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JUDICIAL BALANCING IN TIMES OF STRESS: COMPARING THE AMERICAN, BRITISH, AND ISRAELI APPROACHES TO THE WAR ON TERROR

Michel Rosenfeld*

INTRODUCTION

In 2004, the highest court in three different countries, the United States, Israel, and the United Kingdom, handed down major decisions in cases regarding the war on terror.1 All these cases involved conflicts between liberty and security in the context of combating terrorism, and in all three countries the decisions were the product of judicial balancing.2 The factual settings of the cases varied significantly from one country to the next. Two of the three American cases arose out of the war in Afghanistan undertaken to uproot Al Qaeda and the Taliban

* Justice Sydney L. Robins Professor of Human Rights, Benjamin N. Cardozo School of Law. I wish to thank the participants at the Rockefeller Foundation Bellagio Center conference entitled “Terrorism, Globalism and the Rule of Law,” held July 18-22, 2005, for their invaluable comments and suggestions on an earlier draft of this Article. I also thank Professor Bernhard Schlink for his incisive reading and helpful advice. No one, but me, is responsible for any remaining errors. Finally, I wish to thank the Floersheimer Center for Constitutional Democracy at Cardozo for funding a faculty summer research grant, which enabled me to complete this Article.


2 Consistent with the terminology used by many courts outside the United States, see, for example, The Queen v. Oakes, [1986] 1 S.C.R. 103 (Can.); Pharmacy Case, Bundesverfassungsgericht [BverG] [Federal Constitutional Court] June 11, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 379 (F.R.G.) (Germany); Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727, (E.C.J.), the Israeli Supreme Court referred to the test it used in its two above mentioned decisions as a “proportionality test.” For their part, the British Law Lords used both a “proportionality test” and “balancing.” As will be discussed below, see discussion infra Part I.C, the American and British “balancing” approach and the Israeli and British “proportionality” analysis are not completely equivalent, but they largely overlap.
after the terrorist attacks against the United States on September 11, 2001. These two cases concerned individuals captured in Afghanistan who were being held indefinitely without charges either in the United States or in Guantanamo Bay, Cuba, on an American military base located there. The third American case concerned an American citizen arrested and held indefinitely on U.S. soil upon being suspected of involvement in an Al Qaeda terrorist plot. Of the two Israeli cases, one arose in connection with the building of a barrier on the West Bank by the Israel Defense Forces (IDF) to protect Israeli citizens from Palestinian suicide bombers, while the other involved the conduct by the IDF of military operations in Gaza “directed against the terrorist infrastructure” in that area. Finally, the British case was prompted by indefinite detention without charges of non-citizens suspected of having ties to terrorism who could not be deported to their countries of origin without violation of humanitarian laws because of the likelihood that they would be tortured upon arrival there.

Although all three countries were actively engaged in the war on terror at the times that their respective courts handed down the decisions mentioned above, each of the countries was confronting a markedly different situation from the others. The United States had suffered a single-day coordinated terrorist attack that claimed around 3,000 lives on its territory on September 11, 2001. It engaged thereafter in two foreign wars in far distant countries, Afghanistan and Iraq, which posed no apparent serious threats to America’s domestic security or territorial integrity. In contrast, in Israel, between 2000 and 2004, there were 780 terrorist attacks on Israeli soil collectively claiming 900 lives—proportionately the equivalent of 45,000 lives in the United States, given Israel’s population of 6 million versus the U.S.’s population of 300 million. In contrast, the United Kingdom had not suffered a terrorist attack on its territory from September 2001 until the Law Lords issued their decision in December 2004. Since then, however, British-born citizens conducted terrorist attacks on London subways and buses.

3 See Hamdi, 542 U.S. at 510 (concerning U.S. citizen held in U.S. prison); Rasul, 542 U.S. at 470 (concerning foreign detainees held in Guantanamo).
4 See Padilla, 542 U.S. at 430.
5 See Beit Sourik, supra note 1, paras. 1-2.
6 Physicians for Human Rights, supra note 1, para. 1.
8 See Beit Sourik, supra note 1, para. 1.
in July 2005. \(^{10}\) Approximately fifty United Kingdom citizens were killed in the September 11th attack on the World Trade Center in New York and the United Kingdom had feared ever since becoming a target of international terrorism, fears partially realized by the July 2005 London attacks. This fear has been fueled by the prominent role played by the United Kingdom in the U.S.-led coalition engaged in military operations in Iraq and by the presence within the United Kingdom of sizable numbers of citizens and aliens sympathetic to Al Qaeda’s cause.

Notwithstanding these important differences among the three countries, they have all conducted the war on terror under conditions of stress rather than under conditions of crisis or emergency. As will be discussed in Part I below, conditions of stress fall somewhere between ordinary conditions and conditions of crisis. It is clear that in the context of the fear of terrorism and of the battle against it none of the three countries is living in ordinary times. On the other hand, none of the three countries has been thrown into a state of crisis by its confrontation with terror. For the United States, for example, the current threat posed by terror is not comparable to the Cuban missile crisis, when the Soviet Union and the United States were dangerously flirting with mutual nuclear annihilation. Similarly, the United Kingdom’s confrontation with terror is not comparable to the experience of fighting virtually alone against the Nazis during part of World War II, where Great Britain faced a real risk of military defeat and subsequent subjugation of the British people to brutal Nazi occupation. Finally, Palestinian suicide bombings in the past four years do not put Israel’s survival in question as did the 1948 war of independence or the 1967 or 1973 wars fought against several neighboring countries.

In ordinary times, judicial balancing or proportionality analysis is common and widespread in dealing with conflicts between liberty and security, and more generally, between individual rights and important societal goals. \(^{11}\) In times of crisis, however, balancing becomes problematic and highly contested. In some countries the constitution provides for invocation of a state of emergency that allows for suspension or derogation of fundamental rights. \(^{12}\) Even in the United States, where the Constitution does not provide for emergency powers,


\(^{11}\) See cases cited supra note 2.

\(^{12}\) See cases cited supra note 2; see, e.g., 1958 French Constitution, art. 16.
the right of habeas corpus can be suspended in a crisis and Presidents have de facto increased their powers in times of war or emergency. Moreover, of the three different positions on how to deal with conflicts between liberty and security in times of crisis that have dominated the debate in the United States, two appear to do away altogether with judicial balancing. The three positions are: (1) “executive unilateralism,” which favors allowing complete discretion to the executive branch without any oversight from any other institution, (2) “civil libertarian maximalism,” which requires the same judicial balancing in times of crisis as in ordinary times, and (3) a “process-based institutional approach” requiring coordination between Congress and the President. Positions (1) and (3) involve no judicial balancing, and (1) may require no balancing at all, whereas (3) relies on some kind of non-judicial balancing, namely on “checks and balances” between the legislative branch and the executive branch.

Position (2) is not persuasive in the context of a crisis to the extent that it seems counterintuitive that liberties need be just as extensively protected at times when the nation’s survival is in peril as in ordinary times. What about during times of stress? Does this depend on whether the differences between ordinary times and times of crisis are viewed primarily in quantitative rather than qualitative terms—in other words, in terms of ascribing different weights to the various interests that must be weighed against one another rather than in terms of categorical distinctions calling for altogether different approaches?

The decisions in all three countries were the product of judicial balancing, but some of them also prompted concurring and dissenting opinions.

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13 See U.S. CONST. art. I, § 9, cl. 2 (permitting suspension of habeas corpus in cases of invasion or insurrection).
16 Id. at 297.
17 See Hamdi v. Rumsfeld, 542 U.S. 507, 531-33 (2004); see also Cass Sunstein, Minimalism at War, 2004 SUP. CT. REV. 47, 49 (distinguishing between “a natural security maximalism” and “liberty maximalism,” which roughly correspond respectively to positions (1) and (2) above).
19 Whether or not position (1) requires any balancing depends on whether one regards the Executive Power in terms of its duty to uphold constitutional rights while pursuing security, see infra Part II, pp. 2109-10, or exclusively as devoted to safeguarding security.
20 Legislative power can provide a “check and balance” on executive power to the extent that the two have different institutional interests or political objectives. Accordingly, whereas judicial balancing is supposed to rely on some notion of proportionality, see infra Part II, a “balance” between legislative and executive power need not relate in any way to proportionality.
opinions relying on categorical approaches. Furthermore, some of the judges involved regarded the relevant controversies as arising under conditions of crisis, others regarded them as arising under conditions of stress, and yet others regarded them as arising under close to ordinary conditions.

To compound these difficulties, collectively the six decisions make use of three different legal paradigms to deal with the various conflicts between liberty and security presented for adjudication. These paradigms are: (1) the “law of war paradigm,” (2) the “criminal law paradigm,” and (3) the “police power law paradigm.” No straightforward correlation ties the three conditions described above to these three legal paradigms. Nevertheless, the law of war paradigm seems most compatible with conditions of crisis, whereas the other two paradigms seem best suited for ordinary times.

The thesis defended in this Article is that none of the six decisions deals with the conflict between liberty and security in the context of the war on terror in the best possible way. It is necessary to treat the war on terror, absent extraordinary circumstances, as occurring under conditions of stress. Moreover, these conditions ought to be correlated, all other things being equal, to a new legal paradigm: the “war-on-terror law paradigm.” Under this thesis, judicial balancing has an important role to play in the optimal resolution of war on terror cases. That role is not exclusive but circumscribed by shared institutional responsibility between legislative, executive and judicial power. Finally, reliance on conditions of stress and on the war-on-terror law paradigm makes for an appropriately calibrated judicial balancing. In contrast, as we shall see, the American cases seem to place too much weight on security or too little on liberty; the Israeli cases, conversely, too little weight on security; and the British case, falling somewhere between the American and the Israeli, seems to reach the right result, but not necessarily because of any principled use of judicial balancing.

To elaborate the above thesis, this Article proceeds as follows. Part I sets the theoretical framework by focusing on four issues: the distinctions between conditions of stress, ordinary conditions, and conditions of crisis; the distinctions between the three existing paradigms of law that figure in the six decisions under consideration; the relationship between proportionality and judicial balancing; and the prevalent background conditions for each of the six cases, in order to set

21 See infra pp. 2112-22.
22 See infra text accompanying notes 235-241.
23 See infra Part I.B.
24 See infra Part II.
25 See infra Part III.
26 See infra Part IV.
the parameters of relevant comparison. Part II examines the American cases, Part III the Israeli cases, and Part IV the British case. Part V compares American balancing, Israeli proportionality analysis, and their British counterparts. Finally, Part VI explores the optimal role for judicial balancing consistent with the thesis that links times of stress and the war-on-terror law paradigm.

I. THE THEORETICAL FRAMEWORK

How to handle the conflict between liberty and security in the war on terror and how to do it through judicial balancing depend on the characterization of the prevailing conditions, and on whether terrorists are conceived as criminals who must be prosecuted or as enemy warriors who must be killed or captured and detained until the end of hostilities. As will be demonstrated below, the six decisions are not consistent in their dealings with these issues. They are often at odds with one another and even, at times, seemingly internally contradictory.

The theoretical framework outlined below is meant to provide the critical tools necessary for cogent analysis of the existing jurisprudence and for elaboration of the thesis presented in this Article.

A. Times of Stress vs. Ordinary Times and Times of Crisis

Times of stress are neither ordinary times nor times of crisis. In the context of a crisis, be it military, economic, social, or natural, the head of government may be entitled to proclaim exceptional powers and to suspend constitutional rights, including political rights. In an acute crisis, the polity is singularly focused on survival, and all other political concerns and objectives recede into the background. In contrast, in ordinary times, the polity can readily absorb the full impact of the give and take of everyday politics, and constitutional rights ought to be protected to their fullest possible extent.

27 See, e.g., Hamdi as discussed infra Part II, pp. 2113-22 (Eight justices rejected the Bush Administration’s position, but some did so based on the law of war paradigm, while others relied on the criminal law paradigm.).
28 See infra Parts II, III.
29 The grant and duration of exceptional emergency powers are problematic not in relation to their proper use as means to combat threats to the life of the polity, but in relation to the potential for abuse in the invocation or prolongation of such powers. See Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1040 (2004).
Times of stress differ from those of crisis primarily in terms of the severity, intensity, and duration of the respective threats involved. The line between the two may be difficult to draw, but a less severe, less intense, and more durable threat is likely to give rise to times of stress whereas a severe, intense, concentrated threat, of relatively shorter duration, is likely to provoke a crisis. For example, a foreign military invasion or a widespread domestic insurrection is likely to provoke a crisis. On the other hand, the aftermath of the terrorist attacks against New York City on September 11th, 2001—which involved threats, perceived threats, launching a “war on terror” fought mainly in far away countries, arrest and detention of potential terrorists, but no further terrorist attack on the United States as of the time of this writing—has produced times of stress rather than times of crisis.30

The distinction between ordinary times, times of crisis, and times of stress can be further elaborated consistent with a pluralist conception of the polity where politics looms as the ongoing confrontation between self and other. In a pluralist polity, different groups—ethnic, religious, or ideological—and different interests compete for power and scarce political goods. Such competition, moreover, can be characterized as struggles between self and other. In ordinary times, conflicts between self and other do not threaten the unity of the polity and find resolution, or at least confinement, within the existing constitutional, institutional, and political framework. Thus, in spite of the fact that a number of struggles relating to individual or group identity and to the apportionment of benefits and burdens throughout the polity split the citizenry into a multiplicity of selves pitted against numerous others, the common self that binds all citizens to the unity of the polity remains glued together and shows no danger of unraveling. In ordinary times, neither self nor other may be fully satisfied with their fate and may be likely to struggle continuously to ameliorate their respective positions. Neither of them, however, is likely to become so dissatisfied with his or her status or with the existing institutional framework for processing conflicts as to want to withdraw from the polity.

Times of crisis, in contrast, occur when the common identity or the very life of the polity are in imminent peril. The cause of the peril may be external, as in the case of a foreign war, or internal, as in the case of civil war or violent secession. In times of crisis, the conception of the

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30 It is important, however, to distinguish the long term aftermath from the immediate impact and short term consequences of a terrorist attack. For example, the day of the September 11th attacks, which resulted in around three thousand deaths, and subsequent days in which the American nation had to cope with the shock of the sudden and unexpected attacks and with the prospect of imminent future attacks, can be characterized fairly as a time of crisis. The long period of disquiet that followed those first few weeks, however, seems better described as one of stress than of crisis.
good of self or other is so little integrated or accommodated within the polity that all possible institutional resolutions of the conflict between self and other will strike one or both of them as deeply insufficient, unsatisfactory, and unjust.

Times of stress stand halfway between ordinary times and times of crisis. In times of stress, there is less extensive and less successful accommodation and integration of significantly represented conceptions of the good within the polity. Self and other are less likely than in ordinary times to consider institutional processes of conflict resolution to be just or fair. The identity or unity of the common self that is supposed to bind together the citizenry is not disintegrating, but it is destabilized and under various pressures. Whereas a conventional war may cause a crisis, terrorism and the war on terror seem more likely to create stress. Indeed, unlike a military invasion, terrorist acts are likely to be sporadic and widespread, causing more psychological than physical harm. Having terrorists hidden within the polity’s population is undoubtedly unnerving and can easily lead to overreactions, undue suppression of fundamental rights, or exacerbation of ethnic or racial prejudice such that certain selves and the conceptions of the good they endorse may become increasingly unhinged. At some point, erosion of accommodation of certain conceptions of the good may place increasing strain on the working unity of the polity’s citizenry. In short, both the threat posed by the terrorist—be he or she a foreign or a domestic one—and the dangers posed by overreaction may fray the common glue that binds the polity together. Thus, the dangers looming on the horizon in times of stress may not be very different in nature than their counterparts present in times of crisis. Nevertheless, in times of stress, these dangers are markedly less imminent and less intense.

That the current war on terror gives rise to conditions of stress rather than of crisis is well captured in the following passage from Lord Hoffman’s opinion in the A(FC) case:

[The United Kingdom] is a nation that has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.31

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B. The Criminal Law, Law of War, and Police Power Law Paradigms

Both ordinary criminals and soldiers in the armies of foreign enemies can pose threats to the lives and security of the members of a polity. The law, however, treats suspected criminals and captured enemy soldiers very differently. Following arrest, suspected criminals must be charged, tried, convicted, and sentenced before they can be legitimately confined to prison for a determinate maximum period of time. Moreover, in constitutional democracies, such as the United States for example, criminal defendants are afforded certain categorical constitutionally protected rights, such as the right against self-incrimination,32 the right to counsel,33 and the right to confront witnesses that testify against them,34 to secure an acceptable minimum of procedural fairness. Such rights as well as other norms and protections, such as the requirement that the state prove its case against the accused “beyond a reasonable doubt,” frame the “criminal law paradigm.”

In contrast, captured foreign enemy soldiers who are not in violation of the laws of war can only be detained consistent with applicable norms of the international law so as to prevent them from further participation in the military conflict on the side of the captor’s foreign enemies.35 Such prisoners of war must be treated humanely, are exempt from all but a minimum of clearly defined interrogation, and are to be released without undue delay upon termination of hostilities.36 In short, these as well as other legally binding norms that set the legitimate bounds for the treatment of prisoners of war in the context of conventional military hostilities among two or more nation-states circumscribe the “law of war paradigm.”

In addition to requiring neutralization of criminals and foreign soldiers fighting against the country’s armed forces, the security of that country’s citizenry may require further restraints impinging on the citizenry as a whole or on some distinct groups within it. For example, a city plagued by rampant youth-gang violence may improve security for its inhabitants by imposing a general curfew or one confined to all residents below a certain age. More generally, special security needs arising because of certain specific threats—for instance, threats posed

32 See U.S. CONST. amend. V.
33 See id. amend. VI.
34 See id.
36 Id. arts. 13, 17, and 118.
by terrorists, the spread of deadly contagious disease, a natural disaster, organized crime—call for government measures for the protection of the citizenry that are bound to impinge on the protection or exercise of certain fundamental rights, such as freedom of movement or assembly, privacy, etc. In these circumstances, the constitutional state must seek to harmonize liberty and security through a balancing process. The legal-constitutional underpinnings of such a balancing process as well as the specific legal norms it engenders give shape to the “police power law paradigm.”

In its initial reaction to the 9/11 attacks, the Bush Administration seemingly could not make up its mind concerning whether the terrorists’ acts were acts of war by a transnational state-sponsored and -supported organized terrorist network, or the criminal acts of Osama Bin-Laden and several dozen co-conspirators. Similarly, the American and British war on terror judicial decisions examined below do not appear consistent in their handling of the distinction between crime and war. Moreover, some of the judges involved treated issues arising out of the war on terror as falling under the criminal law paradigm while other judges tackled these same issues as if they fitted neatly within the law of war paradigm. As the following analysis of these cases will demonstrate, neither of these two paradigms is satisfactory for dealing with cases pitting liberty against security in the context of the war on terror.

For their part, the two Israeli cases deal with restrictions on the liberties of the civilian populations in the occupied territories in the West Bank and Gaza. These restrictions were meant to enhance the security of the Israeli citizenry against acts of terror, by means of both defensive—the building of a separation barrier involving walls, fences, etc., in the West Bank—and offensive—chasing terrorists and destroying homes to frustrate arms smuggling from Egypt in Gaza—military operations. Notwithstanding that these operations were military in nature and that they were conducted in the context of the war on terror, the Israeli Supreme Court treated the two cases it decided as if they belonged to the police power law paradigm. As will be explained below, this paradigm is unsatisfactory from the standpoint of balancing liberty and security in the context of the effect of military actions on civilian bystanders in the theater of the war on terror. Ultimately, all

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37 See generally George Fletcher’s observation that following September 11, 2001, the Bush Administration could not decide whether the attacks in New York and Washington amounted to a “collective crime of al-Qaeda and the Taliban, in which case war is the proper response, or the individual crime of Osama bin Laden and other[s], . . . in which case a criminal prosecution is the correct action.” George P. Fletcher, War and the Constitution, The Am. Prospect, Jan. 1, 2002, at 26.

