Notre Dame Journal of Law, Ethics & Public Policy

Volume 19
Issue 1 *Symposium on Security & Liberty*

Article 8

February 2014

Civil Liberties vs. National Security: The Enduring Tension

Francis Cardinal George

Follow this and additional works at: http://scholarship.law.nd.edu/ndjlepp

Recommended Citation

Francis C. George, *Civil Liberties vs. National Security: The Enduring Tension*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 219 (2005).
Available at: http://scholarship.law.nd.edu/ndjlepp/vol19/iss1/8

This Article is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ESSAYS

CIVIL LIBERTIES VS. NATIONAL SECURITY: THE ENDURING TENSION

FRANCIS CARDINAL GEORGE, O.M.I.*

The tension between national security and civil liberties can best be illustrated by a common line heard in the weeks after September 11, 2001. Once the period of mourning came to a close, the question arose how life would ever return to normal. For example, there was even talk of canceling, and not just postponing, the World Series. But if that happened, many people said, "the terrorists would have won," for it was the terrorists' whole purpose to disrupt daily life and to turn the United States into a militaristic nation so completely hostile to Islam that a full-scale clash of civilizations would have been unleashed. So, gradually people went about their ordinary lives, often saying to themselves that otherwise "the terrorists would have won." So common did this phrase become that *The New Yorker* satirized this tic with a cartoon of two men in a bar, and one says to the other, "I figure if I don't have that third Martini, then the terrorists win."[1]

But of course if *nothing* had changed after 9/11, if airport screening had remained as lackadaisical as before, if student visas were not now being more thoroughly checked, if flight schools were still able to register suspiciously motivated students, if cockpit doors were not more securely bolted and reinforced, and if, as a result of such willful negligence, another hijacking had occurred, then that too would mean, in a far more glaring way, that the terrorists *would* have won, precisely by inflicting on the unsuspecting public another outrage.

Both points are, I think, obvious: on the one hand, we don't want to abandon the very traits of our country—religious freedom, free speech, civilian control of the military, freedom of

* Archbishop of Chicago. S.T.D. (Ecclesiology), Pontifical Urban University, Rome; Ph.D. (American Philosophy), Tulane University.

1. *The Cartoon Issue*, THE NEW YORKER, Nov. 12, 2001, at 98.

movement, freedom from excessive government intrusion in our daily lives, and so forth—that were themselves the very reason for the attack by the terrorists. But we also cannot afford to ignore the dangers of the current environment and pretend that the malevolence of our enemies cannot exploit the very openness of our open society to further their evil ends.

Without specifying policy recommendations, does the collective wisdom of the Church have something to offer in this debate on the tension between national security and civil liberties?

I.

Almost from its inception, philosophy has been marked by a debate between idealists and realists—including in the political order. Now, vague as these terms are in metaphysics and epistemology, they are models of clarity compared to how they are used in politics. For in metaphysics, despite the endless variations that one can play on the implications of each position, "idealism" generally refers to the priority given to the rational, the mental, the world of ideas over that of brute matter, while "realism" means crediting the material world with more metaphysical status than the idealist would allow. Similarly, in epistemology "idealism" insists that whatever data come at the subject from the outside "real" world are so significantly changed by the experiencing subject that the experience of the real must be regarded as essentially subjective (that is, "ideal"), whereas "realism" holds that the outside world is itself so real that it cannot help but impinge on subjective experience, so that the subject may reliably trust in the reality of the external source of experience.

