay - that belong to the same “control system.”<sup>17</sup> It is also often asserted that the area of foreign affairs is “constitutionally different” from domestic affairs in the sense that ordinary constitutional schemes are relaxed and greater deference than usual is, and some also say ought to be, accorded to the decisions and policies of the executive. Finally, counterterrorism measures and related governmental powers are “often perceived as directed against a clear group of enemy ‘others.’”<sup>18</sup> The dialectic of “us versus them” allows people to “vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies toward groups or individuals clearly identified as different.”<sup>19</sup> It also results in greater willingness to confer sweeping powers on the government. Indeed, “[t]he clearer the distinction between ‘us’ and ‘them’ and the greater the threat ‘they’ pose to ‘us,’ the greater in scope the powers assumed by government and tolerated by the public become.”<sup>20</sup>

Yet, such bright-line distinctions between normalcy and crisis exacerbate the problematical aspects of balancing the demands of security and the rights and privileges that are entailed in the concept of liberty. We are likely to underestimate certain costs and perhaps overestimate certain benefits reinforcing, yet again, the systemic imbalance inherent in our balancing process.

Consider, for example, the perceived temporal distinction between normalcy and crisis. This view of the relationship between normalcy and the exception fails to account adequately for the possibility that crises will become entrenched and prolonged.<sup>21</sup> Rather

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13. Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* 171-243 (Cambridge U. Press 2006); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 *Yale L.J.* 1011, 1069-1096 (2003).

14. Gross & Aoláin, *supra* n. 13, at 174.

15. *Id.* at 174-175.

16. *Id.* at 175. See e.g. Oren Gross, “Once More Unto the Breach”: *The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 *Yale J. Intl. L.* 437, 440 (1998) (introducing and challenging the “normalcy-rule, emergency-exception” paradigm).

17. Gross & Aoláin, *supra* n. 13, at 181.

18. *Id.* at 220.

19. *Id.*

20. *Id.* at 220-221.

21. See Oren Gross & Fionnuala Ní Aoláin, *To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency*, in *Human Rights: An Agenda for the 21st Century* 79, 95-98 (Angela

than an exception, crises often become the norm leading to a “tendency to slide into a new conception of normalcy that takes vastly extended controls for granted, and thinks of freedom in smaller and smaller dimensions.”<sup>22</sup> Counterterrorism measures and other emergency regimes “tend to perpetuate themselves, regardless of the intentions of those who originally invoked them.”<sup>23</sup> Once brought to life, they are not so easily terminable. Concomitantly, time-bound emergency legislation is often the subject of future extensions and renewals that transform it into permanent feature of the legal terrain despite Lord Devlin’s caution that, “it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.”<sup>24</sup>

Counterterrorism powers that are granted to, and exercised by, government and its agents during a crisis create precedents for future exigencies as well as for “normalcy.” Faced with a “new” crisis, government is likely to resort to the reservoir of extraordinary measures and powers that it had wielded during previous crises while seeking to add to its arsenal even more radical powers, claiming that the old measures have, obviously, been insufficient to deal with the new challenge. Such new extraordinary measures will, in turn, confer *ex post* legitimacy on the “old,” previously used – and less drastic emergency measures. Thus, as our understanding of normalcy shifts and expands to include measures and powers that had previously been considered exceptional the boundaries of new exceptions are pushed farther. And as government grows accustomed to the convenience of sweeping powers, and to the ability to operate with fewer restraints and limitations it is unlikely to be willing to give up such freedom.<sup>25</sup> “So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.”<sup>26</sup> The availability of relatively easy to use powers has “narcotic effects” on government officials, allowing them to bypass the more burdensome “ordinary” processes.<sup>27</sup> This creates a strong incentive to use such special powers for purposes other than those for which they were originally designed and in contexts not originally intended.

Indeed, the effects of the “getting used to” phenomenon are not confined to the state and its agents. Normalization of the exception also results in a tranquilizing effect on the public’s capacity to critically assess and respond to emergency measures.<sup>28</sup> As John Stuart Mill warns: “Evil for evil, a good despotism, in a country at all advanced in civilization, is more noxious than a bad one; for it is far more relaxing and enervating to

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Hegarty & Siobhan Leonard, eds., Cavendish Publ. 1999); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rights Q. 625, 644-647 (2001).

