Sometimes a finding in a survey, while of limited significance by itself, illuminates the encompassing, even debilitating, deficiency of a broader issue. One such finding has it that young Americans expect to have the right to be tried before a jury of their peers, but are quite reluctant to participate in jury duty. This finding illustrates a more general societal imbalance of people who frequently oppose bigger government and higher taxes but are anxious to expand or add governmental programs in many areas, from child care to national health insurance. By the same token, there are the patriots who call upon the United States to show its flag, say, in the Persian Gulf, but who are simultaneously opposed to serving in the armed forces, or sending their sons and daughters to serve.

Some feel so strongly about the primacy of rights and are at the same time resentful of the implications of social or communitarian responsibilities that they are blind to the peculiarity of the positions they advance. Such contradiction seems to be at the core of thinking of organizations like the American Civil Liberties Union (ACLU). A telling example is the ACLU's opposition to searches at airports, i.e., the use of x-ray machines and metal detectors, measures which are minimally intrusive and which diminish only slightly the right to travel freely, but which have significantly enhanced public safety by curtailing high-jacking in the U.S. and reducing terrorism elsewhere. In a similar vein, Dr. Theresa Crenshaw, a member of the President's Commission on the HIV Epidemic, finds herself arguing against a common objection to AIDS testing, that "[t]here is no point in having yourself tested because there is no cure." This argument completely disregards the fatal effect on others who come into contact with the infected person. It is akin to saying that if a person exhales cyanide, there is no sense in telling him of his predicament as long as there is no cure. Other radical individualists oppose seat belts and motorcycle helmets, the war against drugs, and even such innocent measures as voluntary fingerprinting of children to help cope with kidnapping.

Most Americans, though, are more reasonable. They are willing to accept some limited adjustments in their individual rights and some enhancements of their moral and public commitments in exchange for improved public safety, less drug abuse, enough order in the schools to permit teaching to take place, and to advance other compelling shared needs. I choose the term "adjustments" to indicate first of all, that only limited changes are at issue and second, to emphasize that what some consider to be a diminution of rights, however small in the eyes of some, will be viewed by others as a threat to basic freedoms, and by still others as merely a reinterpretation of recent legal traditions. Thus, checkpoints on public roads to search for drugs may be a diminution of rights for some, while others view them as a new interpretation of what constitutes a "reasonable search." (The Constitution bars "unreasonable searches," but what is "unreasonable" is a matter of interpretation.) In either case, at issue is an adjustment in the interpretation of what is deemed legal and legitimate.

The public, it must be acknowledged, finds it difficult to deal in fine gradations, especially when the issues involved are highly emotional. Hence, there is always a danger that public concern may escalate and become overzealous, leading to support for measures...
that are excessive and unnecessary to serve the social goals at hand. While this essay focuses on the arguments advanced by radical individualists, specifically those of their most industrious proponent, the ACLU, I am even more troubled by the opposite extremists, radical communitarians who would quarantine AIDS patients, test every school kid for drugs, and hang criminals from lamp posts at random to curb violence and impose a new tight moral order. The quest for ways to adjust certain rights — and principles upon which such adjustments are to be based — seeks new ways to attend to urgent social needs and to prevent excessive reactions. While I am aware that the media and general public ask ever more for drama, I cannot state the need for moderation and careful action more strongly. We need to reset thermostats, not shatter windows, or tear down walls.

Rights and responsibilities embrace matters of public morality and personal agendas.

To proceed gingerly, I deal first with the main objections raised against making any adjustments in the balance between individual rights and social responsibilities, and follow with specific criteria for a guide of how far to proceed without endangering constitutional foundations. At issue are matters of privacy and recent interpretations of the Fourth Amendment not modifications of fundamental rights of much longer and stronger standing, of the kind involved, say, if one were to curtail the First Amendment.

Rights and responsibilities are, of course, much more encompassing than constitutional and even legal issues; they embrace matters of public morality and personal agendas. Here, however, the focus is limited to issues inherent in the debate over whether or not some constitutional rights need to be adjusted, because these matters in particular get at the heart of the existing imbalance between excessive individual rights and insufficient social responsibility, and because they illuminate the deep connections between constitutional questions and other aspects of public morality, social values, and civic virtue. In other words, while the question of rights and responsibilities can be discussed abstractly or in grand philosophical terms, in reality the issues are fortunately played out in much lower keys.

