Defending liberty: Terrorism and human rights

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The relationship between terrorism and human rights is commonly described as one of conflict or balance between liberty and security. But this perceived trade-off between security and liberty is a false choice. That is so because security should not be (and under a constitutional democracy, is not) an end in itself, but rather simply a means to the greater end of liberty.

This recognition does not settle the debate but only begins the conversation, for the essential question is what one means by liberty. Here, I think Edmund Burke put it best: ‘The only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.’ Order and liberty, under this conception, are symbiotic; each is necessary for the stability and legitimacy that is essential for a government under law.

To illustrate this symbiotic relationship, consider liberty without order. Absent order, liberty is simply unbridled license: Men can do whatever they choose. It is easy enough to recognize that such a world of liberty without order is unstable, but I would argue that it is also illegitimate. The essence of liberty is the freedom from subjugation to the will of another. In a world of unbridled license, the strong do what they will and the weak suffer what they must. One man’s expression of his desires will deprive another of his freedom. Liberty without order is illegitimate because one man can infringe, by force if necessary, another’s freedom. True liberty only exists in an ordered society with rules and laws that govern and limit the behavior of men.

Just as liberty cannot exist without order, order without liberty is not only illegitimate but also unstable. The first of these propositions is widely accepted, so I will not dwell on it here. But it is important to recognize that where there is order but not liberty, force must be exerted by men over men in an attempt to compel obedience and create a mirage of stability. Most people are familiar with Rousseau’s dictum that ‘Man was born free, yet everywhere he is in chains’. But often neglected is the sentence that immediately follows in On The Social Contract: ‘He who believes himself the master of others is nonetheless a greater slave than they… For in recovering its freedom by means of the same right used to steal it, either the people is justified in taking it back, or those who took it away were not justified in doing so.’

Order without liberty is unstable precisely because it is illegitimate. In an apparent order maintained by brute strength, the ruler has no greater claim to the use of force than his subject, and the master and slave are in a constant state of war — one trying to maintain the mirage of stability created by his use of force, the other seeking to use force to recover his lost freedom.

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2 Edmund Burke, Speech at His Arrival at Bristol Before the Election in That City (1774).
Order and liberty, therefore, are not competing concepts that must be balanced against each other to maintain some sort of democratic equilibrium. Rather, they are complementary values that contribute symbiotically to the stability and legitimacy of a constitutional democracy. Like love and marriage, order and liberty go together like horse and carriage; one cannot have one without the other.

In *The Structure of Liberty*, Professor Randy Barnett distinguishes liberty structured by order from unbridled license by comparing the former to a tall building, the Sears Tower. License permits thousands of people to congregate in the same space, but only with the order imposed by the structure of the building — its hallways and partitions, stairwells and elevators, signs and lights — would those thousands be endowed with liberty, each to pursue his own end without trampling on others or being trampled upon. Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to achieve their ends. To illustrate the essential necessity of that structure, Barnett posits this hypothesis: 'Imagine being able to push a button and make the structure of the building instantly vanish. Thousands of persons would plunge to their deaths.\(^4\)

Osama bin Laden pushed that button on September 11, and thousands of persons plunged to their deaths. Just as Barnett’s building was only a metaphor for the structure of ordered liberty, Al Qaeda’s aim was not simply to destroy the World Trade Center. The target was the very foundation of our ordered liberty.

Knowing what we now know about Al Qaeda, it is easy to see that its radical, extremist ideology is incompatible with, and an offense to, ordered liberty. Al Qaeda seeks to subjugate women; we work for their liberation. Al Qaeda seeks to deny choice; we celebrate the marketplace of ideas. Al Qaeda seeks to suppress speech; we welcome open discussion.

More fundamental, however, is the proposition that Al Qaeda or any other terrorist group, simply by adopting the way of terror, attacks the foundation of our ordered liberty. Terrorism, whomever its perpetrator and whatever his aim, poses a fundamental threat to the ordered liberty that is the essence of a constitutional democracy.

The terrorist seeks not simply to kill, but to terrorize. His strategy is not merely to increase the count of the dead, but to bring fear to those who survive. The terrorist is indiscriminate in his choice of victims and indifferent to the value of his targets. He uses violence to disrupt order, kills to foster fear, and terrorizes to incapacitate normal human activity.

In this sense, the terrorist is fundamentally different from the criminal offender normally encountered by the criminal justice system. By attacking the foundation of order in a society, the terrorist seeks to demolish the structure of liberty that governs the lives of citizens. By fomenting terror among the masses, the terrorist seeks to incapacitate them from exercising the liberty to pursue their individual ends. This is not criminality. It is a warlike attack on the polity.

In waging that war, the terrorist employs strategies that fundamentally differ

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