22. Harold D. Lasswell, *National Security and Individual Freedom* 29 (McGraw Hill 1950).

23. Gross & Aoláin, *supra* n. 13, at 175.

24. *Willcock v Muckle* (1951) 2 KB 844, 853-854 (Justice Devlin).

25. Gross & Aoláin, *supra* n. 13, at 230.

26. *Id.* at 230 (quoting *Julliard v. Greenman*, 110 U.S. 421, 458 (1884) (Field, J., dissenting)).

27. Mordechai Mironi, *Back-to-Work Emergency Orders: Government Intervention in Labor Disputes in Essential Services*, 15 *Mishpatim* 350, 380-386 (1986).

28. Gross & Aoláin, *supra* n. 13, at 236.

the thoughts, feelings, and energies of the people. The despotism of Augustus prepared the Romans for Tiberius. If the whole tone of their character had not first been prostrated by nearly two generations of that mild slavery, they would probably have had spirit enough left to rebel against the more odious one.”<sup>29</sup>

Likewise, judicial decisions handed down in times of crisis may be subsequently used as precedents for future cases, including cases that are not emergency-related. Considering that the scope of such notions as “national security” and “emergency” has increased substantially and that “It would, it seems, have to be a manifestly hopeless claim to national security before the courts would turn nasty,”<sup>30</sup> the potentially vast impact of such precedents can be fully appreciated.<sup>31</sup> Thus, “[c]oncessions made to necessity in a special, largely unknown context might be later generalized to apply to other contexts.”<sup>32</sup>

Finally, [i]nstitutional and structural modifications that are put in place during crisis times – either as part of a new “normal” institution or as an expansion and extension of powers and authorities of existing regular institutions – may continue long past the termination of the original crisis.<sup>33</sup> September 11, 2001, provides a clear example of such significant institutional and structural changes. In the aftermath of the attacks, the largest US governmental reorganization in fifty years took place with the establishment of the Department of Homeland Security under the Homeland Security Act of 2002.<sup>34</sup>

Thus, fashioning legal tools to respond to violent crises on the belief that the costs of counterterrorism and similar measures could somehow be limited to the duration of the actual crises may be misguided. The belief in our ability to separate crisis from normalcy focuses our attention on the immediate effects of extraordinary measures and powers while hiding from view their long-term costs and the danger that crisis-specific measures will become an integral part of the regular legal system.

## II

In *The Cost of Counterterrorism: Power, Politics, and Liberty*,<sup>35</sup> Laura Donohue provides a detailed description and analysis of many counterterrorism measures, such as

29. John Stuart Mill, *Three Essays - On Liberty, Representative Government, the Subjection of Women* 185 (Oxford U. Press 1975) (originally published 1861).

30. Graham Zellik, *Official Information, National Security and the Law in Britain*, 98 *Studi Senesi* 303, 317 (1986).

31. Gross & Aoláin, *supra* n. 13, 238.

32. Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 *Harv. Civ. Rights-Civ. Libs. L. Rev.* 349, 389 (1986). *See also* George J. Alexander, *The Illusory Protection of Human Rights by National Courts during Periods of Emergency*, 5 *Hum. Rights L.J.* 1, 26-27 (1984); Kingsley R. Browne, *Title VII As Censorship: Hostile-Environment Harassment and the First Amendment*, 52 *Ohio St. L.J.* 481, 538 (1991). *But see e.g.* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 *Mich. L. Rev.* 2565, 2571-2577 (2003).

33. Gross & Aoláin, *supra* n. 13, at 238.

34. *Id.* at 242-243; Pub. L. No. 107-296, 116 *Stat.* 2135 (2002) (codified 6 U.S.C. §§ 101 et seq. (2006)); Harold C. Relyea, *Homeland Security: Department Organization and Management - Implementation Phase* Cong. Research Serv. RL 31751 (updated May 27, 2004).

35. Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge U. Press 2008).

prolonged (and even indefinite) detentions, coercive interrogations, measures to curtail the financing of terrorist organizations, surveillance and data-mining operations, and measures that impact free speech. While the thesis underlying the book—that the true costs of counterterrorism measures (for example, the fact that counterterrorism measures often end up being applied to non-terrorists and that temporary measures often become a baseline on which future measures are built) all too often go unnoticed—is not itself novel, Donohue's rich discussion of historical and comparative examples—focusing on the experiences of the United States and the United Kingdom—makes an important contribution to the existing literature in the field.

