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### Security and Human Rights

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*Introduction*  
*Security and Human Rights: The Search*  
*for a Language of Reconciliation*

LIORA LAZARUS and BENJAMIN J GOOLD

THE ATTAINMENT OF security and the protection of human rights are not necessarily antithetical, either as a matter of fact or principle. Nevertheless, since 9/11 the words ‘security’ and ‘human rights’ have, in the collective imagination, now come to connote an almost insuperable opposition. Anyone who engages in the debate over security and human rights is almost immediately confronted by this dichotomy, tacit in the political call for a ‘new balance’ and explicit in newspaper editorials calling for the retreat from human rights. Prompted by the urgency or supposed ‘exceptionalism’ of our times, politicians, judges and intellectuals are all addressing the central dilemma of this dichotomy: how are we to protect freedom (through security) without denying its essence (by violating human rights)? For liberals, the search for a new language of reconciliation between security and human rights has arguably become one of their most urgent intellectual challenges. Indeed, there is a growing sense in the academy internationally that the stakes of the thoughts and arguments on this question have been raised.<sup>1</sup>

The challenge of how best to safeguard freedom and democracy without squandering them is not simply a product of the threats arising out of 9/11 (or perceptions of them). It is a challenge that has always existed at the centre of the liberal democratic enterprise. It is this pursuit that animates democratic politics, and the tension that spurs its philosophical refinement. Moreover, if we are to remain squarely within the liberal democratic tradition, many would argue that security

<sup>1</sup> This is no less the case for the contributors to this volume, who came together at the Oxford Colloquium on Security and Human Rights on 16 and 17 March 2006. Drawn from a variety of disciplinary perspectives—legal theory, criminology, criminal law, constitutional law, international law and international relations, as well as government and legal practice—these contributors were able to bring a range of views to bear on the question of how best to resolve the tension between security and the protection of human rights.

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and human rights *must* be reconciled.<sup>2</sup> National and individual security strikes at the heart of sovereignty: the capacity to maintain security, and demonstrably so, is a litmus test of the functionality of the modern state.

From both Lockean and Kantian perspectives, what distinguishes a liberal democracy from a totalitarian state is that the attainment of security through the exercise of democratic sovereignty is justified ultimately by the pursuit of liberty (which itself cannot be exercised in conditions of grave insecurity).<sup>3</sup> Human rights, as positive articulations of the constituents of liberty, are the benchmark by which liberal democracies are judged. Constitutions, parliaments and courts act to protect them and to constrain the executive's overweening assertions of authority. Security as the precondition for liberty, and human rights as the constituents of liberty, are thus both inherent parts of the broader liberal democratic project:

[W]e must find ways of reconciling security with liberty, since the success of one helps the other. The choice between security and liberty is a false choice . . . Our history has shown us that insecurity threatens liberty. Yet if our liberties are curtailed, we lose the values that we are struggling to defend.<sup>4</sup>

Given the evident relationship between the maintenance of security and the preservation of rights within the liberal tradition, we might well ask why a language of reconciliation has become so politically elusive. If it is not the case that the pursuit of security and respect for human rights are necessarily irreconcilable, is the tension between the two a product of our collective inability to agree on a set of assumptions, terms and rules for discussion? Or have the rules of the game, or at least the rules of the debate, really changed?

### I. SECURITY, RIGHTS AND THE 'NEW NORMALCY'

A time of terror may not be the ideal moment to trifle with the most time-tested postulates of government under law. It is certainly not a good time to dispense lightly with bedrock principles of our constitutional system.<sup>5</sup>

Despite the wisdom of Katyal and Tribe's warning, the claim that 9/11 ushered in an era of ongoing emergency that demands fundamental political, legal and constitutional reordering has acquired a seemingly irresistible currency. We are, it is said, in a continuing 'state of exception',<sup>6</sup> the end of which, due to the nature of

<sup>2</sup> Tesón, FR, 'Liberal Security' in R Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge, Cambridge University Press, 2005) 57; Luban, D, 'Eight Fallacies about Liberty and Security' in R Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge, Cambridge University Press, 2005) 242, 245.

<sup>3</sup> Tesón (2005) 60.

<sup>4</sup> National Commission on Terrorist Attacks upon the United States (9/11 Commission), *Report* (2004), available at <http://www.9-11commission.gov/?report/?index.htm>, 395.

<sup>5</sup> Katyal, NK and Tribe, LH, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) *Yale Law Journal* 1111, 1259.

<sup>6</sup> For an argument that the 'state of exception' is a standing constituent of liberal regimes and thus always a part of the 'normal', see Agamben, G, *The State of Exception* (Chicago, University of Chicago Press, 2005).

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the super-terrorist threat,<sup>7</sup> we cannot identify. In short, what was previously viewed as the exception, a time of unprecedented crisis calling for appropriately exceptional measures, has now become the norm. The claim is not the preserve of only neo-conservative US politicians, such as Vice President Dick Cheney, who argue that ‘emergency is the “new normalcy”’.<sup>8</sup> Supposedly left-wing European leaders also argue that the ‘rules of the game have changed’.<sup>9</sup> Similarly, the idea that we are facing the ‘normalization of emergency conditions’<sup>10</sup> and that the ‘age of terror’ calls for unprecedented measures is now taken increasingly seriously within the academy across an ever-extending range of the political spectrum.<sup>11</sup> Even those more sceptical of these exceptionalist claims recognise that ‘there seems to be a general acceptance in the wake of the terrorist attacks of September 11, 2001 that some adjustment in our scheme of civil liberties is inevitable’.<sup>12</sup>

Such is the currency of these propositions that previously marginal arguments have become plausible, while positions that formerly attracted a broad political consensus have come to be seen as naïve or passé. In this environment, Michael Ignatieff’s promotion of ‘lesser evils’,<sup>13</sup> Alan Dershowitz’s support for the legal regulation of torture,<sup>14</sup> Oren Gross’s endorsement of transparent illegality<sup>15</sup> and Bruce Ackerman’s endorsement of ‘suspicionless’ preventative detention under an ‘emergency constitution’<sup>16</sup> have become the central arguments with which we must engage.

Whereas 10 years ago such arguments might have settled at the fringes of scholastic debate, the shoe is now very much on the other foot: constitutional and international human rights once claimed a privileged moral status, their limitation always requiring justification; but claims to security now appear to receive less

<sup>7</sup> ‘Super-terrorism’ is characterised as terrorism that has global aims, an ‘apocalyptic’ ideology, ‘war-like’ means and with which political negotiation is impossible: Freeman, M, ‘Order, Rights and Threats: Terrorism and Global Justice’ in R Ashby Wilson (ed), *Human Rights in the ‘War on Terror’* (Cambridge, Cambridge University Press, 2005) 37, 38.

<sup>8</sup> Remarks to the Republican Governors Association, Washington, DC, on 25 October 2001, available at <http://www.whitehouse.gov/vicepresident/?news-speeches/?speeches/?text/?vp20011025.html>. Repeated in an interview to the television programme *60 Minutes II* on 14 November 2001, available at <http://www.whitehouse.gov/vicepresident/?news-speeches/?speeches/?vp20011114.html>.