But in politics, the matter is somewhat more confused. There "idealism" refers to what is most often meant by that term in ordinary language, as does also the term "realism." Ordinarily, the terms mean, respectively, concern for ideal norms like "justice," "peace," and the like, in contrast to the view that gives priority to those realities of the human animal, like self-interest and greed, that undermine the ideal. In the words of Reinhold Niebuhr, that famous Christian "realist," the matter may be described as follows:

> The terms "idealism" and "realism" are not analogous in political and in metaphysical theory; and they are certainly not as precise in political as in metaphysical theory. In political and moral theory, "realism" denotes the disposition to take all factors in a social and political situation, which offer resistance to established norms, into account, particularly the factors of self interest and power . . . . "Ide-

> alism," is, in the esteem of its proponents, characterized by loyalty to moral norms and ideals, rather than to self-interest, whether individual or collective. It is, in the opinion of its critics, characterized by a disposition to ignore or be indifferent to the forces in human life which offer resistance to universally valid ideals and norms . . . . The definitions of "realists" and "idealists" emphasize disposition, rather than doctrines; and they are therefore bound to be inexact.[2]

That same inexactitude pervades the debate over how much our civil liberties need to be restricted in order to preserve our national security. For that reason one would be led astray by taking the terms "idealism" and "realism" as binary terms, much the way "liberal" and "conservative" are regarded in contemporary discourse. For when taken to their logical conclusions, the idealist position can suddenly find itself driven to the grimmest version of realism. For example, Niccolo Machiavelli is often taken to be the arch-realist of all political thought because of his dictum that political thought must follow the truth of the matter rather than the imagination (meaning that when utopian ideals conflict with sober reality, the statesman must follow reality).[3] Plato, by contrast, is usually seen as the arch-idealist, who insisted on the prior rights of the imagination to think of an ideal republic in order to judge the grubby reality of the present and reform it on that basis. In the *Republic*, Plato "ideally" imagines the guardians of the state being sequestered in private quarters, with family responsibilities absolved (or at least reduced to a minimum), lest the very forces of self-interest that Machiavelli saw as the engine of the state take over.[4] But was that very prescription itself not a concession to reality, a concession on Plato's part that the mind alone cannot be trusted to maintain moral norms but must rely on the compulsory powers of social training? And did not Joseph Stalin's ideal of the New Soviet Man not lead to a vast pyramid of corpses for its attempted realization?

Notice how the same dynamic of *les extremes se touchent* also affects the debate on civil liberties and national security. The noted liberal intellectual and biographer of Isaiah Berlin, Michael Ignatieff, might serve as our Plato here.[5] In his recent

2. Reinhold Niebuhr, *Augustine's Political Realism*, *in* THE ESSENTIAL REINHOLD NIEBUHR: SELECTED ESSAYS AND ADDRESSES 123–24 (Robert McAfee Brown ed., 1986).

3. *See generally* NICCOLÒ MACHIAVELLI, THE PRINCE (Harvey C. Mansfield trans., 2d ed. 1998).

4. PLATO, THE REPUBLIC, bk. V, at 190–97 (A.D. Lindsay trans., 1950).

5. *See generally* MICHAEL IGNATIEFF, ISAIAH BERLIN: A LIFE (1999).

book, *The Lesser Evil: Political Ethics in an Age of Terror*,[6] Ignatieff, the director of the Carr Center for Human Rights Policy at Harvard University, discusses issues even more ominous than the curtailment of such civil liberties as freedom from search and seizure at airports: preemptive war, targeted assassinations, indefinite imprisonment without due process, and so forth—all in the cause of defending our civil liberties, indeed of defending democracy itself. This book does not pertain exactly to the topic of this article, but the nature of the dilemma posed by it bears, I think, on the issue before us. As Ronald Steele, the reviewer of this book in the *New York Times*, noted:

> A good part of this dense and often legalistic book is devoted to hair-splitting over how much lesser evil a society can tolerate and still consider itself virtuous or, for that matter, even democratic. When we are satisfied that the coercive measures we take are a "genuine last resort" and if we are able to "justify our actions publicly to our fellow citizens" and if our repressive actions (like holding suspects without trial or counsel) do "actually enhance security," Ignatieff writes, then we have chosen the lesser evil. And presumably, we can feel satisfied. Given that a frightened public will tolerate inflicting just about any amount of repression in the name of security, Ignatieff's traffic sign seems to mean "proceed but with caution." And his assurance that "democracy itself" will keep a lesser evil from becoming a "greater evil" should ease our collective conscience when we remember that "either we fight evil with evil or we succumb."[7]

It seems to me that the question of the tension between civil liberties and national security cannot be answered except by first meeting the challenge posed by Ronald Steel's critique of the Ignatieff book: How much restriction on our civil liberties must be endured—lest we succumb to a worse evil—exposure to State terrorism, which itself represents a violation of liberty and freedom, of the right to life and freedom of movement?

