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Articles

Interest-Balancing vs. Fiduciary Duty: Two Models for National Security Law

By *Evan Fox-Decent*^{*} & *Evan J. Criddle*^{**}

A. Introduction

The metaphor of the balance has long dominated national security law and policy. As Richard Posner has explained, one side of the balance “contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time as the weights of the respective interests change. The safer we feel, the more weight we place on the interest in personal liberty; the more endangered we feel, the more weight we place on the interest in safety, while recognizing the interdependence of the two interests.”¹ While policymakers have debated the relative weight states should give to civil liberty concerns and public security concerns in various contexts, few question the general balance metaphor that structures these debates.² By all accounts, interest balancing has provided the primary model for making national security law and policy worldwide since September 11, 2001.

The idea that states must balance competing interests when responding to national security concerns rests upon two implicit assumptions: (1) human rights are interests comparable to other societal interests, and (2) a state’s purpose is to maximize social welfare. If these assumptions hold, the state may reasonably sacrifice some individuals’ interests to avoid greater harms to others. Judge Posner and others have employed this reasoning to argue that practices such as torture, discrimination, and prolonged arbitrary detention, which are legally prohibited and morally repugnant during ordinary times, may be acceptable during emergencies where necessary to prevent terrorist attacks that would

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¹ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 148 (2006).

² See *e.g., id.* at 83 (alleging that “almost everyone accepts the necessity of resorting to [torture] in extreme situations”).

imperil human life.³ Once we accept the assumptions upon which the national-security balance rests, it is difficult to dispute the conclusion that all human rights are potentially derogable during emergencies. Human rights become vulnerable to what Carl Schmitt famously described as the “state of exception”— the state of affairs arising from the sovereign’s prerogative to suspend ordinary legal norms in order to address emergencies.⁴

This brief essay explores an alternative, deontological model for conceptualizing the relationship between state authority and human rights during national emergencies. In previous writings, we have argued that human rights are best conceived in relational and legal terms as norms arising from a fiduciary relationship between states (or state-like actors) and persons subject to their power.⁵ States bear a fiduciary duty to guarantee their subjects’ secure and equal freedom, a duty that flows from their institutional assumption of sovereign powers. States may exercise sovereign powers on behalf of their people, but only subject to legal limitations flowing from the Kantian idea that persons subject to their powers are to be treated as ends always (the principle of non-instrumentalization) and the republican idea that persons are not to be subject to arbitrary power (the principle of non-domination). On this fiduciary conception of authority, human rights represent the normative consequences of a state’s assumption of sovereign powers and are thus constitutive of sovereignty’s normative dimension.

The fiduciary theory posits that human rights are not merely individual interests that can be offset by other societal interests. Instead, human rights are legal rights that protect persons’ freedom and dignity (not interests or welfare), placing states under correlative legal obligations to protect those rights.⁶ To satisfy their fiduciary obligations, states must honor the equal dignity of all persons subject to their power; they may not instrumentalize or dominate some of their people for the benefit of others in the interest of maximizing social welfare. States may never derogate from peremptory norms such as the international prohibitions against genocide, prolonged arbitrary detention, or torture, because the violation of these norms could never be consistent with the state’s obligation to guarantee the public’s secure and equal freedom.⁷ On the other hand, states may

³ See *id.* at 77-87; ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 183-215 (2007).

⁴ See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans. 2005) (rev’d ed. 1934).

⁵ See Evan Fox-Decent & Evan Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301 (2010) [hereinafter “Fox-Decent & Criddle, *Fiduciary Constitution*”]; Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE JOURNAL OF INTERNATIONAL LAW (YALE J. INT’L L.)* 331 (2009) [hereinafter “Criddle & Fox-Decent, *Jus Cogens*”].

⁶ See Fox-Decent & Criddle, *Fiduciary Constitution*, *supra* note 5 at 325.

⁷ See Criddle & Fox-Decent, *Jus Cogens*, *supra* note 5 at 356 & 365-70.

derogate from non-peremptory human rights such as freedom of expression, freedom of movement, and peaceable assembly—provided that derogations are applied even-handedly and are strictly necessary to guarantee subjects' secure and equal freedom.⁸ By emphasizing dignity rather than interests, and secure and equal freedom rather than social welfare, the fiduciary theory offers an alternative to the interest-balancing metaphor that currently dominates national security law.