38 See infra Part III.
three paradigms used in the six cases under consideration are wanting in the context of the war on terror, hence calling for the articulation of a new paradigm, which will be attempted in Part VI below.

C. Proportionality and Balancing

In all three jurisdictions judicial balancing played a key role in the disposition of the claims arising in the context of the war on terror. The Israeli Supreme Court applied a proportionality test, the Law Lords relied on both proportionality and balancing, and the U.S. Supreme Court used balancing. Proportionality and balancing are not synonymous, but they seem to overlap significantly, particularly since balancing proper forms part of proportionality tests such as that used by the Israeli Court.

On first impression, balancing in relation to conflicts between liberty and security seems simple and straightforward enough. Both liberty and security are social goods, and the pursuit of one sometimes comes into conflict with the realization of the other. When the pursuit of liberty threatens security or vice versa, the equilibrium between the two must be reestablished by sufficiently restricting the threat to allow for an adequate level of realization of the threatened social good. Consistent with that endeavor, the cost due to the burden imposed on the impinging social good must be weighed against the benefit that results for the threatened social good. Furthermore, from an institutional standpoint, the legislature and/or the executive power is responsible for devising measures designed to cope with the relevant threat. The judiciary, in turn, is charged with determining whether implementation of such measures is compatible with maintaining a suitable equilibrium between the two social goods involved, by weighing the benefits the measures in question confer on one social good against the costs that such measures impose on the other social good.

Judicial balancing would work best and be most transparent if the social goods subjected to balancing were both quantifiable and comparable. Thus, if total liberty weighed as much in units of good as total security; and if each unit of added cost or benefit to liberty would be the equivalent to the correlative unit with respect to security; and finally, if the aggregate of liberty and security were always zero-sum;

39 See supra note 2.
40 See infra Part III.
then judicial balancing could be thoroughly principled and accurate as well as completely transparent. Actually, however, judicial balancing involving liberty and security is anything but simple, straightforward, or transparent. The benefits of liberty or security may not be quantifiable, and even if quantifiable, they may not be comparable. Finally, it is highly questionable that the relation between the two is a zero-sum one: most likely, there is no liberty without security, and security without liberty is not a worthy pursuit.

A further objection against balancing liberty against security stems from the fact that liberty interests are, to a significant degree, protected as constitutional rights—e.g., freedom of speech, of assembly, against arbitrary detention—whereas security interests constitute, to a large extent, a collective social good. Consistent with this, if constitutional liberty rights could be simply weighed against non-constitutional interests, such as a societal interest in maximizing security, they would fall victim to ordinary legislative policy-making, which consists of working out tradeoffs among competing collective interests. To avoid this, constitutional rights may be exempted from weighing and only subject to categorical limitations—e.g., pornography is not speech, speech can only be prohibited if it incites to violence—or following Dworkin, they may be subjected to weighing, but susceptible to being outweighed only by the most weighty social policy goals. In other words, in Dworkin’s view, limitations of constitutional rights can only be justified if their costs to rights holders are far outweighed by the benefit to be produced through the institution of pressing social policy.

These last observations suggest that the conflict between liberty and security may not be susceptible to resolution through simple balancing, though it may be amenable to some kind of comparative weighing with some handicapping of the weights of non-constitutional interests as against constitutional interests. Such handicapping can be given concrete content—i.e., by how much must pressing social policy benefits outweigh correlative costs to constitutional interests—by recourse to the concept of proportionality.

From a theoretical standpoint, the concept of proportionality can be traced back to Aristotle’s conception of justice and equality, which requires that equals be treated equally and unequals unequally. Treating equals unequally or unequals equally is disproportionate, as is treating unequals more unequally than they are unequal. From the

41 For a general critique of judicial balancing in constitutional adjudication, see T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).
42 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92, 95-96 (1977).
44 For example, if stealing $100 is punishable by ten days in prison and stealing $300 by
standpoint of the application of a proportionality standard to resolve conflicts between constitutional rights and social policies for the collective good, on the other hand, two factors loom as paramount: (1) constitutional rights and social policies embodied in legislation or executive decrees are of unequal value such that tradeoffs based on a simple calculus of utilities would be disproportionate; and (2) even when a particular social policy is of such vast importance that curtailing conflicting constitutional rights would not be disproportionate—for example, when an executive decree issued in the context of a struggle for national survival during an emergency partially restricts freedom of movement and assembly—the resulting limitations on, or suspensions of, the constitutional rights involved must not be themselves disproportionate. In other words, even when it is not disproportionate to limit a constitutional right in the pursuit of a vitally important collective end, the means employed to that end should not impinge on the right at stake more than is necessary to achieve the end.

Consistent with the first of the factors above, proportionality in relation to constitutional rights requires treating these rights and conflicting collective goods as unequals. How unequal the rights and goods must be treated so that they are proportionately rather than disproportionately unequal cannot be determined without reference to substantive normative criteria that lie outside of the realm of proportionality. For example, racist speech is likely to be deeply offensive to a large majority within the polity, but mere discomfort with it, standing alone, would not justify its suppression. On the other hand, in some countries it is constitutional—and hence deemed proportional—to prohibit racist speech that incites racial hatred, whereas in the United States, only speech that incites racial violence may be thus prohibited. Assuming the racist’s right to communicate racist views and the discomfort of the audience reached by such views to involve equivalent costs and benefits absent the input of constitutional considerations; and assuming that incitement to violence imposes a greater collective cost on the polity than does incitement to hatred; then limiting free speech because of discomfort would be disproportionate. However, whether either incitement to hatred or
incitement to violence or else both of these would render such limitations disproportionate would depend on values extrinsic to proportionality. Such values may be embodied in a constitutional text, found in the collective identity of a polity, or elaborated by judges in the course of adjudicating constitutional claims.

Consistent with the second factor listed above, on the other hand, proportionality concerns the means employed to achieve constitutionally permissible ends. In this context, proportionality requires a “fit” between means and ends. When some important collective objective justifies limitation of some constitutional right, the permissible intrusion on that right should be the minimum possible consistent with achieving the objective. A perfect fit is achieved when the right-restricting means to a permissible end are neither over-inclusive—they restrict no one who does not threaten achievement of the relevant end—nor under-inclusive—they do not fail to restrict those who would otherwise frustrate achievement of the aforesaid end. Moreover, were a perfect fit possible, the proportionality of means would involve neither comparison nor weighing, but only fine tuning to come into full compliance with the requirement to avoid all over- or under-inclusiveness.

In the real world, however, it is rarely, if ever, possible to achieve a perfect fit. For example, if one could predict with accuracy who will perpetrate a terrorist act unless restrained, it would be possible to assure security from terrorism by means of restrictions on all those and only those determined to carry out terrorist acts. But since that is impossible, the best possible fit is bound to be one that is both under- and over-inclusive, one that will not sufficiently restrict all would-be terrorists and that will inevitably target some who would never engage in terrorist acts.

47 See, e.g., Article 10 of the European Convention on Human Rights (ECHR), which protects freedom of expression but allows for such “restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety . . . .” European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 221. ECHR rights are formally treaty-based ones, but they are nonetheless the functional equivalents of constitutional rights. See Norman Dorsten et al., Comparative Constitutionalism: Cases and Materials 2 (2003).

48 The difference between the Canadian and American treatment of hate speech, see supra note 45, may be due to the contrast between Canadian multiculturalism and American individualism. See Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics 186-87 (1998).

49 Thus, the U.S. Supreme Court has held that limitation of freedom of speech cannot be justified unless in furtherance of a “compelling” state interest. See, e.g., Burson v. Freeman, 504 U.S. 191 (1992). Similarly, racial classifications cannot be upheld absent compliance with a “strict scrutiny test.” This test requires that there be a compelling state interest and the means used in pursuit of that interest be “necessary.” See Korematsu v. United States, 323 U.S. 214 (1944).
In our imperfect world, the best fit is one that, though over- and under-inclusive, is nonetheless least restrictive of liberty and equality rights. Indeed, all relevant rights in relation to the war on terror and to the six cases examined below, namely, besides liberty and equality rights proper, due process rights, habeas corpus rights, privacy rights and the right to use and enjoy one's property, are at a higher level of abstraction reducible to liberty and/or equality rights.\textsuperscript{50} Moreover, liberty and equality rights are sometimes complementary and sometimes in conflict with one another. For example, if most international terrorists happen to be Muslim, then imposing restrictions on the rights of Muslims alone may be less restrictive from the standpoint of liberty than extending such restrictions to all persons within the polity. But since the vast majority of Muslims have no ties to terrorism, imposing the restrictions on them as a group would disproportionately impinge on their rights to equality.

A proportionate fit in an imperfect world, therefore, is one that is least practically restrictive of liberty and equality rights, and that strikes a balance between restrictions on liberty rights and those on equality rights when the two are in conflict. To perform these tasks, moreover, requires comparing alternative means to determine which provide a better fit, and weighing the costs of restrictions on liberty against those on equality to strike a proper balance and to avoid excessive restrictions on either of them.

In short, the first factor of proportionality involves balancing, but it is balancing on a scale that is weighted in favor of constitutional rights. The second factor is likely to include comparisons of costs and benefits of alternative means to the same end, but these are unlikely to involve straightforward balancing in as much as they relate to tradeoffs between restrictions on liberty and restrictions on equality for purposes of achieving something else, such as, in the cases that concern us here, security. Balancing proper, however, has a place within broader proportionality analysis. Such balancing is appropriate in two kinds of situations: those involving direct conflicts between two rights; and those relating to the uncertainties surrounding the likelihood that, and degree to which, legislative or executive means will significantly advance a collective end that is of such great importance as to justify some limitations on constitutional rights.

In the case of a conflict between liberty and equality in the pursuit of security, the rights are pitted against one another indirectly. The

\textsuperscript{50} For example, privacy involves liberty to make decisions within the sphere of intimate decisions, see Griswold v. Connecticut, 381 U.S. 479 (1965), while dignity requires both liberty to make choices for oneself and equality inasmuch as treatment of any person as an inferior results in a deprivation of dignity.
object is to achieve security without undue impingements on liberty or equality and without disproportionate sacrifice of one to the other. The primary goal, however, is the achievement of security with the least possible overall limitation on rights, and that goal may well be best achieved with a greater limitation on equality than on liberty or vice versa. In a direct conflict, in contrast, benefits and burdens related to one right are measured exclusively against those pertaining to another conflicting right and the resolution of the conflict in question is properly reached through balancing proper. For example, if a journalist’s freedom of the press right clashes with a private person’s privacy right, as where the journalist wants to publish a story about that person’s intimate life, the burden on freedom of the press that prohibition of publication would entail would have to be weighed directly against the burden on privacy that such publication would cause.

Concerning the second situation identified above, the probability that a particular means will lead to the achievement of a targeted end plays an important role in determining proportionality and often calls for balancing proper. For example, capture and detention of a person who one knows with one hundred percent certainty is about to detonate a dirty bomb in the center of a city that would cause at least 100,000 deaths would provide a huge boost to security. In that case, the benefit to security far outweighs any corresponding burden on liberty. But what if there is only one chance in one thousand that the person in indefinite detention is a would-be bomber? And what if the chance of any such bomb’s detonating and causing serious casualties is only one in ten thousand? More generally, are significant restrictions on everyone’s liberty in order to be in a slightly stronger position in the war on terror justified assuming that, at worst, terrorism will cause a number of fatalities amounting to a fraction of those due to highway accidents?

To answer these questions properly, the gravity of a threat to security must be measured in relation to its degree of probability and any relevant net decrease in liberty must be weighed against the corresponding net increase in security—i.e., the aimed level of increased security discounted by the probability of its achievement. Thus, actual achievement of collective security may be proportionate to even extensive limitation of rights. For example, under conditions of crisis in the face of a foreign armed invasion, considerations of national security in the struggle for survival would justify extensive curtailment of constitutional rights. In contrast, a slight increase in security in ordinary times may not suffice to justify any curtailment of such rights. Furthermore, even if it is stipulated that the war on terror involves weighty security objectives that justify significant restrictions on
constitutional rights, policies that would only marginally improve security against terrorists would be outweighed by any significant corresponding burden on liberty rights. And, conversely, policies that would in all likelihood dramatically improve security would justify substantial limitations on such rights.

In the last analysis, proportionality analysis comprises measuring, "fitting," comparing and balancing in relation to normative standards or values that transcend proportionality itself. Responsibility for proportionality can be entrusted to legislators, members of the executive branch or to judges, or it can be apportioned among all of them. How much of proportionality analysis and balancing is left to judges depends on many factors, including the particular constitutional order involved and the particular nature of the legislation and/or executive decrees at stake. Furthermore, how much of, and what kind of, proportionality analysis and balancing should be optimally left to judges is also context-dependent, as will be illustrated by examination of the cases below. Finally, when proportionality standards have been set by the legislature and when balancing is embodied in legislation, whether ordinary or constitutional, a judge applying such legislation or evaluating it in connection with a constitutional challenge may be pretty much limited to performing a categorical determination. Moreover, whether proportionality or balancing is factored into particular constitutional or legislative provisions is not always clear. For example, are the constitutional rights afforded criminal defendants under the U.S. Constitution the product of balancing the liberty and dignity interests of individuals against the security and public order interests of the polity? Or, are they the expression of a categorical protection of individual liberty and dignity regardless of consequences?

D. Background Conditions: Contrasting the War on Terror in the United States, Israel, and the United Kingdom

As noted at the outset, the factual circumstances of the cases in the three relevant jurisdictions were quite varied, as were the experiences with terrorism of each of the three countries. Moreover, at least from

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51 A clear example of such categorical determination is provided by Justice Scalia's dissenting opinion in the Hamdi case. See infra Part II, p. 2120. As Justice Scalia sees it, the balance between liberty interests protected through the right of habeas corpus as against collective security interests are balanced within the U.S. Constitution itself in as much as the latter prescribes criteria for when habeas corpus claims should prevail against conflicting security claims, and in as much as it specifies the conditions under which the right to habeas corpus may be suspended. See U.S. CONST. art I, § 9, cl. 2.

52 See supra Introduction, pp. 2085-87.
a formal standpoint, the legal issues differed significantly from one country to the next. The U.S. cases dealt mainly with the constitutional rights of persons being detained for long and indeterminate periods; the Israeli cases with the rights of Palestinian civilians under the international law of occupation and Israeli administrative law in the context of Israeli military operations in the occupied territories; and the British case, with the rights of detained foreign nationals who could not be deported to their home countries under the European Convention on Human Rights (ECHR) and the United Kingdom’s Human Rights Act of 1998 granting the ECHR domestic effect. Given these differences, it is necessary to take a closer look at the context of terrorism in each country to establish suitable parameters of comparison.

Besides the differences in the number of terrorist incidents noted above—one for the United States, 780 for Israel and none for the United Kingdom at the time of the Law Lords’ decision (but two since)—and the proportionately greater magnitude of casualties in Israel than in the United States—fifteen times higher in proportion to total population—there is another important difference between the three countries. Palestinian terrorism arises in the context of a long-standing conflict between two neighboring peoples involving an occupation and vehemently disputed territorial claims. Al Qaeda-led or -inspired terrorism against the United States and the United Kingdom, in contrast, originates in distant places such as Afghanistan and Saudi Arabia and appears to be driven by a virulent strand of religious fundamentalism.

Thus, in Israel it is the means by which Palestinians carry out their struggle—suicide bombings that target civilians within Israel’s pre-1967 borders—rather than the struggle itself that are shocking and utterly unacceptable. In the United States, however, both the means and ends

53 See infra Part II.
54 See infra Part III.
55 See infra Part IV.
56 See supra notes 8-9 and accompanying text.
57 The 2005 London attacks present another variant. These were apparently the work of domestic residents inspired by a virulent foreign ideology. See Tod Robberson, How are Radicals Reeling in Brits? As Angry Young Muslims Fall Under Spell, Officials Set Sights on ‘Preachers of Hate’, DALLAS MORNING NEWS, July 16, 2005, at 1A.
58 This last statement is not meant to convey any moral or political judgment regarding the Israeli-Palestinian conflict. Instead the statement seeks to underscore that even from a subjective Israeli standpoint the political conflict between Israel and the Palestinians is an accepted fact of life, with Israelis divided along a political spectrum that ranges from some who want to make no territorial concessions to the Palestinians to some who favor dismantling all settlements in the West Bank and Gaza, as well as returning Israel to its pre-1967 borders. See, e.g., Louisa Brooke, Politics and The Palestinian Issue, BBC NEWS, Jan. 23, 2003, http://news.bbc.co.uk/1/hi/world/middle_east/2683613.stm. On the other hand, there is a strong consensus among Israelis that suicide bombings are completely unacceptable and utterly
of Al Qaeda-led terrorism loom as largely incomprehensible and absolutely unacceptable.\textsuperscript{59}

When the differences concerning the frequency of terrorist attacks and concerning the socio-political context in which terrorism arises\textsuperscript{60} are added up, they clearly indicate that terrorism is much less “distant”—both in a physical and psychological sense—and much more constant in Israel than in the United States or the United Kingdom.\textsuperscript{61} Thus, although the threat from terrorism is as unpredictable—at least in terms of the times and places of future terrorist attacks—and equally as devastating in Israel as in the United States or the United Kingdom, it is much more a present day-to-day reality in Israel than in the other two countries. In addition, for the most part, Palestinian terrorism since 2000 has mainly consisted of suicide bombings,\textsuperscript{62} hence fomenting reprehensible regardless of their causes, motives or objectives. See Danny Rubinstein, \textit{The Price of Winning Equation}, HAARETZ.COM., June 28, 2004, http://www.haaretz.com.

\textsuperscript{59} President Bush has repeatedly asserted that Al Qaeda terrorists seek to attack the United States because “[t]hey hate our freedoms.” \textit{See, e.g.}, 147 CO NG. REC. S9553, S9554 (2001) (address of President George W. Bush). But even if they hate America’s freedoms, why would they travel half way around the world and commit suicide in order to disrupt its way of life? One plausible answer is that they are zealots fulfilling their religious duties pursuant to the order of their fundamentalist leaders. But even if that is the right answer, it is hardly comprehensible to most Americans whether religious or secular. It bears emphasizing, however, that the fact that, from an American standpoint, Al Qaeda terrorism has no rational basis or purpose and that it is fueled by fanatical hatred does not mean that it lacks justification from the subjective standpoint of many of those who share the terrorists’ religious ideology. Indeed, the latter do not merely regard American culture and mores as an abominable way of life in a far away place, but also as a grave threat to their own societies’ way of life. In this vision, the global spread of American economic power, ideology and culture poses a grave threat against Islam. Moreover, many in the Islamic world who reject terror as a legitimate means to combat the spread of American influence nevertheless agree that such influence poses a threat to their way of life. \textit{See, e.g.}, Husain Haqqani, \textit{In the Bylanes of the War on Terror}, INDIAN EXPRESS, July 12, 2003, http://www.indianexpress.com/archive_frame.php.

\textsuperscript{60} The difference in context between a concretely grounded local conflict and a generalized fleeting global one clearly seems to be the most relevant one in terms of the court decisions that are the principal focus of the present analysis. Nevertheless, this is not to deny that at some deeper level there may be a greater convergence between the two respective contexts. Indeed, the Palestinian circumstances giving rise to suicide bombers may be regarded as part of the intensifying \textit{Kulturkampf} between militant Islam and the West. In this connection, were the scenes of public rejoicing among certain Palestinian crowds immediately after the September 11th attacks prompted by a perception of the United States as Israel’s principal ally and supporter? Or were the attacks also perceived as a proud moment in the struggle between militant Islam and the West? See Ronni Gordon Stillman, \textit{Arafat’s Press: What the Palestinian Authority Gets Away With}, NAT’L REV. ONLINE, Sept. 20, 2001, http://www.nationalreview.com/comment/comment-stillman092001.shtml (describing Palestinians celebrating in streets upon hearing about the 9/11 attacks); \textit{World Shock Over U.S. Attacks}, CNN.COM, Sept. 11, 2001, http://edition.cnn.com/2001/WORLD/europe/09/11/trade.centre.reaction/ (reporting Islamic Jihad stating that the 9/11 attacks were “a consequence of American policies in this region”).