<sup>9</sup> See UK Prime Minister’s Press Conference, 5 August 2005, available at <http://www.number-10.gov.uk/?output/?Page8041.asp>.

<sup>10</sup> Ackerman, B, ‘The Emergency Constitution’ (2004) 113 *Yale Law Journal* 1029, 1043.

<sup>11</sup> The responses to this perceived condition are, however, quite varied. See, inter alia: Ackerman (2004); Gross, O, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’ (2003) 112 *Yale Law Journal* 1011; Ignatieff, M, *The Lesser Evil: Politics in an Age of Terror* (Princeton, Princeton University Press, 2004); Cole, D, ‘The Priority of Morality: The Emergency Constitution’s Blind Spot’ (2004) 113 *Yale Law Journal* 173; Tribe, LH and Gudridge, PO, ‘The Anti-emergency Constitution’ (2004) 113 *Yale Law Journal* 1801.

<sup>12</sup> Waldron, J, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *The Journal of Political Philosophy* 191.

<sup>13</sup> Ignatieff (2004).

<sup>14</sup> Dershowitz, A, ‘Tortured Reasoning’ in S Levinson (ed), *Torture: A Collection* (Oxford, Oxford University Press, 2004) 14.

<sup>15</sup> Gross (2003).

<sup>16</sup> Ackerman (2004), but see now amended proposals in Ackerman, B, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Hartford, Yale University Press, 2006).

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scrutiny than the assertion of rights that may restrict measures in its pursuit. Whatever the empirical merits of the argument that we have entered an ‘age of exception’—and it is far from clear how one would ever prove this—one thing is becoming apparent: the claim is shifting the foundations of political and constitutional debate. It has become the tacit challenge against which we must formulate our propositions.

As a consequence of the status of the perpetual emergency claim and statements about the uniqueness of our present conditions, those who claim that we already have the structures and institutions in place to deal with the threat at hand<sup>17</sup> risk being accused of a blind adherence to absolutism, perfection or idealism.<sup>18</sup> According to Ignatieff, for example,

the belief that our existing rights and guarantees should never be suspended is a piece of moral perfectionism . . . To claim that there are no lesser evil choices to be made is to take refuge in the illusion that the threat of terrorism is exaggerated.<sup>19</sup>

Whereas in the past those concerned with questions of security within liberal democracies may have stopped short of calling for the suspension of rights altogether, in the current climate the idea that certain human rights can be ‘turned off’ when necessary has come to be regarded by many as a thoroughly reasonable reaction to the dangers allegedly faced by democratic societies. In effect, the exceptionalism argument has become pivotal, so much so that liberals and human rights organisations must either rebut claims that our conditions are unique, or respond to these supposedly exceptional conditions by adjusting our institutions, practices, procedures and laws:

The season for talk of leaving the Constitution behind, while we grit our teeth and do what must be done in times of grave peril—the season for talk of saving the Constitution from the distortions wrought by sheer necessity, while we save ourselves from the dangers of genuine fidelity to the Constitution—is upon us.<sup>20</sup>

For many, then, the search for reconciliation between security and human rights is really a search for a language that can claim a purchase on the political, legal and popular imaginations within the existing climate of exceptionalism: a language that engages with the assertion of exceptionalism and the claims of unique crisis, while blunting its worst implications.

Of course, the currency of the exceptionalism claim has deeper social and political roots than the iconic collapse of the New York World Trade Center towers. Two factors in particular underpin the social receptivity of the claim to exceptionalism. The first of these relates to what David Garland and others within the realm of criminal justice have referred to as the emergence of a ‘culture of

<sup>17</sup> See for example, Luban (2005); and Goldstone, R, ‘The Tension between Combating Terrorism and Protecting Civil Liberties’ in R Ashby Wilson (ed), *Human Rights in the ‘War on Terror’* (Cambridge, Cambridge University Press, 2005) 242, 249.

<sup>18</sup> See Gross on those who conduct ‘business as usual’: Gross (2003).

<sup>19</sup> Ignatieff (2004) vii.

<sup>20</sup> Tribe and Gudridge (2004).

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control'.<sup>21</sup> According to these writers, late modern states are increasingly characterised by aspirations towards 'public protection', the 'containment of danger' and the 'management of risk', all of which arise out of a perceived and politically exploited condition of social 'insecurity'.<sup>22</sup>

During the late 1980s and throughout the 1990s, as governments began to shift attention away from the elimination of crime—a problem that they had come to regard as insoluble—to strategies aimed at its management and containment, a new discourse emerged about the role of the state. Instead of presenting themselves as primarily responsible for addressing the problem of crime, states instead began focusing on making people feel safer and more secure while also arguing that responsibility for such security had to be shared with institutions and organisations outside of the state realm. Within political discourse, fear of crime and questions of insecurity were elevated in status, so that the pursuit of 'security'—a term often invoked but rarely defined by politicians—became an overriding social aim.

Insofar as this shift coincided with a gradual surrendering by states of primary responsibility for other important public matters (such as health, transport and education), it contributed to the emergence of a new, neo-liberal conception of government. No longer is the state the unquestioned provider or guarantor of public services or certain accepted social rights, but rather it is one player amongst many. Whether this change was the product of the state's awareness of its own impotence—its inability to 'solve' the problem of crime and other social ills—or an inevitable product of wider changes in governance brought on by the forces of late modernity is open to discussion. Regardless of the reasons behind the shift, the move to disperse responsibility for society's problems usefully freed politicians from having to answer for many of the failures of modern government. At the same time, however, the admission that the state could no longer be the primary provider of security, despite the political elevation of this aim, also threatened to undermine state legitimacy.

It is in this complex and contradictory neo-liberal political environment that Western political responses to the attacks of 9/11 need to be read. In countries like the United States and the United Kingdom, the threat of super-terrorism starkly exposed the limits of the state's capacity to provide security for its citizens. But equally, this threat presented governments with a novel opportunity to develop new and powerful rhetorical arguments, in particular the claim to exceptionalism, in favour of increased state power. Seen in this light, the popularity of exceptionalism is a product of a social transformation whereby the legitimacy of late-modern states has become increasingly bound up with their role as the guarantor

<sup>21</sup> Garland, D, *The Culture of Control* (Oxford, Oxford University Press, 2001). See also: Simon, J, 'Entitlement to Cruelty': Neo-liberalism and the Punitive Mentality in the United States' in K Stenson and R Sullivan (eds), *Crime, Risk, and Justice: The Politics of Crime Control in Liberal Democracies* (Portland, Willan Publishing, 2001) 125–43; and O'Malley, P, 'Volatile and Contradictory Punishment' (1999) 3(2) *Theoretical Criminology* 175–96.

<sup>22</sup> Garland (2001).

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of security and with a politics of security that seeks both to allay and exploit communal feelings of insecurity and fear.

The second factor underpinning the apparent effectiveness of the exceptionalism argument relates to what we term the 'politics of rights scepticism'. Alongside the rise of human rights discourse since 1945 and its seeming international ubiquity after the end of the Cold War,<sup>23</sup> there has been a strong philosophical scepticism of the moral foundation of human rights claims and considerable political controversy regarding their judicial and constitutional protection.<sup>24</sup> Although human rights have been the benchmark of the liberal democratic ideal, there are deep controversies as to how they should be realised, under what institutional conditions they should be pursued, and which specific rights may be branded as sufficiently fundamental to trump majoritarian desires.