Should there be mandatory drug testing for train engineers? Can we expel a disruptive student from a public school without a full-blown hearing? Should we require AIDS patients to disclose their sexual partners? Should the Miranda rule, a suspected criminal's right to be informed of his or her rights, be curbed?

Suspicion of Government Authority

Beneath the opposition by radical individualists to all adjustments of individual rights lies a deep-seated suspicion of government authority. Gene Guerrero, an ACLU representative who opposes drug testing, cites Justice Louis Brandeis: "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encounters by men of zeal, well-meaning but without understanding."

However, if this viewpoint is applied to a functioning democratic government — if one plays on the fear that the nation might at any moment be overturned by a totalitarian movement — then one comes to quite untenable conclusions, including resistance to adjustments of constitutional rights, however compelling the social need. Constitutional rights end up being perceived not as a basis for sound government actions, but merely as protection against government.

This position is reflected in the ACLU opposition to mandatory contact-tracing for those infected with AIDS: "People fear that their confidentiality won't be protected because lists can be stolen and because, once the list exists, there can be no assurance that legislatures won't pass future laws permitting persons other than public health officials from having access to it. Once the government has a list of names, addresses, sexual preferences and other information about people who test positive for the AIDS virus and their partners ... there is no way to guarantee that, whatever the confidentiality protections today, future laws won't be passed to allow insurers, school systems, or other state agencies to have access to such a list."

By that logic, one can never act because it is quite true that it is never possible to know with 100 percent accuracy what might occur at some point in the future. True, it is necessary at all times to bolster our freedoms, from providing civic education to imposing proper penalties on those who violate the law by unauthorized disclosure of information in government files, as has been done, with a high, although admittedly not a perfect, degree of success, with the Internal Revenue Service. The potential for leaks or other violations need not stop us from drawing on the government, when appropriate, only because at some unknown time, in
some unknown way, somebody might abuse the information that is being collected. Despite some serious abuses of Internal Revenue Service files by the Nixon administration, the country is doubtlessly better off having such information on file. Without it, we could hardly finance our social services or defense.

Yet the lengths to which one can be driven by suspicion is highlighted by the ACLU’s opposition to voluntary fingerprinting of children in the schools, so that kidnapped children when found—often years later—can be more readily identified. Fingerprinting also facilitates identification of bodies, sparing parents years of vain searching for a missing child. The ACLU devotes a policy position, “Children’s Rights,” to opposing the program. Why? Because the government agencies might gain access to the fingerprints and disseminate records without the child’s consent and without a warrant. Furthermore, the ACLU’s institutionalized paranoia leads it to believe that “fingerprinting tends to condition children and society to accept without protest unnecessary personal data collection and other invasions of privacy.” This is sociological rubbish, akin to saying that getting a driver’s license or responding to the census will “condition” one to life in a police state.

**Today it is airports, tomorrow it may be banks or city streets.**

This radical individualist position is a call for paralysis with human and moral consequences that may quickly exceed those of marginally modifying legal traditions, and one which directly invites grand disillusionment with the civic order. This, in turn, leads to calls to “suspend the Constitution.” If we are not to act out of fear that somehow an innocent law may one day lead to tyranny, we may well set forth the conditions that cause the kind and level of social distress which serves those who call for “strong” government. What is needed is a lean, well-contained government, not to proceed at every step on the assumption that no government act can be sanitized.

The argument has been made that often dogmatic, if not extreme, positions taken by the ACLU and other radical individualists are useful because they keep the amalgam of politics, the result of numerous tugs and pulls among many forces, more closely allied with individual rights than it would be if they were more reasonable or accommodating. However, extremism in the defense of virtue is a vice. Arguments advanced by radical individualists do cause harm, as they are used by policymakers and by courts to block programs that respond to compelling social needs. These arguments are not part of a healthy give-and-take in which their extreme nature is mitigated by the equally extreme positions of others. Rather than doctrines of excess, what is needed is cautious crafting of middle-of-the-road policies that take into account ways of dealing with social needs while only minimally modifying individual rights — exactly the gentle mix the radicals undermine so effectively.