\textsuperscript{61} For the United Kingdom, this is true with respect to terrorist threats posed by Al Qaeda, but not with respect to those posed by domestic terrorists, such as those associated with the struggle in Northern Ireland. For present purposes, however, the focus will remain on the former.

\textsuperscript{62} There have also been cases where other methods were used, such as the explosion at the
predictability concerning the means of terror without thereby affecting that terror’s lethal nature or the randomness of its time and place. In contrast, as of this writing, there has not been any terrorist attack in the United States since September 11, 2001, though threats and plots may abound. Moreover, as vividly illustrated by the terrorist attacks on commuter trains in Madrid on March 11, 2004, and on London subway trains and buses in July 2005, future terrorist attacks in the United States or the United Kingdom may take a vast array of different forms causing death and destruction of varying orders of magnitude. Such attacks may be on railroads, seaports, bridges, shopping centers, or chemical or nuclear plants, and they may involve ordinary explosives, biological, chemical, or nuclear weapons. Consistent with this ongoing threat, in its current status, the American or British war on terror seems to have to entrust more to the imagination than its Israeli counterpart. That is not to say that the American or British war is imaginary, but rather that imagination may blow the threats out of proportion while, at the same time, failures in imagination may leave the country inadequately prepared for future attacks that could prove particularly lethal.

The difference concerning the greater role for imagination in the American and British contexts has implications for all branches of government, including the judicial branch, as it seems particularly important in relation to judicial balancing. Indeed, any balancing between security and rights would seem more reliable in a situation in which threats to security tend to be constant and foreseeable than in a situation in which such threats are both speculative and subject to great variations.


See e.g., David Johnston & Eric Lichtblau, Tourist Copters in New York City a Terror Target, N.Y. TIMES, Aug. 9, 2004, at A1.


As already noted, the Israeli cases arose in a very different setting than their American or British counterparts. The Israeli cases concern ongoing military operations and involve requests to the courts to intervene in order to change the course of such operations in significant ways. In one case, the Israeli Supreme Court ordered that the location of the separation barrier between Israel and the West Bank being constructed by the military be moved in some places to reduce the losses, inconveniences and disruptions that its erection had caused to Palestinians who owned land, lived, or worked nearby. In the other case discussed below, the Israeli Supreme Court ordered some changes in the conduct of an ongoing military operation in Gaza. Although the Israeli Court made bold use of proportionality analysis in these cases, ongoing military operations seem inherently ill-suited for judicial intervention, let alone for subjection to judicial balancing. This is both because of their very nature, which makes them heavily dependent on military expertise and the ability to take prompt and decisive action under constantly changing circumstances, and because of the inherently political nature—and in many cases, including the operations at stake in the Israeli cases, highly politically controversial nature—of military policy.

To subject purely military policy to judicial review seems inappropriate unless it can be plausibly attacked as contrary to law. But even in the latter case, there would seem to be little room for judicial balancing. Moreover, when judicial balancing zeroes in on the

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67 See supra notes 56-59 and accompanying text.
68 See Beit Sourik, supra note 1, para. 9. In a subsequent case relating to another segment of the separation barrier, Mara‘abe v. The Prime Minister of Israel, the Israeli Supreme Court ordered the IDF to determine whether a suggested alternative location for the barrier less injurious to Palestinian civilians would be a plausible option from the standpoint of protecting Israeli security. HCJ 7957/04 Mara‘abe v. The Prime Minister of Israel [2005] [hereinafter Mara‘abe]. See id. at paras. 114, 116.
69 See Physicians for Human Rights, supra note 1, paras. 4, 39.
70 The Palestinian plaintiffs in the case relating to construction of the separation barrier alleged that the latter was illegal as a means for Israel to unilaterally draw permanent boundaries thereby definitely annexing significant portions of the West Bank. The Israeli Supreme Court rejected this claim and held the construction of the barrier to be for security reasons. See Beit Sourik, supra note 1, paras. 28–30; see also Mara‘abe, supra note 68, para. 98 (same conclusion notwithstanding International Court of Justice decision discussed infra note 71).
71 For example, in its advisory opinion on the separation barrier rendered on July 9, 2004, the International Court of Justice (ICJ) concluded, inter alia, that construction of portions of the barrier in occupied territory was in violation of international law. In reaching this conclusion the Court reviewed the relevant facts to determine whether they were consistent with the requirements imposed by applicable customary and treaty-based norms of international law. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (Jul. 9). The Israeli Supreme Court reviewed this advisory opinion in its Mara‘abe decision and concluded that the two courts agreed on the applicable legal standards but not on the facts. According to the Israeli Court, the ICJ did not have the full facts before it and did not engage in any proportionality analysis. See Mara‘abe, supra note 68, at
conduct of military affairs itself, such as the determination of whether large gatherings of Palestinian civilians should be permitted in the context of Israeli antiterrorist military operations in Gaza,\textsuperscript{72} courts seem to lack expertise to weigh different military options. Finally, even if courts had such expertise, the constantly moving and changing nature of ongoing military action would appear to be sufficient by itself to underscore the unsuitable nature of judicial intervention under such circumstances.\textsuperscript{73}

Because of the Israeli Court’s bold use of proportionality analysis under circumstances so seemingly inappropriate for judicial balancing, close examination of its decisions seems particularly promising for purposes of elucidating the potential and pitfalls of judicial balancing in the context of the war on terror. If such balancing proves in the end defensible, then proportionality analysis may have much greater value in the context of the war on terror than conventional wisdom suggests. If not, then the Israeli cases are likely to provide vivid illustration of the pitfalls of the balancing approach in connection with the war on terror.

The American cases stand in sharp contrast to their Israeli counterparts with respect to judicial balancing. Not only, as will be discussed below,\textsuperscript{74} because the American Court’s use of balancing seems as narrow as the Israeli Court’s seems broad, but also because the circumstances of the American cases seem as appropriate for balancing as those of the Israeli cases seem inappropriate. Indeed, in the three American cases, individuals long held in detention by the U.S. military far from any theater of war were seeking a fair hearing to challenge the validity of their confinement, thus pursuing vindication of basic due process rights.\textsuperscript{75} Moreover, once the Court decided that the detainees were entitled to due process,\textsuperscript{76} the judicial task became to determine what process was due under the circumstances—a task that may require judicial balancing to establish the appropriate level of protection in the case at hand. As the U.S. Supreme Court stated in \textit{Mathews v. Eldridge},\textsuperscript{77} a case it relied upon in its decision in \textit{Hamdi v. Rumsfeld},\textsuperscript{78}

\textsuperscript{72} See Physicians for Human Rights, supra note 1, paras. 24-30.
\textsuperscript{73} See discussion of Physicians for Human Rights infra Part III.
\textsuperscript{74} See infra Part II.
\textsuperscript{75} Besides asserting due process rights under the Fifth Amendment, the detainees advanced other claims, such as their right to habeas corpus and certain rights under international law. Whereas some of these latter claims may not be amenable to a balancing approach, resolution of the due process claims was determinative for the disposition of the cases. For an extended discussion of this point, see infra Part II.
\textsuperscript{77} 424 U.S. 319 (1976).
\textsuperscript{78} See Hamdi, 542 U.S. at 529.
the process due in a particular instance is to be determined by weighing “the private interest that will be affected by the official action” against the asserted Government interest “including the function involved” and the burdens the Government would need to bear were it to afford greater process.\textsuperscript{79} In short, judicial balancing is well established in procedural due process cases. The reluctance with which the Court approached balancing in the three cases before it therefore raises the question of whether an otherwise routine judicial tool such as balancing becomes problematic or inappropriate in cases arising out of the war on terror.

There is a parallel between the British case and the American cases, particularly that concerning the Guantanamo detainees. The Guantanamo case involved an attempt to create a Constitution-free zone,\textsuperscript{80} whereas \textit{A(FC) v. Secretary of State for the Home Department} concerned illegitimate deprivation of fundamental rights due to misuse of derogation powers.\textsuperscript{81} Indeed, Article 15 of the ECHR (incorporated into British domestic law through the Human Rights Act of 1998)\textsuperscript{82} allows for derogation, in times of crisis and of emergency, from Article 5—its basic individual liberty and security of the person provision that also guarantees due process rights—and from Article 14—its anti-discrimination provision.\textsuperscript{83} British post-9/11 antiterrorist legislation, however, made for sweeping derogation, and the Attorney General took the position that it was for Parliament and the Executive, not the courts, to determine the nature of the threat to the country and the appropriate response to it.\textsuperscript{84} Had that view prevailed, and had the political branches determined that the threat posed by Al Qaeda created an emergency, then those deprived of their rights because of derogation would be, much like the Guantanamo detainees, left without basic rule of law protections. This danger could only be remedied by judicial intervention.\textsuperscript{85}

The British case also involves issues of proportionality and balancing, particularly in relation to the determination of whether an emergency existed such as to justify derogation. Accordingly, this case brings proportionality analysis and balancing directly to bear on the distinction between conditions of crisis, on the one hand, and ordinary conditions and conditions of stress, on the other. This explicit treatment

\textsuperscript{79} See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
\textsuperscript{80} See Rasul, 542 U.S. 466.
\textsuperscript{81} \textit{A(FC) v. Sec’y of State for the Home Dep’t} [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) (appeal taken from Eng.) (U.K.).
\textsuperscript{82} See supra text accompanying note 55.
\textsuperscript{83} See \textit{A(FC)}, 2 A.C. at 92-93.
\textsuperscript{84} See id. at 107.
\textsuperscript{85} Id. at 110-11.
of the three conditions is in contrast with the U.S. and Israeli cases, which only deal with them implicitly.

Finally, brief mention must be made of the different legal regimes applicable, respectively, to the cases in the United States, the United Kingdom, and Israel. The American cases involve claims arising under the U.S. Constitution, federal law, and international law. Israel does not have a written constitution, and the Palestinians whose rights were at stake in the two cases involved live in occupied territory governed by laws of belligerent occupation. Consequently, the Israeli cases arise under the law of belligerent occupation, Israeli administrative law, and international law. In spite of these differences, in both Israel and the United States similarly conceived fundamental rights are in conflict with military policies and actions designed to promote the paramount security interests of the country. For their part, the relevant legal norms applicable in the British case come from the ECHR, an international treaty, and from the Human Rights Act, a domestic statute. Nonetheless, functionally, these applicable norms involve basic liberty, equality, and due process rights. From the standpoint of judicial balancing, therefore, the three legal regimes are sufficiently congruent to allow for fruitful comparison.

II. JUDICIAL BALANCING AND THE AMERICAN DECISIONS

In only one of the three American decisions is judicial balancing explicitly used, and even in that case, only by a plurality of four justices. The other two decisions, though consistent with *Hamdi v. Rumsfeld*, do not rely on balancing as they concentrate on threshold issues. In *Rasul v. Bush*, the Supreme Court’s focus was on whether the foreign alleged “enemy combatants” held in Guantanamo were entitled to the same rights to challenge their detention as those of their American counterparts held in the United States. Finally, although *Rumsfeld v. Padilla* raised the same substantive issues as *Hamdi*, the Court decided the case on procedural grounds.

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86 The humanitarian rights at stake in Israel are for present purposes functionally equivalent to American Due Process rights. The main difference is that the American cases deal mainly with Procedural Due Process whereas the Israeli ones focus on rights that are roughly equivalent to American Substantive Due Process rights.

87 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004). Justices Ginsburg and Souter, who concurred in part and dissented in part, can be said to have implicitly agreed to the plurality’s balancing, as their disagreement with the latter was over whether the Congress had given the Executive Branch authority to detain alleged “enemy combatants” indefinitely, and not over the right to challenge detentions actually authorized by Congress. *Id.* at 540.


89 Padilla had sued the Secretary of Defense, Donald Rumsfeld, for his allegedly
The Bush Administration came close to embracing executive unilateralism as its position in all three cases. The Court, however, squarely rejected that position by subjecting Hamdi’s claims to judicial balancing and acted consistent with that rejection in Rasul by refusing to accept the Government’s position that, when it came to foreign enemy combatant detainees, Guantanamo was beyond the reach of American courts. Moreover, executive unilateralism has been consistently rejected by the Supreme Court ever since the Civil War.

Unlike the executive unilateralist position, the process-based institutional approach involving judicial deference to the political branches where presidential action is backed by congressional authorization has been endorsed by the Court and appears to have been determinative in some cases. Judicial use of the process-based approach, however, has by no means been exclusive. Often, as was the case in Hamdi’s plurality opinion, the process-based approach is combined with judicial balancing. For the plurality in Hamdi, the finding that detention of alleged enemy combatants was authorized by Congress was but the first of two steps necessary to reach a proper decision. This first step either leads to invalidation of the asserted Executive authority if Congress has not provided for it, or it leads to a necessary second step to determine through judicial balancing whether unconstitutional detention. The Court held that the commander of the Navy brig where Padilla was being held was the proper party for such a lawsuit, and hence dismissed the case against Rumsfeld, without prejudice as to Padilla’s constitutional claims. See Rumsfeld v. Padilla, 542 U.S. 426, 432 (2004).

90 See supra Introduction, p. 2088, for the three positions that have dominated the American debate, of which “executive unilateralism” is one.

91 This position was not pressed all the way, for although the Bush Administration argued that it was within the exclusive power of the President as Commander-in-Chief during a time of war to designate a person as an “enemy combatant” and to detain the latter until the end of hostilities (which in the case of the war against terror with potentially no certain end may mean permanently), it did concede that the courts had limited jurisdiction to determine whether a contested detention was within the authority of the Executive Branch, but not whether the decision of the Executive Branch was right or wrong based on disputed facts. See Brief for Respondents at 26, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696). Thus, the courts would be limited to an initial categorical inquiry. For example, the courts could decide that it is not within the President’s war powers to designate as “enemy combatants” students on American campuses who criticize his war policies. On the other hand, the Government assertion that Hamdi was initially detained in Afghanistan where the United States was engaged in a war against the Taliban would be all the information that a court would be entitled to before having to accept the President’s exclusive power to determine whether or not to label Hamdi an enemy combatant.

92 See Hamdi, 542 U.S. at 529.

93 See Rasul, 542 U.S. at 483.

94 See, e.g., Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952); Ex parte Milligan, 71 U.S. 2 (1866).

95 Compare Ex parte Milligan, 71 U.S. 2 (holding trial of civilian by military commission without congressional authorization unconstitutional), with Ex parte Quirin, 317 U.S. 1 (1942) (holding trial by military commission authorized by Congress constitutional).
the exercise of the congressionally backed authority unduly tramples on constitutionally protected liberties.\textsuperscript{96}

Because the American Constitution does not provide for special emergency powers, the need to balance security and rights is not suspended in wars and other emergencies. In a country in which the constitution specifically provides for special emergency powers, such as France, the President may be entitled to his or her extraordinary powers without having to accommodate fundamental rights.\textsuperscript{97} It is not the same, however, when the U.S. President confronts a crisis, and even executive unilateralists do not claim that it is. Indeed, what unilateralists argue is that the President is always obligated to uphold civil liberties, including in times of emergency, but that in time of war, because of his or her unique constitutional powers and responsibilities, it is for the President rather than the courts to strike the proper balance between security needs and fundamental liberties.\textsuperscript{98} Accordingly, the Bush Administration’s argument for minimal judicial intervention in connection with the enemy combatant detentions is not predicated on the proposition that the President could disregard constitutional liberties when fighting the war on terror. Instead, the argument in question relies on a balancing approach, but insists that only the Executive is competent and constitutionally empowered to conduct such balancing.

According to the Bush Administration, continued detention of Hamdi more than two years after his initial capture in Afghanistan was justified because it was a necessary means to achieving two compelling government interests: gathering crucial intelligence in the war on terror and preventing suspected terrorists in American custody from rejoining the armed struggle against the United States.\textsuperscript{99} Moreover, the balancing

\textsuperscript{96} As already mentioned \textit{supra} note 87, Justices Ginsburg and Souter concluded that Hamdi’s detention was unconstitutional because in their view it was not authorized by Congress. \textit{See Hamdi}, 542 U.S. at 540. The plurality, in contrast, found the detention congressionally authorized, but concluded that, even in the context of the war on terror, Hamdi was entitled to certain procedural rights that the Executive had theretofore refused to honor. \textit{See id.} at 509.

\textsuperscript{97} \textit{See} French 1958 Constitution, art. 16; \textit{see also} DORSEN ET AL., \textit{supra} note 47, at 330 (when exercising emergency powers, the French President can completely disregard fundamental rights; the only recourse against abuse of emergency powers is impeachment proceedings by the French Parliament.).

\textsuperscript{98} \textit{Cf. Hamdi}, 542 U.S. at 536 (even in the case of war, the “United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake”); \textit{see also} Brief for Respondents at 43-44, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (describing Department of Defense intent to provide counsel to American enemy combatants and to allow them to challenge their detention once the military has determined that such challenge would not thwart intelligence gathering essential for national security).

\textsuperscript{99} The Bush Administration argued that it had virtually complete exclusive authority regarding enemy combatants because of the President’s Commander-in-Chief power. \textit{See} U.S. CONST. art. II, § 2, cl. 1. This might justify the inference that the Bush Administration’s claims of exclusivity are ultimately based on a categorical assertion rather that on implementation of a balancing approach were it not for the duty of the Executive Branch, even when acting
in question is similar to that employed by courts when they adjudicate other conflicts between government policy and fundamental rights claims. Thus, for example, freedom of speech extends to all speech that does not inevitably hinder the realization of compelling government objectives. In other words, the Constitution accords great weight to the free and uninhibited exchange of ideas. Nevertheless, government objectives can outweigh speech claims if they can satisfy a stringent strict scrutiny test.

In sum, the processes of balancing called for in the context of the war on terror and in that of the garden-variety free speech case are essentially identical. The only significant difference consistent with the Bush Administration’s position is that in one case balancing is for the Executive Branch while in the other it is for the courts. Does that matter much? Is the Executive as capable or as accountable as the Judiciary regarding such balancing? Does it matter that most cases occur in ordinary times whereas the war on terror occurs under conditions of crisis or stress? Finally, is the requisite balancing associated with the war on terror beyond the competence of courts?

Before exploring how the three recent Supreme Court decisions may shed light on these questions, brief mention must be made of how the three different positions regarding how to reconcile security and liberty in times of emergency should be further understood in terms of the preceding observations.

First, all three positions involve balancing, albeit differing in terms of who does the balancing and the kind of balancing involved. The executive unilateralists want all balancing to be left to the President in his or her capacity as Commander-in-Chief. On the other hand, civil-libertarian maximalists want courts to do the balancing and want judges to give no greater deference to government claims of compelling security interests in times of emergency than to garden-variety government compelling-interest claims in areas such as healthcare or protection of the welfare of children. These two positions, therefore, differ not only with respect to who shall do the balancing, but also with

unilaterally, to give fundamental liberties their due. See supra note 98. Although both the categorical interpretation and that reliance on balancing are plausible, given the Executive’s constitutional obligation regarding fundamental liberties, the latter interpretation clearly emerges as the better one.

In the familiar terminology of the courts, government cannot deny protection to any particular instance or kind of speech unless such denial meets the strict scrutiny test, i.e., such denial constitutes a necessary means to the realization of a compelling government interest. See, e.g., United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000).

See Issacharoff & Pildes, supra note 15, at 297 (“[C]ivil libertarian idealists . . . deny . . . that shifts in the institutional frameworks and substantive rules of the liberty/security trade-offs do indeed regularly take place during times of serious security threats.”).
respect to the perspective from which such balancing shall be approached. From the perspective of the President as Commander-in-Chief, security is the primary concern and therefore may tend to be more heavily weighted even in the most scrupulous attempt to strike a fair balance between liberty and security. From the perspective of the judge, on the other hand, the preoccupation with fair balancing would be paramount in the pursuit of striking a just and equitable equilibrium between the demands of liberty and the constraints called for by the need for security. Furthermore, from a civil-libertarian maximalist perspective, the judicial branch has a special role in the protection of fundamental rights since the political branches are particularly attuned to majoritarian interests that may run counter to the protection of fundamental rights, particularly those of minorities. Accordingly, from a civil libertarian maximalist perspective, judges should perform the requisite balancing, but they should place additional weight on fundamental liberties to offset tendencies by the other branches and by political majorities to overvalue security interests.\textsuperscript{102} And, in that view, judges should do so even in an emergency or in times of stress.