Rights-sceptic arguments are the product variously of republican criticisms of the constitutional and political legitimacy of judicial review;<sup>25</sup> pragmatic empiricist, post-modern and conservative rejections of the idealist pretensions of enlightenment rationalism;<sup>26</sup> socialist and communitarian objections to the egoistic individualism and atomistic legalism to which rights give rise; left-wing suspicion, particularly in the United Kingdom, of the elite judiciary;<sup>27</sup> and critical pragmatic arguments regarding the emancipatory potential of human rights discourse.<sup>28</sup> This complex amalgam of political, philosophical and pragmatic objections to human rights has generated a debate internal to rights discourse that has made it particularly vulnerable to the competing and increasingly powerful discourse of security.

In essence, then, two divides need to be bridged if we are to find some way of reconciling the pursuit of security with a respect for fundamental human rights.

<sup>23</sup> Freeman, M, *Human Rights: An Interdisciplinary Approach* (Cambridge, Polity, 2002) ch 3.

<sup>24</sup> Douzinas, C, *The End of Human Rights* (Oxford, Hart Publishing, 2000) 1; Campbell, T, Ewing, KD and Tomkins, A, *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001). See also Lazarus, L, *Contrasting Prisoners' Rights* (Oxford, Oxford University Press, 2004) 163–8.

<sup>25</sup> Kramer, LD, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford, Oxford University Press, 2004); Waldron, J, *Law and Disagreement* (Oxford, Oxford University Press, 1999); Bellamy, R, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001); Tomkins, A, *Our Republican Constitution* (Oxford, Hart Publishing, 2005).

<sup>26</sup> Minogue, K, 'What is Wrong with Rights' in C Harlow (ed), *Public Law and Politics* (London, Sweet & Maxwell, 1986) 209, 209–12; Gray, J, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London, Routledge, 1995) 172–3; Ryan, A, 'The British, the Americans, and Rights' in M Lacey and K Haakonssen (eds), *A Culture of Rights* (Cambridge, Cambridge University Press, 1991) 375–95; Loughlin, M, 'Rights, Democracy, and Law' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001); Gearty, C, *Can Human Rights Survive* (Cambridge, Cambridge University Press, 2006) ch 2; Klug, F, *Values for a Godless Age* (London, Penguin, 2000) 154; Douzinas (2000).

<sup>27</sup> Griffiths, J, *The Politics of the Judiciary*, 4th edn (London, Fontana, 1991); Griffiths, J, 'The Political Constitution' (1979) 42 *MLR* 1; Ewing, K and Gearty, C, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford, Clarendon Press, 1990) ch 8; Ewing, K and Gearty, C, *The Struggle for Civil Liberties* (Oxford, Oxford University Press, 2000) ch 8.

<sup>28</sup> Kennedy, D, 'The International Human Rights Movement: Part of the Problem?' (2001) 3 *European Human Rights Law Review* 245.

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On the one hand, we must critically engage with the politics of security in late modern states—a politics in which appeals to security are increasingly used by governments and politicians as a rhetorical device for the expansion of state power. This necessitates the development of an understanding and critique of the conditions in which security discourse—and its displacement of liberal values and human rights—occurs. As a number of authors observe in this volume, although much of the current debate over security can be traced to the events of 9/11, many of the arguments and policies that have emerged over the past five years have their origins in longstanding political and social trends. Looked at in this way, the preoccupation with security is best understood as a cipher for a range of diverse concerns, and as such it is crucial that we retain a meta- or sociological perspective on the apparent conflict between rights and security. We must in other words engage with the social phenomenon of security, the social conditions in which security discourse exists and the philosophical foundations of security claims.

Equally, however, we must also address deeper philosophical concerns that strike at the very heart of the human rights project. For it is not so much that security and rights have to be reconciled per se, but rather that the present concern with collective security and the persistent claim to exceptionalism have exposed and heightened a number of fundamental tensions that are inherent to modern liberal democracies. In broaching the question of how to reconcile security and human rights, we are in effect also asking how to balance between the individual and the collective, between the political and the legal, and between political sovereignty and the rule of law. Thus, the pursuit of the mutual attainment of security and human rights since 9/11 has provoked a re-engagement with questions that are central to democratic orders and has peeled back any veneer of political consensus that may have surrounded them. The current fight is then not only about security and rights, it is also about the essential institutional, procedural and substantive principles that we think a legitimate democracy ought to have. Clearly, conservatives, civic republicans, communitarians and classical liberals will all have different answers to what constitutes legitimacy in this context.

In developing a defence of human rights, if we are unable to be clear about why the rule of law matters and why rights are worthy of respect—regardless of the threats of terrorism—then it is unlikely that liberals will be able to resist arguments aimed at curtailing legal safeguards in the name of security or assuaging the fears of the majority. In this pursuit, it is not safe merely to fall back on previously accepted political presumptions. Given the broader context in which this debate is occurring, defenders of rights are correct to be wary of baldly asserting concepts that, in these times, have become question-begging. We have to find new ways of articulating established beliefs and must engage in new theoretical discussion with a sharpened agenda. As Conor Gearty argues,

without a reworking of what the term 'human rights' means today, designed to give it contemporary intellectual confidence, some theoretical zest, then the time might come when firing the human rights argument will be greeted neither with warmth



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nor dismay but rather with blank indifference, or (which is worse) mute incomprehension: whatever can that term mean?<sup>29</sup>

In other words, if we are properly to defend human rights, we need fully to engage with them.

In attempting to re-enter and realign the debate in this way it is important also to recognise that there are disciplinary as well as political and philosophical divides that must be overcome. Within the academy, different disciplines have developed their own responses to the challenges of security in the years since 9/11, often with little knowledge of or reference to the responses of related fields. While all of these responses, from human rights scholars and practitioners, international lawyers, international relations scholars and criminologists, are important and legitimate, the absence of a shared language, or even a commonly held understanding of the challenge, has perhaps undermined the effectiveness of the liberal response. Partly, this is because of the variance in the questions or pursuits that different disciplines hold as legitimate.

For legal scholars, the defence of the rule of law, legal institutions, the integrity of legal rules and the specificity of rights reasoning feature foremost. For sociologists, criminologists and international relations scholars, on the other hand, questions of the effectiveness of human rights discourse and policy or underlying changes in the social and political landscape may hold centre stage. Hence, this book brings together those disciplines at the forefront of the conflict between rights and security. By encouraging interdisciplinary communication, it is hoped that we can not only learn from each other and gain greater insight into this conflict, but also ensure that we are able both to critique security whilst fully engaging with human rights and to find a collective strategy that is expansive and coherent. While certain disciplines may naturally favour an engagement with either rights or security, it is important that the two approaches overlap. If we are to develop a language of reconciliation between security and human rights—or even simply think about them effectively—then it is important to ensure that those involved in these different debates are aware of each other and to work to enhance the analysis that takes place at the margins and in the overlap between the two.