Although the fiduciary theory of state sovereignty has broad implications for international human rights law, our objectives in this brief essay are modest. We do not seek to demonstrate definitively the fiduciary model's superiority *vis-à-vis* the interest-balancing model. Instead, we merely seek to show that recourse to interest balancing is not inevitable in national security decision-making, and that the fiduciary theory of human rights offers a plausible justification for departures from the interest-balancing approach. We begin in Part I with a brief introduction to the logic of interest balancing in contemporary national security law. In Parts II and III, we examine two cases originating in Germany, which each defy the interest-balancing model. In the first case, the Federal Constitutional Court of Germany declared unconstitutional legislation authorizing the military to intercept and shoot down hijacked passenger planes that could be used in a 9/11-style attack.⁹ In the second case, the European Court of Human Rights (ECHR) held that German law enforcement authorities could not abrogate the prohibitions against torture or cruel, inhuman, and degrading treatment even under circumstances where the life of an innocent child appeared to be at stake.¹⁰ Each of these decisions emphatically rejects the interest-balancing model by declaring that human rights are not mere interests that states may weigh against other interests during emergencies. In Part IV, we defend these decisions by showing that they fit congenially within the fiduciary theory of human rights.

⁸ See Evan Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law* 34 HUM. RTS. Q. 39 (2012).

⁹ Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 357/05, Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (GER.), available at: http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html, last accessed: April 24, 2012, (English translation of press release available at: <http://www.bverfg.de/en/press/bvg06-011en.html>, last accessed: April 24, 2012) [hereinafter "Aviation Security"].

¹⁰ Case of Gäfgen v. Germany, App No. 22978/05, [2010] Eur. Ct. HR 759 (1 June 2010), available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868977&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last accessed: 24 April 2012) [hereinafter "Gäfgen v. Germany"].

B. The Logic of Interest Balancing

The notion that states must balance individual liberty interests against societal security interests is not reserved for emergencies alone. As Jeremy Waldron has observed, proponents of interest balancing suggest that “it is *always* necessary—even in normal circumstances—to balance liberty against security.”¹¹ Society must inevitably “strike a balance between the individual’s liberty to do as he pleases and society’s need for protection against the harm that may accrue from the things it might please an individual to do.”¹² As national security threats become “graver or more imminent,” the balance between liberty and security “is bound to change (and it is appropriate that it should change).”¹³ The interest-balancing model thus offers a dynamic and comprehensive framework for calibrating a state’s response to national security threats.

Because the balance model treats both liberty and security as interests subject to comparative evaluation rather than rights that may operate as trumps, no liberty interests are immune from derogation, at least in the abstract. The classic example in current national security discourse is the prohibition against torture. International law classifies the prohibition as a peremptory norm from which states may not derogate (*jus cogens*).¹⁴ Under the interest-balancing test, however, an individual’s human right to be free from torture is not absolute; public officials must weigh the individual’s liberty interest against the state’s countervailing interest in obtaining information that would promote public security. Taking this analysis to its logical conclusion, Alan Dershowitz has suggested that law enforcement officers could justifiably torture terrorist conspirators in order to avert a 9/11-style attack.¹⁵ Judge Posner has accepted torture as a “necessity . . . in extreme situations” and has intimated that public officers may justifiably employ torture to avert security threats based on “a moral duty that is higher than their legal duty.”¹⁶ Even critics who resist the legalization of torture tend to accept the interest-balancing model’s basic logic, conceding that torture could be morally justifiable under some (exceedingly rare)

¹¹ Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 JOURNAL OF POLITICAL PHILOSOPHY (J. POL. PHIL.) 191, 192 (2003). Waldron criticizes the simple formula ‘less liberty equals more security,’ claiming that this abstract balancing model overlooks important nuances that must be taken into account in the justification of any restriction on civil liberties. For instance, the simple balancing model disregards the fact that diminutions in liberty tend to fall disproportionately on minorities, and that increasing state power also increases the risk of its abuse.; *see also id.* at 200-06.

¹² *Id.* at 192.

¹³ *Id.*

¹⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 702, comments h, k and n.

¹⁵ ALAN DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 477 (2002).

¹⁶ POSNER, *supra* note 1 at 83, 85.

circumstances.¹⁷ The problem with torture is not that it can never be justified under cost/benefit analysis, they argue, but rather that laws legalizing torture under narrow circumstances would tend to invite broader application in practice, leading to abuse.¹⁸ To resist this slippery slope, enthusiasts of interest balancing have therefore set their sights on designing a robust regulatory regime that would harness the societal benefits of coercive interrogation techniques, while minimizing the likelihood of abuse.¹⁹

Once we accept these implications of the interest-balancing model, a variety of other preemptory human rights norms become vulnerable to derogation based on social welfare considerations. For example, a state applying interest-balancing analysis might choose to impose prolonged arbitrary detention on members of a particular religious or ethnic group in order to prevent unidentified terrorist conspirators within that group from perpetrating mass atrocities. Interest-balancing could also support denying terrorism suspects due process rights in criminal trials on the ground that robust procedural protections could lead to acquittals that would allow terrorists to go free, enabling future attacks against the public.²⁰ These conflicts of liberty and security are by no means hypothetical, of course; they exemplify the real-world tradeoffs that states around the world have made in crafting laws and policies to respond to the threat of terrorism. When placed in the balance of liberty and security, even the most fundamental individual liberty interests may be outweighed by broader societal interests.