*The Cost of Counterterrorism* joins a critical debate about the real costs of counterterrorism measures. On the one hand, as noted above, there are those who argue that the eventual normalization of extraordinary powers that are wielded by the government (and particularly by the executive branch) in times of acute crisis creates a long-term damage to society and its legal terrain. Over time, so the argument goes, the executive enjoys enhanced powers while constitutional protections of individual rights diminish. Others have argued that contrary to this narrative, crises have actually been important components of the constitutional learning curve and, if anything, the historical trend tends to demonstrate an increase in constitutional protections of individual rights and civil liberties even when current crises are compared to previous ones.<sup>36</sup> Yet other scholars have rejected both claims, making the argument that no “unidirectional, and irreversible, increase in some legal or political variable,”<sup>37</sup> in either a liberal or a statist direction, could be detected.<sup>38</sup> Donohue clearly falls within the first camp, identifying “a spiral—not a pendulum”<sup>39</sup> to best characterize counterterrorist law. Yet it is thus surprising that Donohue neither cites nor references adequately important earlier works in the field that support, and in fact have developed previously, the “ratchet up” / “spiral” / “negative spillovers” argument nor does she engage critically with the “liberal” or “no detectable” ratchet arguments.

While Donohue focuses her study—as the title itself suggests—on the “costs” of counterterrorism measures, she is not unaware that such measures also bring about social benefits. Thus, for example, she notes that since the terrorist attacks of September 11,

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36. See e.g. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 221, 219-221 (Alfred A. Knopf 1998) (identifying a “generally ameliorative trend” in the protection of civil liberties during wartime, including a pattern of increased congressional and judicial involvement in the protection of civil liberties); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Commentary 261, 284-289 (2002) (noting increased protection for civil liberties during wartime as a result of shifting baselines for determining which civil liberties restrictions are appropriate and recognizing past mistakes).

37. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605, 610 (2003). The authors argue that there are no systematic trends in the history of civil liberties. Thus, “[a]s a working presumption . . . we should approach each new social state - whether labeled war, emergency, or anything else - without worrying or hoping that our present choices will have systematic and irreversible effects on the choices made by future generations in unforeseeable future emergencies.” *Id.* at 626. Under this view then, there is no need to worry about the precedential effects of current policies.

38. See e.g. Mark Tushnet, *Issues of Method in Analyzing the Policy Response to Emergencies*, 56 Stan. L. Rev. 1581, 1591-1592 (2004) (suggesting that political decision making in and after emergencies is not categorically different from political decision making in “ordinary” times).

39. Donohue, *supra* n. 37, at 15.

2001, “no major al Qaeda attack has occurred on American soil, and in Britain, intelligence agencies and law enforcement have successfully broken up a number of terrorist cells.”<sup>40</sup> And while Donohue is undoubtedly correct to suggest that not every counterterrorism measure should be credited with this relative success story, she also recognizes that “calculating such benefits is essential to instituting a strong counterterrorist regime.”<sup>41</sup> Yet beyond such general statements, the book does not seriously deal with the possible gains - as far as enhanced security is concerned - from the counterterrorism measures that are analyzed therein. To be sure, analysis of the benefits may well be tricky. After all, the greatest gain in terms of security is the one pertaining to that which did not materialize - that is, in the ability of security services and law-enforcement agencies to forestall and prevent terrorist attacks from taking place. Establishing causality between particular counterterrorism measures and such nonevents is indeed difficult. Furthermore, information about the foiled attacks is often kept secret and hidden from public view (and when it is made public it is often greeted with suspicion). Donohue is certainly correct to suggest that “[i]t is not sufficient . . . to assume either that no counterterrorist laws work, or that they are all responsible for either the absence or the relatively isolated occurrence of attacks,” and, as a result, “calculating the benefits of the provisions - like calculating their costs - requires a nuanced approach.”<sup>42</sup> Unfortunately, *The Cost of Counterterrorism* does not offer any real attempt to develop such a nuanced approach to the calculation of potential benefits. Thus, while the book makes an important contribution to developing a more nuanced understanding and appreciation of the costs side of a security-liberty tradeoff, it does not measurably enhance our understanding of the benefits side of the possible equation.