## II. ENGAGING SECURITY

### 1. A Sociology of Security

When attempting to find a language of reconciliation between security and human rights, or, put another way, when searching for some basis upon which liberals can engage with those who promote the pursuit of security, it is important to return to the question of what is actually at stake. Just as those in favour of increased security and restricting certain rights continue to critique the ‘human rights project’,

<sup>29</sup> Gearty (2006) 20.

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so too must liberal scholars and rights advocates continue to scrutinise the claims of the security lobby. Although many accounts of the tension between rights and security rightly focus on definitions of torture, the serious dangers of preventative detention and the requirements of a fair trial, the current concern with security must also be seen in terms of longstanding and potentially disturbing structural changes that are taking place in modern society. This volume contains a number of contributions that seek to engage with the claims of the security lobby and to place them within a broader sociological critique.

Ian Loader argues in his chapter that it is important to keep sight of what he refers to as the 'cultural lives' of security and rights. He seeks to uncover the social and political conditions that enable the rhetoric of security to override the rhetoric of rights. In particular, Loader examines three examples from English criminal justice politics that pre-date 9/11: miscarriages of justice, public responses to closed-circuit television (CCTV) and the rise of 'anti-social behaviour orders' (ASBOs), which are designed to sidestep established procedural protections. By identifying and examining some of the key rhetorical strategies that have been employed by politicians and others, Loader reveals how they are able to 'mobilise a populist appeal to the idea of security, while presenting rights claims as the concern of remote special interest groups willing to play fast and loose with the safety of their co-citizens'.<sup>30</sup> Part of the story rests, Loader suspects, in the general distaste for rights within certain cultures (notably English culture), as well as a political concern that rights undermine collective values by insisting on a division between individuals on the one hand and their communities on the other hand. Aside from the fact that one of Loader's stated aims is to encourage deeper investigation into the question of how best to advance human rights in this environment, he also contributes to the larger discussion on reconciliation by arguing that such rights must be situated within a 'solidaristic and egalitarian practice of security'. Security, in the sense that Loader views it, is a central value of the good society—and therefore also rights-regarding.

Like Loader, Benjamin Goold highlights the larger social and political implications of the current drive towards more security. He argues that it is important for us to resist many of these demands—in particular the claim that more and better state surveillance is needed—if we are to preserve our existing concepts of privacy or at least retain some measure of control over the way in which we construct and develop our identities. For Goold, 9/11 is significant because it provides the ongoing expansion of state surveillance in countries like the United States and the United Kingdom with a new, seemingly irrefutable justification, namely the pursuit of security. As a consequence, traditional notions of identity based on narrative understandings of personal development are now under serious threat from an emergent administrative form, the 'categorical identity'. Although this shift may be less obviously alarming than calls for use of torture or the suspension of the right to a fair trial, it is nonetheless deeply problematic. In particular, Goold's

<sup>30</sup> I Loader in this volume, p 27.

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analysis suggests that the widespread expansion in surveillance that is currently being driven by the rhetoric of security has amplified various underlying, ongoing sociological changes that have made the public increasingly willing to surrender their privacy and submit to demands for greater state power.

In essence, what unites Loader and Goold is an appeal for perspective on the current preoccupation with security and a call for a more textured external critique that recognises that the apparent conflict between security and rights has its origins in deep social and political changes that pre-date 9/11. Whereas Loader points to the broader social and political contexts that shape the cultural lives of security and rights, Goold also asks us to look beyond the immediate dangers of security to larger developments in the role of surveillance in modern democratic states. To a lesser extent, both authors also share a willingness to engage with the practical claims of security, suggesting that the way forward to reconciliation may involve a mixture of approaches, some legal and political, others rhetorical. While not going so far as to endorse a pragmatic response to the politics of security, the chapters by Loader and Goold argue that if liberals are to play an effective part in the public debate over the future of human rights, we must engage with the broader context in which security is being pursued and develop a robust 'sociology of security'.

## 2. Exploiting the Language of Risk

If liberals are to resist the worst excesses of security, or at least to be able to respond to its demands, then it is also unavoidable that they will have to engage with the language of risk. One way in which this can be done is, as Bernard Harcourt does in this volume with respect to racial profiling, to test the effectiveness of new counter-terrorism and security measures on their own terms. Harcourt thus turns the rhetoric of security back upon itself, demanding proof that rights-restricting policies or programmes will in fact provide more security. In contrast to liberals who have refused in the past to countenance profiling because of the strong belief that such techniques are by definition discriminatory and therefore simply wrong, Harcourt instead demands that advocates of such methods prove that they in fact work to reduce the threat of terrorism. As he notes, since 9/11 the racial profiling of Muslim men has been advocated by a range of commentators and law enforcement agencies, despite the fact that there 'is no empirical evidence whatsoever, nor a solid theoretical reason why racial profiling would be an effective measure—rather than a counterproductive step resulting in detrimental substitutions and increased terrorist attacks'.<sup>31</sup> More disturbingly, Harcourt argues that, far from deterring terrorists, profiling may in fact undermine the legitimacy of other anti-terrorism measures and, crucially, 'encourage the recruitment of terrorists from outside the core profile and the substitution of other terrorist acts'.<sup>32</sup>

<sup>31</sup> B Harcourt in this volume, p 75 (3 in original file).

<sup>32</sup> *Ibid*, p 95 (29).

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Is Harcourt's strategy one that defenders of human rights need to adopt if they are to counter the claims of those obsessed with security? In other words, should they be prepared to 'get their hands dirty' and participate in debates about the effectiveness of measures that may have serious implications for human rights? Certainly, Harcourt's approach represents a significant departure from that of many in Britain and Europe. Whereas US academics and human rights advocates have been ready to take a pragmatic approach to the preservation of rights, on the other side of the Atlantic there has been a distinct reticence to use such tools as economic modelling and statistical analysis. For those concerned to maintain the high ground, Harcourt's approach may be a step too far. There is always the danger that by accepting that effectiveness matters, we might be forced to concede that some new security measure that undermines rights, even torture, actually works and cannot therefore be resisted. Crucially, however, liberals need to think carefully about how best to balance the need to engage in certain debates while preserving some commitment to the idea of rights as trumps. If we do find that profiling 'works' and that it significantly reduces the risks of future attacks, do we risk being seen as hypocritical if we then fall back on more conventional, principled objections to such measures?

Like Harcourt, Lucia Zedner in this volume also engages with the language of risk, not for the purposes of using it as a critical tool but with a view to exposing some of the assumptions that drive the pursuit of security. According to Zedner, it is fundamentally important to remember that discussions of security and the limits of prevention are intimately bound up with perceptions of risk—perceptions that have been radically altered by the events of 9/11 and 7/7. Indeed, she argues that while we continue to focus our attention on the more obvious manifestations of the current obsession with security and anti-terrorism, there is a danger that too little attention is being paid to 'the degree to which the growing sophistication of actuarial tools and huge advances in computational power both enable and legitimate pre-emptive intervention'.<sup>33</sup> For Zedner, because it is impossible to separate these statistical tools from the political and policy choices that animate our conceptions of risk, it follows that pre-emptive measures designed to increase security can never be truly objective or divorced from our political concerns and values. By highlighting this connection and drawing together existing discourses on rights, risk and security, Zedner reveals one of the inherent dangers of the current focus on security: by using risk categories to impose restrictions on only targeted sections of the population, we minimise the likelihood that such responses will be accompanied by healthy political debate or 'invoke the natural political resistance generated by burdens that affect us all'.<sup>34</sup>

Taken together, the chapters by Harcourt and Zedner remind us that the emerging discourse of risk has not only provided a drive for much of the current obsession with security, but also fundamentally altered the way in which policy makers

<sup>33</sup> L Zedner in this volume, pp 260–61 (8–9 in original file).