This debate has actually been a part of U.S. history almost from the beginning, starting with the Alien and Sedition Acts of 1798,[8] reaching one climax in Abraham Lincoln's suspension of

---

6. MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004).

7. Ronald Steel, *Fight Fire with Fire*, N.Y. TIMES BOOK REV., July 25, 2004, at 13 (reviewing MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004)).

8. Encarta Online provides a brief historical overview of the Acts:

the writ of habeas corpus in 1861, with the concurrence of Congress in 1863,[9] reaching another climax with Franklin Roosevelt's

---

Alien and Sedition Acts, in American political history, [were] four laws passed in 1798. The Naturalization Act, raising from 5 to 14 the number of years of United States residence required for naturalization, was repealed in 1802. The Alien Act, empowering the president to arrest and deport any alien considered dangerous, expired in 1800. The Alien Enemies Act, which expired in 1801, provided for the arrest and deportation of subjects of foreign powers at war with the United States. The Sedition Act made it a criminal offense to print or publish false, malicious, or scandalous statements directed against the U.S. government, the president, or Congress; to foster opposition to the lawful acts of Congress; or to aid a foreign power in plotting against the United States. Although the Sedition Act enacted some reforms in the existing law of seditious libel-evidence of the truth of the alleged libel could be pleaded in justification its penalties were severe: imprisonment for up to five years and fines up to $5,000.

The Alien and Sedition Acts were enacted by a Congress dominated by the Federalist Party and signed by President John Adams during the war crisis with France that followed publication of the XYZ letters (see XYZ Affair). These documents had revealed that French officials had demanded bribes from American diplomats in Paris as a condition for negotiations to preserve the peace between the two nations.

The Naturalization and Alien Acts were aimed largely at Irish immigrants and French refugees who had participated in political activities critical of the Adams administration. The Sedition Act was an attempt to curb newspaper editors who supported the Republican Party and who, in many cases, were also immigrants and refugees. The duration of the law (until March 3, 1801) indicated that its purpose was to obstruct Republican Party activities during the presidential election of 1800. Before it expired, about 25 people were arrested and about 10 were convicted. Some of them were later pardoned.

The most prominent opponents of the Alien and Sedition Acts were the Republican Party leaders, Thomas Jefferson and James Madison. They drafted, respectively, the Kentucky and Virginia Resolutions of 1798 as part of their campaigns to protest Federal violations of civil liberties and Federal restrictions on the freedom of the press clause of the First Amendment to the U.S. Constitution. The resolutions also became important in American political history after 1830 as precedents to justify the doctrine of nullification (the principle that the states could nullify federal laws). The Alien and Sedition Acts were widely unpopular and played a major role in both the downfall of the Federalist Party and the election of Jefferson to the presidency in 1800.

Alien and Sedition Acts, *in* MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2005, *at* http://encarta.msn.com/encyclopedia_761559286/Alien_and_Sedition_Acts.html (last visited Feb. 10, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

9. "In a curiously passive voice, the Constitution stipulates that the writ of habeas corpus 'shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' This provision appears in Article I,

imprisonment of Japanese-Americans during World War II, and culminating now both in the USA PATRIOT Act of October 2001 and in the imprisonment of suspected terrorist "enemy combatants" in Guantanamo Bay after the defeat of the Taliban in Afghanistan in 2002.[10]