The final chapter of *The Cost of Counterterrorism* offers suggestions that are designed “to mitigate the costs of security measures without seriously reducing the government’s ability to respond to real threats.”<sup>43</sup> In an attempt to distance legislators from the pressures of public opinion following terrorist attacks, Donohue proposes the fostering of a legislative culture of restraint. That culture of restraint would mean that the legislature ought to resist extraordinary procedures that are likely to result in the passage of “destructive laws”<sup>44</sup> and the temptation to include sunset provisions in emergency legislation, but the legislature should act immediately to institute a parliamentary or congressional inquiry following a terrorist attack.<sup>45</sup> In addition, Donohue calls for the strengthening of transparency and accountability through stringent oversight by the legislature over the executive and the enhancement of the freedom of information regime.<sup>46</sup> Finally, Donohue argues that clear lines ought to be maintained between ordinary criminal law and counterterrorism measures and suggests that the legislature ought to resist strongly proposals to modify normal judicial rules in order to deal with the

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40. *Id.* at 3.

41. *Id.*

42. *Id.* at 334.

43. *Id.* at 336.

44. Donohue, *supra* n. 37, at 337.

45. *Id.* at 336-341.

46. *Id.* at 341-345.



exigency or allow the executive to move into the judicial realm (e.g., by establishing military commissions to try suspected terrorists).<sup>47</sup>

I share with Donohue the belief that in order to address many of the concerns about the long-term costs of counterterrorism we should focus on the legislature (and, as noted below, I am even more strongly in agreement with James Baker that our primary focus ought to be on the executive branch of government). By and large, I also believe that many of her recommendations are steps in the right direction. However, I would also suggest that several of those proposals are unrealistic and would not, in fact, mitigate the costs of counterterrorism. Take, for example, the recommendation that calls upon the legislature to immediately institute an inquiry following a terrorist attack. While I would agree that such an independent evaluation of information by the legislature can be extremely valuable, I very much doubt that it might “help prevent extraordinary powers from being rushed through without thoughtful consideration of their possible consequences and how they would be used for nonterrorist-related affairs.”<sup>48</sup> Donohue offers as an example for such an inquiry the investigation carried out by the Intelligence and Security Committee in the United Kingdom in the aftermath of the July 7, 2005, London bombings. She notes, with approval, that “[w]ithin 10 months of the attacks, the committee issued a public report.”<sup>49</sup> But how would such a ten-month inquiry help prevent the rush to pass counterterrorism legislation? If the problem is that violent crises, such as shocking terrorist attacks, tend to bring about a rush to legislate, reminding one of the observation by the Athenian of Plato’s *The Laws*<sup>50</sup> that, “no man ever legislates at all. Accidents and calamities occur in a thousand different ways, and it is they that are the universal legislators of the world,”<sup>51</sup> that rush to legislate is unlikely to be slowed down by such inquiries. In fact the opposite may be true. If a legislative inquiry is likely to be meaningful, the executive would have even stronger incentives to try and push proposals for expansive counterterrorism measures as early as possible in order to get those in place before the inquiry is completed. Indeed, following the London bombings in July 2005, the British government pushed for an extension of the precharge detention maximum period from fourteen to ninety days,<sup>52</sup> citing difficulties involved in investigating international terrorist networks, deencrypting numerous computer files, and translating documents from Arabic and other languages. Eventually, the Terrorism Act of 2006<sup>53</sup> which was made into law prior to the release of the report extended the maximum period to “only”<sup>54</sup> twenty-eight days.<sup>55</sup>

Similarly problematic is the recommendation that the legislature maintain clear

47. *Id.* at 345-359.

48. *Id.* at 337.

49. Donohue, *supra* n. 37, at 337.

50. Plato, *The Laws* (Trevor J. Saunders trans., rev. ed., Penguin Bks. 2004).

51. *Id.* at 119.

52. Originally the maximum period for precharge detention was seven days. That period was extended in 2003 as part of the Criminal Justice Act and without significant public debate. Criminal Justice Act 2003.

53. Terrorism Act 2006.

54. Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, 43 U. Rich. L. Rev. 927, 952 (2009).