<sup>34</sup> *Ibid*, p 272.

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and governments assess the success or failure of new security measures. In our efforts to respond to curtailments or modifications of existing human rights, it is important to ensure that risk does not become the only lens through which concerns about security are viewed, or the only set of criteria that informs decision making about them. This is a point that is also made by Didier Bigo and Elspeth Guild, although for them the central challenge is to ensure that when risk is at the centre of any public debate about security, the language used to describe that risk—which inevitably structures the response to it—is accessible to all. Noting that it is difficult to imagine an average person being able to ‘successfully navigate the overwhelming professional discourses surrounding the management of threats and not be under their “charm”’,<sup>35</sup> Bigo and Guild construct a powerful argument in favour of a common conception of risk, based in particular on the accepted norm of the reasonable person or ‘man on the Clapham omnibus’. Fearing that undue reliance on a specialist conception of risk gives too much power and influence to the security industry, they argue that reference to a ‘reasonable person’ can act as an important ‘reality check’ against exceptional legal decision making. The general discussion of risk and security must, they argue, be moved away from a fixation on worst-case scenarios—typically favoured by governments and the security industry—to a discourse based on reasonable grounds for a reasonable person. By shifting the language of risk in this way, they argue, we are better able to protect the rule of law and to ensure that many, rather than a few, voices are heard in the security and human rights debate.

## III. ENGAGING RIGHTS

A robust defence of rights needs to be situated within a critical appreciation of the limit of rights, an engagement with the constitutional controversies they present and an understanding of the particular political dilemmas to which they give rise when society is faced with grave threats. It is not enough to assert rights as a good in themselves by reference to metaphysical arguments that transcend social reality. Rights advocates must show how rights can work in practice, how the rule of law can be maintained, why the integrity of the law matters and how rights-regarding institutions can be shown to work even when facing our most perilous social challenges. Rights arguments need also to engage with the possibility of alternative conceptions of rights, law and legal institutions, as well as rights-sceptical challenges, if they are to have a contemporary currency. There is, however, a difference between critically engaging with such challenges and succumbing to their worst excesses, as Judt warns:

The alacrity with which many of America’s most prominent liberals have censored themselves in the name of the War on Terror, the enthusiasm with which they have invented ideological and moral cover for war and war crimes and proffered that

<sup>35</sup> D Bigo and E Guild in this volume, p 101 (4 in original file).

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cover to their political enemies: all this is a bad sign. Liberal intellectuals used to be distinguished precisely by their efforts to think for themselves, rather than in the service of others. Intellectuals should not be smugly theorising endless war, much less confidently promoting and excusing it. They should be engaged in disturbing the peace—their own above all.<sup>36</sup>

Thus, intellectuals now have to walk a tightrope between being single-mindedly committed to rights to the point of dismissing issues of security, and providing the intellectual legitimisation for proponents of the security lobby.

### 1. Politics, the Rule of Law and a Culture of Justification

Two central dichotomies—between politics and legality, and between pragmatism and idealism—exist within constitutional debate in ‘times of crisis’.<sup>37</sup> This volume contains a number of contributions that seek to establish a middle ground between the polarities of pragmatic political responses to security threats and the idealistic preservation of legality. In doing this, these contributors help to resolve the background political and constitutional conflicts underpinning the tension between security and human rights, thereby identifying the conditions in which a language of reconciliation between these supposedly competing objectives might be achieved.

In his chapter, David Dyzenhaus asserts that the middle ground between legality and political sovereignty rests in the development of principles of judicial due deference grounded in a ‘culture of justification’. Because common law principles of judicial review ‘rest on the distinction between inappropriate merits or correctness review and appropriate review of legality’<sup>38</sup> they contain the possibility to check the legality of administrative action while also affording leeway and respect to administrative expertise. Hence, judicial deference to expert administrative tribunals that are set up to deal with sensitive security concerns, such as the Special Immigration Appeals Commission (SIAC) in the United Kingdom, is not a necessary violation of rule of law values. The test, however, lies in just how that judicial deference is exercised.

For Dyzenhaus, the overriding principle of the constitutional legitimacy of judicial review of security measures cannot be found exclusively in either liberal constitutionalism or democratic positivism but rather is situated in a distinct ‘culture of justification’. This culture can be said to exist ‘when a political order accepts that all official acts, all exercises of state power, are legal only on condition that they are justified by law, where law is understood in an expansive sense, that is, as including fundamental commitments such as those entailed by the principle of

<sup>36</sup> Judd, T, ‘Bush’s Useful Idiots’ (2006) 28(18) *London Review of Books*, available at [http://www.lrb.co.uk/v28/n18/judd01\\_.html](http://www.lrb.co.uk/v28/n18/judd01_.html).

<sup>37</sup> See the contribution by V V Ramraj in this volume.

<sup>38</sup> D Dyzenhaus in this volume, p 137 (22 in original file).

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legality and respect for human rights'.<sup>39</sup> This onus of justification falls therefore on the legislature, the executive and the judiciary. In such a culture, judicial due deference to executive and legislative decisions is not only possible but necessary for the establishment of 'an effective principle of legality'. The 'very possibility of deferring is what makes evaluation of the quality of reasoning necessary, but that evaluation is of whether the decision-maker's reasons were good enough in a democratic society'.<sup>40</sup> In this way, Dyzenhaus seeks to 'reconcile the democratic urge to place the development of law in the hands of the representatives of the people with the liberal urge to ensure that such development does not interfere with the rights of the individual more than can be justified'.<sup>41</sup> To that extent, the resolution between security and human rights, for Dyzenhaus, rests on the possibility of 'deference as respect' as opposed to 'submissive deference'—and this type of judicial due deference can only function properly within an established culture of justification.

The culture of justification model need not apply only to municipal legal orders, or describe the rule of law in a municipal setting. Nor, as Cathy Powell argues in this volume, need it apply only to questions of judicial deference. As she demonstrates, a culture of justification can legitimately be said to form part of the 'institutional design of the international legal order'. This is because 'all law, including international law, entails the rule of law' and as a consequence 'requires that the law constrain those who wield power and hold them to account'.<sup>42</sup> On this basis, Powell critiques the increasing power of the United Nations Security Council in its anti-terrorism activities; the acquiescence of many states to this power; and the capacity of the Security Council to both make and enforce the laws for the international community, and to take and enforce its own executive decisions. She concludes provocatively that the international order is presently one based on a culture of authority, rather than on a culture in which such assertions of power are justified.