Practitioners of interest balancing tend to view this model as the only plausible conceptual framework for negotiating liberty and security concerns in public law. For example, in *Terror in the Balance: Security, Liberty, and the Courts*, Eric Posner and Adrian Vermeule observe that deontological models, which deploy individual rights as trumps over considerations of aggregate welfare, “risk being, and seeming extremist and impractical.”²¹ The problem, they argue, is that rights-based theories fail “to come to grips with the inevitability of tragic choices.”²² In matters of national security, states must sometimes

¹⁷ See, e.g., Henry Shue, *Torture*, 7 *PHILOSOPHY AND PUBLIC AFFAIRS* (PHIL. & PUB. AFF.) 124, 141 (1978).

¹⁸ *Id.* See also Judith Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 26-27 (Nancy L. Rosenblum, ed. 1989); Waldron, *supra* note 11 at 207.

¹⁹ To this end, Dershowitz has proposed a warrant regime for coercive interrogation, see ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 158-59 (2002), while Eric Posner and Adrian Vermeule have advocated a series of reforms for administrative oversight to address the potential for abuse in coercive interrogation; see POSNER & VERMEULE, *supra* note 3, at 209-13.

²⁰ In the age of weapons of mass destruction, Michael Dorf observes, “people are a little nervous about applying that maxim [that it is better to let 10 guilty men go free than to send one innocent man to jail] where the 10 guilty men who are going to go free could have biological weapons.” Waldron, *supra* note 11, at 204 (quoting Michael Dorf in Pam Belluck, *Hue and Murmur over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8).

²¹ POSNER & VERMEULE, *supra* note 3, at 38.

²² *Id.* at 187.

inflict a “necessary evil” on a few in order “to prevent serious harm to others.”²³ By way of example, Posner and Vermeule dismiss as “fanatical” the notion that a state may not subject individuals to torture or cruel, inhuman, and degrading treatment in order to obtain information that would prevent a grave terrorist attack.²⁴ In the heat of a national security crisis, reasonable decision-makers will employ interest balancing rather than human rights as trumps, they suggest.

Although there can be no doubt that interest balancing has become the dominant model in national security law, consequentialists such as Posner and Vermeule have been too quick to dismiss rights-based approaches as pie-in-the-sky fanaticism. In the discussion that follows, we review two post-9/11 cases in which courts have emphatically rejected interest balancing in contexts where the stakes for public security could scarcely be higher. Both cases endorse a rights-oriented approach that rejects reliance on social welfare concerns where state practices would violate the principles of non-instrumentalization or non-domination. These cases repay close study and offer resources for constructing a plausible rights-based model of national security regulation.

C. Renegade Aircraft: The Aviation Security Act Case

May a state authorize its military to shoot down a passenger airliner hijacked for use in a 9/11-style attack on civilian targets? Most advocates of interest-balancing would likely conclude that neutralizing a “renegade aircraft” would be reasonable to protect a greater loss of life. Nonetheless, in 2006 the German Federal Constitutional Court answered this question in the negative on the grounds that such action would violate human dignity.²⁵

The context for the court’s decision was a statute enacted by the German legislature to deal with renegade aircraft: the Aviation Security Act (*Luftsicherheitsgesetz*) of 2003. Following the terrorist attacks of September 11, 2001, public officials around the world labored to develop response plans for future renegade airplane attacks against skyscrapers, hydroelectric dams, nuclear power plants, and military installations. In Germany, calls for legislation to address such threats reached a crescendo after a disoriented sport pilot threatened to crash his plane into a skyscraper in Frankfurt am Main in January 2003.²⁶ In the Aviation Security Act, the federal legislature authorized military

²³ *Id.*

²⁴ *Id.*

²⁵ *Aviation Security*, *supra* note 9.

²⁶ Felix Müller & Tobias Richter, *Report on the Bundesverfassungsgericht’s (Federal Constitutional Court) Jurisprudence in 2005-2006*, 9 GERM. L.J. 161, 185 (2008), available at: http://www.germanlawjournal.org/pdfs/Vol09No02/PDF_Vol_09_No_02_161-194_Developments_Mueller.pdf (last accessed: 24 April 2012).

forces to intercept, fire warning shots, and threaten to use force in order to avert “an especially grave incident” (*besonders schwerer Unglücksfall*).²⁷ Should these measures prove inadequate, the Act further authorized the Federal Minister of Defense, in consultation with other officials, to order “direct use of force of arms”—provided that “the [targeted] aircraft will be used against the lives of human beings and . . . the use of force of arms is the only way to prevent this.”²⁸

A group of frequent flyers filed suit to challenge the Aviation Security Act on the basis that they risked becoming targets of military force in a renegade aircraft incident. They argued that the Act violated their “fundamental rights to human dignity and life” – constitutionally enshrined under the Basic Law – by authorizing the military to treat them instrumentally as “mere objects of government actions.”²⁹ In developing this argument, the complainants expressly contested the Act’s implicit liberty/security tradeoff:

The value and the preservation of their lives are left to the discretion of the Federal Minister of Defence according to quantitative aspects and to the life span presumably remaining to them “under the circumstances.” In the case of an emergency, they are intended to be sacrificed and to be intentionally killed if the Minister presumes, on the basis of the information available to him or her, that their lives will only last a short time and that, in comparison with the losses which are imminent otherwise, they therefore are no longer of any value at all or are, at any rate, of reduced value.