The kind of balancing associated with the third position which relies on a process-based institutional approach differs from the balancing linked to the other two positions. As already noted, the third position relies on institutional balancing, that is on “checks and balances” between the Executive Branch and the Legislative Branch rather than on direct actual balancing of security and liberty interests.\textsuperscript{103} On a purely inter-institutional level, the kind of balancing that is associated with the process-based approach is exclusively indirect. Actually, the inter-institutional dynamic is more likely to result in a “check” than in a “balance.” Indeed, because the President and Congress may be effectively answerable to somewhat different constituencies,\textsuperscript{104} and because they have different, and even at times antagonistic, institutional interests and priorities, they may each approach the conflict between security and liberty somewhat differently. In particular, because as Commander-in-Chief the President is prone to increasing his or her power in times of emergency, Congress has an institutional interest in acting in ways to keep presidential powers in check. Furthermore, as each of the political branches has an internal constitutional duty to strike a proper balance between security and liberty, significant differences in how each branch strikes such balance

\textsuperscript{102} Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (stating that courts should review with more exacting scrutiny laws that may impinge on rights guaranteed by the Bill of Rights or on the rights of unpopular minorities).

\textsuperscript{103} See \textit{supra} note 20 and accompanying text.

\textsuperscript{104} This could be due to differences between presidential politics and congressional politics, and to the different majorities on whose respective backing they may each depend.
may serve either as a check or as a balance. As a check: when one branch disagrees with the other on how to draw the requisite balance, it can withhold its necessary cooperation for purposes of expanding governmental powers to deal with emergencies. On the other hand, such disagreements can lead to further balancing as either branch can fine tune its balancing to reach a workable consensus.

These three positions complement each other in that the respective strengths of each make up for the respective weaknesses of the others. Executive unilateralism is best equipped to meet security needs during an emergency, but prone to undervaluing liberty or to treating it in a rather perfunctory manner. Ordinary judicial balancing is most transparent and best institutionally equipped to reconcile compelling government interests and fundamental liberties, but may be ill-equipped to properly assess threats to security or to cope with the complex and rapidly changing circumstances prevalent in emergencies or special circumstances such as those prompted by the war on terror. Finally, process-based approaches lack the respective weaknesses of the other two approaches—unilateralism and lack of expertise regarding intelligence and security policy—but, by the same token, they fall short of the respective strengths of the other two approaches—concentrated and unitary decision-making in the face of dangerous and rapidly changing circumstances and systematic and consistent balancing of liberty and security. In theory at least, the combination of a process-based institutional approach with ordinary judicial balancing should afford the greatest protection to fundamental liberties, and conversely, executive unilateralism ought to be optimal to maximize security.105

Of the three Supreme Court decisions, *Hamdi* affords the best opportunity to explore how balancing and the interplay between the positions and approaches examined above may fare in practice. Indeed, the four opinions filed in the case,106 taken collectively, represent all these positions and approaches, and in addition, one of these opinions relies on a categorical approach rather than on judicial balancing,107 thus affording a glimpse into the contrast between these two approaches to judicial decision-making.

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105 It is of course possible that, on occasion, shared responsibility among the President and Congress might prove best for security as the give and take between the two branches may lead to a more efficient security policy than would have been the case had the President acted alone.

106 Justice O’Connor announced the decision of the Court and wrote a plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. Justice Souter, joined by Justice Ginsburg, filed an opinion concurring, in part, and dissenting, in part. Justice Scalia, joined by Justice Stevens, filed a dissenting opinion. Finally, Justice Thomas filed another dissenting opinion, which basically endorsed the Government’s position.

Yasser Hamdi, born in Louisiana, moved to Saudi Arabia as a child and was captured in 2001 in Afghanistan by the Northern Alliance, a coalition of Afghan military groups opposed to the Taliban government, which subsequently turned him over to the United States military.\textsuperscript{108} The latter detained and interrogated Hamdi in Afghanistan and then transported him to Guantanamo.\textsuperscript{109} In 2002, upon learning that Hamdi was a U.S. citizen, the military transferred him to the United States where he remained in indefinite military detention.\textsuperscript{110} The Government’s position was that Hamdi was an “enemy combatant” and that as such he could be held indefinitely without formal charges or a hearing until such time as the Government determined that access to counsel or further proceedings would be warranted.\textsuperscript{111}

Hamdi’s father filed a petition for a writ of habeas corpus alleging that his son was being illegally detained in violation of the Fifth and Fourteenth Amendments\textsuperscript{112} and international law, including the Geneva Conventions on Prisoners of War.\textsuperscript{113} The petition asked the court to order the Government to cease interrogating Hamdi, to declare Hamdi’s detention unconstitutional, and to require that the Government either press charges against Hamdi and provide him with counsel or release him from detention.\textsuperscript{114} The petition also requested that the court order an evidentiary hearing to deal with the conflicting factual assertions of the parties concerning the circumstances surrounding Hamdi’s capture and his transfer to the American military.\textsuperscript{115}

The facts were indeed disputed. The Government asserted that Hamdi had received military training from the Taliban and that he became part of a Taliban unit with which he remained past September 11, 2001, when the United States commenced armed conflict against the Taliban and Al Qaeda in Afghanistan.\textsuperscript{116} Hamdi was captured when his Taliban unit surrendered to the Northern Alliance forces and he thereafter “surrender[ed] his Kalashnikov assault rifle to [these forces].”\textsuperscript{117} Upon being turned over to the United States military, Hamdi was designated an “enemy combatant” because he was associated with the Taliban, which was—at the time of his surrender

\textsuperscript{108} Id. at 510.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 510-11.
\textsuperscript{112} Id. at 511.
\textsuperscript{113} Id. at 515. Although some of the opinions in the case discussed the claims under international law, evaluation of these claims is beyond the scope of this Article.
\textsuperscript{114} Id. at 511.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 512-13.
\textsuperscript{117} Id. at 513.
and at the time of the Court’s decision—engaged in military conflict against the United States.\textsuperscript{118}

For his part, Hamdi’s father asserted that his son had traveled to Afghanistan to do “relief work,” that he had not been long enough in the country prior to September 11th to receive military training, and that as someone traveling alone for the first time he was “trapped” in that country once the military hostilities began.\textsuperscript{119}

Although the case raises a large number of issues, the plurality opinion by Justice O’Connor hones in on the factual dispute concerning the propriety of Hamdi’s designation as an enemy combatant after briefly dealing with two other issues. The plurality opinion, however, provides the most comprehensive account of the appropriate role of judicial balancing in the context of the conflict between security and liberty in an ongoing war against terror.

The two threshold issues dealt with briefly by the plurality opinion were the legal criteria for designation as an enemy combatant and whether the President acting alone has authority to detain enemy combatants indefinitely or whether congressional authorization was also required. Concerning the first of these issues, the plurality acknowledged that large, difficult, and, to a significant extent, unprecedented questions were raised regarding the handling of enemy combatants in the novel, frequently unconventional, and potentially interminable war against terror.\textsuperscript{120} Nevertheless, by focusing on Hamdi’s circumstances narrowly, the plurality managed to avoid the most vexing questions. Furthermore, concerning the second issue, the plurality, contrary to Justices Souter and Ginsburg, found that Congress had authorized the President’s order to detain enemy combatants such as Hamdi, thus obviating the need to broach the separation of powers question.\textsuperscript{121}

Whereas the Government had not publicly revealed the exact set of criteria it uses to classify someone as an enemy combatant,\textsuperscript{122} Hamdi fell within established criteria under national and international law. According to these criteria the Government can capture and detain an individual who is “part of or supporting forces hostile to the United States or coalition partners” that are “engaged in an armed conflict against the United States.”\textsuperscript{123} The detention of such an individual is to

\begin{flushleft}
\textsuperscript{118} Id.\\
\textsuperscript{119} Id. at 511-12.\\
\textsuperscript{120} Id. at 519-21.\\
\textsuperscript{121} As will be discussed infra notes 162-163 and accompanying text, Justices Souter and Ginsburg concluded both that congressional authorization was required and that in cases such as Hamdi’s it was not granted.\\
\textsuperscript{122} See Hamdi, 542 U.S. at 516.\\
\textsuperscript{123} Id.\
\end{flushleft}
be for security purposes, not for punishment, to prevent him or her from rejoining the enemy’s forces after being released. Such detention, moreover, cannot last beyond the end of hostilities. Finally, relying on the precedent set in *Ex parte Quirin*, the plurality held that American citizenship is no bar to being designated an enemy combatant. The plurality went on to acknowledge, however, that dealing with enemy combatant designations in the war on terror would raise thorny problems as the enemy may not be visible or clearly defined and as the end of such war may be elusive and unlikely to be marked by a clear cut event, such as a formal cease-fire agreement. Nevertheless, these difficulties did not affect Hamdi’s case, as conventional military hostilities were taking place in late 2001 in Afghanistan when Hamdi was captured, and as such armed conflict between the United States and the Taliban was still occurring in Afghanistan in 2004 at the time the case was heard by the Court.

The bulk of the plurality’s analysis was devoted to Hamdi’s challenge to his designation as an enemy combatant. The only evidence the Government introduced in the courts in support of its contention that Hamdi was properly being detained as an enemy combatant was the declaration of Michael Mobbs (the Mobbs Declaration), an officer of the Defense Department who had reviewed relevant documentation and was familiar with military policy and procedure relating to designation as an enemy combatant, but who had no firsthand information concerning Hamdi’s capture by the Northern Alliance, his being turned over to the United States military, or the evidence the military had considered in concluding that Hamdi was an enemy combatant.

The Government’s position before the Court was that the Mobbs Declaration was all the evidence that Hamdi was entitled to; for, as noted above, the Government insisted that the courts were limited to the determination of whether Hamdi’s detention was within the authority of the Executive Branch. For that purpose, the Government argued it was sufficient that it present “some evidence,” and the Mobbs Declaration satisfied that requirement. Consistent with this argument,

124 317 U.S. 1 (1942).
125 *Hamdi*, 542 U.S. at 519.
126 *Id.* at 520.
127 *Id.* at 521. Contrast the circumstances surrounding the detention of another American citizen, Jose Padilla, upon his arrival in a commercial airplane in Chicago from a trip to Pakistan. *See* Rumsfeld v. Padilla, 524 U.S. 426, 426 (2004). Determining whether Padilla was properly designated as an “enemy combatant” would have necessitated dealing with the difficult questions left open in *Hamdi*. By disposing of the case on procedural grounds, the Court avoided dealing with these questions. *See id.* at 426.
129 *See supra* note 91.
130 *Hamdi*, 542 U.S. at 526.
the courts would have been limited to determining from the face of the Mobbs Declaration whether Hamdi’s detention was consistent with the Executive Branch’s authority to detain enemy combatants. This determination, however, would have to have been made without regard to the veracity of the Mobbs Declaration or to the weight of the evidence on which it purported to rely. Accordingly, the judiciary would have been limited to a determination, based solely on a declaration made by the Government, of whether the asserted Government authority falls within the legitimate realm of authority of the Executive Branch. Under these circumstances, virtually complete executive unilateralism would prevail.

Hamdi, on the other hand, wanted a full judicial hearing in compliance with constitutional safeguards and the law of evidence to determine whether he was properly designated as an enemy combatant. Had Hamdi been charged with a criminal offense, he would have been entitled to the full panoply of constitutional protections afforded criminal defendants and to the Government’s having to prove the charges against him beyond a reasonable doubt. Hamdi, however, though facing possible lifetime detention because of the conceivably unending nature of the war on terror, was being detained not as a criminal, but for interrogation and security purposes. As the Court’s plurality emphasized, Congress contemplated that habeas corpus petitioners would have an opportunity to present facts and rebut facts introduced against them. Moreover, the plurality specified that it was up to the courts to adjust the ways in which the due process requirements associated with habeas petitions may be handled depending on the particular context of the challenged detention.

Rejecting executive unilateralism and a purely process-based approach, the plurality declared that resolution of the conflict over what process was due to Hamdi had to be achieved on the basis of “constitutional balancing.” What had to be balanced, moreover, was Hamdi’s procedural due process right not to be deprived of his liberty without notice and an opportunity to be heard, on the one hand, and the Government’s compelling interest in waging the war in Afghanistan in the most efficient way possible with the least possible danger to U.S. troops and (because the war in Afghanistan is part of the war on terror

\[131\text{ Id. at 524-25.}\]
\[132\text{ Id. at 526.}\]
\[133\text{ Id.}\]
\[134\text{ Rejection of a purely institutional process-based approach stems from the plurality’s refusal to accept the Government’s position, although the plurality concluded that detention of enemy combatants in connection with the war in Afghanistan had been authorized by the Congress. See id. at 516-17.}\]
\[135\text{ Id. at 532.}\]
and the Taliban is linked to Al Qaeda) to U.S. civilians at home and abroad, on the other hand.

Such constitutional balancing is quite customary in judicial determinations of the limits of substantive constitutional rights, but quite problematic when used to specify procedural rights in cases such as Hamdi’s. For example, free-speech rights do not extend to utterances that incite to violence. This means that the state’s interest in protecting those who are likely to become victims of violence as a consequence of inflammatory utterances that urge aggression against them clearly outweighs whatever communicative benefit may flow from the inciting utterance. Accordingly, the balancing involved sets the limits of the substantive rights at stake. In contrast, in at least certain settings, such as criminal prosecutions of serious crimes that may result in long prison terms, the confines of the applicable procedural rights cannot fluctuate depending on the circumstances of the crime at stake. For example, the criminal trial of a person accused of being a serial killer cannot be conducted with fewer procedural safeguards than the trial of someone accused of a white collar crime who poses no danger of violence whatsoever. The Constitution guarantees the same procedural rights to all accused of having committed a serious crime; this is appropriate because they all have an equal stake in determination of innocence or guilt. The presumed serial killer has the same interest as the presumed white collar criminal in being allowed to use the full panoply of available procedural safeguards in connection with the determination of his or her guilt.

Hamdi was neither accused of a crime nor subjected to a criminal proceeding, but his detention, which the plurality acknowledged could potentially have lasted throughout his entire lifetime, was comparable to that of a convicted criminal’s sentenced to a long prison term. The determinative issue in Hamdi is not whether the security interests of the United States far outweigh the liberty interests of enemy combatants, but whether or not Hamdi was an enemy combatant. And, with respect to this latter issue, while there may be no need to adhere to the formalities of a criminal trial, it is difficult to understand why Hamdi should not have been entitled to procedural safeguards that are as efficacious and as fair as those afforded criminal defendants.

Balancing in the context of procedural due process rights is certainly warranted in many civil cases in which the threatened deprivation of liberty or property is relatively minor. Whereas temporary suspension of a state granted license or denial of a state permit resulting in a loss of business must comply with the due process

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137 Hamdi, 542 U.S. at 520.
requirements of notice and an opportunity to be heard, it is clear that insisting on the formalities of a criminal trial in such cases would be completely disproportionate.\textsuperscript{138}

To determine what process is due to comply with due process under given circumstances, the courts resort to judicial balancing consistent with the criteria set in \textit{Mathews v. Eldridge},\textsuperscript{139} a case involving termination of disability benefits. The test articulated in \textit{Mathews} and implemented by the plurality in \textit{Hamdi} requires weighing the private interest affected by state action against the Government’s asserted interest, taking into proper account the added burden the Government would have to assume were it to afford greater process.\textsuperscript{140}

More specifically, what the judicial balancing test must address is “the risk of an erroneous deprivation” of the private interest affected if the process were reduced against the “probable value, if any, of additional or substitute safeguards.”\textsuperscript{141}

The plurality recognized that Hamdi’s interest in being free from physical detention by the Government is “the most elemental of liberty interests”\textsuperscript{142} and that the danger of erroneous deprivation of liberty in the absence of sufficient process is very high.\textsuperscript{143} In particular, the plurality noted that the danger of mistaken military detention of journalists and humanitarian relief workers in a war such as that fought in Afghanistan is quite high.\textsuperscript{144} On the other hand, the military’s need to detain captured enemy combatants to prevent their return to the theater of war to fight alongside the enemy is compelling, as is the freedom to pursue strategic military objectives with utmost flexibility.\textsuperscript{145} Equally paramount is that the military not get bogged down with trial-like processes that would distract them from their military mission and might compromise military secrets by making them subject to discovery.\textsuperscript{146}

Under these circumstances, the plurality found that neither the criminal-trial-like process proposed by Hamdi nor the Mobbs Declaration offered by the government struck the proper balance.\textsuperscript{147}

\textsuperscript{138} \textit{Cf.} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (holding that tenured public employee facing dismissal was entitled to a pre-termination notice, oral or written, of charges, an explanation of employer’s evidence, and an opportunity to present his side of the story).

\textsuperscript{139} 424 U.S. 319 (1976).

\textsuperscript{140} \textit{Hamdi}, 542 U.S. at 529 (citing \textit{Mathews}, 424 U.S. at 335).

\textsuperscript{141} \textit{Id.} (quoting \textit{Mathews}, 424 U.S. at 335).

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 530 (citing Brief for AmeriCares et al. as Amici Curiae Supporting Petitioner).

\textsuperscript{145} \textit{Hamdi}, 542 U.S. at 531.

\textsuperscript{146} \textit{Id.} at 531-32.

\textsuperscript{147} \textit{Id.} at 532-33.
The former would be too burdensome on the military; the latter would not allow a meaningful challenge to an erroneous detention.

The proper balance, according to the plurality, required that a citizen detained as an enemy combatant be given notice of the factual basis for such detention and be entitled to rebut the Government's factual assertion before a neutral decision-maker.\textsuperscript{148} To alleviate the burden on the Government while the Executive is engaged in active military operations, the plurality specified that hearsay evidence is acceptable, and that once the Government made out a prima facie case for detention, it would be appropriate to grant the Government's evidence a presumption of validity:\textsuperscript{149} the burden of persuasion would then shift to the detainee to rebut that presumption and to demonstrate that he or she does not fall within the relevant criteria.\textsuperscript{150} This burden shifting procedure would ensure, in the plurality's estimation, that "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error."\textsuperscript{151}

The "balance" struck by the plurality imposes little additional burden on the Government, and it may be adequate for an erroneously detained journalist, but not for someone in a predicament such as Hamdi's. The Government's initial burden would be satisfied by a Mobbs Declaration, but the shifting of the burden of proof would make it very difficult and burdensome to overcome the Mobbs Declaration's presumption of validity. It is well known that the determination of which party bears the burden of proof is often decisive in litigation.\textsuperscript{152}

In the case of a journalist, bearing the burden of proof may not amount to an insurmountable obstacle if the detainee is employed by a large news organization that can vouch for the journalist's employment and for his or her assignment to cover the war. But what if someone like Hamdi had been turned over to the Northern Alliance by local Afghan villagers who acted to receive a ransom? It would presumably be impossible to meet the burden of proof, and the detainee's fate would be sealed as a practical matter by the Mobbs Declaration.

As bad as the plurality balancing was for Hamdi, it is even worse for someone like Jose Padilla, a United States citizen arrested on American soil upon suspicion of involvement in a terrorist plot to carry out an attack within the United States with a nuclear weapon, a so-called dirty bomb.\textsuperscript{153} Hamdi was captured in Afghanistan in a theater of...
war, and though to be sure very difficult, it would not have necessarily been impossible for him to obtain the testimony of people he dealt with in Afghanistan that might have helped him meet his burden of proof were he in fact the relief worker that his father claimed. In a case such as Padilla’s, in contrast, the Government’s Mobbs Declaration may simply consist of a statement that a reliable undercover intelligence operation has gathered convincing evidence that the detainee is involved in an ongoing terrorist plot to plant a dirty bomb in some unknown location in the United States at some unknown time in the future. The government could plausibly claim, moreover, that revealing the source of the information contained in the Mobbs Declaration would compromise national security and seriously derail the Executive’s conduct of the war on terror. Under such circumstances, it would seem nearly impossible for Padilla, or for most other American citizens for that matter, to meet the requisite burden in order to overcome the presumption of validity accorded to the Government.

