

THE ASSUMPTIONS BEHIND THE ASSUMPTIONS IN THE WAR ON TERROR: RISK ASSESSMENT AS AN EXAMPLE OF FOUNDATIONAL DISAGREEMENT IN COUNTERTERRORISM POLICY

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I. INTRODUCTION

Public policy, like metaphysics, does well to follow Occam's Razor, *entia non sunt multiplicanda praeter necessitatem*: no unnecessary multiplication of entities. It has a specific public policy corollary: that explanations ought to delve no deeper than necessary in pursuit of policy

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and, most of all, ought to avoid seeking ultimate foundations in political things. Why? Because the deeper one goes into explanations for policy, the harder it becomes, at least in a complex and plural democratic society, to find sufficient agreement necessary to implement policy. If policy depended in every case, or even in very many cases, on deep political agreement, there would be very little policy, or at least very little successfully implemented policy. Indispensable issues of the day would await the resolution of foundational political issues, which would never come. Hence the heuristic principle of *lex parsimoniae*.¹

Alas, the remarks that follow do not abide that good counsel. The premise of this essay is, on the contrary, that policy responses by the United States to the threat of transnational, jihadist terrorism depend remarkably upon foundational political issues, upon which there seems to be less and less agreement. Some of these issues are ones of fundamental values regarding how the polity might permissibly respond to terrorist threats to security. Others are ones of fundamental factual assessment of the nature and magnitude and probability of threat. Yet, as 9/11 recedes in memory, both the American public and, even more, the American governing elites, share less, rather than more, agreement as to the fundamental issues regarding terrorism. The coming of a new administration—whether Republican or Democratic is unknown at this writing—tends to cause a paralysis of policy because it is unclear where a new administration will go, in part because the fundamental foundations of policy are unclear.

For some years now, once past the initial shock of 9/11, the United States has elided the problem of disagreement over foundations of policy by two interlinked mechanisms. On the one hand, the executive branch has offered stern rhetoric as to the global and long-term nature of the threat—a strategic vision of a long-term war on terror, extended in both time and space. In the initial period following 9/11, the executive undertook a strategic response based around that view of things. On the other hand, while its rhetoric continues largely unabated in the vein of grand strategy, its concrete actions, after a high water mark of executive power, have been trimmed and cut back, partly by other organs of government, the courts especially, and partly by shifting views of governing elites. Whether any of these shifts is a good idea or a bad idea as a matter of policy is beyond the scope of this discussion. More important to this essay is that U.S. policy is now highly fragmented, ad

1. See generally CASS SUNSTEIN, *WORST-CASE SCENARIOS* (Harvard Caravan 2007). Although I am here “riffing” off of Cass Sunstein, I am not appealing here to the apparatus of Cass Sunstein’s “incompletely theorized agreements.” For our purposes, we do not need such elaborate theoretical machinery.

hoc, a matter of temporary and tactical coalitions, and not guided by much that could be called an overarching view of the foundations of national security policy. Whether on detainee policy, surveillance, or many other areas, policy is narrow and cramped.

The United States needs greater coherence in addressing terrorism. The current lack of coherence, however, is not simply about the much analyzed problems of institutional mission, will, coordination, resources, and other technocratic and bureaucratic issues, important as they are. The lack of a coherent counterterrorism policy stems from disagreements that are deeper than mere operational policy alone. Some of these disagreements stem from genuinely profound differences in how to see fundamental issues of risk, how to assess risk and what to do about risks, what magnitudes of damage are worth what kinds of responses, and whether a counterterrorism policy ought to be motivated by a larger strategy. In a moment in which there is a change of administration, the foundational questions ought to be on the table. Most, perhaps nearly all of the time, discussion should confine itself to less weighty phenomena, in order to get to actionable policy. There are other moments—and this is one—where the sclerosis of action is occasioned by deeper conflicts that ought to be squarely on the table.

This essay takes up certain aspects of threat assessment, risk assessment, cost benefit analysis, strategy and tactics, as exemplary in offering a foundational assessment as to disagreements in surface policy. The discussion aims merely at showing that there are foundational disagreements, what some of those disagreements might be with respect to risk and threat assessment, and what the implications of such disagreements might be. The discussion of these particular topics is not exhaustive and, moreover, there are other equally momentous issues that might, and should, be taken up. All such issues, for example, are the nature of the enemy; the origin and growth of jihad; and the relationship of jihad to Islam as a religion, and its possibly syncretic relation to Western ideologies, or the economic ordering of transnational terrorism. Other topics include questions of both personal and geographic boundaries of the political community that policies and actions are designed to protect; the importance of safety as against liberties; or whether the United States owes, as a moral matter, the same juridical protections to foreign terrorists that it owes to its own citizens. Still other topics for consideration may be the relationship of war generally, and wars in Afghanistan and Iraq specifically, to undermining terrorist organizations; and, of course, the question of whether any of the foregoing is worth answering, because they all imply the virtues of a larger, strategic nature of policies responding to terrorism. Perhaps that is itself *the* deep strategic error, and the correct response is a determinedly

ad hoc one that refuses to look too far forward for fear of losing its eye on the immediate ball.

The present discussion addresses none of those questions, but instead uses risk assessment and cost benefit analysis as an example of what such an inquiry into foundations might be. As to conclusions, well, they are decidedly modest. Foundational inquiries have only limited utility in complicated democratic policy making, even if it is a moment when they are appropriate and indeed necessary. They cannot really induce agreement as such; what they can do is indicate where the fissures, ordinarily papered over by the political process, lie. They can remind the participants that the disagreements mean that things that one might have thought were settled are, after all, contestable and contested. The final outcome of such an inquiry is necessarily, but ironically, a re-papering over of the foundational disagreements into a new institutional and policy settlement that, at best, might have come through the exercise with a greater understanding of what cannot be done by consensus—because there is none—and what, if it happens, must be by nakedly majoritarian democratic legislative process or by the exercise of executive powers. This kind of discussion helps lay bare where and on what matters the polity does not act by consensus, but instead relies on political imposition of one kind or another. Quotidian, actual policy comes about not in the presence of profound foundational disagreement, but in its cautionary remembrance about agreement and consensus that will *not* be achieved.

That is all that this essay seeks to do—to offer an example, at a dismayingly high (from the standpoint of practical policy) level of abstraction, of philosophical, conceptual and methodological disagreements that today motivate and de-motivate government responses to jihadist terror. It is finally a very modest aim, because it invites the opening of this discussion and then suggests that, now modestly informed as to that on which we lack consensus, and in the interests of actual policy, we close it again. Too much foundationalism in democratic policy-making: that way lies madness.

II. SUCCESSFUL TERROR PREVENTION POLICY OR HAPPY FORTUITY, AND ANYWAY HOW DO YOU KNOW?

A. What to Make of Counterterrorism Success Since 9/11?

Today, nearly seven years after 9/11, the war on terror, which may well no longer be called that in polite policy company, is a vast efflorescence of government. It flourishes. Yet, on measures of rational operational performance, it is ill-coordinated, incoherent and, in the eyes

of skeptics, questionably effective in pursuit of an unfathomable goal. A formidable array of policies, laws, regulations, executive orders, budget provisions, bureaucracies, agencies, and institutions seek to analyze terrorism and terrorist organizations; anticipate threats; collect intelligence and inform decision-makers; make available actions and resources ranging from electronic monitoring to undertaking war; prevent hijackings and terrorist entry to the United States; secure the ports; detain suspected terrorists and interrogate them whether at home or abroad; interdict terrorist sources of funding; coordinate intelligence and action with our allies; cajole our semi-allies; intimidate states that harbor or sponsor terrorists; prevent the linkup of terrorists and weapons of mass destruction; provide civil emergency response in case of a successful terrorist attack; identify the terrorists who would attack us and stop them; and, well, defend the Constitution of the United States against all enemies, domestic and foreign.