The state may not protect a majority of its citizens by intentionally killing a minority—in this case, the crew and the passengers of a plane. A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible. The state may not kill people because they are fewer in number than the ones whom the state hopes to save by their being killed.³⁰

²⁷ Gesetz zur Neuregelung von Luftsicherheitsgesetz (*Aviation Security Act*) § 14(1) (BGBl, I) (Jan. 11, 2005).

²⁸ *Id.* at § 14(3).

²⁹ *Aviation Security*, *supra* note 9 at, § 34.

³⁰ *Id.* at §§ 34-35 (summarizing complainants’ arguments).

The federal government staunchly defended the Act as a valid exercise of legislative power. The Act did not violate the right to life or offend human dignity, the government argued, because its measures were necessary “in order to prevent an even larger wrong.”³¹ The government added that when “the right to life of one human being and the right to life of another come into conflict with each other, it is incumbent upon the legislature to determine the kind and the extent of the protection of life.”³² The respondents also defended the Act on the ground that it authorized the use of force only in emergencies where the hijacker’s deadly purpose was clear and the renegade aircraft posed an imminent threat to other human lives.³³

The Federal Constitutional Court sided with the complainants. The Court observed that the right to life “demands of the state and its bodies to shield and to promote the life of every individual”³⁴ rather than treat some persons as “mere objects of its rescue operation for the protection of others.”³⁵ “What is thus absolutely prohibited,” the Court explained, “is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person.”³⁶ Hence, the military could not use force against a renegade aircraft when this would mean killing innocent passengers and crew members: “[b]y their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.”³⁷ In effect, the court held that the federal government could not authorize its agents to privilege the lives of innocent persons on the ground over the lives of innocent passengers and crew members in the air. Individuals in each group had the same “value” irrespective of the fact that one group might be larger than the other or have a longer collective life expectancy. The assumption that passengers and crew of a renegade aircraft “are doomed anyway,” the court reasoned, “cannot remove its nature of an infringement of their right to dignity” because “[h]uman life and human dignity enjoy the same constitutional protection

³¹ *Id.* at § 47.

³² *Id.* at § 51.

³³ *Id.* at § 121.

³⁴ *Id.* at § 118.

³⁵ *Id.* at § 122.

³⁶ *Id.* at § 119 (internal citations omitted).

³⁷ *Id.* at § 122. The court held that the military’s use of lethal force against a renegade aircraft would not violate the right to life, if the plane did not contain any innocent passengers or crew members. *Id.* at § 142.

regardless of the duration of the physical existence of the individual human being.”³⁸ Thus, the Federal Constitutional Court rejected the interest-balancing model’s embrace of the “necessary evil,” concluding that the state could not invoke specific and urgent security concerns as a justification for granting its military a license to kill innocent civilians.³⁹

D. Torture: *Gäfgen v. Germany*

Supporters of the interest-balancing model might reply to the renegade aircraft case, in part, by pointing out that it was decided in the abstract. While the relevant legislation was passed in response to 9/11 and the sport pilot incident, the Constitutional Court decided the case in a factual vacuum. As a result, the court did not need to grapple with an actual decision to shoot down a renegade aircraft that (let us assume) would have been destroyed by terrorists in any event and with a much greater loss of life. In the absence of an actual case such as this, the argument might go, the court did not need to take responsibility for a greater loss of life, and so it was able to render a high-minded and rights-based decision. Furthermore, interest-balancers might say, plausibly the court felt at liberty to stand fast on principle because it believed that, in a 9/11-type situation, the executive would order a renegade aircraft shot down in any event, with or without legal authority. Two weeks after the decision was handed down, the Minister of Defense announced that he would do just this.⁴⁰ A proponent of balancing might therefore conclude that, in an actual emergency, Schmittian and consequentialist imperatives invariably (and appropriately) come to the fore, thus nullifying any meaningful application of the court’s judgment.

Gäfgen v. Germany pulls in the opposite direction. The case involved the threat of torture by police and concrete facts that come close to the “ticking time bomb” hypotheticals relied on by interest-balancing advocates such as Dershowitz.⁴¹

On September 27, 2002, Gäfgen, a 27 year-old lawyer living in Frankfurt am Main, lured an 11-year old child into his home and killed him. Shortly after the child’s abduction and murder, Gäfgen delivered a ransom note for a million euros to the child’s wealthy parents,

³⁸ *Id.* at §130.