**A Slippery Slope**

Probably the most commonly used argument against making adjustments in the balance between individual rights and social responsibilities is the one that draws on a bogus piece of sociological wisdom which says once one seeks to modify a tradition, it will crumble. This argument is often used by orthodox Jews to oppose any changes in Judaism (e.g. seating men and women together in synagogue), as well as by Catholic traditionalists (e.g. conducting Mass in the vernacular). To use another analogy, it is widely held that moral order is like someone precariously perched on top of a hill; if one so much as sets a foot on the edge of the slope, one will end up on one’s rear end at the bottom of the heap. Referring to the “dangers” of anti-smoking legislation, sociologist Barry Glaser takes the plunge: "...if this pattern continues, we’ll have a homogenized population in which everybody will be within recommended weight ranges, and nobody will smoke anymore, and nobody will drink and everybody will work out.”

Over the years, most people have become accustomed to having themselves and their luggage searched at airports without much inconvenience. Yet the ACLU opposed airport security not only because it violates, they said, the Fourth Amendment, but also because of what they feared it might lead to. Thus one of its policy statements reads: "Regrettably, we live in dangerous times. If the danger posed in one situation is thought to justify unconstitutional, emergency measures, where can the line be drawn? Today it is airports, tomorrow it may be banks or city streets. "The argument is not wholly without merit. Once taboos are broken by a community and modification of its ethical code is tolerated, it is often not easy to find a stopping place. Those who challenge the traditional vows of fidelity in marriage often find it difficult to sustain their marital contracts and frequently end up with no stable relationships at all. And "reform" in Judaism was
followed (although it may well have occurred anyhow) by a massive flight from religious commitment. At the same time, it is also equally evident that we do not end up at the bottom each time we collectively negotiate a step on the top of what are potentially slippery slopes. Not every young woman who allows herself to be kissed (let alone goes further) before marriage ends up a hooker, as some of our forefathers and mothers warned, and not everyone who experiments with marijuana ends up a crack addict. Similarly, sexual education in schools and has not lead to new heights of promiscuity, orgies, and the destruction of American society as archconservatives had feared. This goes to show that societies can modify their moral codes without necessarily losing their grip.

Principles for Limited Adjustments

What is needed are principles that delineate how far one can travel in the new direction, what steps on the slope one is allowed to negotiate without free fall.

Clear and Present Danger

Adjustments should only be implemented if there is a clear and present danger — a real, readily verifiable, sizeable social problem or need. Unfortunately, in a "media-ized" society, prophets of alarm rapidly gain wide audiences. There are frequent calls on policy makers and citizens alike to tighten their belts and modify their lifestyles, as well as calls for laws and constitutional protection to combat some imagined or anticipated scourge. For example, in the mid-1970s Americans were told that they must be forced out of cars and into mass transit because the United States was running out of oil, and, more recently, that America must introduce central planning in order to compete with the Japanese, and so on.

If policymakers and citizens were to respond to all these cries of "wolf," society would periodically be run through the wringer, shaken and rearranged at great cost. Unfortunately, on most issues it is nearly impossible to discern well in advance which dangers are real and which are wildly exaggerated, if not outright false. Hence, one must, however reluctantly, reach the humble conclusion that the best way to respond is not to try to anticipate too far into the future and to embrace the humbler posture of not acting until there is a clear and present danger. Nuclear weapons, handguns, AIDS, and crack are clear and present. The evidence that they endanger large numbers of lives, if not the very existence of our society, are incontestable. Killer bees are not, and the heating of the climate may not justify the kind of draconian measures the alarmists advocate. Other measures are justified because of the direct link between the cause and effect; if someone points a machine gun at a person's head, one has a right to take away the others' "property," even wrestle the assailant to the ground. The danger is clear and present. At the same time, we would condemn, indeed penalize, the same conduct on the mere suspicion that a gun owner put a weapon to that use.