55. See also Adrian Vermeule, *Emergency Lawmaking after 9/11 and 7/7*, 75 U. Chi. L. Rev. 1155 (2008).

lines between ordinary criminal law and counterterrorism measures. Donohue argues that “legislative reluctance to borrow measures from other areas and apply them to terrorism and vice versa may force a more careful examination of the consequences of new provisions and ultimately reduce the costs of counterterrorism.”<sup>56</sup> Yet Donohue fails to explain how this recommendation would change the very experiences that she so painstakingly detailed throughout the rest of the book. First, the “transsubstantive”<sup>57</sup> nature of many constitutional limitations and legal rules—the fact that they apply to ordinary criminals and to suspected terrorists—has two important implications in this context. First, judicial decisions made in the context of fighting terrorism will also apply in the more general context of criminal law and procedure. Second, when judges decide “ordinary” criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.<sup>58</sup> Second, the recommendation that measures ought not to be borrowed from counterterrorism and applied to other areas (the “vice versa”) runs against the core of Donohue’s “spiral” argument and against historical and comparative experience. Donohue seems to be falling back onto the assumption of separation between normalcy and the exception, an assumption that she and others have clearly debunked and shown to be illusory.

A final note: Despite repeated statements that the events of September 11 have forever changed the world, much of the discussion around matters dealing with terrorism, the structuring of counterterrorism measures, extraordinary governmental powers to answer future threats, and fashioning legal responses to terrorist threats is not new. The quandaries posed by defining and structuring responsible responses to crises have faced nations embroiled in wars against external enemies, as well as those responding to violent movements within their own borders. They have haunted countries powerful and weak, rich and poor. Thus, careful historical and comparative studies are of vast significance in this area. *The Cost of Counterterrorism* is to be commended for offering a comparative analysis of the most critical counterterrorism measures, looking at both the experiences of the United States and the United Kingdom. However, decision makers, scholars, and the general public would benefit greatly if the scope of comparison were further extended beyond the usual suspects. And while few studies to date have sought to expand the horizon of investigation and research across legal terrains and geographies, there are some encouraging signs of change.<sup>59</sup>

### III

James Baker’s *In the Common Defense: National Security Law for Perilous Times*<sup>60</sup> focuses exclusively on national-security law in the United States and does not engage in a comparative analysis in any meaningful sense. In addition, Baker focuses

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56. Donohue, *supra* n. 37, at 345.

57. William J. Stuntz, *Local Policing after the Terror*, 111 Yale L.J. 2137, 2140-2141 (2002).

58. *Id.* at 2140-2141.

59. See e.g. *Emergency Powers in Asia: Exploring the Limits of Legality* (Victor V. Ramraj & Arun K. Thiruvengadam eds., Cambridge U. Press 2010).

60. James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge U. Press 2007).

most of his study on the executive branch of government rather than on the courts or the legislature. The book, he suggests, “explains why and how the good faith *application* of law results in better security at the same time that it honors America’s commitment to the rule of law.”<sup>61</sup> Bringing together his experiences as a judge on the United States Court of Appeals for the Armed Forces and as a teacher of national-security law, Baker identifies correctly that “the meaningful application of law requires that lawyers . . . understand where, how, and when legal decisions might be taken, and not just where they are recorded.”<sup>62</sup> It is thus that *In the Common Defense* makes a significant contribution to our understanding of national-security decision making processes, in general, and presidential decision making processes, in particular.

When an extreme exigency arises, it almost invariably leads to the strengthening of the executive branch, not only at the expense of the other two branches but also at the expense of individual rights, liberties, and freedoms. The executive branch assumes a leading role in countering the crisis, with the other two branches pushed aside (whether of their own volition or not). The government’s ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights. Crises tend to result in the expansion of governmental powers, the concentration of powers in the hands of the executive, and the concomitant contraction of individual freedoms and liberties. Enhanced and newly created powers are asserted by, and given to, the government as necessary to meet the challenge to the community.<sup>63</sup> The increase in governmental powers leads, in turn, to a contraction of traditional individual rights, freedoms, and liberties. Indeed, as Baker notes, that “[n]ational security decision-making gravitates to the president for legal, policy, and functional reasons,” and that this focus “is magnified during wartime,” is not new.<sup>64</sup> Yet his book offers a unique perspective by examining the practice of national security law as “informal, undocumented, and dependent on the moral integrity of the government’s officials.”<sup>65</sup>

Baker makes the seemingly controversial, yet in my opinion utterly correct, observation that, when all is said and done, “the law cannot solve what is essentially a leadership and intellectual challenge.”<sup>66</sup> That is, “the answer . . . is not found in legal prescript, but in a process of proactive internal appraisal that places emphasis on efficacy as well as legality.”<sup>67</sup> One is reminded of Judge Learned Hand’s famous statement:

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61. *Id.* at 1 (emphasis added).