³⁹ The court noted secondarily that even under a consequentialist theory of the right to life, it was questionable whether the *Aviation Security Act* could survive constitutional review, because there will always be uncertainty surrounding “how long people who are on board a plane which has been converted into an assault weapon will live and whether there is still a chance of rescuing them.” *Id.* at § 131.

⁴⁰ *Aufruf zum Verfassungsbruch?* (Call for violation of the constitution?), FRANKFURTER ALLGEMINE (Sept. 17, 2007), available at: <http://www.faz.net/aktuell/politik/inland/kritik-an-jung-und-schaeuble-aufruf-zum-verfassungsbruch-1463080.html> (last accessed: 24 April 2012).

⁴¹ *Gäfgen v. Germany*, *supra* note 10, at §§ 10-22, 47, 94-100.

stating that if the kidnappers received the ransom and succeeded in leaving the country, then the parents would see their child again. Gäfgen in fact was acting alone. After delivering the ransom note he drove an hour's distance and hid the child's corpse under a jetty.

On September 30, 2002, Gäfgen picked up the ransom at a tram station, and from then on was under police surveillance. He deposited part of the ransom into his bank accounts and hid the remainder in his apartment. He was arrested at the Frankfurt airport that afternoon, with the police pinning him face down on the ground.

At the police station, a detective informed Gäfgen that he was suspected of kidnapping and instructed him of his right to remain silent and right to counsel. Meanwhile, the police found half the ransom money in Gäfgen's apartment and a note concerning the planning of the crime. Gäfgen intimated that another kidnapper was holding the child. After consulting a lawyer for 30 minutes, he claimed that two co-conspirators had kidnapped the child and were holding him near a lake.

Early in the morning of October 1, 2010, the Deputy Chief of the Frankfurt police ordered another officer to threaten Gäfgen with considerable pain, and to subject him to such pain in order to make him reveal the child's location. Subordinate department heads had previously and repeatedly opposed this measure, proposing instead further questioning and confronting Gäfgen with the child's family. The officer followed the Deputy Chief's order, however, and the ECHR later found that the officer threatened Gäfgen "with intolerable pain if he refused to disclose [the child]'s whereabouts."⁴² This treatment was to be administered by a person "specially trained for such purposes,"⁴³ and who in fact was already en route via helicopter. Within 10 minutes of receiving the threat, and fearing its execution, Gäfgen informed the authorities of the child's whereabouts and later showed them where he had hidden the body.

In a note dated October 1, 2010, the Deputy Chief stated that he believed the child's life was in danger, given lack of food and the temperature outside. The ticking time-bomb in this case was time itself. It appeared that only a confession from Gäfgen could defuse it. So, in an attempt to save the child's life, the Deputy Chief ordered the officer to threaten Gäfgen with torture. He confirmed in the same note that the threat was to be executed under medical supervision, and that he had ordered another officer to obtain a "truth serum" to be administered to Gäfgen.

Gäfgen was eventually sentenced to life imprisonment for kidnapping and murder. While the Regional Court that heard the case ruled that his confession under threat of torture

⁴² *Id.* at § 94.

⁴³ *Id.* at § 15.

was inadmissible, it did not order a discontinuance of the criminal proceedings. The Regional Court also allowed into evidence material that flowed from the confession, such as the child's body.⁴⁴ On the second day of the trial, in his statement on the charges, Gäfgen admitted to kidnapping and killing the child, and on the final day of the trial he confessed that this had been his intent all along. He made these admissions, he claimed, to apologize and take responsibility for what he had done.⁴⁵ The Regional Court noted that the findings of fact concerning the execution of the crime were based exclusively on Gäfgen's confession at trial, and that this second confession also underlay "the essential, if not the only" basis for the court's findings of fact in relation to the planning of the offence.⁴⁶

Gäfgen appealed to the Federal Court of Justice and lodged a complaint with the Federal Constitutional Court. The gist of his appeal, dismissed without reasons, was that the Regional Court had erred by refusing to discontinue the proceedings. The Federal Constitutional Court held that his complaint was inadmissible because he had failed to show why criminal proceedings could not go forward once the coerced confession was excluded. And, because he failed to raise the "fruit of the poisonous tree" issue before the Federal Court of Justice, he was barred from raising it before the Federal Constitutional Court.

Gäfgen sought relief before the ECHR on the grounds that his rights under Articles 3 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had been violated. Article 3 provides that "[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment," while Article 6 provides a right to a fair trial, including a presumption of innocence and a right to counsel.⁴⁷

The ECHR reaffirmed its jurisprudence and other international legal sources that have long held that the prohibition on torture is absolute and admits of no exceptions.⁴⁸ The Court recognized the "atmosphere of heightened tension and emotions" under which the interrogation of Gäfgen was conducted, and that the police officers had "acted in an attempt to save a child's life."⁴⁹ The Court nevertheless held that:

⁴⁴ In Germany there is no hard-edged doctrine analogous to the U.S. exclusionary rule.