A good illustration of this issue is the case of transportation workers. After several train accidents, the United States Department of Transportation determined that there was enough of a problem to warrant random testing of train engineers (who drive the trains) for drug and alcohol use. Radical individualists opposed the policy on the usual grounds that only individualized case-by-case evidence of "probable cause" constitutes proper cause. Testing, according to their claim, is not even permissible if an engineer is seen stumbling away after a wreck unless there is evidence of drinking or drugs use, etc. In February of 1988, a Federal Appeals Court in California agreed with these individualists and ruled that it is unconstitutional to administer drug tests to those who drive trains.

The following evidence suggests which data may be considered sufficient to show a direct link. A 1979 study found that 23 percent of railroad operating employees were "problem drinkers," many of them having gotten drunk on the job. Of all the train accidents between 1975 and 1984, drugs or alcohol were "directly affecting" causes in forty-eight of them, accounting for thirty-seven fatalities and eighty injuries. Since then, the danger seems to have become only worse. Out of 179 railroad accidents in 1987, engineers in 39 of the cases tested positive for drugs, 34 percent more than in 1986. Following a January 1987 crash between an Amtrak and Conrail train, in which 16 people died and 174 were injured, the engineer and the brakemen were found to have been under the influence of marijuana.

While there are no simple mechanical numbers or criteria, it seems that when 23 percent, that is, nearly one out of four transportation workers is affected and when those involved deal directly with life and death (unlike the National Weather Bureau staff, which was also to be tested!), we hold that random testing of train engineers and other high-risk groups, such as airline pilots, for drugs and alcohol, is justified. Once it is established that there is a clear and present danger, the matter must then be examined against other criteria.

Modifying the Constitutional Balance

Assume we agree as a community that the human toll is such that we should discourage smoking (over 300,000 people in the United States die from smoking
purchases, moral justification can be found in the fact that we assume that we agree that the link between smoking and ill consequences is sufficiently tight for it to be considered a direct cause, hence, justifies an adjustment. Even if we accept the radical individualist notion that people ought to be free to choose their purchases, moral justification can be found in the fact that, as Robert Goodin points out, smoking seems to be harmful to others. Passive smoking has been attributed as the cause of approximately 2400 cases of lung cancer per year and in 1986 approximately 1600 people died in fires caused by smoking. In addition, the fact that smokers show that their real preference is to stop — 90 percent of all smokers have tried to quit — is a signal for help.

Now assume that these findings, if they hold under further scrutiny (e.g., there are serious questions about the magnitude of secondary effects), indicate a clear and present danger; it does not yet follow that we need to make a constitutional adjustment. We first ought to look for ways that do not necessitate tampering with the Constitution. Armed with these criteria, we are likely to conclude that raising taxes on cigarettes is more justifiable than prohibiting cigarette ads. For one, the result is more efficient; a 10 percent increase in price is reported to correlate with a 12 percent decrease in demand. Other studies corroborate this by demonstrating that young people's taste for cigarettes is highly controlled by their price. Secondly, and more to the point, curbing ads raises constitutional issues of freedom of speech while raising taxes does not. Hence, even if curbing ads proved to be somewhat more efficient, raising taxes would still be preferable as long as one can show that cigarette advertisements are not significantly more influential than prices.

**Ways of Minimal Intrusion**

Once it is established that there is no effective alternative to adjusting the constitutional balance between individual rights and social responsibilities (e.g. that to prevent the harms of side-stream smoke and in order not to impose the health care costs on society caused by smoking), we must look for options that will make the most minimal intrusion possible, rather than proceeding with a sledge hammer.

An examination of the debate over the issue of Miranda rights, the rule that a suspected criminal must be informed of his rights prior to being arrested, provides a good example of how ways may be found to trim rather than hack. In recent years, "Miranda" has come under criticism as being excessively favorable toward criminals. The extent to which these rules actually hobble the work of the police and prosecutors is a much-debated and scrutinized topic warranting long study just to sort out this question. It is difficult to tell whether recent court rulings have already sharply or only moderately affected the reach of Miranda, although most would agree that over the last ten years, the balance has tilted somewhat toward lesser rights for criminals and more toward public safety. Our concern here is to illustrate what a reasonable intermediary position looks like rather than settling many of the attending intricacies.