62. *Id.* at 4.

63. See e.g. Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 117-149 (Yale U. Press 1990); Charles de Montesquieu, *The Spirit of Laws* 154 (Thomas Nugent trans., Free Press 1970) (originally published 1748); Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 288-290 (Princeton U. Press 1948); Pitirim A. Sorokin, *Man and Society in Calamity: The Effects of War, Revolution, Famine, Pestilence upon Human Mind, Behavior, Social Organization and Cultural Life* 122-144, 275-276 (E.P. Dutton & Co. 1942); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *Yale L.J.* 1385, 1386 (1989); Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 *Ohio St. L.J.* 736, 738-741 (1978).

64. Baker, *supra* n. 62, at 4.

65. *Id.*

66. *Id.* at 5.

67. *Id.*

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>68</sup>

Thus, *In The Common Defense* seeks to bring to the forefront the national-security decision making processes that have to date not been adequately explored in legal literature. The book does an admirable job focusing on the National Security Council process; the military chain of command; intelligence gathering, analysis, and dissemination; and the Homeland Security Council process. In doing so, it analyzes not only constitutional, legal, and formal structures but also, and perhaps as significantly, informal frameworks and processes. Finally, true to his belief that “national security law is dependent on the moral integrity of those who wield its power,”<sup>69</sup> Baker’s final chapter is devoted to a timely and well-presented discussion of the role and responsibilities of the national-security lawyer.

In all, this book is a must read for anyone interested in national-security law and national-security decision making, as well as to any individual who wishes to be an informed citizen about these matters.

#### IV

A democracy may lose the battle against terrorists either by physically crumbling before them or by collapsing inward when it abandons its fundamental principles in the heat of battle. A weak, hesitant action against an impending threat may cause irreparable damage to the state’s body. But the instinct of self-preservation may lead to transformation of the very nature of that society and to the loss of its soul. As Paul Wilkinson puts it:

It is a dangerous illusion to believe one can “protect” liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of “emergency” or “military” rule carrying countries from democracy to dictatorship with irrevocable ease. What shall it profit a liberal democracy to be delivered from the stress of factional strife only to be cast under the iron heel of despotism?<sup>70</sup>

The task of survival and of security is not confined to the defense of the physical existence of the state. It is as much about defending the “innermost self” of the nation.<sup>71</sup> “If we do not preserve the rule of law zealously in this area as well,” commented the Landau Commission, “the danger is great that the work of those who assail the existence of the State from without will be done through acts of self-destruction from within, with

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68. Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189-190 (Irving Dillard ed., repr. ed., Leg. Classics Libr. 1989). See also Gerald Gunther, *Learned Hand: The Man and the Judge* 547-552, 639-643 (Knopf 1994).

69. Baker, *supra* n. 62, at 7.

70. Paul Wilkinson, *Terrorism and the Liberal State* 122-123 (2d ed., N.Y.U. Press 1986).

71. Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* 13, 119 (Brown U. Press 1957).

'men devouring each other.'<sup>72</sup> Adherence to the rule of law is a necessary element in a nation's security and safety. As Aharon Barak, the former President of the Israeli Supreme Court, wrote in one of his opinions: "[T]here is no security without law, and the rule of law is a component of national security."<sup>73</sup>

Both Professor Donohue and Judge Baker remind us that the discussion of tradeoffs and balancing between security and liberty is all too often premised on a perilous dichotomy and a false choice. "Security," Baker reminds us, "is a predicate for liberty, not an alternative to liberty."<sup>74</sup> And Donohue echoes that by noting that the "security or freedom rubric" overlooks "many grave and complex problems."<sup>75</sup> Each author enhances our collective understanding of what is at stake and how to approach the challenges ahead. They do so by a comparative study of some of the most critical counterterrorism measures (Donohue) and a detailed study of the actual operation and practice of national-security decision making in the United States (Baker). Their works, focusing on the legislative process (Donohue) and presidential decision making processes, both formal and informal (Baker), complement each other and offer important insights on some of the most critical questions of our time.

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72. *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 *Isr. L. Rev.* 146, 183 (1989) (originally published Israeli Govt. Press Off. 1987).

73. H.C. 428/86, *Barzilai v. Govt. of Isr.*, 40(3) (1986) P.D. 505, 622 (Barak, P.).

74. Baker, *supra* n. 62, at 7.

75. Donohue, *supra* n. 37, at 359.