What then are we to make of the fact that the United States has not suffered a successful homeland attack since 2001? There have been plots and attempts, according to law enforcement and intelligence authorities. These include the Richard Reid "shoe bomber" attempt to bring down an aircraft, not long after 9/11.² They also include much more recent plots, authorities report, such as the 2006 case in which suspects are alleged to have plotted to attack the military base at Fort Dix, New Jersey.³ They also appear to include plots and attempts not publicly known, aimed at United States territory. Former Bush administration officials recount the steady drumbeat of what former Office of Legal Counsel head Jack Goldsmith has called the "harrowing" daily flow of threat assessments from around the world. These officials' fears are fueled, he says, by "their knowledge of terrorists' aims and the infinite number of targets, and by their relative ignorance about when, where, or how the next attack will occur."⁴ The current Attorney General, Michael Mukasey, has said how surprised he has been by the seriousness of the flow of daily threats.⁵

2. See, e.g., *Shoe Bomb Suspect to Remain in Custody*, CNN.COM, Dec. 25, 2001, available at <http://archives.cnn.com/2001/US/12/24/investigation.plane/index.html> (last visited Oct. 20, 2008).

3. See, e.g., Dan Eggen & Dale Russakoff, *Six Charged in Plot to Attack Fort Dix*, WASH. POST., May 9, 2007, at A01.

4. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION*, 186-87 (WW Norton 2007).

5. See Terry Frieden, *Mukasey "Surprised" by Scope of Terrorist Threats*, CNN.COM, Mar. 21, 2008 available at <http://www.cnn.com/2008/POLITICS/03/21/-mukasey.terrorism> (last visited Oct. 20, 2008).

Despite such great contingencies, however, US governmental response to the palpable threats of terrorism, whether at home or abroad, at the strategic level of undermining terrorist organizations or the tactical level of preventing a particular attack, plausibly have at least had the effect of staving off a new homeland attack such as 9/11—or, worse, a 9/11 with weapons of mass destruction. Even if institutional activity to counterterrorism is (as is practically inevitable in a large, complicated, bureaucratic yet also democratic government and society such as the United States) haphazard and disorganized by the rationalist standards of modern management theory, perhaps there is some benefit, some overlapping protection, conferred by the organic growth of counterterrorism responses. Friedrich Hayek, the great economist and political philosopher, once remarked that the nature of capitalism was its seemingly organic, asymmetric growth—so untidy and inelegant that seemingly it could not possibly be as efficient or effective as state-planned economies—but that in fact the organic nature of the growth, its sheer opportunism, was its strength and the source of its efficiency.⁶ Perhaps something like that might be said of the effectiveness of America's tangled policies and institutions of counterterrorism—particularly since terrorism itself grows opportunistically.

Skeptics will correctly note, however, that it is not so easy to show causation for why a possible event has not happened, and it is too easy to reach the conclusion that the lack of a successful attack since 9/11 shows the effectiveness of US counterterrorism policies and institutions. There are plausible alternative hypotheses. In particular, the threat of terrorism, the skeptics say, was never as large as the post-9/11 environment made it out to be. The likelihood, particularly of a massive follow-up attack, was never very large. Some people conjoin this skepticism to a quasi-conspiracy theory; that if the threat was not so large, but the response so overwhelming, it must be in the service of some other, hidden government agenda. Goldsmith recounted one such dinner party encounter with Harvard academics in 2004. The consensus at the Cambridge dinner table (minus Goldsmith) was that the “government’s reactions to 9/11 were pretextual attempts to expand presidential power.”⁷

Even without invoking conspiracies of hidden governmental agendas in bad faith, however, skeptical assessments of the risks posed by terrorism often correctly add the position that, in any case, public safety is not the only issue. Civil liberties and human rights matter as well. If

6. See generally FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 1 (2nd ed. 2006) (1944).

7. GOLDSMITH, *supra* note 4, at 185.

safety gains are properly set against liberty costs, then many counterterrorism policies, programs, and institutions—Guantanamo, waterboarding, warrantless wiretapping, etc.—are not justified.

Those reaching such a conclusion must themselves respond, on the other hand, to a certain skepticism from the other direction. Are they truly empirical skeptics about the safety risks posed by terrorism, who in good faith attempt to weigh up to competing liberal values—safety and liberty? Or are they instead covert moral absolutists who do not actually give any actual weight to the value of safety, but are not willing to publicly say so? Kantian moral purity is a perfectly honorable position, but if it is indeed one's position, rather than a genuine weighing up of competing moral values, one should honorably say so. Why? Because very few of the rest of us are actually pure Kantians and we do expect that safety will be weighed along with civil liberties and human rights; and if one's position is otherwise, one must say so.⁸

B. Assumptions Behind the Assumptions in the War on Terror

The evaluation of risk, competing liberal values, what constitutes success in counterterrorism and to what one should attribute it, and other such abstractions quickly carry us far away from in-the-trenches discussion about what counterterrorism policy, law, and institutions should be and how, in a practical sense, we can get there. Behind the institutional and surface policy questions lies a whole other layer of assumptions about the nature of the counterterrorism enterprise. For a long time it was possible, indeed prudent, to see that layer of fundamental assumptions as mostly a distraction, an academic luxury. It was a bit of a vacation from such concrete tasks as answering what constitutes torture or illegal interrogation and, more generally, what should Congress legislate as policy, what should the courts mandate, and many other ground-level questions that, while obviously raising fundamental philosophical and conceptual issues, did not require addressing them directly in day-to-day decision-making.

Sometimes it is useful to ignore deeper differences because nothing more than intellectual purity turns on them. In other cases, the inability to generate workable policy stems from unacknowledged deeper differences, and one cannot get anywhere without addressing them. I have already alluded to two such differences in surface policy that are causally a function of irreconcilable deep assumptions that can serve as examples. One is the clash between a covert Kantianism followed by

8. See generally Benjamin Wittes, *Terrorism, the Military, and the Courts*, POL'Y REV., June 1, 2007, at 21-22.

some civil liberties and human rights advocates and a loose pluralist-value consequentialism followed by more or less everyone else. The inability to reach agreement on important concrete issues stems, most likely, from deep and quite possibly irreconcilable moral differences. A second is the assessment of risk. If, for example, you believe that the possibility of another 9/11 attack, let alone a weapons of mass destruction (WMD) terrorist attack, on an American city is smaller by orders of magnitude than US policy, the government, and the public assumes, then you will surely think the current war on terror is not just irrational but quite mad.

Thus, what you think policy should be in concrete matters such as whether there should be detentions at Guantanamo, or military commissions instead of regular civilian court trials of alleged terrorists, or coercive interrogations, or wars against regimes incubating terrorist organizations, or Predator missile strikes against suspected Al Qaeda targets in third countries, or wholesale and very expensive screening of banking transactions to interdict terrorist financing, or other crucial counterterrorism issues of the day-to-day turns out to depend in no small part on such abstract questions as how you assess risk, or your abstract philosophical commitments to stronger or weaker versions of moral rights, or many other abstractions. For most of us, quotidian practicalities count for a lot. But daily arguments over practical surface aspects of policy for combating terror are protracted and bitter, and yet do not ever seem to settle things, precisely because for many of the key participants, there is no agreement on the much deeper questions.

III. MAGNITUDE AND LIKELIHOOD

A. Assessing Terrorist Risks

A few months ago, my review of Jack Goldsmith's *The Terror Presidency* appeared in the *Times Literary Supplement*, a London book review read largely by intellectuals and academics around the English-speaking world.⁹ Reader reaction to the review, which addressed many highly controversial issues such as executive power and the Justice Department torture memos, surprisingly focused almost exclusively on a single remark made in passing. "Many people today," I wrote in the review, "believe that the terror threat is overrated, the problem is to 'manage' rather than defeat it." Anecdotal, to be sure, but most of us have heard, and quite possibly think exactly that, this view is quite

9. Kenneth Anderson, *Going it Alone*, TIMES LIT. SUPP. (London), Dec. 21 and 28, 2007, at 32-33 (reviewing GOLDSMITH, *supra* note 4).

prevalent.¹⁰ A goodly number of people emailed to comment on the article, mainly to say that Goldsmith's book, although a true reflection of his experience, is not *real*; it is merely indicative of a great deal of government hoopla over a wildly exaggerated risk. Because it is wildly exaggerated, Goldsmith's book, riveting as it is to read, is rendered substantively irrelevant as a proposal for rational policy.