⁴⁵ *Id.* at § 32.

⁴⁶ *Id.* at §34.

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3 & 4, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter "Convention"].

⁴⁸ *Gäfgen v. Germany*, *supra* note 10, at § 87 (citing, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Labita v. Italy* ([GC], no. 26772/95, § 119, ECHR 2000-IV; *Chahal v. the United Kingdom*, 15 November 1996, § 79, Reports of Judgments and Decisions 1996-V).

⁴⁹ *Id.* at §§ 106-07.

Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognizes that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. *The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.*⁵⁰

Applying this interpretation of Article 3 to the facts of the case, the ECHR suggested that even when a child is kidnapped and thereby imperiled by an individual with information that can save the child's life, authorities are still not permitted to use torture, inhuman or degrading treatment to coerce life-saving information from the kidnapper. Whereas in the renegade aircraft case the Federal Constitutional Court had said that the state cannot take some innocent lives to save others, here the ECHR determined that the state cannot coerce life-saving information from a kidnapper.

In fact, the ECHR's ruling is more dramatic still because it held that the mere *threat* of torture against Gäfgen was enough to violate Article 3, even when the point of the threat was to save a child's life.⁵¹ According to the Court, if the threat of torture was "sufficiently real and immediate," as it was in Gäfgen's case, then the threat alone was a violation of Article 3.⁵²

Before the ECHR, the government admitted that Gäfgen's interrogation violated Article 3, but argued that Gäfgen was no longer a "victim" within the meaning of Article 34.⁵³

⁵⁰ *Id.* at § 107 (emphasis added).

⁵¹ *Id.* at §§ 91, 108.

⁵² *Id.* at §91. Gäfgen alleged that he had been assaulted and subject to additional threats while he was interrogated. The government denied these allegations, and explained Gäfgen's evidence in support of them. In light of these explanations and the domestic courts' failure to find for Gäfgen on these issues, the ECHR held that Gäfgen had not met the burden of showing that he was subject to further abuses. *Id.* at §§ 96-98.

⁵³ Article 34 provides that "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

Moreover, domestic courts in Germany had acknowledged that the threat of torture was illegal under domestic law and violated Article 3 of the Convention. The Regional Court drew this conclusion in Gäfgen's criminal case when it excluded the coerced confession from evidence.

This same court addressed the matter again in 2004 when the Deputy Chief and the officer who made the threats were prosecuted criminally. The court rejected the defense of necessity, finding that, "[t]he protection of human dignity was absolute, allowing of no exceptions or any balancing of interests."⁵⁴ While the officers were convicted, they were assessed only light suspended fines.⁵⁵ The court found the officers' motivation and the stressful circumstances to be significant mitigating factors, and that the conviction established that the use of force to obtain information was illegal. The Deputy Chief was later appointed Chief of the Police Headquarters for Technology, Logistics and Administration.

The ECHR condemned the sentences as "manifestly disproportionate to a breach of one of the core rights of the Convention," and found that the promotion of the Deputy Chief raised "serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3."⁵⁶ In short, the national and international judicial bodies agreed on the absolute nature of Article 3, but differed on the consequences of its application.

The ECHR itself split 11-6 on the question of whether there had been a violation of Article 6, with the majority finding that there had not. The minority found that Article 6 was violated when the Regional Court admitted evidence that flowed from the breach of Article 3. The partial dissenters called for a clear affirmation of the exclusionary "fruit of the poisonous tree" doctrine.⁵⁷ Once again, there is unanimity on the principle that the prohibition on torture and threats of torture is absolute, but disagreement on the extent of the legal consequences that flow from a breach of the prohibition. The domestic and international unanimity on the absolutist principle calls into question the interest-balancing claim that the principle itself is "fanatical."

A Schmittian cynic might think that the domestic courts let the defendants off with a wink and a nod, and that the ECHR majority's unwillingness to find a breach of Article 6 is further evidence that, in emergencies, executive agents can call the shots with relative

⁵⁴ *Gäfgen v. Germany*, *supra* note 10, §§ 47-48 (the ECHR's characterization of the Regional Court's holding).

⁵⁵ *Gäfgen v. Germany*, *supra* note 10, at §§ 49-50.

⁵⁶ *Gäfgen v. Germany*, *supra* at note 10, at §§ 124-25.