The persistence of this often-sorry record testifies not just to the violation of civil liberties that so often follows in the wake of national panic but also to a real dilemma that lurks behind all statecraft: How (using the above philosophical terminology) can we reconcile idealism and realism in establishing and governing any particular polity? Without offering any specific expertise to lawmakers and citizens seeking to address this dilemma, the *Pastoral Constitution on the Church in the Modern World* asserts:

> Often enough the Christian view of things will itself suggest some specific solution in certain circumstances. Yet it happens rather frequently, and legitimately so, that with equal sincerity some of the faithful will disagree with others on a given matter. Even against the intentions of their proponents, however, solutions proposed on one side or another

---

which otherwise specifies the powers of Congress (executive powers are laid out in Article II)." James M. McPherson, *The Greatest Republican*, N.Y. REV. BOOKS, Aug. 12, 2004, at 22 (reviewing inter alia MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004)). On the basis of its location in the Constitution, the provision for suspension prompted Chief Justice Taney to rule that only Congress could suspend the writ. Lincoln insisted that suspension was an emergency power intended to be exercised by the Commander in Chief in time of war. According to McPherson:

> [S]everal legal authorities wrote essays endorsing Lincoln's position, while Taney, as the author of the *Dred Scott* decision, commanded little respect in the North. Later in the war, military tribunals in Ohio and Indiana did indeed convict several Northern civilians . . . of aiding and abetting Confederate agents operating behind Union lines. After the war the Supreme Court in *Ex parte Milligan* voided the Indiana convictions on the ground that military courts could not try civilians when civil courts were open and functioning, as they were in Indiana during the war.

Id. This decision has obvious relevance to the recent Supreme Court decisions *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, and *Rasul v. Bush*, dealing with the issue of imprisonment of suspected and apprehended terrorists without due process of law. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004).

10. Please note that in reciting these various acts of the government in times of crisis, I am not equating them or lumping them into one basket, either of governmental iniquity or of expediency. The internment of Japanese-Americans was a particularly egregious example of governmental abuse of civil liberties . . . while as we saw in the footnote immediately above, Lincoln's suspension of the writ of habeas corpus was widely supported by Unionists (or at least Unionist Republicans) in his day and continues to be defended by respectable Civil War historians down to today.

> may be easily confused by many people with the Gospel message. Hence it is necessary for people to remember that no one is allowed in the aforementioned situations to appropriate the Church's authority for his opinion. They should always try to enlighten one another through honest discussion, preserving mutual charity and caring above all for the common good.[11]

All well and good. But the role of a teacher of the Catholic faith cannot end just there. For if the debate is cast in terms of "idealism" and "realism," then the wisdom of the Catholic tradition of political thought has something very valuable to offer. For that reason, I would like to offer a specifically theological perspective on the tension between idealism and realism in the political order, considering how Augustine, that famous Christian "realist," interpreted the *reality* of the Earthly City when set against the *idea* of the City of God. As Reinhold Niebuhr says so well of Augustine's masterpiece on this theme:

> Augustine was, by general consent, the first great "realist" in Western history. He deserves this distinction because his picture of social reality in his *Civitas Dei* gives an adequate account of the social factions, tensions, and competitions which we know to be well-nigh universal on every level of community; while the classical age conceived the order and justice of its *polis* to be a comparatively simple achievement, which would be accomplished when reason had brought all subrational forces under its dominion.[12]

---

11. The Second Council of the Vatican, *Gaudium et Spes* (Pastoral Constitution on the Church in the Modern World), *in* THE DOCUMENTS OF VATICAN II 244 (Walter M. Abbott & Joseph Gallagher trans. & eds., 1966). William Temple, one of the twentieth century's great Archbishops of Canterbury, made roughly the same point when he objected to certain official positions being proposed by his fellow Anglican bishops in these wise words:

> [It is] a matter of justice [for the Church to respect the legitimate diversity of prudential political judgments], for even though a large majority of Christians hold a particular view, the dissentient minority may be equally loyal to Christ and equally entitled to be recognised as loyal members of his Church . . . . [I]f any member of the convocation of York should be so ill-advised as to [insist] that these proposals be adopted as a political programme for the Church, I should in my capacity as Archbishop resist that proposal with all my force, and should probably, as President of the Convocation, rule it out of order. The Church is committed to the everlasting gospel and to the Creeds which formulate it; it must never commit itself to an ephemeral programme of detailed action.