Such views, often eloquently expressed, represent, in my estimation, the mainstream and momentum, the moving average, of today's elite opinion in the United States. These readers were undeniably fascinated by Goldsmith's descriptions of an entire government still in thrall, years after 9/11, to daily risk assessments of terrorist plots, or the idea that planes might today come hurtling out of the sky, or more anthrax might be spread by mail around an American city or a city subway bombed.¹¹ Yet their fascination was removed from and not with actual policy. Rather, regarding the administration as a dangerous echo chamber for its own inordinate fears—a positive feedback machine ratcheting itself up into bureaucratic hysteria, they saw Goldsmith's book not as reflecting exterior reality but instead as a window into a dangerously closed world. They were fascinated, yes, but not by what Goldsmith purported to describe—government responding to an external threat under conditions of radical uncertainty—but instead by what they saw as an exhibition in institutional madness, a consciousness turned in upon itself and creating its own unreality.¹²

One cannot really get to other issues of counterterrorism policy without making assessments of risk.¹³ Hence, the question of *how* one should make those assessments of risk, as a matter of method; the selection of method colors outputs. If the government's risk assessments are systematically exaggerated—intentionally or unintentionally—then the vast resources spent on counterterrorism are a waste and in many ways counterproductive. Moreover, tradeoffs of civil liberties and rights

10. See, e.g., Bret Stephens, *Global View: An Inordinate Fear of Terrorism?* WALL ST. J., Mar. 4, 2008, at A16.

11. See Clive Crook, *Just Brainless, Mr. Bush*, FT.COM, Oct. 15, 2007, available at <http://www.ft.com/cms/s/0/34275ce0-7ab9-11dc-9bee-0000779fd2ac.html> (last visited Oct. 20, 2008) (stating that he had read the book overnight in a single sitting, but was not especially convinced that the risks were so great as government made them out to be).

12. REMY DE GOURMONT, *SIXTINE*, quoted in BLAISE CENDRARS, *MORAVAGINE* epigraph (Alan Brown, trans., Peter Owen 1968) (1926).

13. Those seeking a good non-technical introduction to the fundamental ideas of risk, presented as intellectual history, might consult PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (John Wiley & Sons 1996); see also Kenneth Anderson, *The Uses and Abuses of Risk Management: How Men Learnt to Bet Against the Gods*, TIMES LIT. SUPP., (London) Feb. 21, 1997 (reviewing PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (John Wiley & Sons Inc. 1996)).

premised on terrorism's risks to public safety and national security might then be wrong, whether they be provisions of the Patriot Act(s), or surveillance legislation, or airport security, or so many other laws, regulations, and policies since 9/11. The costs of being wrong about the systematic exaggeration or misperception of risk might, on the other hand, be catastrophic.

American society appears, seven years after 9/11, at a peculiar point with respect to risk assessment. American elites—this country's intellectuals, academics, policy analysts, politicians, across a wide range of activities—appear to have concluded that risks are severely exaggerated, and quite possibly deliberately so and in political bad faith. In the former belief, they follow the lead of European elites and policymakers who have confronted serious terrorism in various forms over decades, such as the Irish Republican Army (IRA), Euskadi Ta Askatasuna (ETA), and in earlier years such movements as the Red Army Faction and the Bader-Meinhof Gang. European policymakers tend to view terrorism less as something to be defeated than as something to be managed like any other social welfare problem. It is, on that view, a serious issue of deviancy, but not one of fundamental threat to society or the state, any more than any other question of crime.¹⁴ As to a “war on terror”—the idea is laughable.¹⁵ The assimilation of elite American opinion to this European view is, in considerable part, a shift in the view of how risks ought to correctly be assessed.¹⁶

The broader American public, for its part, seems to believe *both* that the risks are very grave, and that it can afford to be complacent about them precisely because it believes that government takes those risks so seriously. The public thereby tends to passivity about continuing to put terrorism high on its list of priorities, as public opinion surveys show

14. Not in every single instance, that is, at least not rhetorically. Then-French President Jacques Chirac, in a remarkable speech during his visit to the French Strategic Air and Maritime Forces at Landivisiau in January 2006, expressed this mentality when he noted that, while “combating terrorism is one of our priorities . . . [o]ne should not, however, yield to the temptation of restricting all defense and security-related considerations to this necessary fight” See Jacques Chirac, President of the French Republic, Speech During His Visit to the Strategic Air and Maritime Forces at Landivisiau, L’Île Longue (Jan. 19, 2006), available at <http://www.globalsecurity.org/wmd/library/news/france/france-060119-elysee01.htm> (last visited Oct. 20, 2008). It was unsurprisingly widely and quickly repudiated by the European political establishment.

15. See Bruce Ackerman, *Response, This is Not a War*, 113 YALE L.J. 1871 (2004) (discussing the voluminous literature believing the “war on terror” to be absurd, and comparing European and American approaches).

16. Niall Ferguson, *The War on Terror Is Not New*, N.Y. TIMES, Sept. 20, 2001, at A31.

steady declines in how highly Americans rank terrorism as an issue.¹⁷ Yet, this ironically appears to be because the public believes it does not need to prioritize it, not because the public thinks the issue is not important, but because the public believes that the government already does and will continue to do so. The public out-games itself and so overlooks the fact that over time in a large and complicated democracy, politicians reflect the priorities that voters tell them are important. Moreover, as Goldsmith points out, the public focuses “less on the threat it cannot see, and more on the things it can,” such as “false alarms, the alienation of allies, terrorist recruitment, misallocated resources, and diminished American honor.”¹⁸ The public sees costs but takes for granted benefits.

The question of how to assess risk can carry us in diametrically different directions—either to the concrete institutional mechanisms by which threat assessments are made by the intelligence community or, alternatively, upwards in abstraction to theories of information relation and screening for relevance, prediction, congruence, convergence, and verisimilitude. We pursue the latter and start with two of the simplest dimensions: magnitude and likelihood.¹⁹

B. John Mueller on Terrorist Threat Magnitude and Likelihood

Political scientist John Mueller has argued to wide media and policy establishment attention that the risks of terrorism are wildly overstated. Developing this thesis in various scholarly and policy venues and articles since 9/11, he has most recently pulled the argument together in his 2006 book, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them*.²⁰ Despite the breathless title and popularly aimed prose style, the book makes an aggressive intellectual argument that the threat to the United States presented by terrorism, particularly the possibility of catastrophic

17. “One month after 9/11, 85 percent of the American public believed that another attack was likely to happen in the near future; by the summer of 2007, this figure had dropped to 40 percent. During this same period, the percentage of the country that saw terrorism as the nation’s most important problem dropped from 46 to 4 percent.” GOLDSMITH, *supra* note 4, at 187.

18. *Id.* at 188.

19. Of the distinctions between these two risk dimensions, early in my tenure as the first general counsel to George Soros’ Open Society Institute foundation, Soros presented me to a meeting of several hundred civil society activists in Eastern Europe by saying, “Mr. Anderson is the foundation’s lawyer—he advises me of catastrophic risks of extremely low likelihood.”

20. JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* (Free Press 2006).

terrorism using weapons of mass destruction, is so low as to obviate anything that might constitute a "war" on terror.²¹ It is something to be managed through policing and relatively modest intelligence work, in the United States and abroad.

The policy implications are the familiar ones: so much investment in counterterrorism is a waste of resources; it wrongly sets the tradeoffs between security and liberty; it is counterproductive, because many of the more radical actions in the war on terror counter-radicalize people into terrorism or the support of terrorism; and the radical and counterproductive war on terror persists because it is in the political interests of politicians and the economic interests of what Mueller calls the "terrorism industry."²²

These are contentions that, on the one hand, are comforting to those who would like to move political conversations to other issues now that 9/11 has receded to the background—issues of domestic policy, the economy, health care, and other kinds of foreign policy questions such as genocide in Darfur.²³ Mueller, it should be said, is far from merely an incendiary or debunking journalist; he is a highly regarded political scientist and security scholar of many decades standing.²⁴ On the other hand, it is striking to see just how sweeping Mueller's claims are when laid out, so to speak, end-to-end. Here is a sample of his introductory bullet point assertions, in case one would like to test one's intuitive reaction to believing, as Mueller asserts, that the threat is not really so very large:

21. See generally *id.*

22. See *id.*

23. Mueller might profitably have quoted Mademoiselle Mathilde de La Moïe, telling her brother and his friends in an aristocratic drawing room in Paris of 1830, fearful of a return of the Revolution and the Terror: "And so, gentlemen . . . you will be haunted by fear all your lives, and afterwards people will say of you: 'It was not a wolf, it was only a shadow'." STENDHAL, *THE RED AND THE BLACK*, 314 (Moya Longstaffe rev. and ed., Moncrieff trans., London Wordsworth Editions 2001) (1830).