⁵⁷ *Gäfgen v. Germany*, *supra* note 10, at §§ 1-13 (Rozakis, Tulkens, Jebens, Ziemele, Bianku, and Power, JJ., dissenting).

impunity. Yet there is a further important aspect of this case that resists dismissive cynicism: the Deputy Chief's subordinate department heads refused his repeated orders to threaten and, if necessary, torture Gäfgen. Instead of complying with those orders, they proposed legal alternatives. Whether their disobedience arose from a purely self-interested fear of punishment or nobler motivations, their refusal to obey illegal orders suggests that domestic and international law can guide executive decision-making during even the most pressing and time-sensitive crises. While one can only speculate on the reasons the department heads may have given the Deputy Chief for their disobedience, it would be surprising if illegality did not figure among them.

E. The Logic of Fiduciary Duty

Advocates of interest balancing might argue that, from the standpoint of everyday morality, the cases discussed above adopt an overzealous regard for human rights. Other things being equal, national security decision-makers should choose to save more innocent lives rather than fewer, and should choose that a (culpable) person suffer a threat of violence (or worse) rather than allow another (innocent) person to lose her life. These are the basic consequentialist intuitions that drive the interest-balancing view.

What advocates of interest balancing arguably fail to apprehend, on the fiduciary theory, is that other things are not equal, because public power is held in trust for the benefit of everyone subject to it. On our construal of the fiduciary theory, public power cannot be used in a way that deliberately treats individuals as mere means to others' ends, as would necessarily occur in the cases of torture or the killing of innocent passengers to save others.

The theory, however, does not rest on a deontological insistence that human rights are natural moral rights, some of which are absolute, and therefore that the state (like everyone else) must respect them. It rests instead on the idea that human rights are relational norms that arise from the state's unilateral assumption and exercise of sovereign powers. In previous writings we have relied on Kant's account of parent-child relations to explain how fiduciary duties arise, and why they are owed by the state.⁵⁸ We trace this argument now to explain how the state can owe its subjects a fiduciary duty to respect peremptory norms, and how these are part of a regime of secure and equal freedom.

In the parent-child case, parental fiduciary duties arise by operation of the fiduciary principle to set legal limits on the parents' discretionary authority over the child. Because the child cannot consent to the parent-child relationship, the fiduciary principle intercedes to ensure that the relationship is mediated by legality. Thus, parents must act toward their

⁵⁸ See e.g., Fox-Decent & Criddle, *Fiduciary Constitution*, *supra* note 5, at 309-25.

child in what they reasonably perceive to be the child's best interests. With fiduciary constraints in place, the parent-child relationship can be rightful because it is governed by law, rather than the unilateral will of the parent.

More generally, fiduciary relations arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary's power in that he is unable, either as a matter of fact or law, to exercise the entrusted power. Discretionary power of an administrative nature is other-regarding, purposive, and institutional. It is other-regarding in the strictly factual sense that another person is involved. The fiduciary's power is purposive in that it is held for limited purposes, such as an agent's power to contract on behalf of her principal. Lastly, the power is institutional in that it must be situated within a legally permissible institution, such as the family or the corporation, but not, for example, within a kidnapping ring.

Bearing in mind the constitutive features of fiduciary relations, we are now in a position to explain how the state and its institutions stand in a fiduciary relationship to their people. The state's legislative, judicial, and executive branches all assume discretionary power of an administrative nature over the citizens and noncitizens affected by their power. The legislative, executive, and judicial powers entailed by sovereignty, in their own familiar ways, are institutional, purpose-laden, and other-regarding. Furthermore, legal subjects, as private parties, are not entitled to exercise public powers. For this reason, legal subjects are peculiarly vulnerable to public authority, notwithstanding their ability within democracies to participate in democratic processes. It follows that the state's assumption of sovereign powers—public powers that private parties are not entitled to exercise—places it in a fiduciary relationship with its people.

The state's overarching fiduciary duty to citizens and noncitizens is to establish a regime of secure and equal freedom under the rule of law. Human rights provide the blueprint or structure of this regime. They supply the conditions under which individuals can live free from both public and private forms of instrumentalization and domination. To sum up, the fiduciary principle authorizes the state to secure legal order, but subject to fiduciary constraints that include human rights.

Because the fiduciary principle authorizes state power on behalf of everyone subject to it, the state cannot use its coercive powers in a way that victimizes some for the sake of others. Where a particular action or policy would necessarily do so, the state is peremptorily barred from pursuing it. Such actions or policies are anathema to a regime of secure and equal freedom. Torture and the killing of innocent life fall within this narrow category. Thus, the state is peremptorily barred from engaging in such acts. Put another way, the state owes a fiduciary duty to its people to respect absolutely their human rights to innocent life and security from torture. It cannot weigh the interests protected by these rights and sacrifice them during a time of crisis.

