I

When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, deception, secrecy, and violation of rights. How can democracies resort to these means without destroying the values for which they stand? How can they resort to the lesser evil, without succumbing to the greater? This book seeks to answer that question.

While it is written under the impact of September 11, 2001, I have found inspiration in sources distant from our own time, from Euripides to Machiavelli, from Dostoevsky to Conrad, all of whom thought deeply about the moral hazard of using doubtful means to defend praiseworthy goals. This book brings together ideas from literature, law, ethics, philosophy, and history to help citizens and leaders make the hazardous choices that a successful struggle against terrorism requires.

There have been many valuable critiques of the measures taken by liberal democracies to defend themselves since September 11. Instead of contributing yet another of these, I have tried to range more broadly, looking at the nineteenth- and twentieth-century history of attempts by states to deal with terrorist threats without sacrificing their constitutional identity. September 11 shadows the book, but while much of the discussion focuses on the dilemmas that America faces, I have tried to learn from terrorist emergencies in the United Kingdom, Canada, Italy, Germany, Spain, and Israel, as well as countries farther away, like Sri Lanka. I have also looked forward to consider the dark scenarios that open up when terrorists acquire chemical, nuclear, and biological weapons.

In the first chapter, “Democracy and the Lesser Evil,” I explain why the use of coercive force in a liberal democracy, not just in
times of emergency, but in normal times as well, is regarded as a lesser evil. This particular view of democracy does not prohibit emergency suspensions of rights in times of terror. But it imposes an obligation on government to justify such measures publicly, to submit them to judicial review, and to circumscribe them with sunset clauses so that they do not become permanent. Rights do not set impassable barriers to government action, but they do require that all rights infringements be tested under adversarial review.

I try to chart a middle course between a pure civil libertarian position which maintains that no violations of rights can ever be justified and a purely pragmatic position that judges antiterrorist measures solely by their effectiveness. I argue that actions which violate foundational commitments to justice and dignity—torture, illegal detention, unlawful assassination—should be beyond the pale. But defining these limits in theory is not hard. The problem is to protect them in practice, to maintain the limits, case by case, where reasonable people may disagree as to what constitutes torture, what detentions are illegal, which killings depart from lawful norms, or which preemptive actions constitute aggression. Neither necessity nor liberty, neither public danger nor private rights constitute trumping claims in deciding these questions. Since good democrats will disagree about these questions, it is crucial that they agree at least to strengthen the process of adversarial review that decides these matters. When democrats disagree on substance, they need to agree on process, to keep democracy safe both from our enemies and from our own zeal.

The second chapter, “The Ethics of Emergency,” examines the impact of emergency suspensions of civil liberties on the rule of law and human rights. The issue at stake here is whether emergency derogations of rights preserve or endanger the rule of law. I take the position that exceptions do not destroy the rule but save it, provided that they are temporary, publicly justified, and deployed only as a last resort.

The larger question is what role human rights should play in deciding public policy during terrorist emergencies. Most
human rights conventions allow for the derogation or suspension of some rights in times of emergency. Suspending rights is a lesser evil solution, but it compromises the status of human rights as a set of unchanging benchmarks. Once you admit that human rights can be suspended in times of emergency, you are accepting that human rights are not a system of indivisible absolutes; their application requires balancing liberty and necessity, pure principle and prudence. This does not reduce them to instruments of political expediency. On the contrary, realistic rights constraints are more likely to be effective than unrealistic ones. International human rights conventions serve to remind democracies at war with terror that even their enemies have rights, which are not dependent upon reciprocity or good conduct. Such conventions also remind states that their actions need to conform not just to national standards but to international ones too. But rights can fulfill this function only if they are flexible enough to allow some compromise with absolute standards when political necessity or emergency requires.

The third chapter, “The Weakness of the Strong,” seeks to explain why liberal democracies consistently overreact to terrorist threats, as if their survival were in jeopardy. Why are liberal democracies so quick to barter away their liberty? The historical record suggests, disturbingly, that majorities care less about deprivations of liberty that harm minorities than they do about their own security. This historical tendency to value majority interests over individual rights has weakened liberal democracies. They usually survive the political challenge presented by terrorism but in the process of doing so they have inflicted enduring damage to their own rights framework. Far from being an incidental menace, terrorism has warped democracy’s institutional development, strengthening secret government at the expense of open adversarial review.