24. Although, it should be said, Mueller's earlier career reflected much the same views about the Cold War—in particular, that the West and Reagan overreacted. See, e.g., JOHN MUELLER, *RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR* (Basic Books 1989), John Mueller, *The Essential Irrelevance of Nuclear Weapons: Stability in the Postwar World*, 13 INT'L SECURITY 1, 55-79 (1988), John Mueller, *The Art of a Deal: No Rewards for Iraqi Aggression*, ARIZ. REP., Dec. 16, 1990, at C1. Mueller's accommodationist instincts were on display in the first Gulf War. *Overblown* is, in many important ways, continuous with Mueller's overall conception of international security, long predating the threat of Islamist terrorism. See generally MUELLER, *supra* note 20. That accommodationist framework might have been seen as wrong in the Cold War, and is still seen as wrong today. If the United States had followed the policies suggested by Mueller's Cold War era work, we might still be in it.

- In general, terrorism, particularly international terrorism, doesn't do much damage when considered in almost any reasonable context. . . .
- The likelihood that any individual American will be killed in a terrorist event is microscopic.
- Just about any damage terrorists are likely to be able to perpetrate can be readily absorbed. To deem the threat an "existential" one is somewhere between extravagant and absurd. . . .
- Lashing out at the terrorist threat is frequently an exercise in self-flagellation because it is usually more expensive than the terrorist attack itself and because it gives the terrorists exactly what they are looking for.
- Chemical and radiological weapons, and most biological ones as well, are incapable of perpetrating mass destruction.
- The likelihood that a terrorist group will be able to master nuclear weapons any time soon is extremely, perhaps vanishingly, small. . . .
- Although additional terrorist attacks in the United States certainly remain possible, an entirely plausible explanation for the fact that there have been none since 2001 is that there is no significant international terrorist presence within the country.
- Policies that continually, or even occasionally, focus entirely on worst-case scenarios (or worst-case fantasies) are unwise and can be exceedingly wasteful.
- In fact, much, probably most of the money and effort expended on counterterrorism since 2001 (and before, for that matter) has been wasted.
- Seeking to protect all potential targets against terrorist attack is impossible and foolish. In fact, just about anything is a potential terrorist target.

- Terrorism should be treated essentially as a criminal problem calling mainly for the application of policing methods, particularly in the international sphere, not military ones.
- Because terrorism probably presents only a rather limited threat, a viable policy approach might center around creating the potential to absorb its direct effects and to mitigate its longer range consequences while continuing to support international policing efforts, particularly overseas.²⁵

The reason for my offering this recitation is in part because it is *so* comprehensive a statement of the skeptics' claims and such a reassuring one, particularly when it tells us that the risk of a terrorist group managing to master nuclear weapons any time soon is "vanishingly small."²⁶ But should we believe him on all or most of these strenuous propositions?

Mueller is perhaps most devoted to the proposition that international terrorism does not do "much damage when considered in almost any reasonable context."²⁷ It is, in other words, a proposition that the damage wrought by transnational terrorism, even if it occurs as it did on 9/11 and even if it occurs on a semi-regular basis, is simply not all that great, on reasonable measures. Government and what Mueller calls the "terrorism industry" have severely inflated the estimations of likelihood and magnitude.

What are (some of) the measures of magnitude, according to Mueller? Well, the number of "people worldwide who die as a result of international terrorism is generally a few hundred a year, tiny compared to the numbers who die in most civil wars or from automobile accidents."²⁸ Even including the 9/11 attacks, Mueller dismisses the risks by noting that the number of Americans killed by international terrorism since the late 1960's "is about the same as the number killed over the same period by lightning, or by accidents caused by deer, or by severe allergic reactions to peanuts."²⁹ There are many similarly dismissive comparisons scattered throughout the book. Mueller makes a critique of the magnitude of counterterrorism efforts on the grounds that the magnitude of terrorist harm is small, as compared with a wide variety of social harms, measured either annually or over several decades.

25. MUELLER, *supra* note 20, at 4-5.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 13.

One sees where this critique comes from and where it goes, and of course it is not irrelevant. Tradeoffs involving resources and outcomes require comparisons and weighing up of opportunity costs. But the point Mueller nowhere addresses is that these comparisons are only as relevant as the points of comparison are relevant. As a form of consequentialist reasoning, it turns quickly into a *reductio ad absurdum* leading to social quietism, because no effort at preventing any particular harm will turn out to be worth the trouble. After all, by *some* comparison, there is always something worse that one ought to be preventing. Opportunity costs are not opportunity costs unless they correspond to a real opportunity. There has to be a plausible scenario in which addressing one is actually about acting, or not, with respect to the other. Opportunities—only genuinely plausible and real opportunities—are the relevant comparison for comparing opportunity costs.

One might additionally suppose that through serial, iterative comparison we ought to arrive at the worst thing and seek to prevent that, and then gradually work our way down the list. But of course human life is not like that—not merely because it is not “practical” in a dispersed world of billions and billions, but more fundamentally because we in fact value multiple and plural things. There is no arriving at a maximum harm to be prevented ahead of all else, and even if we were able to determine such a maximum harm, the conditions of human life are such that we must promote and prevent many different things all at the same time. This is obvious. But the form of analysis that Mueller engages in (and which is enthusiastically taken up by various journalists of good repute including, for example, *The Atlantic Monthly’s* James Fallows)³⁰ slides

30. See, e.g., James Fallows, *Declaring Victory*, ATLANTIC MONTHLY, Sept. 2006, available at http://www.theatlantic.com/doc/200609/fallows_victory (last visited Oct. 20, 2008) [hereinafter “Declaring Victory”]; see also James Fallows, *Act as if Mueller Is Right: Responses to ‘Is There Still a Terrorist Threat?’: the Myth of the Omnipresent Enemy*, FOREIGN AFFAIRS, Sept. 7, 2006, available at http://www.foreignaffairs.org/special/9-11_roundtable/9-11_roundtable_fallows (last visited Oct. 20, 2008) [hereinafter “Act as if Mueller Is Right”]. Fallows’ version of this argument in magazine journalism attracted much attention in large part because of its insouciant cynicism—insincerity as policy, a call to announce victory in the war on terror while essentially giving up on it. See generally *id.* His Atlantic Monthly accounts aroused, in my recollection, much admiration from liberals who at the time had decided to drop foreign policy idealism as something like a neoconservative con game. See *Declaring Victory*, *supra*. What I called at the time the “new liberal realism” found Fallows’ tough, amoral realism viscerally appealing; liberals, it seemed, had grown tired of forever having to worship at the Wilsonian church of idealism, and seized the opportunity to slip the leashes of their human rights minders to hold a little Carnival of realism, reveling in such hitherto benighted realist principles as security first, then human rights and democracy, maybe; proclaiming that authoritarian strongmen, including Saddam, can be good things; and accommodation of bad regimes and rulers under the rubric of containment. See generally

quickly past the question of multiple human goods that, even on consequentialist reasoning alone, human beings must pursue on behalf of themselves and others.

C. Moral Agency Constraints on Agentless Risk Comparisons

Opportunity cost is not the only criterion important to establishing what constitutes a relevant comparison, although it is the most digestible within the terms of *homo economicus* instrumentalism.³¹ Less assimilable but still crucial are certain moral constraints upon relevant comparisons.