Victor Ramraj is sceptical of the culture of justification approach, however. He is concerned about Dyzenhaus and Hunt's optimistic approach to what he terms 'deferential standards of review', which he believes leave considerable latitude to the executive. He argues in his contribution that novel institutional design to deal with security questions can considerably dilute independent judicial oversight and that courts remain retrospective in their responses to emergency powers. These risks, he argues, are not necessarily lessened in a culture of justification. Ramraj is equally unconvinced, however, by pragmatic scepticism of the courts' capacity to stem exceptional powers effectively in the face of threats to national security. This pragmatism, he argues, is exemplified in the extra-legal measures argument of Oren Gross.<sup>43</sup>

<sup>39</sup> *Ibid*, p 137 (19 in original file).

<sup>40</sup> *Ibid*, p 141 (27 in original file).

<sup>41</sup> *Ibid*, p 138 (21 in original file).

<sup>42</sup> C H Powell in this volume, p 181.

<sup>43</sup> See: Gross (2003); Gross, O, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience' (2004) 88 *Minn L Review* 1481; Gross, O, 'Stability and Flexibility: A Dicey

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Gross's argument is that the 'highly deferential' judicial attitude in states of emergency results in a dilution of the rule of law and, worse, adds a 'veneer of legality' to extra-legal measures. In these circumstances, Gross has argued, it is better publicly to declare an action extra-legal when officials, in dealing with catastrophic cases, must 'go outside the constitutional order and violate accepted constitutional principles, rules and norms'.<sup>44</sup> The public must then decide whether retrospectively to approve of the action or to hold actors accountable through criminal prosecution. This, Gross has argued, establishes a bright line between extra-legal measures, used in 'truly exceptional situations', and the integrity of the rule of law. Against this view, Ramraj argues that the political strategy of promoting public admission of 'extra-legal measures' does not form an appropriate alternative because 'in the long term, it is likely to prolong the underlying conflict, compounding and perpetuating state abuses of power'.<sup>45</sup> In particular, it is likely that short-term actions taken in pursuit of security will alienate the very minorities that more fundamental political reforms should address.

In sum, while Ramraj accepts that both the 'culture of justification' and the 'extra-legal measures' approaches preserve the integrity of the rule of law while taking a pragmatic approach to the limits of judicial review, they 'nevertheless fail to provide a comprehensive theory that combines the virtues of legality with the pragmatism of a political response to emergencies'.<sup>46</sup> Instead, Ramraj argues that 'in a more complex conflict (or set of conflicts), such as the current "war on terror", it may be necessary to resort to multiple strategies, legal and political'.<sup>47</sup> Thus, he promotes an alternative, broad and multi-faceted political strategy that addresses 'the problem of minority alienation squarely both by entrenching rule of law protections (for instance, human rights and equality guarantees) and by reforming key institutions to build confidence'.<sup>48</sup>

Taken together, Dyzenhaus, Powell and Ramraj provide a broad and textured approach to the constitutional dilemmas, in both domestic and international contexts, that arise in times of crisis. Their chapters suggest a theoretical foundation for a language of reconciliation between security and human rights by providing a middle ground between the pragmatic political approaches to exceptional measures on the one hand and the strict adherence to the rule of law on the other hand. The culture of justification approach emphasises the quality of reasoning as the primary test for the legitimacy of legislative, executive and judicial action, and rests in a clear recognition of the necessity of dialogue between the constitutional actors who represent the political and the legal respectively. Although Ramraj is more sceptical of the assertion that the exercise of judicial deference can also be rights-regarding, his emphasis on political strategies that address the root causes

Business' in VV Ramraj, M Hor and K Roach (eds), *Global Anti-terrorism Law and Policy* (Cambridge, Cambridge University Press, 2005) 92.

<sup>44</sup> Gross (2005) 92.

<sup>45</sup> VV Ramraj in this volume, pp 196–7 (12 in original file).

<sup>46</sup> *Ibid*, p 186.

<sup>47</sup> *Ibid*, p 199 (14 in original file).

<sup>48</sup> *Ibid*, pp 198–9.



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of terrorist threats is entirely complementary to the culture of justification approach.

## 2. The Limits and Dangers of Balancing

One now common approach to the task of reconciling security and human rights is to invoke metaphors of balance. Typically drawing on appeals to common sense and everyday reasoning, policy makers and governments have in recent years argued for a ‘rebalancing’ of the criminal justice system in favour of better security and more public protection, and fewer substantive and procedural rights-based restrictions on law enforcement. Prime Minister Tony Blair in a speech delivered in June 2006 declared that it is both right and necessary for governments to rebalance the criminal justice system ‘in favour of the decent, law-abiding majority who play by the rules and think others should too’, and to decide whose civil liberties should ‘take priority’ in a given situation.<sup>49</sup> Although the metaphor of balance is a tempting starting point for a language of reconciliation between security and human rights, it is not one that any of the authors in this book embrace. As both Andrew Ashworth and Lucia Zedner point out in this volume—in keeping with works by Dworkin and Waldron<sup>50</sup>—the argument for balancing not only lacks specificity and militates against any structured consideration of the value of rights, it naturally lends itself to the political rhetoric of greater security and to the curtailment of rights.

According to Ashworth, there is a danger that political discussions of balancing and proportionality can obscure genuine conflicts between the promotion of human rights and the pursuit of security. Rhetorical appeals for a rebalancing of the criminal justice system in favour of greater security and public protection assume not only that such an exercise is possible but that once balanced, the relationship between rights and security will be a stable one. For Ashworth, a more productive approach is to establish first a clear hierarchy of rights and then develop new modes of reasoning and discussion that acknowledge the fact that certain rights are more subject to the claims of security than others. Although he admits that the success of such an approach will largely depend on the extent to which decision-making bodies such as the courts are prepared to enter into a genuine dialogue with rights advocates and proponents of security, Ashworth’s approach engages directly with those who question the idea of rights as trumps, as well as the notion that reconciling rights and security is simply a matter of reordering certain political priorities. Like Dyzenhaus, he also recognises the importance of establishing clear norms for the evaluation of evidence relating to perceived threats.

<sup>49</sup> Prime Minister Tony Blair, ‘Our Nation’s Future’, Speech delivered in Bristol on 23 June 2006, available at <http://www.pm.gov.uk/output/Page9737.asp>.

<sup>50</sup> Dworkin, R, ‘The Threat to Patriotism’, *New York Review of Books*, 28 February 2002; Waldron (2003).

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This insistence on structured engagement with the substance of human rights and the security claims posited in order to restrict them is important. As recent experiences have shown, there is a danger that zealous governments may overstate the risks of terrorism when attempting to garner public support for new security measures, legal reform or military action. By ensuring that there are clear, or at least identifiable, standards by which evidence for such actions can be judged by the judiciary and (where appropriate) the public at large, we improve the chances not only of there being a meaningful discussion between different sides of the security debate, but also that members of the executive can be held accountable for their actions. Equally, human rights cannot simply be held up as trumps without a clear and rigorous exposition of the exact protections to which such rights give rise and of the reasons such protections cannot be weakened in the face of security claims. There is, in short, an onus on all sides of the security and rights debate to make clear, structured and accessible arguments.

### 3. The Integrity of Law

Another question raised by a number of the authors in this volume is whether established criminal law principles and practices are capable of meeting the demands of security. Although these authors share similar concerns, their three chapters take quite different approaches to answering this question.