In the fourth chapter, “The Strength of the Weak,” the focus shifts to terrorism itself. The chief claim used to justify terrorism is that if oppressed groups were required to abstain from violence directed at civilians, their political cause would be condemned to failure. In the face of oppression and superior force,
terrorism rationalizes itself as the only strategy that can lead the oppressed to victory. This argument from weakness presents liberal democrats with a special challenge, since liberal democratic theory has always admitted the right of the oppressed to take up arms as a last resort, when their cause is just and peaceful means are certain to fail. The way to meet the challenge of terrorism, I will argue, is to ensure that the oppressed always have peaceful political means of redress at their disposal. Where such means are denied, it is inevitable that violence will occur. Terrorists exploit injustice and claim to represent just causes. Hence a counterterror strategy that fails to address injustice, that fails to maintain political channels for redress of grievance, cannot succeed by purely military means. The key dilemma is to address injustice politically without legitimizing terrorists.

The fifth chapter, “The Temptations of Nihilism,” examines the darker possibility that in a struggle between a liberal constitutional state and a terrorist enemy both sides will be tempted to descend into pure nihilism, that is, violence for violence’s sake. High principle and moral scruple may lose their purchase on the interrogators in the state’s secret prisons or the fighters in a guerrilla or insurgent struggle. Both sides may start with high ideals, and end, step by step, in their betrayal. A critic of a lesser evil morality would argue that anyone who trafficks in evil, even with the best intentions, is likely to end up succumbing to nihilism. The chapter considers how this declension occurs and how it can be avoided.

The final chapter, “Liberty and Armageddon,” addresses the acquisition by terrorist groups of weapons of mass destruction. If this were to occur, the state’s ultimate powers of violence would pass into private hands, either those of a terrorist internationale like Al Qaeda, or those of a superempowered loner, a lonely citizen with a grudge and the capability to hold his entire nation hostage. These scenarios would take us into a new world, in which terrorism might transmute from an eternal but manageable challenge to liberal democracy into a potentially lethal foe. The book ends, therefore, by thinking the worst, in order to pose, as starkly as possible, the questions with which the book
began: whether our democracies are strong enough to cope with these dangers and how to strengthen the institutions we are committed to defend.

II

This book began its life as six Gifford Lectures, delivered in the Playfair Library at the University of Edinburgh in January 2003. The Playfair Library is a long, high-ceilinged room, built at the turn of the nineteenth century, with white marble busts of the leading luminaries of the Scottish Enlightenment in its columned recesses. The august setting and the example of the preceding Gifford lecturers made it an inspiring experience. I owe that first audience an especial debt though I doubt that they will recognize anything but broad outlines of the original lectures in this book, since I have reworked and rethought all of my initial hypotheses.

I remain deeply grateful to the committee, especially Professor Timothy O’Shea and Professor Leslie Brown, who did me the honor of inviting me to give the lectures. One member of that committee, Nicholas Phillipson, has been my friend for twenty-five years, and I thank him for his support, hospitality, and affection. I also want to acknowledge Paul McGuire, who did so much to make the Gifford experience a pleasure. My appreciation also goes out to Stephen Neff, John Haldane, Duncan Forrester, and Vicki Bruce for their comments on the lectures.

After their life in the Gifford Lectures, the thoughts in this book were developed further in front of audiences at Macalester College, Amherst College, the Law School at the University of Chicago, the University of Manitoba, the University of Saskatchewan, and the University of Regina. I want to thank the audiences and academic commentators for pressing me to improve my arguments. Denise Rheaume, Cass Sunstein, Bernadine Dohrn, and Martha Nussbaum provided especially useful criticisms. I also delivered versions of these ideas at the Center for Ethics and the Professions at the Kennedy School, Harvard, and at a seminar on terrorism organized by the Harvard University
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The book is dedicated to my wife, Suzanna Zsohar, who has lived with it in all its incarnations and improved it, as she always does.

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