In the last analysis, whereas the plurality rejected Executive unilateralism, when one considers where the balance was struck, the departure from unilateralism was limited. Furthermore, from the standpoint of judicial balancing itself, the plurality accorded too little weight to the serious deprivation of liberty associated with the designation as an enemy combatant and too much weight to security concerns relating to the war on terrorism. The plurality’s handling of balancing in *Hamdi* thus raises the question of whether it would be better to use a categorical approach in enemy combatant cases.

Justice Scalia’s dissenting opinion in *Hamdi* does offer a categorical solution to the conflict between the government and Hamdi. According to Justice Scalia, the Government could only continue to detain Hamdi indefinitely without pressing charges against him if Congress were to suspend the right to habeas corpus, which it can only do in case of an invasion or rebellion. Otherwise, the Government could either press charges against Hamdi or release him, as the Constitution would then require that his habeas petition be granted.

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154 See supra note 119 and accompanying text.
155 See *Hamdi*, 542 U.S. at 562. Congress would have to decide whether the September 11, 2001 attacks constituted an “invasion” and whether these attacks still justified suspension several years later. *Id.* at 578.
156 *Id.* at 576-78.
Justice Scalia further stressed that there were several criminal laws already enacted by Congress that the Executive could invoke to press charges against someone like Hamdi, including laws against treason, against providing material support to terrorists, and against “enlistment to serve in armed hostility against the United States.” 157 Significantly, the only American citizen other than Hamdi detained after capture in the Afghan theater of war, John Lindh, had already been criminally charged and convicted.158

Unlike Lindh, who fell into American hands and who pled guilty to criminal charges,159 Hamdi may well have been difficult to convict. Indeed, given that he was captured by the Northern Alliance, the Government may have felt that it lacked a sufficiently solid case to meet the requirement of proof beyond a reasonable doubt.160

Justice Scalia’s categorical approach could be even more problematic for the Government in cases such as Padilla’s. Suppose, for example, that American undercover intelligence officials working with foreign counterparts had come upon solid evidence of a detainee’s participation in a conspiracy to plant a dirty bomb at a specified location within the United States. Suppose further that the evidence in the Government’s possession would suffice to prove the detainee’s active involvement in the above conspiracy beyond a reasonable doubt. The Government, however, may not be in a position to prosecute the detainee without compromising vital intelligence sources and methods. Under such circumstances, under the categorical approach, the Government would seem to have little choice but to release the detainee after a relatively brief period of detention.

Some of the difficulties noted above with respect to the balancing approach or the categorical approach may be better met by the process-based institutional approach. As already mentioned, the plurality opinion in Hamdi placed some reliance on the process-based approach,161 though that reliance was rather perfunctory. The opinion of Justice Souter, concurring in part and dissenting in part, however, makes much more vigorous use of the process-based approach. Drawing on the Constitution’s reliance on “checks and balances,” and referring to the permanent tension between security and liberty, Justice Souter stressed that in time of war, Congress is in a better position than the Executive to strike the right balance. In his view, the task of

157 Id. at 561.
158 Id.
159 Id.
161 See supra notes 134-135 and accompanying text.
balanced is not well entrusted to the Executive Branch of Government, whose responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. In other words, because Congress is less likely to be biased in favor of security, it is better suited to strike the right balance and thus check any Executive propensity to disproportionately favor security.

The process-based approach envisioned by Justice Souter provides a preferable and presumably more reliable alternative to executive unilateralism and, at least in those cases in which statutory law falls on the side of liberty, to ad-hoc judicial balancing. On the other hand, the process-based approach lacks the flexibility of its two alternatives. Indeed, neither the broad post-9/11 congressional authorization nor the more restrictive Non-Detention Act was drafted with the peculiarities of the war in Afghanistan or the capture of individuals such as Hamdi and Padilla in mind.

Another important factor further complicates the task of striking a proper balance between security and liberty in cases such as Hamdi’s, Padilla’s, and those of the Guantanamo detainees. That factor is that the war on terror is fought at once as a conventional military war and as a national and international operation designed to bring criminals to justice. Indeed, the military campaign conducted by the United States and its allies against the Taliban in Afghanistan was regarded by the Bush Administration as a war against a state army. At the same time,


163 Unlike the plurality, Justice Souter did not rely on the broadly phased congressional authorization allowing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” to assess the legality of indefinite detention of enemy combatants. *See Hamdi*, 542 U.S. at 51 (citing Authorization for Use of Military Force, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2002))). This authorization adopted shortly after the September 11, 2001, attacks did not refer to detentions and thus, in Justice Souter’s view, it was neither consistent with, nor did it supersede, the Non-Detention Act, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” *See Hamdi*, 542 U.S. at 542.

164 As mentioned in the discussion of the plurality opinion, see *supra* notes 120-155 and accompanying text, where there is Congressional authorization for a detention, absent suspension of habeas corpus, such detention can still be challenged in the courts as being violative of the detainee’s constitutional rights.

165 *See Hamdi*, 542 U.S. at 542 (Souter, J., concurring in part and dissenting in part).

166 *See supra* note 37.

the President made clear that Al Qaeda members and other terrorists would not be treated as fighters and that he would not afford them rights under the Geneva Conventions. The problem caused by this bifurcated approach without clear lines of demarcation was that issues relating to those designated as enemy combatants did not fit neatly within either of the two well-defined distinct legal paradigms. In cases of conventional war, captured enemy soldiers are to be subjected to the categorical prescriptions of the Geneva Conventions and of other relevant bodies of international law and detained until the end of hostilities in accordance with the requirements that these laws impose. In contrast, criminal suspects must be charged with a crime or released from detention within a relatively short time. Also, if charged they must be afforded the full set of constitutionally guaranteed procedural protections regardless of the crime involved.

In all three cases, the government attempted to straddle the line between these two regimes in order not to fall within the strictures of the criminal law system while also escaping from the requirements of the Geneva Conventions. Neither the American citizens, Hamdi and Padilla, nor those Guantanamo detainee plaintiffs in Rasul—who were citizens of countries friendly to the United States, such as Australia and Kuwait—fell within the ordinary definition of enemy combatants. Moreover, they all contested their designations as enemy combatants. The government sought to avoid legal responsibility for the detentions by seeking to carve out as best it could a no man’s land between the two regimes.

Only the plurality in Hamdi sought to resolve this impasse by means of a balancing approach. Four of the remaining five justices found Hamdi’s indefinite detention illegal. On the other hand, both Padilla and Rasul left the balancing question open. In the end, both the need for balancing and the kind of balancing needed depend on which legal regime is properly brought to bear on these cases. And, neither of the two familiar paradigms, that of criminal law or that of the law of war, seems adequate.

Afghanistan, he declared that he would apply the Geneva Conventions to Taliban fighters.

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168 Id.


170 See Justice Scalia’s dissenting opinion in Hamdi. Hamdi, 542 U.S. at 554-58 (Scalia, J., dissenting).

171 See supra note 37.


173 These were Justices Scalia, Stevens, Souter and Ginsburg. See supra notes 155-164 and accompanying text. Justice Thomas in his dissent agreed with the government’s position. See Hamdi, 542 U.S. at 554-58 (Thomas, J., dissenting).
III. BALANCING, PROPORTIONALITY, AND THE ISRAELI DECISIONS

Not only is the Israeli Court’s balancing as broad as the American Court’s is narrow,\(^{174}\) but the Israeli cases are much more directly related to an ongoing war than their American counterparts.\(^{175}\) Whereas the American cases dealt with procedural rights of detainees far removed from theaters of war, the Israeli cases concerned substantive rights pressed by civilian non-combatants affected by ongoing military activity, including active combat within the very core of the relevant theater of war.\(^{176}\) Moreover, whereas in the United States balancing did not result in a dramatic departure from the Government’s position, in Israel, balancing led the Court to order the Government to make substantial changes to the location of the separation barrier built for security and to make changes in the conduct of an ongoing military operation in Gaza.\(^{177}\)

If, from the standpoint of security, the circumstances surrounding the Israeli cases seem much less amenable to balancing than their American counterparts, from the standpoint of the respective rights involved, the opposite appears to be true. The Israeli cases involve substantive liberty, property, and dignity rights—which are usually subjected to judicial balancing.\(^{178}\) These rights are customarily not absolute, and their limits are usually established through judicial balancing or proportionality-based analysis. As already mentioned, the relative weight ascribed to the particular rights and government interests involved may vary from context to context or among various jurisdictions, and so may the proportion by which a government interest must outweigh a right to justify limitation or derogation, but the determination always involves some kind of judicial balancing.\(^{179}\)

The Israeli cases relate to military action claimed to be necessary for the security of the country and for the safety of its citizens. At the same time, these military undertakings adversely affected the legitimate and recognized liberty, property, and dignity interests of Palestinian civilians residing in the occupied territory areas affected. In a constitutional democracy, the military has an obligation—enhanced in Israel by the legal responsibilities imposed by the international laws of

\(^{174}\) See supra, p. 2105.
\(^{175}\) See supra, p. 2106.
\(^{176}\) See Mara’abe, supra note 68 (separation fence erected to thwart would be suicide bombers coming from West Bank); Beit Sourik, supra note 1 (same); see also Physicians for Human Rights, supra note 1 (military operation, including hostile combat in Gaza).
\(^{177}\) See infra notes 190, 214, 217, 228-232 and accompanying text.
\(^{178}\) See supra p. 2117.
\(^{179}\) See supra Part I.C.
belligerent occupation applicable to the West Bank and Gaza\textsuperscript{180}—to take into account, and to ascribe proper weight, to the needs, legitimate interests, rights, and liberties of the civilians who will be inevitably adversely affected by implementation of military policy.\textsuperscript{181} Beyond that, however, should ongoing military operations be subjected to judicial balancing? And if they are, are judges competent to perform the requisite balancing operations?

The Israeli decisions rest on a seeming paradox. As Chief Justice Barak starkly stated in \textit{Beit Sourik}, “We, Justices of the Supreme Court are not experts in military affairs.”\textsuperscript{182} Yet, he also hastened to add that his Court is competent to review the Israeli military commander’s decision concerning the location of the barrier because judges are \textit{the} experts in applying the principle of proportionality.\textsuperscript{183} This sense of paradox is heightened, moreover, by the Court’s refusal to enter into the battle among military experts. The Palestinian plaintiffs whose land was seized, mobility curtailed, and communal life disrupted, were joined by the Council for Peace and Security (Council), an Israeli nongovernmental organization that included high ranking reserve officers of the IDF and that had expertise in military security.\textsuperscript{184} The Council joined the Palestinian plaintiffs as amici curiae\textsuperscript{185} and argued that in their expert opinion, better security for Israel and less intrusive incursion into Palestinian lands and community life could be achieved by moving the barrier closer to Israel.\textsuperscript{186} The defendant, the IDF’s military commander in the West Bank, acknowledged the expertise of the Council but disagreed with their judgment, insisting that the actual location for the barrier decided upon by the IDF was the optimal security option after giving proper weight to political considerations and to the legitimate interests of Palestinian civilians.\textsuperscript{187} Faced with this disagreement among experts, the Court recognized that the conflicting positions involved were “based upon contradictory military views,”\textsuperscript{188} but went on to declare “we must grant special weight to the military opinion of the official who is responsible for security.”\textsuperscript{189} Yet, for all its

\textsuperscript{180} See \textit{Beit Sourik}, supra note 1, para. 23.
\textsuperscript{181} \textit{Id.} at para. 13 (discussing the military’s assertion than in planning the separation barrier “great weight was given” to the interests of Palestinians affected).
\textsuperscript{182} \textit{Id.} at para. 46.
\textsuperscript{183} \textit{Id.} at para. 48.
\textsuperscript{184} \textit{Id.} at para. 16.
\textsuperscript{185} \textit{Id.} at para. 18.
\textsuperscript{186} \textit{Id.} at paras. 18-19.
\textsuperscript{187} \textit{Id.} at para. 20.
\textsuperscript{188} \textit{Id.} at para. 47.
\textsuperscript{189} \textit{Id.} While the court refused to weigh the respective strengths and weakness of the two contending military positions, it did indicate that the military commander’s position was not beyond challenge. The commander was entitled to a presumption that his “professional reasons
unwillingness to enter the battle of the military experts, the Court engaged in a weighing of the tradeoffs between security and liberty struck by the barrier, and concluded that the IDF had acted in a disproportionate manner.\textsuperscript{190} Furthermore, based on that conclusion, the Court ordered the military commander to come up with changes regarding the barrier in order to ensure compliance with the requirements of proportionality.\textsuperscript{191}

The Court asserted that military affairs are no different than any of the other areas beyond its expertise in relation to which it is called upon to adjudicate controversies by means of judicial balancing.\textsuperscript{192} Close examination of what the Court does rather than what it says it does, however, leads to a much more nuanced conclusion. Military affairs are in some respects like other specialized fields, but in other respects, they appear sui generis. Before evaluating this conclusion in greater detail and assessing how it affects the legitimacy and efficacy of judicial balancing in cases dealing with military affairs, it is necessary to take a closer look at the Israeli Court’s handling of the cases before it.

The Court’s recourse to balancing and proportionality analysis in its adjudication of the controversy over the separation barrier is grounded both in the relevant application of substantive law and in the Court’s established practice of using balancing to resolve conflicts between competing interests. From the standpoint of substantive law, the international law of belligerent occupation allows the occupying country to protect its security and that of its citizens, but also requires that country to balance its security needs against the rights, needs, and interests of the population residing in the occupied territory.\textsuperscript{193} More generally, proportionality is a key principle of the law of war, which requires establishing a balance between “military needs and humanitarian considerations.”\textsuperscript{194} Proportionality is also a general principle of Israeli administrative law and has more recently become a constitutional principle incorporated in Article 8 of Israel’s Basic Law on human dignity and freedom.\textsuperscript{195}

As already mentioned, the IDF, which is an administrative body under Israeli law, had performed its substantive legal obligation to balance security concerns against the rights and interests of affected
Palestinians before settling on the location of the barrier. In this respect, the IDF’s administrative duty is equivalent to the constitutional duty of the U.S. Executive. Unlike the American Court however, the Israeli Court was engaging in administrative review and, accordingly, its first task was to determine whether the military commander had performed his balancing duty in good faith. The Court found that he had.

The Court’s exercise in judicial balancing started after this initial determination, thus raising the question of the extent to which it merely supplements the non-judicial balancing performed by the military commander as opposed to engaging in a de novo balancing of its own. To elucidate this question, it is first necessary to inquire briefly into the proportionality test used by the Court.

The proportionality test used by the Court, applicable under both international law and Israeli administrative law, is divided into three subtests. The first subtest requires that the administrative means used be rationally related to the realization of the state’s objective. The second subtest prescribes that the means used to realize the objective be those that are “least injurious” to adversely affected individuals. Finally, the third subtest, that of “proportionality in the narrow sense,” requires that the harm to the relevant individuals be proportionate to the benefit to the state. The third subtest can be satisfied in one of two possible ways: either by directly weighing the benefits against the harms of the proposed administrative course of action; or, by comparing different administrative alternatives to one another to determine whether the decrease in benefit caused by shifting from the most beneficial alternative to a somewhat less beneficial one is accompanied by a greater decrease in harm. If it is, then proportionality requires that the somewhat less beneficial but significantly less harmful alternative be adopted.

All three subtests require balancing, albeit different kinds of balancing. The rationality requirement of the first subtest calls for minimal balancing in that only such means that are so disproportionate as to be irrational are excluded. The second subtest requires a

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196 See supra note 181.
197 See supra note 98 and accompanying text.
198 Beit Sourik, supra note 1, at para. 85.
199 Id. at para. 40.
200 Id.
201 Id.
202 Id.
203 Id.
204 Minimal “rationality” analysis does not, strictly speaking, always require balancing. Whether or not it does depends on whether the relevant means are “irrational” because grossly disproportionate, or “irrational” because illogical, contradictory, or inherently absurd. For
balancing among the respective injuries that would result from adoption of the various possible means toward the relevant administrative objective. This requires applying a proportionality standard that includes comparison and may involve “balancing” in a pure formal sense, as when one alternative calling for the expropriation of one hundred landowners is “weighed” against another alternative involving only fifty such expropriations. On the other hand, more problematic balancing would become necessary if one alternative involved land expropriations and the other restrictions on the affected population’s freedom of movement. Finally, the third subtest, that of proportionality proper, requires extensive balancing, either between military benefits and civilian harms, or between the ratios of harm to benefit for various plausible alternatives.

Notwithstanding the Court’s declarations to the contrary, the military dispute between the Council and the military commander concerning which of their proposed routes for the barrier would be best for security did figure prominently in the Court’s application of the three-part proportionality test. The dispute centered on whether the barrier would make Israel more secure if built away from Israel’s population or if built away from the Palestinian population. The Council maintained that a barrier close to Israel’s population would be more easily defended as it would provide time and space to intercept terrorists before they could harm Israeli soldiers or civilians.

The military commander’s view, on the other hand, was that a barrier closer to the Palestinian population would be safer for Israeli soldiers and would give the latter a better opportunity to run down or capture terrorists before they could reach Israeli civilians. Furthermore, the military commander and the Council agreed that a

example, increasing the speed limit on highways from 65 to 130 miles per hour for purposes of improving highway safety, when statistics undisputedly demonstrate that the number of deaths on the highway increase dramatically when cars travel at higher speeds, would be illogical and contradictory. In contrast, prohibiting driving by all persons under twenty-five because of evidence that those in that age group cause twice as many fatal automobile accidents as older drivers—though ninety percent of those under twenty-five drive as safely as their older counterparts—would not be illogical, as it would lead to an increase in safety on the highways. Nevertheless, such a total ban would be so disproportionate as to be “irrational.”

205 In the Mara’abe case, the Court held that the segment of the separation fence in dispute violated the second subtest because of the Israeli government’s failure to consider a prima facie plausibly less injurious alternative route for reasons of political expediency. See Mara’abe, supra note 68, paras. 113-14. The actual segment of the separation fence encompassed certain Palestinian villages, placing them on the Israeli side of the barrier and cutting them off from the West Bank. The plausible alternative location for the fence would leave the affected village on the Palestinian side but was opposed by an Israeli community that feared an adverse effect on its quality of life.

206 See supra notes 184-191 and accompanying text.

207 Beit Sourik, supra note 1, para. 18.

208 Id. at para. 20.
barrier closer to the Palestinian population would be more injurious to that population than one right next to the Israeli population, and also, according to the Council, a closer barrier would further embitter the Palestinians and thus eventually foment greater terrorism.

The dispute between military experts had a significant bearing on the Court’s application of the third subtest under the proportionality standard. The Court resorted to the second alternative, namely, comparing different plans for the location of the barrier with respect to the ratio of harm to benefit that each of these plans would produce. Accordingly, the Court did not engage in a direct weighing of harms and benefits of the IDF plan, but it did take into account the plan proposed by the Council for purposes of weighing the IDF plan against plausible alternatives. This comparison between the two plans, moreover, appears to contradict the Court’s assertion that it would refuse to opine on the relative merits of various military options.

The Court sought to avoid this contradiction by arguing that the comparison carried out in the course of conducting the third subtest was not meant to be a comparison of military options. Instead, it was a comparison necessitated by the Court’s duty to balance the IDF’s plan regarding the barrier against plans with different ratios of harms to benefits. As the Court saw it, it was not comparing military options to determine which one was militarily best, but to determine whether the IDF plan was on balance compatible with the humanitarian considerations owed Palestinian civilians under Israeli and international law. In other words, the military comparison was not for its own sake, but merely subordinate to finding the proper balance between security and liberty.