As Kent Roach reminds us in his contribution, there is ample evidence to suggest that the perception of perpetual crisis continues to generate exceptional national and international legal measures. Indeed, the detention of ‘illegal combatants’ at Guantanamo Bay, the broad powers incorporated into the US PATRIOT Act 2001, the indefinite detention powers of the UK Anti-terrorism, Crime and Security Act 2001 and the freezing of assets of those suspected of terrorism are all examples of this. Observing that ‘trends in anti-terrorism laws, unlike trends in fashion, do not fade away’,<sup>51</sup> Roach is keen to stress that because past measures and procedural reforms are rarely evaluated or repealed before new ones are instituted, there is a danger that misguided trends and presumptions will continue to exert influence on how we respond to terrorism. In addition, he notes that because many new anti-terrorism measures cut across different areas of the law—most notably criminal law and immigration law—there is a danger that the assembled ‘bricolage’ may hide the extent of the damage that is being done to fundamental legal principles. As a result, Roach argues that even though many new and proposed anti-terrorism measures—such as incitement offences based on the principles set out in UN Security Council Resolution 1624—may end up having a disproportionate and ultimately discriminatory effect on already suspect communities, they may also contribute to a more general erosion of the rule of law.

<sup>51</sup> K Roach in this volume, p 229 (4 in original file).

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If Roach's chapter serves as an implied caution against expanding the existing law before we have had time to assess or even reflect on its implications, then Zedner sounds an even clearer warning. For Zedner, many of the legislative measures enacted in the United Kingdom in the aftermath of 9/11 and the London bombings represent an attempt on the part of the government to sidestep normal legal channels and rule of law safeguards. According to Zedner, pre-emptive measures such as control orders are dangerous because they typically circumvent established criminal law values, such as proportionality of sentence and the need for blameworthiness, by ensuring that assessments of risk and dangerousness are dealt with in the civil sphere. This not only leads to the imposition of restrictions that are prospective and often expressive in character, but also enables governments to avoid the sort of rigorous public or legislative debate that usually accompanies proposed expansions in the substantive criminal law.

In contrast to both Roach and Zedner, Shlomit Wallerstein presents a case for extending existing law in times of insecurity, arguing in her contribution that the state is entitled to use the law and other coercive measures in order to provide security for its citizens. Her claim, based on well-established principles of individual self-defence, is hardly novel, and politicians in a host of countries have become increasingly fond of referring to the state's right to defend itself. However, Wallerstein rightly notes that to date the claim has not been clearly or rigorously examined, in terms either of its foundation or of its possible implication for broader legal principles. Observing that the state 'is an artificial entity created for the purpose of securing its citizens', Wallerstein suggests that it is entirely appropriate for states—within limits and by reference to what is necessary and proportionate in the particular circumstances—to make use of substantive criminal law in their efforts to defend those who live within their borders. Although she acknowledges that extending the power of the state to criminalise activities has its dangers and may ultimately lead to a curtailment of civil liberties, she argues at the same time that it is nonetheless crucial to admit openly that the state is uniquely placed and therefore duty-bound to respond to terrorism and threats to individual security.

As all three of these authors demonstrate, the demands of security have serious implications for the integrity of the criminal law and for the extent to which adherence to established criminal law principles and procedures should restrain responses to terrorism and other serious threats. Just as liberals must engage with political and policy arguments that threaten to undermine established human rights, so too must they expose substantive changes to the criminal law to careful analysis and critique. Equally, however, they must insist that changes in the law are based on rigorous arguments for legal change rather than loose or expedient political or moral arguments. While all of this may mean that we have to enter dangerous territory and seriously consider alternative conceptions of the criminal law and established legal concepts and boundaries, failing to engage in this way risks greater marginalisation and, more worryingly, removes the possibility of influencing future reforms.

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IV. SECURITY AS A RIGHT: THE RESOLUTION?

The present fixation with the balance between security and human rights tends to obscure the parallel development of the notion of security *as* a human right. As Neil MacFarlane argues in this volume, 'the evolution of the discourse on security may considerably enhance the capacity for international protection of the human rights of individuals and communities at risk from violence'.<sup>52</sup> Clearly, the United Nations Declaration of Human Rights and numerous other human rights conventions and constitutions around the world enunciate that 'everyone has the right to life, liberty and *security* of person'.<sup>53</sup> While this right has traditionally been understood in its negative sense as the security of the citizen from state action, it is progressively being developed as a positive right to state action in pursuit of the security of its citizens. In the international realm, the increasingly popular concept of 'human security' is moving the conception of international security away from its traditional association with sovereign military action between states, to one focused on the well-being of citizens within states. This international movement is also associated with a broadening acceptance that security is a precondition not only of human and economic development<sup>54</sup> but also of individuals' capacity to exercise their human rights to freedom and dignity.

The growing international emphasis on 'human security' is closely paralleled with the development of the 'responsibility to protect' doctrine. Recently endorsed in the 2005 UN World Summit Outcome Document, this doctrine recognises the responsibility of sovereign states to protect their own populations from genocide, war crimes and ethnic cleansing, and urges the international community to take collective action when states fail to fulfil this obligation.<sup>55</sup> These international developments are mirrored in jurisdictions across the world, including the United Kingdom, Canada, South Africa and India, where courts are increasingly imposing positive obligations on the state as a correlative of the individual's right to security.

So what are we to make of these developments? Is this the way in which the supposedly competing imperatives of security and human rights may be reconciled? Certainly, those seeking to achieve such a reconciliation may be tempted to use the concepts of human security, the right to security or the responsibility to protect both to temper the authoritarian overtones of the language of security, as well as to provide a potentially new legitimating framework for human rights in the face of widespread human rights scepticism. Four chapters in this volume explore this approach. Sandra Fredman and Liora Lazarus look at the development of the right

<sup>52</sup> N MacFarlane in this volume, p 348.

<sup>53</sup> Universal Declaration on Human Rights (1948), Art 3 (emphasis added).

<sup>54</sup> A point strongly made in the final report of the Commission on Human Security (CHS): UN Commission on Human Security, 'Human Security Now' (New York, May 2003), available at <http://www.humansecurity-chs.org/finalreport/index.html>.

<sup>55</sup> United Nations, '2005 Summit Outcome', General Assembly Document, A/60/L.1, 15 September 2005, arts 138 and 139.

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to security in a range of domestic jurisdictions, while Neil McFarlane and Jennifer Welsh explore the international development of ‘human security’ and the ‘responsibility to protect’ doctrine.