The first moral constraint upon comparison of relative magnitudes goes to the issue of intentionality and human agency. Ordinarily, we evaluate harm differently when it is caused by intentional human agency, particularly with criteria of culpability attached, than we do unintentionally caused harm. It is not irrelevant that Mueller formulates his criteria of likelihood and magnitude to include, even to emphasize, natural events such as being struck by lightning. One might, as well, include earthquakes and volcanic eruptions and asteroid strikes. It might easily be the case, of course, that one or another of these natural catastrophic occurrences or accidents might cause more harm in the aggregate than terrorism. Let us accept Mueller's figures on a death for death basis. It is also true that societies must undertake difficult cost benefit analyses, on a discounted probability basis, with respect to preventing harms caused by highly contingent natural events, such as earthquakes. All the same opportunity cost questions can be raised about them as with any social harm.

Although we seek to protect against these harms, even at the cost of diversion of resources away from preventing intentional human agency harms, it seems uncontroversial as a social fact that people regard the two categories as morally distinct. We give distinct analyses of the proper resources that ideally ought to be devoted to each. This is no more than to make the sociological observation that our society is morally

id. As the neoconservative democracy project, with its presumption of a wormhole, as it were, directly from Democratic Elections to the Land of All Good Things, unraveled and frayed, liberals decided that rather than retake the idealist high ground, it would be more—really, there is no better word—fun to turn hardened, cynical realist. Both Mueller and Fallows fit within this political trope. For a discussion and sharp denunciation of the “new liberal realism,” see Kenneth Anderson, *Goodbye to All That: A Requiem for Neoconservatism*, 22 AM. U. INT’L L. REV. 277, 293-98 (2007); see also Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT’L L. J. 455, 466-70 (2007).

31. Meaning, more or less, that it can be easily graphed.

deontological in social organization and psychological conviction. Our moral evaluations include resource tradeoffs with great attention to non-moral consequences, but they also take into account moral agency, moral rights and duties of moral agents, and do so as a separate matter. One may argue that this is irrational and that we should confine ourselves to some strictly consequentialist calculus, but it is surely unexceptional to say that this is *not* how we do things.³²

Meaning, that is, that we do not act as strict consequentialists even in ordinary public life—even when *not* undertaking such extraordinary efforts as the war on terror. Consider how Mueller's analysis might apply to our society's ordinary efforts at criminal justice, even absent a war on terror or the threat of terrorism. One could just as easily apply Mueller's analysis to many of our uncontroversial institutions of criminal justice, institutions that occupy resources that quite possibly, on a strictly consequentialist calculus, would turn out to be unjustified, especially considering how badly our system of criminal justice actually functions. Why do we expend the resources we do on murder cases, for example, when, after all, that same funding could better be spent on child vaccination or health care or any number of other things? Mueller's analysis is striking mostly for its reliance on a *general* form of consequentialism—needed, however, in order to reach his very strong conclusions regarding the irrationality, and wrongness of, the war on terror *specifically*. Plainly, this is a form of Ethics 101 discussion that has been going on for a very long time; the rote response from the consequentialist is that we must also consider the secondary and tertiary consequences of failing to police and investigate crime.

The point, however, is that Mueller does not take up the secondary and tertiary costs or benefits that might accrue to the war on terror. He stops with simple comparisons—the primary costs of the war on terror and the primary benefits that might result if those resources were put elsewhere. Mueller does not specially address the possibility that his argument might be applied to a vast array of social programs and particularly instances of justice that, in fact, appear difficult to justify except as an acknowledgment of the social fact that people have an independent attachment to a conception of justice, as such. For that matter, insistence upon justice for its own sake is not merely a social fact to be observed sociologically, it also happens to be *right*. Mueller might respond that he means only excess resources applied to

32. For those looking for an accessible introduction to such basic terms in moral philosophy as consequentialism or deontology, see Lawrence B. Solum's Legal Theory Lexicon, available at http://lsolum.typepad.com/legal_theory_lexicon/ (last visited Oct. 30, 2008).

counterterrorism—but there is nothing special about his argument that limits it to the war on terror. It is open to the charge that it proves far too much and undermines the arguments for any agent-culpability institution of justice.

One might say with perfect consistency, of course as a pure consequentialist, that as a society we do indeed put too many resources toward unproductive exercises due to an irrational attachment to our sense of justice. It is just irrational. But, Mueller gives no indication of saying that as a general proposition. His target is specifically the war on terror, and he does not acknowledge the full range of what his argument could plausibly be read as embracing. Mueller proves, if one is strictly a consequentialist and shares enough of his factual predicates, that the war on terror is irrational in its consumption and diversion of social resources. Mueller, however, fails to acknowledge that one could make the same argument about any intentionality-based, guilt-based, justice-based, human agent-based institution. The argument smuggles in an assumption that in order to be rational, we are all, or ought to be, consequentialists. Although, it would be more accurate to say that, socially, we are permissive deontologists—not indifferent to consequences and not morally bound by them or anything else.

D. Mueller Proving Too Much About Chemical and Biological Weapons

Nowhere is Mueller's hard, but smuggled-in, consequentialism more at work than in his discussion of the magnitude of harm that he claims is (un)likely to result from chemical or biological terrorism.³³ He dismisses the possibility of serious attack on the basis of the factual claim that it is quite hard to weaponize and deploy chemical or biological weapons (CBW) in order to produce a catastrophic attack.³⁴

Mueller is perhaps partly correct, if the point of comparison is the Bush administration's apocalyptic public statements immediately following 9/11 about the immediate threat of mass destruction by CBW in the hands of terrorists, and if the assumption is the ability of a terrorist group to weaponize CBW itself rather than obtain it from a rogue state and merely serve as the delivery mechanism. But, the limits on terrorist groups to weaponize CBW will get smaller as technology moves on and we will soon be a decade beyond the technology available on 9/11. Mueller discounts essentially to zero the effects of the US war on terror, including driving Al Qaeda from its safe haven in Kabul along with the Taliban, and disrupting the long term research, training, and logistical

33. See MUELLER, *supra* note 20, at 18.

34. *Id.*

planning necessary to carry out a large scale CBW attack upon the United States. Even so, Mueller makes breathtaking assumptions about matters that are essentially factual uncertainties.

Yet, if the effects of chemical weapons attacks are merely what Mueller describes,³⁵ then not only is the US government's agitation unwarranted—so is the quite extraordinary amount of concern shown in word and deed and resources by other governments, the United Nations, the International Committee of the Red Cross (ICRC), Human Rights Watch, the plethora of arms control groups, and everyone who devoted so many years and vast sums of money and effort to creating and putting in place two of the most technically worked-out treaties in history: the Chemical Weapons Convention (CWC) and the Biological Weapons Convention (BWC). Each of these requires great effort and expense by chemical and other private industries as well as governments, and each is celebrated as a great achievement in arms control. This has all involved a quite lofty diversion of resources, and we should be clear that even if Mueller's skepticism is aimed at the Bush administration,³⁶ it all seems quite equally suited to *all* the efforts to proscribe CBW.

Put another way, Mueller's cheerful confidence that CBW attacks are not that big of a deal³⁷ seems unsustainable unless one takes his downplaying of the factual consequences (including the strategic consequences that he does not consider at all) entirely at face value or unless—more likely—one has already bought into a ruthlessly puritanical form of consequentialism. Because, why bother if the effects are as limited and the military and terror uses of the weapons as circumscribed as Mueller says?³⁸ The resources and the apparatus for their prohibition through the CWC and BWC have not been small and although they are celebrated as politically progressive exemplars of what international arms control law can achieve, on Mueller's calculus, they must surely be altogether excessive to the provocation.

For that matter, why stop there? The international campaign to ban landmines went to extraordinary efforts throughout the 1990s to secure a treaty of prohibition.³⁹ Celebrated as a monumental achievement of the international non-governmental organization (NGO) movement and a progressive victory for international law, it nevertheless cost large amounts of money to pursue, and diverted very substantial diplomatic,

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See, e.g., International Campaign to Ban Landmines: History, available at <http://www.icbl.org/campaign/history> (last visited Oct. 20, 2008).

governmental and nongovernmental resources, and for what?⁴⁰ Landmines were thought in the mid-1990s to produce on the order of 20,000 casualties a year—out of a global population of some six billion people, let's be plain.⁴¹ It is a number which, to put it in Mueller-Fallows terms, is approximately half the number of annual US driving fatalities.⁴² The same resources put into tsunami detection during the 1990s might have made a real difference a few years later, and if not then, at some later point. Moreover, this kind of substitution—tsunami detection, malaria prevention, etc.—might arguably even pass the opportunity cost test posed earlier. Global civil society, the international NGOs, might really have chosen to organize around tsunami detection or malaria prevention rather than landmines. And yet, even if it does pass the “actual, not merely alternative world, opportunity” test, it is not wicked or irrational to put resources into landmine prevention, in no small part because they are part of a certain *intentional* human activity.