The specific finding of the Court was that even though it accepted that the IDF plan led to greater security than the Council’s, the IDF plan also led to much greater injury than the Council’s. Therefore, concluded the Court, since the difference in security between the plans was “minute,” the IDF plan failed the third subtest and had to be rejected as disproportionate. Based on that conclusion, the Court ordered the military commander to draw a new plan for the barrier, and

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209 Id. at paras. 18, 29.
210 Id. at para. 18.
211 Id. at para. 61.
212 Id. at para. 48.
213 Id. at para. 61. Cf. Mara’abe, supra note 68, para. 116. If the plausible alternative mentioned supra note 205 does not prove viable, then without the disputed segment “there is no security for the Israelis,” and with it “there is a severe injury to the fabric of life of the residents of the [Palestinian] villages.” Applying subtest three under such circumstances will be “the most difficult of the questions.” Id.
specified that one possible, though by no means required, alternative was adoption of the Council’s plan.\footnote{\textit{Beit Sourik}, supra note 1, para. 71.}

In the end, the Court did not engage in a direct comparison of military plans, but it did perform an indirect comparison. The Court did not order the military commander to adopt the Council’s plan, but it did order him to adopt something comparable. Finally, the Court struck down the IDF’s plan not because it did not strike a proper \textit{military} balance between security and liberty, but because it failed to strike that very same balance as required by humanitarian considerations.

From a substantive point of view, the balancing engaged in by the Court in \textit{Beit Sourik} is certainly de novo balancing rather than a review of the adequacy of an administrative agency’s balancing. The Israeli Court’s balancing seems to be the equivalent of the kind of balancing that courts routinely perform in ordinary civilian settings.\footnote{One area in which courts are routinely called upon to balance conflicting claims is the Dormant Commerce Clause under the American Constitution. The relevant principle, under the Dormant Commerce Clause, is that where Congress has not regulated an area of interstate commerce, state regulation that is not discriminatory against out of state business is constitutional so long as the benefits it produces outweigh the burdens that the regulation in question imposes on interstate commerce. \textit{See} Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Thus, for example, courts are called upon to determine whether the benefits produced by particular safety, health or environmental regulations outweigh the burdens they impose on the free flow of interstate commerce. \textit{See}, e.g., S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (weighing safety of shorter trains versus extra costs of uncoupling and reconstituting long trains at state borders).}

This squarely raises the question of whether different criteria concerning balancing should apply in the context of military affairs than in that of civilian ones. This question will be examined in Part V below, but brief reference must be made here to the \textit{Physicians for Human Rights} decision, in which the Israeli Court went even further than it did in \textit{Beit Sourik}, and in its own words, was “at the outer limits of the reach of the judiciary”\footnote{\textit{Physicians for Human Rights}, supra note 1, para. 9.} when it used judicial balancing with respect to military actions that included ongoing armed combat with the enemy.\footnote{\textit{Id.}}

\textit{Physicians for Human Rights} arose out of an Israeli military operation in the area of Rafah in the Gaza strip.\footnote{\textit{Id. at para. 1.}} The IDF mission was to locate underground tunnels believed to be used to smuggle weapons from Egypt and to arrest persons wanted for terrorist activity.\footnote{\textit{Id.}} The IDF engaged in armed combat, exchanged gunfire and was targeted with explosive charges during the course of the operation.\footnote{\textit{Id.}}
The lawsuit was brought by human rights organizations prompted by the harm caused to Palestinian civilians in Rafah by the military operations, including demolition of houses and civilian injuries. The plaintiffs requested that the Court order the IDF to allow medical teams and ambulances to reach the wounded in Rafah; that electricity and water be restored; that provision of food and medicine to certain neighborhoods be permitted; that medical teams of one of the plaintiff organizations be allowed entry into Gaza in order to assess the situation there; and that an investigation be ordered into the shelling of a crowd of protesting civilians that resulted in several deaths.

The key question in Physicians for Human Rights is how close to actual military conduct courts may intervene without crossing the line into the realm of pure military decisionmaking to be left to military commanders. The Court relied on a balancing approach to handle this question. Moreover, within the area that the Court carved out as proper for it to intervene into, it also decided on a balancing approach. Like in the Beit Sourik case, the Court in Physicians for Human Rights emphasized that it did not question the wisdom of the decision to engage in military action. Moreover, the Court specified that it would refuse to take any position on how the IDF is carrying out armed combat so long as soldiers’ lives are in danger. But when they are not in danger, courts are empowered to review military decisions to make sure they comply with applicable law. So long as soldiers’ lives are in danger, security issues relating to ongoing military obligations outweigh liberty interests and humanitarian concerns. Beyond that, however, the security benefits of military action must be

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221 Id. at para. 7.
222 Id.
223 Id.
224 Id.
225 Id.
226 Id. at para. 77 (Beinisch, J., concurring) (speaking of “a new balance between . . . the fact that the Court will not intervene in the combat activity itself, and between the need to ensure, at the same time, that combat proceeds according to humanitarian obligations”).
227 Id. at para. 19 (stating that “the IDF must act . . . with reasonableness and proportionality”).
228 Id. at para. 17 (The Court “presume[s] that the operations in Rafah are necessary from a military standpoint.”).
229 Id. at paras. 9-10.
230 Id. at para. 9.
231 Given the factual setting in Physicians for Human Rights, this latter assertion should be qualified as follows: because the security involved outweighs the liberties in question, courts should refuse to intervene prospectively. Given the Court’s insistence on the fact that, today, wars are subject to law, id. at paras. 13-14, however, the relevant balancing should not be construed as barring retrospective judicial intervention to punish unlawful war making.
weighed against the harms that such action causes to liberty and dignity interests.\textsuperscript{232}

Consistent with the above distinctions, the Court divides the military operations in Rafah into two categories: active combat and maintaining order after such combat or during intervals between various instances of such combat. In active combat, soldiers’ lives are highly at risk, whereas in the course of maintaining order, they presumably are much less so. In the war on terror, as made manifest in Gaza, however, the distinction drawn between combat and maintaining order tends to blur. For example, terrorists, such as members of Islamic Jihad, may mix with civilians in a seemingly peaceful crowd\textsuperscript{233} and then attack Israeli soldiers without warning. Should the Court nevertheless continue to treat maintenance of order among civilians differently than armed combat? Or do the particular ways of terrorism justify carving out a much greater area of military discretion beyond judicial reach?

What is even more striking in\textit{ Physicians for Human Rights} is that in addition to its intrusion on the military commander’s decisions, the Court’s review of the latter’s decision and actions is contemporaneous rather than ex post, bringing the Court in on every step of an ongoing military mission. Such simultaneous intervention by the courts makes fact gathering, dealing with constantly changing circumstances, and evaluating contending assertions particularly difficult. As stated in the concurring opinion, “the difficulty of employing judicial review as combat continues reduces the effectiveness of that review and makes intervention by the Court difficult.”\textsuperscript{234}

In the end, the Israeli decisions leave unanswered the following questions. First, is there any cogent way to draw or maintain the distinction between zones of military discretion and zones where such discretion ought to be balanced against humanitarian concerns? Second, even if there were a cogent way to maintain the latter distinction, is judicial intervention into day-to-day military operations ever justified? And if not, is there any plausible alternative to unmitigated military discretion in the face of an ongoing war on terror?

For all its insistence that it did not second guess military policy, the Israeli Court came close in both\textit{ Beit Sourik} and\textit{ Physicians for Human Rights} to engaging in complete de novo review. In the application of the proportionality test “in the narrow sense,” the Court gave some deference, but not much, to the military judgment of the relevant IDF commander. In both cases, the Court ordered changes in military actions and policies, and in the\textit{ Physicians for Human Rights} case, it

\textsuperscript{232} \textit{Id.} at para. 11.
\textsuperscript{233} See \textit{id.} at para. 56.
\textsuperscript{234} \textit{id.} at para. 77 (Beinish, J., concurring).
actually became an active participant in the ongoing military operation, ordering commanders to make changes and adjustments in the midst of an active military campaign. Did the Israeli Court go too far?

IV. BRITISH PROPORTIONALITY ANALYSIS AND THE DISTINCTION BETWEEN TIMES OF CRISIS AND TIMES OF STRESS

Like in the American cases, the main issue in the A(FC) case decided by the Law Lords was whether indefinite detention without charges of persons suspected of having links to terrorism was compatible with fundamental liberty and due process rights. As viewed by the Law Lords, the answer to this question depended on one or both of two key considerations: whether the war on terror as gauged from the vantage point of the United Kingdom created a state of emergency or merely conditions of stress; and, whether different treatment of the detainees who were non-deportable foreigners as compared to that of otherwise similarly situated deportable foreigners and British nationals not subject to deportation violated applicable anti-discrimination standards. Eight of the nine Law Lords found the challenged detentions to be in violation of the ECHR and of the 1998 United Kingdom Human Rights Act.235

In reaching their decision, the Law Lords applied a proportionality standard to determine whether the war on terror created a state of emergency:236 they balanced the detainees liberty interests against the nation’s security interests,237 much as the plurality in Hamdi had, and they considered whether the different treatment accorded foreign suspected terrorists in comparison with domestic ones was disproportionate.238 The eight Law Lords who found the challenged detentions illegitimate diverged on the precise grounds for their conclusions. There was disagreement over how much deference the courts owed Parliament and the Executive,239 over whether the United Kingdom’s war on terror was fought under emergency conditions or conditions of stress,240 and over whether the challenged detentions were

236 See id. at 102-03.
237 Id. at 160.
238 Id. at 142, 144.
239 Compare Lord Bingham’s opinion deferring to the Executive on the question of whether, on a factual basis, the terrorist threat justified the conclusion that the United Kingdom was in a state of emergency, see id. at 102, with Lord Hoffman’s refusal to accord such deference and conclusion that there was no such emergency, see id. at 131-32.
240 Contrast Lord Hoffman, see id. at 132 (concluding no emergency), with Lord Hope of Craighead, see id. at 137-38 (finding the government “fully justified” in its position that “there
illegitimate because unduly discriminatory—the prevalent view—or because there was no state of emergency—Lord Hoffman’s view.  

To better grasp the role of proportionality and balancing in the Law Lords’ decision, it is first necessary to focus briefly on the key factual and legal underpinnings of the case. After the 9/11 attacks, the British Parliament adopted antiterrorist legislation that provides in relevant part that “[a] suspected international terrorist may be detained” as someone subject to deportation even if he or she cannot be deported due to some legal or factual impediment. Consistent with this legislation, as already mentioned, the United Kingdom deported certain foreign suspected terrorists to their country of citizenship, but the United Kingdom could not do so with respect to others whose deportation would have been in violation of United Kingdom obligations under international law because of the danger that the would-be deportees would be tortured upon their return home. The latter challenged their indefinite detention without charges—which resembled the challenge in the American cases but was not equivalent in that the detainees in the United Kingdom had always had access to administrative bodies and courts for review of the legitimacy of their detention—under the ECHR incorporated into United Kingdom domestic law by the 1998 Human Rights Act.

The relevant provisions of the ECHR were: Article 5, which, as mentioned, guarantees the “right to liberty and security of the person” and provides basic due process rights to those under arrest; Article 14, which prohibits discrimination with respect to the rights secured by the ECHR; and Article 15, which allows a country to derogate from its obligations under the ECHR in times of emergency. Article 15.1 provides in relevant part: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation . . . .”

In November 2001, the United Kingdom derogated from its obligations under the ECHR citing the September 11th attacks and the subsequent U.N. Security Council resolutions recognizing those attacks as a threat to world peace and security and referring to an existing threat
posed by international terrorists against the United Kingdom in which foreign nationals within its borders were playing a pivotal role.247

Within this framework, the key issues were: whether the threat of international terrorism was proportionate so as to justify derogation; whether, assuming it was, the means used to combat such terrorism were the least restrictive possible with respect to the relevant liberty (Art. 5) and equality (Art. 14) rights; and who, as between the political branches and the courts, had the ultimate power to determine the proportionality of derogation. Moreover, these inquiries had to be placed in the context of an overall concern for striking a proper balance between liberty and security in the United Kingdom’s war against international terror.248

The standard for derogation, the existence of a state of crisis,249 was provided by the ECHR and hence, from a domestic standpoint, by United Kingdom law itself.250 Furthermore, since derogation must be affirmatively instituted by a country, the initial decision and, hence, determination of the existence of a state of crisis in the first instance, is the responsibility of the political branches. As mentioned above, the Law Lords were divided over whether this determination by the political branches was binding on the judiciary.251

The question of whether it is proper for judges to review the proportionality of derogation, which involves deciding whether the United Kingdom is actually in a state of crisis, parallels the question of the propriety of judicial balancing in the American cases in significant respects but with one major difference: under British law, the judiciary can declare derogation or the means used to combat the crisis that prompted derogation to be contrary to the Human Rights Acts, but it cannot order relief or invalidate the challenged laws or executive decrees. It remains up to Parliament to initiate changes or to remain with the status quo notwithstanding the judicial declaration.252 As a consequence, an erroneous assessment of the balance between liberty and security by British judges seems less ominous than one by

247 See A(FC), 2 A.C. at 93-94.
248 See id. at 160.
249 See supra Part I.C.
250 This follows from incorporation of the ECHR through the 1998 Human Rights Act. See supra text accompanying note 82.
251 See supra note 239.
252 See A(FC), 2 A.C. at 170. There is arguably another noteworthy difference between the United States and the United Kingdom, given that the former is a presidential democracy while the latter is a parliamentary democracy. Accordingly, the distinction between executive unilateralism and an institutional process-based approach, which figures importantly in the U.S. jurisprudence seems much less relevant in the United Kingdom. Given the focus of the Law Lords’ opinions, this latter distinction need not be considered further for present purposes.
American judges, since the British Parliament can ignore such an assessment whereas the American political branches cannot.253

It is difficult to assess the import of the fact that the Law Lords were divided over their power to review the propriety of derogation given that they had a choice to conclude that the challenged detentions were illegitimate because derogation was unjustified or because the means employed in connection with it were disproportionate as violative of the detainees’ ECHR equality rights. The question of the propriety of judicial review of derogation decisions, though perhaps not determinative in A(FC), is nonetheless of great importance as it could well be determinative in other cases. For example, had the British political branches decided to implement derogation through detention of all suspected of having links with foreign terrorism regardless of nationality or deportability, then there would have been no plausible equality challenge. In that case, the legitimacy of the detentions would turn on whether or not the United Kingdom would be facing conditions of crisis.

This last possibility alone suggests the desirability of judicial review of the initial decision leading to derogation. In the context of the A(FC) case, moreover, there were three additional reasons that bolster the conclusion that judicial review of the initial political decision was desirable and that it could be performed in a principled way. The first reason is that although the United Kingdom faced a similar threat from international terrorism as other Western European nations, it was the only country to have derogated from its obligations under the ECHR,254 Even Spain, after the attack perpetrated by Al Qaeda on March 11, 2004, in Madrid, did not derogate.255 Even if this fact alone should not be determinative, and even if significant deference to political decisions is warranted, perhaps by granting a rebuttable presumption of validity to such decisions, the fact that the United Kingdom was the only one among the forty-five members of the Council of Europe to derogate from Article 5 of the ECHR raised a serious question at the time concerning the conclusion that international terrorism was threatening the life of the nation.256

The second reason is that the United Kingdom did have a period within living memory during World War II in which the life of the nation was definitely threatened, and as Lord Hoffman pointed out in

253 This is not to say that a decision by the Law Lords may not result in strong political pressure on Parliament to conform the law to the judicial decision. Nonetheless, from an institutional standpoint, Parliament remains free to ignore the judicial decision.
254 See A(FC), 2 A.C. at 99-101.
255 Id. at 100-01.
256 See supra notes 31, 246 and accompanying text.
the passage cited above, the current threat posed by international terrorism is nothing comparable. The threat of international terrorism does cause fear, and such fear may lead to exaggeration of the actual dangers confronting the citizenry or of the probability that such dangers will materialize. Precisely because of this, the circumstances surrounding derogation should be closely scrutinized, and it seems proper for judges to perform that function. As Lord Hoffman observed, neither the United Kingdom, which had not experienced an international terrorist attack at the time \(A(FC)\) was handed down, nor Spain, which had conducted public affairs as if their institutions were threatened or the life of the country was in peril. That alone should suffice to lift the presumption of validity of the derogation.

The third reason that buttresses the case for judicial review is that the means devised to deal with the threat that supposedly justified derogation bolster security minimally if at all. This suggests that the British political branches are not taking the terrorist threat as seriously as they claim they are. To be sure, the mere adoption of discriminatory means, even if they must be eventually invalidated because they disproportionately trample on equality rights, does not necessary imply that the threat sought to be contained is not taken with utmost seriousness. For example, if the overwhelming majority of Al Qaeda terrorists and their sympathizers happen to be Muslim, government action targeting Muslims would be consistent with taking Al Qaeda’s threats seriously, though disproportionate, from the standpoint of equality rights. In contrast, the detention of non-deportable suspected foreign international terrorists, but not of such suspected terrorists who are British subjects, like Richard Reid, the “shoe bomber,” or of deportable foreign suspects who may freely regroup and plan attacks on the United Kingdom once back in their own country, seems highly inconsistent.

The disproportionate means selected by the United Kingdom provide an independent ground for a judicial finding that the challenged detentions were illegitimate. As these means bordered on the irrational, alternative means that treated all those suspected of having links to international terrorism the same would not only have been more equitable, but also in all likelihood more efficient and, hence, far more

257 See supra text accompanying note 31.
258 See \(A(FC)\), 2 A.C. at 136-37.
259 Id. at 137.
260 Id. at 130-31. Moreover, that concern is not altered by the July 2005 attacks. See Ralph Frammolino, By Foot or by Bus, Londoners “Get On With It”, L.A. TIMES, July 23, 2005, at A9 (reporting on the resilience of London commuters after the attacks).
261 \(A(FC)\), 2 A.C. at 104-05.
262 Id. at 142.
rational.\textsuperscript{263} Moreover, focus on the means rather than on the decision to derogate arguably has the advantage of confining the judicial role to what is clearly a matter of law as opposed to something that is above all a matter of politics.\textsuperscript{264} The Law Lords who thought it inappropriate for them to review the political decision to derogate, but entirely legitimate for them to review the proportionality of means, thus took a position very similar to that of the Israeli Supreme Court in the cases discussed above.\textsuperscript{265} For the Israeli Court, the challenged military actions themselves were not subject to judicial review, but their impact on Palestinian civilians was.

In the \textit{A(FC)} case, because the means were hardly rational, the question of means could be kept clearly separate from that of derogation. But what about a case in which the means are rational and efficient though clearly discriminatory? In that situation, it would seem that the British judiciary no more that the Israeli Court could neatly or cogently sort out questions of law from questions of politics in the course of proportionality review. Nevertheless, in the last analysis, it seems less objectionable for judges to review the proportionality of a political decision to derogate consistent with standards furnished by the ECHR than for judges to review military action deployed in the course of active engagement with the enemy.

There is an additional reason why judicial review of proportionality of means with respect to equality is particularly important in the context of the current war on terror. That war arises out of an ideological conflict pitting proponents of certain forms of radical Islamic fundamentalism against the values that prevail in Western democracies. Under these circumstances, combating terrorism by singling out Muslims, or foreigners who for the most part are Muslims, seems particularly objectionable in as much as it encourages casting Muslims as scapegoats to appease excessive fears stemming from an overly susceptible public imagination. Moreover, not only would such scapegoating unfairly trample on the fundamental liberties of politically powerless minorities, but it may well also leave most of the citizenry indifferent to the injustices involved.\textsuperscript{266} In contrast, if the political branches were confined to imposing non-discriminatory

\textsuperscript{263} Detaining all terrorist suspects would overcome objections on equality grounds, but still leave the policy vulnerable to challenges on liberty grounds. As Lord Hoffman emphasized, ‘‘suspicion of being a supporter [of international terrorism] is one thing and proof of wrongdoing is another.’’ \textit{Id.} at 129-30. Indeed, the policy would be grossly overinclusive and hence disproportionately restrictive of liberty if everyone who expressed sympathy for Al Qaeda in a discussion overheard in a pub was subject to indefinite detention. \textit{Id.}

\textsuperscript{264} This view was that of Lord Bingham of Cornhill. \textit{See id.} at 102.