Drawing on the work of Nussbaum and Sen,<sup>56</sup> Fredman proffers a compelling theoretical case for a conception of the right to security—as freedom from fear and want—that is embedded in a deeper understanding of human freedom. For Fredman, the right to security ought to incorporate ‘the right to demand from the state the minimum resources necessary to fulfil one’s capabilities’.<sup>57</sup> From this platform, Fredman critiques the judicial development of the right to security in Canada, South Africa and the United Kingdom, exposing how these judicial approaches reflect ‘background understandings of choice and responsibility’.<sup>58</sup> She argues that courts should apply interpretive principles founded on the prevention of destitution and degradation and shaped by the pursuit of dignity, fairness and equality. For Fredman, the development of the right to security within the courts can only be successful if courts ‘deepen their understanding of the ways in which positive rights and obligations interact’. In other words, it is essential to locate the right to security within ‘a community with reciprocal benefits and responsibilities, rather than in the competitive arena of individualised rights-bearers’.<sup>59</sup>

The contribution by Lazarus is concerned with the tendency of domestic courts and a number of human rights instruments to ground a broadening array of constitutional rights in a meta-right to security. While acknowledging that recourse to a ‘right to security’ may presently be a useful tool for the achievement of a variety of political ends, Lazarus argues that its widening legal conceptualisation has the potential to ‘undermine accepted understandings of the foundations of fundamental rights reasoning’.<sup>60</sup> She warns that if the right to security becomes the meta-principle upon which all other rights rest, this can also inadvertently legitimise security measures that encroach upon other human rights. There is therefore a difference in Lazarus’ view between ‘securing rights’ and ‘securitising rights’. Although tempted as a consequence to reject altogether the argument for a right to security, Lazarus opts rather to engage with the evident development of the right in a number of jurisdictions. Nevertheless, in contrast to Fredman’s broader conception, she argues that courts must restrict the right to security to a narrow and distinctive right to be protected from ‘critical and pervasive’ threats of harm to person. It is, in her view, the role of courts to temper the rhetoric of ‘securitising rights’.

The varying approaches of Fredman and Lazarus are echoed in the ‘conceptual disagreement over the purview of human security’ in the international realm.<sup>61</sup> As

<sup>56</sup> Nussbaum, M, *Women and Human Development* (Cambridge, Cambridge University Press, 2000); Sen, A, *Development as Freedom* (Oxford, Oxford University Press, 1999).

<sup>57</sup> S Fredman in this volume, p 323.

<sup>58</sup> *Ibid*, p 308.

<sup>59</sup> *Ibid*, p 323.

<sup>60</sup> L Lazarus in this volume, p 344.

<sup>61</sup> N McFarlane in this volume, p 352.

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MacFarlane notes, two 'general clusters' of thought have developed, one arguing that poverty, famine and widespread disease represent a far graver threat to human security than physical violence, the other arguing that broadening the term 'human security' undermines its potential as an analytical and policy tool. This dispute has arisen, MacFarlane notes, because of the international competition for scarce resources, which has resulted in the development community's politically expedient emphasis on the economic dimension of security. Nevertheless, MacFarlane argues that both sides of the debate are unified in their attempt to 'privilege human beings in security discourse', a process he terms the 'humanisation of security'. This has in turn led to 'numerous normative and legal developments' on the international stage, not least the development of the idea that states internationally have the 'responsibility to protect' citizens both within their own jurisdictions and, collectively, in other states where there are grave threats of harm to individuals. These developments, argues MacFarlane, have fundamentally shifted the grounding principle of state sovereignty in the law of states, as well as the conception of the role of states in the defence of individual security. In MacFarlane's view, this reordering of the sovereignty principle is the most important consequence of the humanisation of security and has fundamental implications for the future development of international law and relations. Given the United States' growing recourse to the language of its 'responsibility to protect' citizens around the world, not to mention its use of this language to prompt the UN Security Council into action, MacFarlane is led to suggest that this shift in principles of sovereignty will not always be benign.

Jennifer Welsh is similarly wary. Her contribution traces the evolution of the 'responsibility to protect' doctrine up to its endorsement in the UN 2005 World Summit Outcome Document and critically analyses its implications. Welsh emphasises two important aspects of this development. First, she shows how the term 'responsibility to protect' has come to displace the language of 'humanitarian intervention'. Thus instead of expressing a 'right of intervention', states can now claim a 'responsibility to protect' individuals in other states where grave violations of human rights are occurring. Second, Welsh shows how the doctrine has been developed as a means to reconcile the traditional antipathy between human rights and state sovereignty in international law. This reconciliation has occurred, Welsh argues, by linking the 'very notion of sovereignty . . . more closely to the responsibility of states to their citizens'.<sup>62</sup> However, Welsh does not view this emphasis on responsibilities instead of rights that citizens can invoke as entirely unproblematic. Because ambiguity remains as to who should fulfil the responsibility to protect when states fail, and at what stage the responsibility transfers from the state in question to the international community at large, Welsh is sceptical as to whether the language of the UN Outcome Document has actually enhanced the capacity of international actors to challenge state sovereignty effectively. Moreover, Welsh demonstrates that the expression of the responsibility to protect

<sup>62</sup> J Welsh in this volume, p 366.

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in the Outcome Document is weaker than that originally conceived by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, and it in effect ‘circumscribes the international community’s obligation to protect individuals from massive human rights violations’.<sup>63</sup> Given these factors, argues Welsh, there is a danger that the language of the ‘responsibility to protect’ sets up false expectations, namely a belief on the part of people under persecution that ‘outsiders’ will honour their right to security by intervening when in fact the nature of the international responsibility to do so still is not clear.

Welsh and the other commentators in this section reveal some disquiet about the directions in which the right to security, human security and the ‘responsibility to protect’ are developing. These objections do not amount to a rejection of the central concepts; however, nor do they all move in the same direction. For Fredman, the right to security fails if it rests on an individualistic conception of human rights that is disconnected from a broader material understanding of human agency and the values of dignity and equality. For Lazarus, the risk of securitising rights leads her to argue for courts to develop a narrow conception of the right to security as a right to be free from ‘critical and pervasive’ threats of harm. While MacFarlane welcomes the humanisation of security, he is hesitant about the ramifications of associated shifts in the conceptions of sovereignty under the law of states. Finally, Welsh sounds a warning about the move from rights to responsibilities as a means of securing citizens and is concerned that the 2005 Outcome Document’s expression of the ‘responsibility to protect’ doctrine represents a weakening of the international community’s existing obligation to protect individuals’ human rights.

## CONCLUSION

Notwithstanding the intellectual and disciplinary diversity amongst the authors who feature in this volume, they are united by the desire to move the current debate over security and human rights forward. They are equally concerned to do this in a way that does not underestimate the importance of security or undermine the legitimacy of rights. Clearly, reconciling the interests of security with a respect for fundamental rights is no easy task, and while finding a language of reconciliation—or acknowledging security as a right—may help to bring the two sides of the debate closer together, it is unlikely to resolve all of the tensions that are identified in this book. We must accept that the conflict between security and rights is a fundamental and recurring problem that will always be a central challenge for the liberal democratic project, even in times of peace or after threats of imminent terrorist attack have receded. If we are to move forward, however, we must do more than simply recognise this truth: we must embrace it and continue to seek new ways of thinking about this conflict and of minimising the negative effects that an absolutist commitment to either security or rights may produce.

<sup>63</sup> J Welsh in this volume, p 363.

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If liberal academics and intellectuals are to offer a way forward, they must as a matter of urgency find a language that can claim a purchase on the broader political imagination within conditions of crisis. If academics are blessed with the freedom to offer a critical reflective response to the conditions of our world, they might also reflect on their responsibility to develop critiques with which the wider world can engage. In short, intellectuals who can offer clarity, detachment and rigour on the relationship between rights and security—or even develop ways of reconciling them—cannot risk being marginalised in a time of supposed exception.

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