As noted already, most human rights, such as freedom of expression, movement and assembly, are not peremptory and can be restricted in limited circumstances. While this is not the place to set out fully the requirements that must be met under the fiduciary theory for rights limitations to be justified and lawful, those requirements differ significantly from the requirements of interest balancing. Under the latter view, rights can be restricted if the limitation tends to promote overall welfare. Under the former, rights restrictions must be publicly justified, they must satisfy a context-sensitive test of proportionality, and they must be justifiable from the point of view of the state's overarching mission to provide a regime of secure and equal freedom. For example, a state's fiduciary duty to guarantee secure and equal freedom arguably entitles it to infringe the freedom of expression of manufacturers by requiring them to place warnings on products that notify the public of possible health risks and other dangers.⁵⁹

More generally, under the fiduciary theory the appropriate inquiry into the limits of state power in a given case is not an abstract moral inquiry into which policy or decision would best advance an optimal balance of interests. Rather, the inquiry is fine-grained and institutional in orientation. It asks: "In this context, what institutional powers could the state hold and exercise that are consistent with its fiduciary duty to supply a regime of secure and equal freedom?" The relevant framework of analysis, in other words, is not an open-ended assessment of a balance of interests where the role of the state and its institutions (in principle) makes no difference to the inquiry, but a much narrower contextual assessment of the legitimate powers the state as fiduciary may possess and exercise.

Viewed in this light, *Göfgen v. Germany* and the renegade airplane case may be seen as instances where courts have recognized that there are some things the law cannot authorize public authorities to do. The fiduciary theory explains these cases as straightforward examples of the way peremptory human rights lend hard-edged substance to the limits of the fiduciary principle's authorization of state power. Advocates of interest balancing can respond to the cases in one of two ways. First, they can simply reject them on consequentialist moral grounds. But then their argument starts to look more like an abstract normative argument, one that gives up completely any attempt to take the judgments seriously and explain their basis.

Second, they can take the indirect route, discussed already, justifying our case studies on the grounds that encroachment on the absolute prohibitions on torture and killing of the innocent would be a slippery slope to wider abuses that would outweigh the benefit of relaxing the prohibitions in particular cases. The difficulty with this argument is not that the slippery slope may never materialize. The difficulty is that this is an unwarranted use of

⁵⁹ See Criddle & Fox-Decent, *supra* note 8.

an error theory. In effect, advocates of interest balancing argue that judicial discourse on rights is purely rhetorical. Judges are taken to be speaking as if they are relying normatively on one thing – absolute rights based on inalienable equal dignity – but they are in fact relying on something else: a consequentialist cost/benefit analysis that justifies the enforcement of absolute rights as the best way to maximize welfare over the long-term. If it were not for the slippery-slope problem, judges should, on this theory, decide every case on the merits of its contribution to overall welfare, without presuming that there is an absolute bar to torture and the killing of innocent life.

If there were no way to make sense of the courts' publicly-stated commitment to absolute rights in these narrow contexts, we might have reason to adopt the error theory implicit in the indirect approach. The fiduciary theory, however, makes sense of the courts' commitment by explaining peremptory human rights as correlates of the state's fiduciary duty to guarantee a regime of secure and equal freedom. Rather than dismiss the relevant legal phenomena as an error, the fiduciary theory strengthens and explains the rights-based grounds on which judges actually rely. The fiduciary theory thus takes the critical judgments seriously and on their own terms. For this reason alone, it merits consideration as a plausible alternative to the interest-balancing model.

F. Conclusion

In both *Gäfgen v. Germany* and the renegade airplane case, courts expressly rejected the argument that states must always seek to strike a balance between individual liberty interests and collective security interests in national security law. According to the ECHR, “[t]he philosophical basis underpinning the absolute nature of [certain human rights] does not allow for any exceptions or justifying factors or balancing of interests.”⁶⁰ States may not violate peremptory norms such as the right to life or the prohibition against torture under any circumstances, these courts held—not even to avoid greater harm to the public as a whole. Advocates of interest balancing will no doubt criticize these decisions for displaying an impractical and morally troubling preoccupation with individual liberty to the neglect of reasonable collective security interests. What is missing from *Gäfgen* and the renegade airplane decisions is an account of the “philosophical basis” that would justify the courts' rejection of interest balancing in favor of peremptory human rights.

The fiduciary theory of human rights fills this gap, explaining why states may not sacrifice the peremptory human rights of some of its people for the benefit of others. States bear a fiduciary obligation to provide a regime of secure and equal freedom under the rule of law for their people. They must therefore treat all who are subject to their powers as persons endowed with equal dignity rather than as objects that they may abuse or destroy for the

⁶⁰ *Gäfgen v. Germany*, *supra* note 10, at § 107.

benefit of others. The fiduciary obligation to respect human rights arises from the special, institutionally grounded relationship between states (or state-like actors) and the people on whose behalf the fiduciary principle authorizes them to exercise public powers. On the fiduciary theory, states may not violate peremptory human rights such as the right to life and the prohibition against torture under any circumstances. If they do, they subvert their own authority to exercise public powers in defense of national security.