So Mueller's form of argument relies implicitly on a strong form of moral consequentialism that proves much too much.⁴³ Moreover, justice and human agency are distinct categories of value separable from a general consideration of consequences. They are not immune from claims of overall consequences, but they are nonetheless a separate category of things to be valued. We have no reason to apologize for choosing to put a high resource premium on preventing harms, such as terrorist attacks, that are products of willful human agency, even above such events as natural disasters that might (by hypothesis) have a similar magnitude and likelihood. When Mueller argues from non-agency cases as a comparison with the war on terror,⁴⁴ his point is not irrelevant—it is always something to consider—but we should not and do not feel bound by those considerations. To the extent he insists, he sweeps too much in, and really adopts a covert utilitarianism that is more radical than American society, at least, is prepared to endorse.⁴⁵ Traditional ethical

40. The Human Rights Watch Arms Division was one of the founding members of the International Campaign to Ban Landmines, which spearheaded the NGO ban campaign during the 1990s. See Kenneth Anderson, *The Ottawa Convention Banning Landmines, The Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 1 (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=233561 (last visited Oct. 20, 2008) (offering a critical read of the campaign).

41. See, e.g., International Campaign to Ban Landmines, available at <http://www.icbl.org/problem/what> (last visited Oct. 20, 2008).

42. See THE ARMS PROJECT OF HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, LANDMINES: A DEADLY LEGACY (1993) (discussing 1990s figures).

43. MUELLER, *supra* note 20.

44. *Id.*

45. *Id.*

theory would say that in deciding to put greater resources toward the prevention—as well as the investigation and punishment of guilt—a society acts as a permissive deontologist, not indifferent to consequences by any means, but not rigidly bound by them, either.⁴⁶

We should be careful what we wish for, in other words, in embracing either the logical structure of Mueller's consequentialism or the factual assumptions on which he makes his judgment that the war on terror is not worth it. The argument cuts further and deeper than it looks, or than Mueller, Fallows, et al., are willing to admit. It finally proves too much.

IV. RELEVANCE AND COMMENSURABILITY

A. Comparisons of Moral Rights and Non-Moral Consequences?

Cost benefit analysis is as simple in principle as it is indispensable in practice. Take the expected costs and expected benefits, using some kind of probability discount to determine expectations, and net them against each other.⁴⁷ In the case of risks and uncertainties such as terrorism, which are really all about expected costs, including costs of prevention, the process is one of determining costs by reference to the two primary probabilistic dimensions of magnitude and likelihood.

The formal modeling of these dimensions has been thoroughly worked out in a variety of settings,⁴⁸ including terrorism, and is not the primary concern here. The overall concern in this essay is not about rational modeling as such, but instead about considerations exogenous to the calculus that change the way in which the model is conceived. The principal issue is less how to establish expected costs with respect to their probabilities, than it is how to make *genuinely relevant* tradeoffs with respect to the investment of resources in prevention that might be used to prevent (or accomplish) something else. The issue of relevancy turns out to be more conceptually difficult than one might have thought—consider how quickly cracks and fissures arise in Mueller's apparently robust argument—and not from a single source of worry.⁴⁹

46. Traditional ethical theory is also open to reach the same result in practice by some suitably tweaked version of rule utilitarianism, in which results consistent with our social notions of justice are accommodated within consequentialist theory. There are other moral considerations that might also exogenously affect the calculus of tradeoffs in addressing, but we will take this as exemplary.

47. See, e.g., Introduction to Cost Benefit Analysis, available at <http://www.cost-benefitanalysis.org/> (last visited Oct. 20, 2008).

48. See, e.g., Cost-Benefit Analysis, and Terrorism, available at http://www.becker-posner-blog.com/archives/2005/09/katrina_cost-be.html (last visited Oct. 20, 2008).

49. MUELLER, *supra* note 20.

The issues of relevancy arise from multiple directions when trying to establish the proper bases for comparison—some prudential, some moral, and some from a still deeper, conceptual issue of commensurability.

Moreover, this concern for justice, desert, and human agency invokes categories of value and not simply categories of consequences. It therefore raises an issue of relevant comparisons, and how to make comparisons. The ways in which background assumptions about the priorities of moral principles (set against non-moral consequences) color and condition, in covert ways, arguments over terrorism and counterterrorism are legion and bitter, and oftentimes do not recognize the fundamental differences in how to make tradeoffs. For example, for many human rights activists, natural law theorists, and other (semi-) strict deontologists, the fundamental point of 'rights' is to override considerations of consequences: the familiar rubric of rights as trumps.⁵⁰ Rights establish a priority ordering of considerations, and consequences come afterwards. Some of the bitterest arguments over torture, degrading and inhumane treatment, and coercive interrogation in the matter of counterterrorism are, somewhere buried within the practicalities, fundamental disagreements over what takes priority and whether, as a matter of principle, one does take categorical priority over the other or whether there even is a categorical.

One way out of this is to reframe *all* consequences as rights-talk, so that everything of value is framed as a matter of rights.⁵¹ So, following a familiar rhetorical line since 9/11, 'public safety' is also a matter of human rights and 'security' is a matter of right—in order to bring it within the discourse of rights. The obvious problem, of course, is that now rights are set against rights and supposed trumps set against trumps, insofar as we are speaking of human rights—and the question of priority is no less pressing. Put another way, when everything is a right, nothing is a right.⁵² Rights are no longer trumps but have to be prioritized as

50. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (The Free Press 1991).

51. See, e.g., Kenneth Anderson, *The Therapeutic as Rights Talks*, 96 COL. LAW REV., 1062 (1996).

52. This rhetorical move to reframe everything as a right, including national security, takes its cue from the long history within the human rights movement of reframing distributive questions, economic matters, etc., as rights. It does not originate with national security issues on the right; far from it. At least since economic aspirations were enshrined as rights in the founding UN Covenant on Economic and Social Rights, the progressive left has set about framing its political agendas as the discovery of new human rights; a survey of US international law reviews for a ten or twenty year period would reveal the lengthy history of the discovery of new ways in which to frame distributional issues as rights in the article titles alone.

against each other. In that case, what has changed besides the labels? What has changed in moving to an all-rights discourse? In practical terms in the United States, what changes is the decision-maker. Many matters which, in pursuit of the democratic common good, would have been made as a matter of public policy by the legislature become, through the legal assertion of rights discourse, matters for decision by the judiciary which, after all, exists to determine rights. The question of priority is no less present; but the question of who decides between rights shifts. Political battles in the United States over the proper role of the executive, legislature, and courts in establishing the legal framework for counterterrorism—the rights of detainees at Guantanamo, habeas corpus and, on the other side, the ‘right’ of the public to security and safety, and so on are, to a significant extent, really battles over using rhetorical shifts—rights talk—in order to shift decision-makers.

At the same time, even most rights-activists do subscribe to a certain level of permissive deontology—meaning acceptance at least in some circumstances of the *direct* consideration of consequences, *not* remediated as rights or some other moral category.⁵³ This is so even if, with a little theoretical pressing and costs to the rhetorical value of rights-talk itself, they could reach the same results by reformulating everything in categories of rights and values. Permissive deontology accepts alteration by expected consequences either when the rights at issue seem modest enough, or else when the magnitude and the likelihood of harm become high enough—really, a combination of the two. But ethical theory is notoriously bad at providing a set of decision rules for how to determine when this is okay or not, and to what extent. Rights-talk, without a great deal of special theorizing, really does seem fundamentally at odds with tradeoff-talk: and yet the comparisons called forth by a permissive deontology require that, within our ordinary conceptions of justice and ordered liberty, we consider both rights and consequences. With enough special pleading, tradeoffs, proportionality, marginality, the whole structure of cost benefit analysis, can be made more or less consistent with one other in result. Much of this theorizing, however, at least in politically fraught and highly disputed matters of counterterrorism, seems to consist of ad hoc rationales that do not so much provide a structure for decision as a rationalization for which consideration—rights or consequences—one favored in a particular case in the first place. This is not unfamiliar, of course, from decades of argument over utilitarian social policy and rights, but today’s questions

53. See, e.g., *Dentological Ethics*, available at <http://www.britannica.com/eb/article-9029972/deontological-ethics> (last visited Oct. 20, 2008).

of terrorism and counterterrorism force the issue in a particularly unavoidable and, indeed, sometimes ugly way.