WILLIAM TEMPLE, CHRISTIANITY AND SOCIAL ORDER 28–29 (1956).

12. Reinhold Niebuhr, *Augustine's Political Realism*, in THE CITY OF GOD: A COLLECTION OF CRITICAL ESSAYS 120 (Dorothy F. Donnelly ed., 1995).

Pervading the whole debate in this country on civil liberties (and I would maintain that this holds true even when concerns of national security are not part of the picture), a certain naiveté reigns in the minds of civil libertarians, who often seem to imitate the classical age at least in regarding civil liberties as a "comparatively simple achievement." Civil liberties lobbies like the ACLU or Human Rights Watch tend to absolutize civil liberties precisely because they seem to have little understanding of why states are obligated to respect liberty in the first place. *Why* is man free? Or in other words, *why* are we endowed by our Creator with certain inalienable rights, chief among them the rights to life, liberty, and the pursuit of happiness? *Why* is the state obligated to respect human rights and not intrude in areas of conscience, thought, speech, and belief? According to Augustine, all our liberties are ordered to God, whose pursuit alone can bring happiness; and the chief enemy of *that* pursuit is not the state (even an oppressive one) but ourselves. In contrast to both classical and modern theories of the self, Augustine maintains that it is not the bad body (conceived as either nature-determined or nurture-determined) that causes the good soul to sin but the bad soul causes the good body to sin. Modern presuppositions hold otherwise, as Niebuhr wisely points out:

> Compared with a Christian realism, which is based on Augustine's interpretation of biblical faith, a great many modern social and psychological theories, which fancy themselves anti-Platonic or even anti-Aristotelian and which make much of their pretended "realism," are in fact no more realistic than the classical philosophers. Thus modern social and psychological scientists are forever seeking to isolate some natural impulse such as "aggressiveness" and to manage it; with equal vanity they are trying to find a surrogate for Plato's and Aristotle's disinterested "reason" in so-called "scientific method." Their inability to discover the corruption of self-interest in *reason* or in man's *rational* pursuits, and to measure the spiritual dimension of man's inhumanity and cruelty, gives an air of sentimentality to the learning of our whole liberal culture. Thus we have no guidance amid the intricacies of modern power politics, except as the older disciplines, less enamored of the "methods of natural science," and the common sense of the man in the street, supply the necessary insights.[13]

We live in an era when civil liberties have become an absolute for a large swath of the public, especially among secular

13. *Id.* at 121 (emphasis added).

intellectuals. But this for Augustine makes no sense. As an abstraction, freedom is not an absolute, for freedom is only *freedom for* a value, and if that value is self-interest alone, then we immure ourselves within the walls of the Earthly City and are left completely flummoxed when raw malice appears in the guise of terrorism. The tension between national security and civil liberties will thus never be resolved until Americans first get clear as to why the Creator has endowed us with freedom. In other words, when civil liberties are absolutized, then we are left without a conceptual armory to judge when and where they must be curtailed, either for the greater good or for the defense of the nation against enemies who worm their way into the polity precisely by exploiting those very liberties for their nefarious ends.

II.

Of course that insight alone does not resolve anything either, for the dilemma still faces us and still demands a practical answer. What do we do in specific situations? What laws are legitimate responses (for example, heightened security at airports) and which are clear imitations of the totalitarian enemy we oppose in the name of our freedoms (for example, the internment of Japanese-Americans in World War II)? However, there too the Catholic tradition has insights to bring to the conversation that could begin to provide a moral calculus enabling lawmakers and citizens to address this issue. I am referring here to that aspect of the moral wisdom of the Catholic Church that goes under the name of *casuistry*.