\textsuperscript{265} \textit{See supra} Part III.

\textsuperscript{266} \textit{See} Sunstein, \textit{supra} note 66.
restrictions on liberty, it would become much more likely that significant portions of the citizenry would politically mobilize against them if they seemed excessive or unfair.

Finally, in many cases involving tradeoffs between increased security and decreased liberty in relation to the war on terror, cogent and principled judicial balancing of resulting benefits and burdens may be difficult to achieve. In A(FC), however, because the means chosen to increase security were so disproportionate, and because the political branches’ conclusion that the life of the nation was in peril was so tenuous, the situation was quite different. Indeed, it seemed beyond reasonable dispute that the increases in security likely to be achieved by detention of non-deportable foreign terrorism suspects were far outweighed by the burdens imposed on fundamental ECHR rights, which apply to foreigners and nationals alike. In sum, this demonstrates that, in some cases at least, straightforward judicial balancing of liberty and security is both feasible and desirable.

As seen thus far, American balancing appears too narrow as the Court’s Hamdi plurality’s repudiation of executive unilateralism did not result in an adequate protection of liberty. By the same token, Israeli balancing seems too broad, for although in form it professes to leave a zone of exclusivity to the executive, in practice virtually no military action or policy remains beyond the reach of judicial balancing. Finally, it is difficult to gauge the scope of British balancing, given the blatant disproportionality of the means used to implement the derogation. Moreover, the full import of the contrast between the respective positions of the three courts cannot be grasped without reference to certain contextual factors that had an important bearing on how each of them dealt with the cases before it.

An important difference between the three jurisdictions relates to how they respectively chose to place issues arising out of the war on
terror within one of the three legal paradigms identified above.\textsuperscript{273} The justices in Hamdi were divided into four different legal positions ranging from the paradigm of war to that of criminal law. The position of the four justices in the plurality is best viewed as almost fitting completely within the paradigm of the law of (conventional) war. Indeed, the plurality agreed to the legitimacy of the detention of enemy combatants for security reasons for the duration of the hostilities. Its only concession to the unconventional nature of the war on terror was that it recognized that, given the unusual nature of the enemy and the extraordinary difficulty in pinpointing the end of such a war, risks of mistaken detention and of the detentions remaining unnoticed were much greater than in the context of ordinary war. Accordingly, the plurality concluded, detainees ought to have a right to challenge their status. But because the plurality was essentially working from a paradigm of war, it granted procedural due process rights adequate in the context of alleged deprivations of liberty or property in the realm of civil, not criminal law. For anyone who regards Hamdi’s two-year detention, which could have plausibly extended for decades, as better fitting within a criminal law paradigm, however, the procedural rights carved out by the plurality are bound to seem inadequate and disproportionate.

The plurality in Hamdi operated from within a slightly modified war paradigm, but only five of the nine justices consistently approached all three American cases from the standpoint of a war paradigm. The fifth justice in this group, Justice Thomas, actually dealt with these cases strictly from the standpoint of the paradigm of (conventional) war, deferring to the President as if Hamdi, Padilla, and the foreign citizens from friendly nations detained in Guantanamo were no different than a group of German prisoners of war captured in the course of active combat against American troops in the North African or European theaters of war during World War II.\textsuperscript{274}

The four remaining justices in Hamdi did not find the procedural rights endorsed by the plurality to be sufficient. Two of these, Justices Scalia and Stevens, approached the case squarely from the standpoint of the criminal law paradigm\textsuperscript{275} and would have ordered Hamdi released

\textsuperscript{273} See supra Part I.B.

\textsuperscript{274} Justice Thomas dissented in Hamdi because he would not have granted Hamdi the procedural rights that the plurality opined he was entitled to. See Hamdi v. Rumsfeld, 542 U.S. 507, 579-81 (2004) (Thomas, J., dissenting).

\textsuperscript{275} These justices were prepared to allow for a limited period within which the Government could sort out the status of detainees such as Hamdi. See id. at 554 (Scalia, J., dissenting). Beyond that period—and two years was well beyond—the Government would either have to press criminal charges or release the detainees. See supra note 156 and accompanying text.
absent the Government filing criminal charges against him. Justices Souter and Ginsburg would also have had Hamdi released, although not strictly coming from a criminal law paradigm. Because they found Hamdi’s detention wanting due to failings under the process-based institutional approach and under pertinent international law standards applicable to prisoners of war, they stood at least for the negative proposition that Hamdi’s detention—whether or not he satisfied the Government’s definition of “enemy combatant”—could not be fit within the war paradigm. What these two justices left open, however, is whether, had the institutional process-based requirements been met, they would have still insisted on compliance with the procedural rights called for in criminal cases.

Unlike the American Court, which seems clearly caught between two paradigms, the Israeli Court perceives itself as firmly grounded in a war paradigm, and a very conventional one for that matter. The Israeli Court was quite explicit that it was applying the law of war and of belligerent occupation. What is surprising under these circumstances is how little deference the Israeli Court has actually given to the military. Moreover, although the Court specified that the challenged military actions involved in the cases discussed above were directed against Palestinian terrorism, nothing specific to the war on terror seems to figure in either the paradigm explicitly embraced by the Court or in its actual decisions.

There is an incongruity between the Israeli Court’s unanimous embrace of the war paradigm and its seeming under-weighing of the military security objectives at stake in its cases. Whereas these cases concern the rights and interests of Palestinian civilians, the Court also stressed that, both in the West Bank and Gaza, terrorists often mingle with the civilian population, thus posing a constant hidden and unpredictable danger. Under these circumstances, the under-weighing of, or lack of sufficient deference to, military security objectives is puzzling unless one hypothesizes that alongside or underneath the war paradigm lies a different paradigm.

This second paradigm is the police power law paradigm. The occupying Israeli military administration is indeed the guarantor of

276 See Hamdi, 542 U.S. at 554 (Scalia, J., dissenting).
277 See supra note 163 and accompanying text.
278 See Hamdi, 542 U.S. at 549-50 (Souter, J., concurring in part and dissenting in part).
279 See supra note 193 and accompanying text.
280 See supra Part III.
281 See supra Part III.
282 See supra note 233 and accompanying text. The very purpose of the separation barrier was to contain terrorism by separating the Palestinian population in the midst of which terrorists were easily concealed from the Israeli population that they targeted. Id.
public order and rights in those portions of the occupied territories that it controls or substantially affects. From the standpoint of this second paradigm, moreover, the IDF is exercising what amounts to police powers vis-à-vis the Palestinian civilians affected by its activities in the West Bank and Gaza. Just as any state bears responsibility for maintaining order and providing essential services to its citizenry, the IDF as military occupier had similar obligations toward Palestinian civilians over whose lives it exercised substantial control. This police power obligation of the IDF is most clearly manifest with respect to the situation in Gaza that gave rise to the Physicians for Human Rights case. Indeed, as emphasized by the Court in that case, the IDF had a positive obligation toward the Palestinian civilians that included providing or guaranteeing essential services, such as food, water, and electricity.283 On the other hand, with respect to the Palestinian civilians directly affected by the separation barrier in the West Bank, the IDF had at least a negative obligation not to disrupt the public order or public services more than absolutely necessary.284

Viewed from the standpoint of the police power law paradigm, most of the claims of the Palestinian civilians in the above cases 285 ought to have been treated by the Israeli Court as requiring a balancing between what are essentially IDF police power claims286 and what substantially amount to Palestinian civilians’ constitutional rights claims. Consistent with this requirement of balancing, the Israeli Court would be in the same position as any court confronting constitutional cases presenting a conflict between the exercise of state police powers and the vindication of fundamental individual rights.

In the end, the seeming incongruity of the Israeli decisions can be traced back to the Court’s concurrent reliance on two separate paradigms. From the standpoint of Israel’s interests and Israeli administrative law, the Court was operating under a war paradigm, and, hence, its deferential declarations regarding discretion in the pursuit of military objectives.287 From the standpoint of the international law of belligerent occupation and of its institutional role as guarantor of the Palestinian population’s fundamental rights as recognized under

283 See Physicians For Human Rights, supra note 1, paras. 11-20.
284 See discussion of Beit Sourik case supra Part III.
285 The claims arising directly out of military combat, such as those pertaining to evacuation of the wounded in the Physicians for Human Rights cases, supra note 1, paras. 21-23, do not fit within the police power law paradigm.
286 In a democracy, police powers are used to foster collective goals that are majoritarian in origin. In an occupation, in contrast, the collective goals involved are not majoritarian, but instead imposed by international law. Nevertheless, in terms of the content of these goals and of their clashes with individual rights, the two situations are largely equivalent and hence the police power law paradigm can extend to both.
287 See supra note 182 and accompanying text.
applicable humanitarian standards, on the other hand, the Court placed itself within a police power law paradigm. Moreover, effectively, given the little deference it accorded to military discretion, the Court remained principally within the police power law paradigm.

The Law Lords in *A(FC)*, much like the American Court, seem to straddle between the law of war paradigm and the criminal law paradigm. Those Law Lords who agreed that the derogation from ECHR rights was warranted because the life of the United Kingdom was under threat would undoubtedly have agreed to indefinite detention of suspected terrorists were it not for the discriminatory manner in which it was being implemented. On the other hand, as noted above, the detainees could challenge their deprivations of liberty before administrative bodies and courts, though, unlike criminal suspects, they were not entitled to disclosure of information used by the government to brand them as suspected terrorists.288

Unlike in the American cases where the war paradigm may have been misused, but where there was an actual foreign war being fought in Afghanistan, in the United Kingdom the war paradigm appeared to have emerged out of context. The suspected terrorists detained in the United Kingdom had no known connection to any conventional war; only a supposed connection to a loose and ill-defined network of terrorists. Moreover, the war paradigm, as we have seen, is usually only appropriate in times of crisis.289 In contrast, the whole question of the legitimacy of derogation, which figures prominently in *A(FC)*, puts into question whether the United Kingdom’s war on terror is being fought under conditions of crisis. Assuming, consistent with some views among the Law Lords, that it is not being fought under such conditions, is the war paradigm still appropriate? As will be argued below,290 so long as the war on terror is fought under conditions of stress rather than of crisis, neither the war paradigm nor the criminal law one is likely to be adequate.

The task of determining whether, and to what extent, judicial balancing is appropriate in the context of the war on terror is certainly complicated by the comparative insights gleaned thus far. What ought to be balanced, and what weight to ascribe to the particular interests to be balanced, depends in part on whether one embraces a war, criminal law, or police power law paradigm. It also depends in part on whether one deems that the war on terror creates conditions of crisis or conditions of stress or even (less likely though not impossibly) ordinary conditions.

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288 See *supra* note 244 and accompanying text.
289 See *supra* Part I.B.
290 See *infra* Part V.
The first question that consideration of balancing in relation to the war on terror poses is whether it would be optimal to rely exclusively on extra-judicial balancing. The advantage of doing so is that it allows for bodies with greater expertise and political accountability to weigh competing interests rather than relying on courts to do so. In cases of extra-judicial balancing, such as those that arise under the constitutional guarantees afforded criminal defendants under the American Constitution, courts are limited to categorical determinations. Arguably, categorical adjudication is preferable to judicial balancing, because it presumably allows for less judicial discretion or judicial politics.291

In spite of the possible benefits of extra-judicial balancing or of those of categorical judicial determinations, the preceding analysis clearly counsels against doing away with judicial balancing. For the reasons already alluded to in the analysis of the Hamdi case,292 executive balancing is likely to be skewed owing to that branch’s special responsibility for security.293 Furthermore, the institutional process-based approach requiring both executive and legislative action provides greater safeguards than the executive branch’s acting alone. As evinced by the U.S. Congress’s broad delegation of power after 9/11, by the sweeping powers it granted the Executive by enacting the USA PATRIOT Act,294 and by the equally sweeping British legislation, however, the latter approach and the additional balancing it promotes do not do away with the need for judicial protection of constitutional rights or their equivalents.295

291 This is, in fact, a debatable point. Certain adjudications seem to bear this point out, but not others. For example, a law that provides that no vehicles are allowed in public parks certainly makes for a categorical determination that motorcycles are excluded from parks. But what about motorized wheelchairs? See H.L.A. HART, THE CONCEPT OF LAW 125 (1961). A judge may take up that issue categorically, but it may be more fruitful if she were to appeal to balancing. Assuming the purpose of the law is quiet enjoyment of the parks by the municipality’s residents, is it not better to decide the issue raised by motorized wheelchairs through a balancing process, comparing the cost of excluding disabled persons who could not otherwise use the park against the benefit of not having the extra noise or movement that motorized wheelchairs would inevitably produce? As this Article argues below, that limitation to categorical judicial action is neither desirable nor properly feasible in the context of the war on terror. See infra text accompany note 307. Thus, it is not necessary to pursue this subject any further.

292 See supra Part II.

293 The same argument applies, perhaps even more strongly, with respect to the administrative power represented by the IDF in the Israeli cases.


295 As parliamentary democracies, rather than presidential ones like the United States, Israel and the United Kingdom have less of a separation between legislative and executive power than does the United States. Since this Article argues than even the arguably stronger separation prevalent in the United States does not suffice to adequately protect rights in the war on terror, separation of powers differences between the three countries can be left aside for present
To better appreciate this last point, it may be useful to look at the alternative offered by a categorical approach such as that found in Justice Scalia’s opinion in *Hamdi*. That approach would not have been appropriate for the Israeli cases dealing with substantive rights of civilians. Indeed, a categorical approach to substantive rights provides too blunt a tool to allow for as much enjoyment of such rights as compatible with the state’s realization of its vital security needs. Furthermore, even under the assumption that a categorical approach is unequivocally superior with respect to the procedural rights of criminal defendants, Justice Scalia’s approach seems too rigid in the context of the war on terror. Because Hamdi’s plight was similar to that of a criminal suspect, and because the plurality in *Hamdi* gave too much weight to the government’s security interests, a categorical approach may seem to have been superior in the context of that case. But the numerous other kinds of situations in which liberty and security are bound to clash in the war on terror will inevitably be varied and different. Accordingly, the more flexible balancing approach would be better. For example, even under the circumstances surrounding Padilla’s detention, and assuming that after two years of detention proper judicial balancing would grant him essentially the same rights as those of a criminal defendant, there may still be a need for flexibility. Thus, if the Government arrested Padilla on the basis of intelligence it could not reveal, it might be appropriate to allow it to introduce hearsay testimony or present secret evidence in camera allowing for review and challenge by the judge but not by the detainee’s counsel.

Balancing affords greater flexibility, but is it reliable? Can it be made to conform to standards? Or, does balancing in the end rest solely on the unfettered discretion of judges? To circumscribe this question more narrowly, assuming that balancing can work satisfactorily in areas other than the war on terror, are there special problems or issues pertaining to that latter area?

296 See supra p. 2120.

297 This assumption is, of course, highly debatable given the many problems identified with respect to balancing. See Aleinikoff, supra note 41. Even under the best circumstances, using judicial balancing is unlikely to lead to a single right result for every case. However, although the result produced by means of balancing may be indeterminate for any complex or controversial issue, so too can be the result reached through a categorical or any other interpretive approach. For a theoretical discussion of the problems of indeterminacy in legal interpretation, see MICHEL ROSENFIELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS, at ch. 1 (1998). For present purposes, suffice it to note that the balancing approach in the United States, such as review of racial classifications under a strict scrutiny test, see supra note 49, and the proportionality test used in many constitutional democracies elsewhere, can lead to fairly consistent, reasonable and fair results. It is this potential of balancing under ordinary circumstances that will serve here as a baseline.
In all genuine war-on-terror conflicts between security and fundamental rights, both the government objectives involved and the rights at stake are bound to be of great importance. Consistent with this fact, the respect in which these terms ought to be weighed against one another can be satisfied by application of the derogation standards of Article 15 of the ECHR in force in the United Kingdom, the American strict scrutiny test, the Israeli tripartite proportionality test, or something equivalent.

The weighing operation itself differs according to whether one operates under the United Kingdom standard, the American strict scrutiny test, or the Israeli proportionality test. Under the ECHR Article 15 standard in force in the United Kingdom, and under American strict scrutiny, once the relevant government objective is judicially or otherwise decreed as being sufficiently weighty—i.e., as meeting a threat to the life of the nation in the United Kingdom, or as being “compelling” in the United States—that objective is not subjected to any further balancing or scrutiny. The focus then shifts to the governmental means deployed to achieve the objective in question and the “weighing” is confined to such means. For example, assume Hamdi had claimed that it violated his substantive liberty rights to be detained as an enemy combatant, rather than challenging his designation as such. In that case, if the Government’s claims that neutralizing those fighting the United States on the side of the terrorists and preventing them from rejoining the enemy before the end of hostilities were deemed compelling, then the designation of enemy combatants and preventing them from returning to battle would no longer be open for discussion or further balancing. What would remain under the strict scrutiny test would be determining whether means less drastic than imprisonment—e.g., wearing an electronic device allowing constant Government monitoring—would be equally likely to lead to satisfaction of the desired government objective.

The third subtest of the Israeli proportionality test, on the other hand, does provide for further discussion and balancing of government

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298 Formally as we have seen, the question is one of “fit” between means and ends. See supra Part I.C. Substantively, however, “fit” means that pursuit of a compelling state interest only outweighs a conflicting right in so far as the injury to that right caused by such pursuit is no greater than absolutely necessary.

299 Compare Korematsu v. United States, 323 U.S. 214 (1944), where the court applied strict scrutiny and found internment of Japanese-Americans in detention camps during World War II constitutional as it accepted the claim of the American military that the danger of a Japanese invasion of the U.S. West Coast would be greatly enhanced by availability of a potential fifth column living throughout the West Coast. That claim, though eventually proven false, see Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), remained unquestioned by the Korematsu majority in 1944.
objectives that seem “compelling” by American standards. Thus, in 
Beit Sourik, the Israeli Court accepted the “compelling” need for a separation barrier to stem the flow of terrorist attacks against Israeli civilians. Yet, in applying the third subtest of the Israeli proportionality test, the Court compared the particular separation barrier pursued by the IDF in the good faith belief that it would maximize security to a proposed alternative that may have led to somewhat lessened security but would have significantly reduced the injuries to the rights and interests of affected Palestinian civilians. And on the basis of that comparison, the Court held the IDF barrier to be disproportionate. In short, unlike in the United Kingdom and the United States, where state objectives are weighed against an objective standard, in Israel, similar state objectives are weighed against one another to determine which among them is most proportionate. The Israeli proportionality test makes for significantly more intrusive judicial intervention into policy, including military policy, than does the American strict scrutiny test or the British proportionality standard. This difference is important and it must be kept in mind while considering whether balancing is appropriate or desirable in cases involving military affairs. More specifically, the question that needs to be addressed in relation to this latter difference between the American and the Israeli approach—which may be conveniently referred to as a difference between “balancing means” and “balancing ends”—is whether the Israeli approach goes too far, and if it does, whether that is due to lack of judicial expertise in weighing military policy or to the conclusion that such weighing is impolitic and potentially damaging to the judiciary’s institutional interests.

300 Whereas the Israeli proportionality test differs from the American strict scrutiny test, in both countries protecting the citizenry in the face of terror is among the weightiest government objectives. See discussion supra Part I.D.

301 See supra note 70.

302 See supra note 190 and accompanying text.

303 Since the nexus between means and ends is a relational one, the IDF barrier and the Council proposed barrier in Beit Sourik may be regarded as means to the more abstract end of the country’s security in general rather than as ends in themselves as two contending concrete embodiments of a particular type of security. Ultimately, the level of abstraction at which a given government objective should be set ought to be determined by practical considerations. For present purposes, suffice it to note that even if the separation barrier is taken as the means, and the country’s security in general as the end, there would still be some balancing with respect to ends. This follows from the proportionality test’s third subtest, which leads to the conclusion that a somewhat less secure but significantly less injurious barrier than the IDF’s would be more proportionate.