B. The Limits of Opportunity Cost Comparison: The Special Case of Government

Comparisons become therefore difficult and complicated. They are much deeper and much subtler than we might have thought. It is not quite as we thought: figure out expected costs and expected benefits, alter them to reflect our values, net them against each other, and compare to other "relevant" possible courses of action. We might have profound differences about how factually to evaluate certain expectations, and we might value certain things differently, and so we might come to quite different conclusions. In principle it all seemed fairly easy; but in the end, not so easy as that. Our calculus of comparison might have to weigh moral values versus non-moral consequences. It might also have to weigh moral values against moral values. It might have to weigh the special moral category of rights against other values, or against non-moral consequences. And, in the case of terrorism, it might have to do so against very high stakes.

What decision theory is able to persuasively instruct us in these matters and command wide adherence at a sufficient level of concreteness? None that I know. One narrow conclusion I draw from this is one of intellectual *attitude* within our acrimonious public debate. Given that we lack a broadly accepted theory for how to deal with multiple goods and values, it is not a good idea to argue practical policy in the way that Mueller does,⁵⁴ in a way that covertly presumes precisely such a theory (and which then intermingles it with a great many factual predicates, thus giving it a luster of descriptive authority).

Certainly an attitude of intellectual dismissiveness—which so much of this literature on all sides tends to affect—is scarcely warranted given that dissimilar, indeed incommensurable social goods are widely acknowledged as desirable, even necessary, yet there is no similarly widely shared view on how, or in some cases even *whether*, to make tradeoffs among them. This is not an intellectually overwhelming point—we could dress it up with a lot of theory about overlapping consensus and so on, but it hardly seems necessary. Still, given the curdled nature of much of the public debate, it bears stating.

Now, shift away from the debate over multiple values, non-moral consequences, and rights to a different problem in 'weighing up.' This is

54. MUELLER, *supra* note 20.

the question of 'relevancy' of comparisons, or the general question of commensurability. We start with a form of cost benefit analysis (that, in the case of bad events such as terrorism, becomes a downside risk analysis), and out of which resource investments to minimize or prevent the risk must be weighed against opportunity costs. As observed earlier, however, a comparison of resource investments—whether to put additional resources into counterterrorism or some other activity—depends in large part upon whether the alternative is genuinely an opportunity denoting an opportunity cost, or something more akin to possible alternative worlds. We are not going to take resources that could be spent on treating the cut finger in Washington DC and divert them to AIDS in Africa. But when is the comparison absurd, and when is it not?

One way to think about this problem is to appeal to economic models that address institutional opportunity cost decisions. A private business firm engaged in capital budgeting provides an ordinary example because private business firms must make many opportunity cost comparisons. Yet the private firm example does *not* offer a guiding principle.

Why not? Capital budgeting for a firm typically does not need to deal directly with the problem of radically differing opportunity costs because the question of alternative possible investments for comparison is ordinarily self-restricting. The universe of possible comparisons is self-constraining. Opportunities that go far outside the existing firm's capabilities (usually loosely indicated by its lines of business) bring with them risks and uncertainties that *themselves* must be absorbed into the calculus. The opportunity costs posed, for example, by a uranium mining company considering entering the lingerie business are perhaps the business equivalent of the cut finger-AIDS in Africa comparison. It *might* follow a "conglomerate" strategy and go into the fashion business. But market judgments of the rational limits of such diversification will be factored into the comparisons so as to constrain the universe to a set of apples-apples profit criteria. The uranium company's universe is self-policing. In the business environment, firms are mostly self-policing because the risks and uncertainties speak for themselves. This is not so with public, social institutions in which the plural goods are for the less self-constraining.

Thus, while this self-limitation renders private firm capital budgeting inapposite for truly general relevancy criteria, government stands in a quite different and perhaps more useful position in giving an example of how to evaluate opportunity costs. The private firm's self-limiting mechanism does not apply in the case of government. The reason, long developed in the literature of public administration, is that the nature of government is that it *must* attend to plural needs. It cannot specialize (including, crucially, by abandoning whole lines of business activity as

unprofitable) in the way that firms can. There is a range of functions that a government is expected to perform: provide security, manage the macro-economy, ensure social welfare, and guarantee many other public goods. Without entering into the endless debate over how wide or how narrow those functions ought to be, even the ones that nearly everyone agrees upon, such as monetary policy or national security, require tradeoffs that are not, on their face, obviously commensurable. We look to cost benefit analysis and opportunity cost comparisons. Yet many of the goods at issue are sufficiently dissimilar that comparisons are difficult and often do not convince us that they make sense.⁵⁵

So if the nature of large, democratic government in advanced democratic economies is that it must perform and be responsible for plural and dissimilar functions, it is not available for government to decide, for example, that it is going to do social security, but not national security. Or that it is going to provide elementary education, but not money. The relevance and commensurability problems of tradeoff are unavoidable for government. What happens? Ordinarily government can resolve the apples-to-oranges comparison problem by creating a second order mechanism, a procedural mechanism that resolves the problem without making claims as to substance. Democratic processes, or interest group politics, or whatever procedural mechanism the polity has in place, make these determinations on whatever substantive basis, rational or irrational, prudent or imprudent, thrifty or profligate, they can make them.

However they *are* made, these budgeting and resource allocation decisions are different from the opportunity cost decisions of private firms, because, unlike government, there is no *necessity* that a private firm be involved in any particular kind of business. In a trivial sense, dealing with terrorism and counterterrorism is no different than any other resource allocation function in government. There is a second order mechanism, the complex decision-making structures of a complex, bureaucratic democracy, for dealing with counterterrorism as with any other issue. But what we seek here is not the procedure by which decisions are made, but instead to establish the substantive rational criteria on which they should be made.

How can we characterize the second order mechanisms? Public management theory accepts that although government, unlike private

55. Outsourcing, in the sense of having some private party provide the public good, of course does not make the resource tradeoff go away, so long as the government pays for it. And simply giving up on the public good is also a decision as to tradeoffs—marking to market, so to speak, at zero—at least so long as the good in question is indeed regarded as a public good.

firms, has certain, possibly incommensurate, obligations among which it nevertheless must make investment tradeoffs, it can make decisions about tradeoffs so long as those activities are in the ordinary course of public business.⁵⁶ 'Ordinary' here takes on, however, two distinct meanings. One is that so long as there is some reasonably legitimate, reasonably democratic process (or process of assent) in place for determining the tradeoffs, then the rationality of the actual tradeoffs themselves is not so very important.⁵⁷ It accepts, that is, that the final answer is one of under-determination of rational criteria for establishing the tradeoffs at issue, meaning that it is procedural⁵⁸ rather than substantive.

The second is that the process adopted is 'ordinary' in the sense that it is not 'single catastrophic event'-driven. It is 'ordinary' in the sense that the decisional process can be revised over time, according to lessons learned, some positive and some negative, but none of them a 9/11 or worse. We can afford to be under-determined as to rational decision criteria provided that we can change and adjust as we go. We can afford a learning curve. If, however, the necessary object of policy is to prevent, under all circumstances and without fail, *an* event from happening, a casuistical approach to adjusting the process to lessons learned is inadequate. Under the condition of what we might call 'event specific catastrophism,' the modestly ad hoc nature of under-determined public management criteria is insufficient as a matter of policy. Neither private nor public managerial theory is adequate to terrorism and counterterrorism because they can neither provide substantive criteria for establishing relevant opportunity costs among value-plural public goods nor provide a procedure that can make those determinations without the prospect of grave and unacceptable mistakes.