Admittedly, in the wake of Blaise Pascal's withering critique of Jesuit casuistry in the seventeen century in his *Provincial Letters*,[14] casuistry has become identified in the public mind with pettifoggery, hairsplitting, and legalism. Certainly casuistry, when wrongly practiced, can lead to such abuses. But the dismissal of casuistry *tout court* can lead to its own severe problems; above all, it leads here to the absolutization of civil liberties and to the inability to see how such an absolutization can lead to precisely the dilemmas we see operative today. Under that rubric debate goes nowhere, with one side certain that any curtailment of civil liberties sets us down the long road to totalitarianism, while the other side is willing to countenance any curtailment in the name of security. Perhaps this is why ethical and political debate in our country has become so shrill. As Alasdair MacIntyre has noted:

14. BLAISE PASCAL, THE PROVINCIAL LETTERS 194–212 (O.W. Wight ed., Thomas McCrie trans., Hurd and Houghton 1875) (Letter V).

> It is easy also to understand why protest becomes a distinctive moral feature of the modern age and why indignation is a predominant modern emotion . . . . Protest is now almost entirely that negative phenomenon which characteristically occurs as a reaction to the alleged invasion of someone's *rights* in the name of someone else's *utility*. The self-assertive shrillness of protest arises because . . . protestors can never win an argument; the indignant self-righteousness of protest arises because . . . the protestors can never lose an argument either. Hence the utterance of protest is characteristically addressed to those who already share the protestors' premises . . . . Protestors rarely have anyone else to talk to but themselves. This is not to say that protest cannot be effective; it is to say that it cannot be *rationally* effective.[15]

This passage will no doubt strike a chord of recognition in all hearts, but few, I suspect, will attribute the reason for this dolorous state of affairs to the demise of casuistry. But what is the application of just-war theory but casuistry? How else can one strike a balance between liberty and equality, between rights and duties, except by casuistry? How else can political compromise—or even political debate and conversation—be at all morally possible except on the basis that absolute principles often conflict and that hard cases, while they often make for bad law, also make for acute moral analysis? That is how casuistry first arose: by the consideration of hard cases. First adumbrated, at least in the West, by Aristotle,[16] then explicitly mooted by the Stoics and picked up by Cicero, it entered Catholic thinking with Pope

---

15. ALASDAIR MACINTYRE, AFTER VIRTUE 68–69 (1981).

16. According to Aristotle:

> [L]aw is always a general statement, yet there are cases which it is not possible to cover in a general statement. . . . [T]his does not make it [the general statement] a *wrong* law; the error is not in the law nor in the lawgiver, but *in the nature of the case*: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion. . . . *This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.* For what is itself indefinite can only be measured by an indefinite standard, like the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case.

ARISTOTLE, THE NICOMACHEAN ETHICS, bk. V, ch. x, ll. 3–7, at 315–17 (T.E. Page et al. eds., 1934) (1137b) (emphasis added).

Gregory the Great,[17] was fully developed by St. Thomas Aquinas,[18] and then gradually entered a period of decadence, until Pascal administered the *coup de grace* with his *Provincial Letters.*

Pascal engaged in his polemics for good reason, for he spotted what was becoming increasingly obvious anyway: that casuistry was rapidly devolving into what we now call "situation ethics," which countenances no instance of human behavior that could be called inherently evil (*malum in se*) and where intention

17. St. Gregory the Great, Morals on the Book of Job, vol. 3, pt. 2, bk. 32, ch. 36–38, at 538–40 (Members of the English Church trans., John Henry Parker 1850). The cases Pope Gregory adduces are three: (1) Two men promise to be completely honest with one another but to tell no one else what they share with each other; then one finds out the other is planning to murder someone: does he break his promise or become an accessory to murder? (2) A man enters a monastery to avoid the temptations of secular life, but the abbot appoints him the monks' negotiator with tradesmen: does he disobey the order or, by obeying, expose himself to the temptations of secular life? (3) A priest gets a parish assignment through bribery but then repents of his sin: should he give up his "ill-gotten gains" or keep the parish lest his parishioners go without spiritual care? Actually, Pope Gregory I should not really be regarded as the first Christian casuist; that accolade should in fact go to St. Paul, as his wrestling with the issue of a marriage between a pagan and a Christian, 1 *Corinthians* 7, and food sacrificed to idols, 1 *Corinthians* 8, amply attest.