304 If the British standard is interpreted as requiring judicial review of a political determination that the nation is in a state of crisis, it would more closely approximate the Israeli standard than the American.
There are strong arguments against courts weighing ends in such a way that squarely thrusts them into policy-making—a power constitutions generally grant to legislative and administrative bodies. Assuming, nonetheless, that such balancing is institutionalized in a particular country, is there any reason to single out military policy for exemption from judicial balancing?

In terms of lack of judicial expertise, military policy seems no different than environmental, economic, or police policy aimed to securing public order. Moreover, whether or not balancing of ends is considered appropriate, it is difficult to see how courts could avoid balancing means in the context of military affairs. For example, suppose that once the separation barrier is completed it were to cut off two West Bank villages from one another but would allow for passage through doors from one village to the other. Suppose further that the IDF refuses all passage to Palestinians for reasons of military security. In a putative suit by Palestinians who live in one of the villages and want to visit relatives in the other, any court using a standard akin to the American strict scrutiny test would have to determine if the total ban is necessary in order to accomplish the IDF’s military security objectives. And such determination would require a factual inquiry into whether any easing of the IDF’s total ban on passage would be possible without reducing the level of security provided by the total ban.

The relevant difference between military policy and other policies such as environmental policy, for example, is that the former requires much more secrecy than the latter, and that military issues may have a different kind of political sensitivity than environmental or most other non-military issues. Indeed, military affairs tend to have foreign as well as domestic implications, and a serious impact on national security and diplomacy.

From the standpoint of inter-institutional balancing, therefore, it is preferable to avoid or greatly limit judicial balancing of ends in general, and especially in the realm of military policy. Moreover, although balancing of means generally is crucial from an inter-institutional standpoint, certain precautionary limitations with little substantial effect on affected fundamental rights should be permissible in the context of military affairs. For example, greater tolerance of hearsay evidence, or recourse to in camera review to preserve confidentiality of

305 See, e.g., U.S. CONST. arts. I (Legislative powers granted to Congress) and II (Executive powers delegated to President); 1958 French Constitution, art. 34 (Parliament makes laws); German Basic Law, arts. 70-78 (Parliament and Government make federal law).

306 See discussion supra p. 2112 (indicating that a purely process-based institutional approach would insufficiently protect fundamental rights).
sensitive military information, ought to be allowed even if that would slightly weaken actual protection of fundamental rights.

In the last analysis, there ought to be no automatic ban on judicial balancing of ends. In some cases, as the discussion of the $A(FC)$ indicated, judicial balancing of ends may be both clearly feasible and desirable.\(^{307}\) Even in the military context, there may be rare cases where no other institutional balancing of security and rights takes place at all and where, accordingly, fundamental rights would be left completely unprotected absent judicial balancing. In the remaining cases, however, judicial balancing of ends should be avoided and balancing of means pursued with appropriate adjustments to avoid compromising military security.

VI. **Concluding Observations: Balancing and Terror**

Though judicial balancing should not be eliminated in cases arising from the war on terror, its shortcomings, which have emerged in the course of the preceding analysis, call for a determination of whether it is possible to structure and guide such balancing so as to minimize unsatisfactory outcomes. Should that be impossible, use of judicial balancing would still be preferable to its abandonment, but its benefits would remain modest and unpredictable.

To explore how judicial balancing may be optimized, it is useful to start from the six cases examined above, to postulate what would have been the most desirable outcome for each of them and to determine what institutional mechanisms, contextual references, and judicial techniques would have been instrumental in stirring the process toward the desired outcome. The desirable outcome in *Hamdi* and *Padilla* seems obvious and has been mentioned extensively in the preceding discussion: both Hamdi and Padilla should have been granted the rights that are substantively equivalent to the due process rights accorded criminal defendants, with flexibility concerning the means of effectuating such rights to accommodate military and intelligence concerns relating to the war on terror.\(^{308}\) With respect to particulars, the circumstances surrounding Hamdi’s detention are different from those pertaining to Padilla. The Government’s case against Hamdi seemed weak (otherwise, he could have been prosecuted like Lindh)\(^{309}\) and his

\(^{307}\) See supra Part IV.

\(^{308}\) See supra Part II.

\(^{309}\) See supra note 160.
release would and did pose little danger. With respect to Padilla, on
the other hand, it is not clear whether the Government never had
sufficient evidence to prosecute him, had sufficient evidence but could
not prosecute him without revealing sensitive intelligence, or whether,
as it now appears, it had a weak case against him much like it did
against Hamdi. This could be clarified in a hearing in which the
Government would have the burden of proof, but where sensitive
information could be, if necessary, only disclosed to the judge, without
giving access to it to Padilla or his counsel. This latter possibility
amounts to a departure in substance, and not only form, from the due
process rights of criminal defendants. This departure would be
proportionate, however, as it would strike a balance between the
Government’s security needs and Padilla’s liberty interests. Involving
the judge in the determination of the relevant contested issues would
secure the institutional benefit of a judicial decision though without the
usual added protections of the adversarial process, which makes for
confrontation by the detainee’s counsel. Moreover, the difference in
treatment between Padilla and Hamdi advanced here is also justified in
relation to the gravity of the respective threats that these two individuals
were accused of posing against the United States. Hamdi was, at worst,
yet one more soldier in a ground war in Afghanistan; Padilla, in
contrast, was once alleged to be a terrorist plotting a devastating attack
that could claim hundreds of thousands of lives and destroy the world’s
most important financial center.

Because Rasul, like Padilla, was disposed of on threshold grounds,
the fate of the Guantanamo detainees was not examined in any detail by
the U.S. Supreme Court. Since the Court’s decision, some Guantanamo
detainees have been charged, and trials before military commissions
have started; some detainees have been released; and some

310 It is noteworthy in this respect that shortly after the Supreme Court decision, the
Government began negotiating for Hamdi’s release rather than undertaking further litigation. See
13, 2004, at A10. Shortly thereafter, Hamdi was returned to Saudi Arabia. See supra note 160.
311 If this is indeed the most proportionate outcome under the relevant circumstances, it
illustrates why Justice Scalia’s categorical approach expressed in Hamdi is too blunt a tool in the
war on terror.
312 Imagining the devastation caused by a dirty bomb is an unspeakable horror. A proper
judicial assessment in a case such as Padilla’s would have to gauge the probability of such a
bomb being successfully detonated in a city like New York or Chicago. If that probability turned
out to be infinitesimally small, a judge should not skew balancing due to virtually purely
imaginary horrors. See infra notes 333-334 and accompanying text for further discussion of the
role of imagination in the war on terror.
313 See Sebastiaan Gottlieb, First Trial Starts at Guantanamo, Aug. 24, 2004, RENSE.COM,
314 See, e.g., Gitmo Detainees Return to France, CNN.COM, July 27, 2004,
detainees were ruled enemy combatants in a review process organized by the Pentagon in response to the Court’s decision.  

A suit challenging the above mentioned military commissions is now pending before the Court. In terms of an optimal result, the Guantanamo detainees should be granted procedural rights within the spectrum lying between the rights recommended for Hamdi and those recommended for Padilla.

Beyond these procedural rights, all three cases raise important substantive rights issues that for the most part were not addressed by the Court. The plurality in *Hamdi* did hold that the Executive Branch may detain enemy combatants until the end of hostilities, thus treating them like prisoners of war under the Geneva Conventions. This holding, however, which has the support of a bare majority of the justices, raises more questions than it answers. Leaving aside relevant issues of international law that are beyond the scope of this Article, while the *Hamdi* plurality’s conception of an “enemy combatant” is roughly equivalent to the conception of a “prisoner of war” under the Geneva Conventions, the Pentagon has taken the position that enemy combatants may be held indefinitely without charges.

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316 See Hamdan v. Rumsfeld, 126 S.Ct. 622 (2005) (mem.) (granting certiorari on whether the commissions are statutorily authorized by statute or by the President’s inherent powers and whether petitioner may judicially enforce his rights under the Geneva Conventions via habeas corpus petition). A panel for the U.S. Court of Appeals for the D.C. Circuit had held in July 2005 that the commissions were authorized by Congress’s Authorization for Use of Military Force, that the Geneva Conventions conferred no private enforcement right of action, and that, notwithstanding, the commissions did not violate any rights under the Geneva Conventions. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). In December 2005, Congress passed the Detainee Treatment Act of 2005, which vests exclusive authority to hear habeas appeals from Guantanamo detainees in the U.S. Court of Appeals for the D.C. Circuit and the Supreme Court. 28 U.S.C.S. § 2241(e) (LexisNexis 2005). The Bush Administration has since moved to dismiss detainee challenges already filed before passage of that act, including Hamdan’s, for want of subject-matter jurisdiction. See Dan Eggen & Josh White, U.S. Seeks to Avoid Detainee Ruling, WASH. POST, Jan. 13, 2006, at A07. In a press release, Senator Carl Levin, one of the co-authors of the legislation, has disputed the administration’s attempts to apply it retroactively to pending cases. Press Release, Sen. Carl Levin, Levin Statement on Administration Announcement it Will Seek Dismissal of Guantanamo Lawsuits (Jan. 4, 2006), available at http://www.senate.gov/~levin/newsroom/release.cfm?id=250235 (“Congress specifically considered and rejected language that would have applied the Graham-Levin amendment retroactively to pending cases.”)
317 See Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).
318 The fifth justice in support is Justice Thomas, who endorsed the Administration’s position on the subject. See supra note 106.
319 See Detainees Ruled Enemy Combatants, supra note 315. Faced by challenges from human rights organizations, Defense Secretary Rumsfeld announced in 2004 that the case of every detainee in Guantanamo will be reviewed once a year to determine if he is a security threat to the United States. See id.
Ideally, the category of “enemy combatant” ought to be eliminated or greatly limited in scope. This category fits well within the paradigm of war so long as “enemy combatant” is roughly synonymous with “prisoner of war.” But the war on terror, as we have seen and will discuss further below, cannot be encapsulated within the war paradigm. The war on terror is, at least in part, like the war on crime, a constant struggle with varying degrees of intensity, but without any final outcome. To the extent that the war on terror fits within the criminal law paradigm, the potential lifelong detention of an enemy combatant without the filing of any charges, let alone conviction of a crime, seems grossly disproportionate and easily prone to abuse. For that reason, for some of those detained as enemy combatants, such as Padilla, who have not been detained at or near a theater of war, the label of enemy combatant ought to be dropped altogether. Because the war on terror is not merely a part of the war on crime, someone like Padilla should be subject to detention without charges for a reasonably brief period, to allow the Government to interrogate him and to neutralize him while it tries to round up confederates, dismantle cells or successfully thwart an ongoing terrorist operation. After this initial period, the detainee should be criminally charged or released.

For someone like Hamdi or many of the Guantanamo prisoners who were detained at or near a theater of war, on the other hand, the status of enemy combatant may be adequate so long as it remains coextensive with that of prisoners of war. Also, to prevent abuses based on the linkage of a war that had the trappings of a conventional war, such as the war in Afghanistan with war on terror, any detainee labeled an enemy combatant should be either released or charged with a crime upon cessation of the hostilities conducted in the manner of a conventional war.

Turning to the Israeli cases, it seems clear that their principal shortcoming was the Court’s failure to give adequate weight to military security determinations. It is difficult, however, to ascertain what would have been the optimal result in these cases. In Beit Sourik, if the security differences between the IDF’s separation fence and that of the Council were indeed “minute” as the Court found, then the actual result may come close to the optimal one. What remains problematic then, is the way the Court reached that result. Although the Court professed to give deference to military expertise, it in substance engaged in de novo

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320 See infra pp. 2153-56.
321 As terrorism is likely to take unanticipated forms, judges should be empowered to extend the initial period of detention without charges upon the government proving it has a compelling need for such extension.
322 See supra Part III.
balancing. The question this raises, therefore, is whether the Court could have reached the same result by relying on better judicial means.

In Physicians for Human Rights it is also difficult to assess what would have been the optimal result. It may have also been the one reached by the Court, though if that led to a significant increase in deaths and injuries among Israeli soldiers, then it would be an undesirable result. Indeed, balancing security and liberty in military operations involving issues of life and death should be left to the military so long as it undertakes its responsibilities legally, competently, and in good faith. Moreover, as the Court itself noted, it was reaching the “outer limits of the judiciary,” by intervening in day-to-day military operations as they were unfolding. One could argue that the Court actually went beyond those limits as it acted more as a mediator between the IDF and Palestinian civilians than as an adjudicator. This raised the question of whether it is possible to find a more suitable alternative that would preserve the benefits of oversight over the military, where appropriate, without the judiciary’s unduly trampling on military operations or becoming involved in day-to-day decision-making.

As already emphasized, the result reached by the Law Lords in A(FC) is clearly the right one. Accordingly, it would be impossible to improve on the actual outcome of the case. On the other hand, the road to that outcome is confusing due to the possibility of invalidation of the challenged detention scheme on two alternative grounds: improper derogation or disproportionate means. This choice between alternatives not only allowed for murky reasoning regarding whether the United Kingdom was in a state of crisis, but also permitted obscuring the important issue of whether the judiciary should defer to the political branches in the determination of whether a state of crisis exists.

Optimally, derogation decisions should be judicially reviewable in terms of the distinction between a state of crisis and conditions of stress. As we have seen, in relation to A(FC), criteria for such review existed, and even factoring in a presumption of validity for a political branch decision to derogate, the British war on terror did not create crisis

323 See supra note 183 and accompanying text.

324 The Court did state that it deferred to the military so long as soldiers’ lives were in danger. See supra note 229 and accompanying text. In view of the ongoing terrorist threat with terrorists hiding within civilian crowds, see supra note 233 and accompanying text, it is arguable that it is impossible to separate parts of the Gaza military operation involved that pose risks to soldiers’ lives from other parts that do not.

325 See supra note 216.

326 One possibility would be to entrust this mediator responsibility to a non-judiciary body supervised by the courts.

327 See supra Part IV.

328 See supra note 249 and accompanying text.
It did create conditions of stress, which though not warranting wholesale derogation from fundamental rights, may nonetheless justify discrete limitations on particular rights that may be somewhat more extensive than those found permissible in ordinary times.

All the problems discussed thus far arise in substantial part because the legal issues that emerge from the war on terror do not fit neatly within any of the three existing legal paradigms discussed throughout. Moreover, all the suggested optimal results presented above involve some shift in paradigm. Consistent with this, it seems appropriate to adopt a new paradigm, the “war-on-terror law paradigm.” This new paradigm incorporates aspects of the three other paradigms but recasts the relationships among them. The war-on-terror law paradigm also accounts for the tensions that pit conditions of stress against conditions of crisis.

The war-on-terror law paradigm is conceived as a dynamic one, evolving and adapting to the needs and problems of the war on terror. Its contours are defined by the contextual shifts produced by contemporary terrorism and by the reactions mounted against it. The war on terror is in many ways different from ordinary war. It is different in terms of the enemy it confronts, of how it is fought, of the dangers it poses, and of its duration. Whereas conventional wars are generally limited in duration, the war on terror must be conceived as a war without end. This, in turn, should have a strong bearing on how extraordinary powers are conceived and institutionalized in the context of the war on terror. In the context of a conventional war of limited duration, emergency powers can be conceived and implemented as temporary extraordinary measures. In the war on terror extraordinary measures must be conceived as permanent, and as such require a different and more careful balancing of security and rights—one that is tailored to the concerns of times of stress rather than to the exigencies of times of crisis. Had this difference been taken into account, it might definitely have caused the result in *Hamdi* to come closer to the optimal result described above.

Various references have been made above to the important role that imagination plays in shaping our conception of terrorism and of the nature and likelihood of the threats it poses for society. It was also noted that imagination plays a larger part in shaping American and
British conceptions of terror than it does in shaping Israeli ones. 333 Whereas it is important not to lack imagination sufficient to prompt adequate preparation to defend and protect against terrorism, exaggerated and unlimited imagination can lead to skewed balancing and undue suppression of civil liberties.

By its very nature, terrorism is intended to cause fear, panic and insecurity to a degree that is often disproportionate to the damage inflicted or the real danger posed. 334 To be sure, some of the imaginable acts of terrorism, such as dirty bombs or biological or chemical contamination, could cause mass disasters. Others, such as suicide bombings or truck-bombing incidents, may cause only dozens of casualties, certainly an unacceptable toll and nothing to be taken lightly, but something much smaller than the casualties suffered in conventional wars. 335 It is important for the institutions of government, including the judiciary, not to be swayed by the most frightening imaginary scenarios without first inquiring into the feasibility or probability of particular kinds of acts of terror. 336 Otherwise, both inter-institutional and judicial balancing will inevitably become skewed.

The Israeli cases underscore the importance of including elements of the police power law paradigm in the war-on-terror law paradigm. Whereas it is true that the Israeli situation is rather unique given its occupation of Palestinian territory, to the extent that the problems raised by the separation barrier and aspects of the military occupation in Gaza can be genuinely regarded as “internal,” its implications are quite far reaching. Indeed, the war on terror seems often bound to require imposing restrictions and burdens on a country’s own citizens. And often, as in the case of the Arab-American community in the United States after 9/11, such burdens fall disproportionately on particular minorities. 337 It is accordingly important to remember that even in

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333 See supra p. 2103.
334 Even schemes involving dirty bombs, poisoning of water supplies, biological and chemical warfare and other horrors frequently associated with terrorism would not cause any danger comparable to mutual nuclear annihilation. See supra p. 2087. Yet because of the random, arbitrary, and unpredictable quality of terrorism, it is prone to causing greater panic than the constant nuclear threat did during the Cold War.
335 In the Yom Kippur War fought during seventeen days Israel suffered 2,523 casualties, see Peter Colón, The Yom Kippur War: A Nation Caught By Surprise, The Friends of Israel Gospel Ministry, Inc., http://sites.silaspartners.com/partner/Article_Display_Page/0,,PTID306608|CHID556136|CID1397306,00.html (last visited Mar. 6, 2006), as compared to the nine hundred it suffered from terrorism from 2000 to April 2004. See supra note 8 and accompanying text.
336 See Chemical, Biological, Radiological And Nuclear (CBRN) Terrorism, The Wednesday Report, http://www.thewednesdayreport.com/twr/CBRN.htm (last visited Mar. 6, 2006) (stating that the “popular scenario involving poisoning the water supply of a major metropolitan area does not appear very feasible” and that use of many chemical or biological agents would depend on a perfect combination of various atmospheric conditions to be successful).
337 See, e.g., Muslims, Arabs Bracing for Discrimination, RELIGIONLINK.ORG, Feb. 24, 2003,
countries like the United States and the United Kingdom, where recent terrorism is not connected to a conventional war or boundary dispute, the war on terror does not merely fall within the war and criminal law paradigms.

Assuming that the results in the Israel cases are the optimal ones, suggesting ways to circumvent the danger of judicial overreaching seems particularly difficult. It is clear that judicial intrusions into military policy and action, even if not absolutely barred, ought to be few and far between. The Israeli Court’s intervention was seemingly inevitable as it was prompted by the need to avoid leaving a legal vacuum.338 Under different circumstances, however, it seems preferable to curtail the scope of judicial balancing either through the administrative process, if the military carries out the law-and-order function, or through legislation, if civilian authorities do.

Some of the tasks enumerated above for purposes of closing the gap between the actual court decisions and the suggested optimal outcomes, such as clarification of the category of “enemy combatant,” are better left to legislators. Other tasks can be entrusted to judicial balancing as properly circumscribed within the emerging paradigm of the war on terror. This will inevitably involve some experimentation and some discretion to choose among various open paths. This does not mean that judicial balancing in the area need be unconstrained or undisciplined. Given a commonality of values and objectives when it comes to the war on terror, and given that successful judicial balancing requires openness toward all plausible positions,339 it is quite possible that a cogent, fair, and balanced jurisprudence on the war of terror will emerge. We are at the beginning of this process, and hopefully development of the new legal paradigm of the war on terror will provide useful tools to handle these novel, constantly changing, and always daunting challenges.


338 Indeed, absent intervention by Israeli courts, aggrieved Palestinian civilians would, as a practical matter, have no legal recourse for violations of their humanitarian rights.