The under-determinacy is thus evident. Private firm capital budgeting theory is inadequate to the decisional task because it, unlike the management of counterterrorism, can safely assume rational relevancy of the opportunity costs that it considers. Public management theory is inadequate because while it is able to assume a relaxed posture with respect to the relevancy of its comparisons and commensurability,⁵⁸ it has no firm grounds to commit to an independently determinable 'rational' answer. But that is only because the second-order

56. "Ordinary" in the sense of ongoing, changeable, correctable, and procedural.

57. It might even be considered simply a matter of preferences not subjected to rational argument, except out at the margins of "no national security" or "no monetary policy."

58. This is because over time, its procedures will come to democratically legitimate answers, even if they turn out to be mistaken on occasion and so shift over time.

proceduralism to which it is committed instead is formulated with respect to ordinary, ongoing operations of government. 'Event specific catastrophism' alters that assumption, in ways that force us to seek genuinely (i.e., independently defensible) rational points of comparison in order to establish rational levels of investment in countering uncertain catastrophic risks precisely because they are catastrophic. Business as usual—second order procedures—will not suffice.

One can argue, to be sure, that they do indeed suffice and that our ordinary decision-making procedures should not be altered on this account. Many serious people take this view in the multiple debates over tradeoffs of safety and civil liberties: no military commissions, but instead Article III courts; or no coercive interrogations or renditions; or no indefinite detention of aliens without charges, and so on. Insofar as they reach such positions through Kantian absolutism, or even some softer version of rights-as-trumps, they have found, for themselves at least, a substantive response to the question of criteria for weighing incommensurables. One may of course agree or disagree, but for our purposes the question is posed to those who do *not* avail themselves of deontological trumps. Our concern is with those who grapple with genuine pluralism: values versus consequences, or values versus other values and those who accept in principle the idea of tradeoffs in the first place. Finally, those who accept Muller's reasoning depend upon his unstated commitment to a general consequentialism that is far from universally shared.⁵⁹ If we do not simply sign on to absolutist rights, or an equally absolutist utilitarianism, but accept the problem of pluralism, then we face the general problem of comparison. What does it mean for something to be 'commensurable' at all?⁶⁰

V. CONCLUSION: OF STRATEGY AND TACTICS

This essay has made three over-arching points.

First, US responses to terrorism—whether one calls it generically counterterrorism policy or a war on terror or anything else—depend on certain underlying assumptions, what this essay has called the 'assumptions behind the assumptions' in counterterrorism. Cost benefit analysis is a core 'assumption behind the assumptions' lying below the surface of operational counterterrorism policy.

Second, cost benefit analysis itself depends upon further assumptions. These further assumptions have a large impact on the

59. MUELLER, *supra* note 20.

60. See RUTH CHANGE, *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Cambridge University Press 1997).

otherwise apparently straight-forward comparative approach to weighing up policy options in the face of risk and uncertainty. These further assumptions embedded, but not necessarily transparent, within cost benefit analysis include, among others, the difficulties in ensuring that the analysis compares apples-to-apples or oranges-to-oranges. In a social and political world of multiple and plural values, this is far more difficult than it would be, for example, in the case of financial analysis in the private marketplace, where, at least in principle, comparisons can be reduced to the common denominator of money. Not all values in our social world can be reduced to a common denominator.

Moreover, although cost benefit analysis can provide important data for making moral judgments about such fraught matters as how to respond to terrorism, it does not finish the moral discussion—at least not for most people in American society. Beyond whatever advice cost benefit analysis might give, most people are ‘permissive deontologists’ when it comes to matters of how to respond to purposive and intentional actions such as murder and terrorism. For the same reason—justice—we devote far greater resources to the pursuit of criminals than cost benefit analysis might plausibly justify, we are also inclined to devote more resources to responding to and preventing terrorism. Arguments from a cost benefit analysis that suggest that we devote too many resources to counterterrorism would also apply with equal force to the argument that we allocate too many resources to the criminal justice system for the pursuit of ordinary criminals.

Similar observations about the overreaching tendency of cost benefit analysis, under an apparently simple exterior, can be made with respect to ‘commensurability.’ As noted earlier in the essay, this is a point closely related to, but still different from, the observation that we, as a society, embrace plural values that are not reducible to one common denominator. Cost benefit analysis relies upon the comparison of ‘opportunity costs,’ but the comparison of opportunity costs depends upon them being genuinely available ‘opportunities’—social choices that might genuinely be made. Whether an opportunity is genuinely an opportunity in our existing social world or not is a question of social fact about the world. Arguments from cost benefit analysis that rely upon opportunity cost comparisons involving socially or politically implausible opportunities—opportunities from another, alternative world, so to speak, not our real one—are of much less importance than their conclusions might seem. Again, such arguments overreach.

This essay has focused on the writings of one particular analyst, John Mueller, and his book *Overblown*, as an example of the deeply flawed

use of cost benefit analysis.⁶¹ It is a more than fair point to respond that using *Overblown* as the case study in the ills of cost benefit analysis is the worst kind of strawman argument. On the one hand, the book has been widely noticed, cited, and relied upon for argument by important journalists and policy analysts, such as journalist James Fallows.⁶² On the other hand, serious academic students of cost benefit analysis would recoil from the sweeping, breezy assertions and conclusions made by the book, on all the objections raised above and perhaps more. The reason for making it the target in this essay is not in order to suggest that it stands in for much more serious cost benefit analysis. It does not.

But, *Overblown* is illustrative of the basic errors that can and might arise from failing to take into account the underlying assumptions of cost benefit analysis—and the illustration is far easier to see in a crude form of cost benefit analysis, rather than a more careful and hedged version of it. The point of this essay is not to undermine the case for cost benefit analysis in responding to terrorism—far from it—but instead to help define the subtle limits upon the method and the matters that must be drawn out carefully and explicitly in order to ensure that comparisons are indeed comparable, particularly with respect to counterterrorism policy. It is therefore useful to start with a view, claimed on its own terms to be generated by cost benefit analysis, that America's approach to terrorism, far from trying to wipe out its perpetrators or even devote much in the way of resources to prevent it from taking place, might instead merely "center around creating the potential to absorb its direct effects," and "mitigate its longer range consequences."⁶³ The very boldness of the claim, and the fact that the claim reached such radical conclusions through the application of cost benefit analysis, puts squarely on the table what the method can do, cannot do, and what assumptions it relies upon. There are sophisticated and defensible applications of the method to counterterrorism,⁶⁴ but as a starting point for considering the method's assumptions, sometimes the crudest, least methodologically protected example provides the most illustrative value (provided that the critic understands that the baby of cost benefit analysis cannot, therefore, be thrown out with the bathwater, as it were).

One final observation can be made about cost benefit analysis and its underlying assumptions. It is an observation particularly pertinent to its application to terrorism and counterterrorism. The nature of cost benefit

61. See MUELLER, *supra* note 20; see, e.g., SUNSTEIN, *supra* note 1.

62. See generally *Declaring Victory*, *supra* note 30; *Act as if Mueller Is Right*, *supra* note 30.

63. See MUELLER, *supra* note 20, at 5.

64. See, e.g., SUNSTEIN, *supra* note 1.

analysis is essentially reactive. It is—and this point deserves an essay all its own with respect to national security and terrorism policy—a method of *evaluation*, a mechanism for evaluating proposed courses of action, not for *generating* them.⁶⁵ As a method, it is, in Philip Bobbitt's phrase, "relentlessly tactical."⁶⁶ Cost benefit analysis does not propose solutions; it evaluates solutions offered by other processes. It is not a strategic form of thinking.

The fundamental limitation of cost benefit analysis, in other words, lies not so much in its own assumptions, but in the limits of what it does. The long-term US response to terrorism—counterterrorism policy, the war on terror, however one wants to frame it—requires a strategic form of thinking. We will not agree on what the strategy should be, which is why, as a democracy, we have majoritarian processes to sort out the agreements and disagreements, and come to a form of action. Cost benefit analysis can provide indispensable information for arguing over, and finally formulating, strategic approaches. But it will not come up with those strategies in the first place. And that, in the end, is its true limitation.

65. Thanks to a discussion with my colleague, law and economics scholar Jonathan Baker, on this point.

66. Kenneth Anderson, *Home Fronts*, TIMES LIT. SUPP. (London), July 25, 2008, at 8.