18. According to St. Thomas:

> It would *seem* that theologians should not take note of the circumstances of human acts. Because theologians do not consider human acts otherwise than according to their quality of good or evil. But it seems that circumstances cannot give quality to human acts; for a thing is never *qualified, formally speaking,* by that which is outside it, but by that which is in it. Therefore, theologians should not take note of the circumstances of acts. . . . On the contrary, I answer that the theologian considers human acts according as they are found to be good or evil, better or worse; *and this diversity depends on circumstances.*

St. Thomas Aquinas, Summa Theologiae, I-II, q. 7, art. 2, obj. 1 & respondeo, at 623–24 (Fathers of the English Dominican Province trans., Christian Classics 1981) (emphasis added). Similarly:

> It would *seem* that an action is not good or evil from a circumstance. For circumstances stand around (*circumstant*) an action, as being outside it . . . . But *good and evil are in things themselves,* as is stated in *Metaph.* vi. 4. Therefore an action does not derive goodness or malice from a circumstance. . . . On the contrary . . . human actions are good or evil according to circumstances . . . [for] [e]very accident is not accidentally in its subject; for some are proper accidents; and of these every art takes notice. And thus it is that the circumstances of actions are considered in the doctrine of morals.

Aquinas, *supra,* I-II, q. 18, art. 3., obj. 1 & respondeo & ad. 2, at 664–65 (emphasis added). An "accidental accident" would be something like the color of someone's skin, which has no bearing on the humanity of the person, while a "proper accident" would be the color chosen by an artist when painting a sunset, which directly affects the quality of the painting.

counts for everything.[19] Like the attempt of certain Jesuits in Pascal's time to exonerate even dueling, adultery, gossip, and other vices of the royal courts of Europe (where they often served as confessors),[20] situation ethics rapidly declined into an ethics of sentimentality, where one only had to have the intention of "love or sincerity" to exonerate any deed.

Abuses of casuistry undoubtedly form part of its sad history. Unfortunately, that does not absolve us from the human condition, where abstract principles of moral value often conflict, as we see so vividly in the newly dangerous world we now inhabit after 9/11.

Let us see how a casuistical analysis of the USA PATRIOT Act might work in practice. Passed in October, 2001, by a vote of 357 to 66 in the House of Representatives and by 98 to 1 in the Senate, the Act tried above all to address a problem that had bedeviled the fight against terrorism in this country using laws (and a political climate) that were designed to address an earlier abuse of governmental investigative powers when the FBI, during the years of J. Edgar Hoover, spied on Martin Luther King and other Americans whose politics Hoover found distasteful. In response, a wall was created to divide intelligence-gathering capabilities from criminal investigations. But that is just what the terrorists exploited, as Andrew McCarthy, the prosecuting attorney of the twelve Muslim terrorists who bombed the World Trade Center in 1993, explains in his overview of what led from that event to the destruction of the same buildings in 2001:

> It was mid-August 2001, the last desperate days before the 9/11 terrorist attacks. Desperate, that is, for an alert agent of the FBI's Foreign Counterintelligence Division (FCI); much of the rest of America, and certainly much of the rest of its government, blithely carried on, content to assume, despite the number and increasing ferocity of terrorist attacks dating back nearly nine years, that national security was little more than an everyday criminal-justice issue. Since 1995 a "wall" had been erected, presumptively barring communications between FCI agents and their counterparts in law enforcement . . . . This FCI agent collided, head-on, with the wall, and strewn in the wreckage was the last, best hope of stopping 9/11. Putting disconnected clues together, the agent had deduced that two Al Qaeda operatives . . . had probably gotten into the U.S. Alarmed, he pleaded with the FBI's criminal division to help him

19. *See, e.g.*, PASCAL, *supra* note 14, at 266–391 (Letters IX–XV).
20. *Id.* at 230–42, 266–283, 284–302 (Letters VII, IX, X).

> hunt down the terrorists—but they refused. For agents to fuse their information and efforts would be a transgression against the wall. The prescient agent rued that, one day soon, people would die in the face of this paralyzing roadblock. [The infiltrators] remained undetected until they plunged Flight 77 into the Pentagon on 9/11.[21]

I cite Mr. McCarthy's views not so much to endorse them as to validate his wider point: that an absolutization of civil liberties as an unalloyed good with its own self-justifying teleology will leave us blind to wider realities. Moreover, the dilemma he points to, and which the USA PATRIOT Act tried to address, cannot be addressed except by a reformulation of the supposed absolutes of autonomous individualism into a more nuanced casuistical approach.

A similar casuistical perspective might also illuminate the recent Supreme Court decisions on the inmates in Guantanamo Bay.[22] These decisions are in fact highly ambiguous, no doubt because of the unprecedented nature of the crimes committed and also because of the unusual status of the prisoners, who do not belong to duly constituted armies of nation states or to ordinary criminal bands like the Mafia and drug cartels. These circumstances underlie the analysis of Ronald Dworkin, the professor of constitutional law in New York University and University College in London:

> Though the Court did insist that, even in war, executive detention of suspected enemy combatants must be subject to some form of review by a neutral tribunal, it suggested rules of procedure for any such review that omit important traditional protections for people accused of crimes. The government may well be able to satisfy the Court's lenient procedural standards without actually altering its morally dubious detention policies. But in the longer run, the Court's decisions might prove to have a more profound impact, because the justices' arguments provide the legal basis for a much more powerful conclusion than the Court itself drew—that the Constitution does not permit the government to hold suspected enemy combatants or terrorists indefinitely without charging and convicting them of crimes, according them all the traditional protections of our criminal law process, unless they are treated in effect as

---

21. Andrew C. McCarthy, *The Patriot Act Without Tears: Understanding a Mythologized Law*, NAT'L REV., June 14, 2004, at 32.

22. *See* Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

> prisoners of war. They would then have the benefits of protections allowed by international law, including the Geneva Conventions.[23]

Again, I am neither endorsing nor criticizing either the Supreme Court decisions or Professor Dworkin's analysis, but I would like to point to the inevitability of something like this balanced approach, as outlined both in the decisions and in Prof. Dworkin's analysis. In other words, what we find in both (even if both the Court and Dworkin are unaware of it) is an analysis based on the inability of the law to reconcile the tension between civil liberties and national security except by a prior cognizance of the concrete situation currently facing the country at this stage of its history. As the horizons of each civilization expand and as the world itself grows into one global community, the dangers to a morally based legal order become even more acute.

Would it be too much to hope today that society might be moving back to Augustine's Christian realism? As he so acutely said, the world community, as it grows into one global village, will grow more iniquitous: "After the state or city comes the world, the third circle of human society—the first being the house, and the second the city. And the world, as it is larger, so it is fuller of dangers, as the greater sea is the more dangerous."[24] Seeing the danger, Augustine himself created a method that mediates between moral idealism and political realism. It addresses the tensions between civil liberties and national security without denying moral absolutes or elevating the interest of the moment to their level, in other words, without resolving their tensions in a prior fashion. It also presupposes a climate of public civility in which casuistic agreement can be made on its own terms, without manipulation.

23. Ronald Dworkin, *What the Court Really Said*, N.Y. REV. BOOKS, Aug. 12, 2004, at 26.

24. ST. AUGUSTINE, THE CITY OF GOD, bk. XIX, ch. 7, at 683 (Marcus Dods trans., Modern Library 1950).