At one extreme is the radical individualist position that no changes are to be made whatsoever, as if a rather recent legal tradition, not in effect until 1966, has the standing of the Bill of Rights and the sanction of the Founding Fathers. On the other hand, radical communitarians argue that many rights accord criminals more constitutional protection than is afforded their victims. Former Attorney General Edwin Meese wanted to do away with Miranda Rights altogether because, he said, "it provides incentives for criminals not to talk" and "only helps guilty defendants." The Office of Legal Policy of the U.S. Attorney General under the Reagan Administration issued a position paper that called for a wholesale overturning of the Miranda decision.

A reasonable intermediary position seems to be to let the evidence stand as it was collected despite possible technical errors as long as there is no indication of bad faith, and making sure to include an indication of the error in the relevant personnel file at the appropriate law enforcement agency to avoid repetition. In a 1985 Supreme Court case of a suspect who had confessed to a crime before he was read his rights, was later informed of his rights, and then confessed again, the Court unanimously agreed that the first confession could not be used as evidence even if given voluntarily and without coercion, but ruled, six to three, that the unsolicited admission of guilt did not taint the second confession. In 1987, the Supreme Court ruled that the police are not required to inform a suspect about each crime being investigated because, the Miranda decision specifically requires that the police inform a suspect of his right to remain silent and that anything he says may be used against him."

Another example of a carefully honed adjustment is the introduction of some restrictions on the inadmissibility of evidence uncovered during discovery which was technically flawed. In United States v. Leon, the police thought they had obtained a search warrant for a house wherein they gathered incriminating evidence. Later it was discovered that the clerk had written the address incorrectly on the search warrant. In 1984 the
Supreme Court ruled that the evidence gathered should not be excluded on the basis of the technical mistake.

The debate over the rights of students provides still another example of a reasonable intermediary position. Many observers agree that both substantive rights of students in public schools and their due process rights have reached a level that has made it difficult for public schools to function. Linda Bruin, legal counsel for the Michigan Association of School Boards writes, "Following the split decision in Goss v. Lopez, 419 US 565 (1975), which struck down an Ohio statute permitting student suspensions from school without a hearing, educators expressed fears that they no longer would be able to discipline students efficiently."

Moral and legal "notches" will reduce the danger of slipping down the slope.

What is an intermediary position between according students full-fledged Fourth Amendment rights, in effect deterring teachers and principals from suspending them, and declaring students fair game for any capricious school authority? It seems reasonable that students who are subject to expulsion and suspension should be granted due process to the extent that they are notified of the nature of their misconduct and given an opportunity to respond; both actions must occur before the expulsion takes place. Expulsion need not guarantee students the right to counsel or cross examination and calling of witnesses. This would unduly encumber a school's ability to maintain an educational environment and their right to impose additional restrictions and simplified procedures for internal purposes. This is far from a novel approach, for several state courts have already modified school policies in the directions we suggest.

To reduce the danger of slipping down the slope, it is important to draw moral and legal "notches" along the way. While it may be appropriate for students charged with expulsion to insist on due process, they need not be granted the same opportunities when they want to protest a grade. Radical individualists are strongly opposed to any modification of due process with regard to searches, seizures, and tests without presentation, before the fact, of case-by-case compelling evidence to a third party, an independent judge. Radical communitarians would suspend such constitutional protections to "win the war on drugs." Others who, like the author, seek intermediate, principled "notches," find that one can make a strong case that random searches of automobiles on public highways are significantly different from random searches of homes. Automobiles are an optional means of transportation, convey passengers on public territory, and travel in places where behavior under the influence of drugs may affect others: homes are true castles, truly private, and what we do in them is much less likely to harm others.

Another reasonable measure is to require people who drive into open-air drug markets to show their driver's license and car registration. This situation arose in Inkster, Michigan, a small community just outside Detroit, where the drug trade was so furious local residents could rarely take to the streets and lived in constant fear of their lives and the corruption of their children. The county sheriff set up roadblocks from one to four each afternoon, checking drivers' licenses and registrations. The tactic broke up the open drug market but had to be stopped when the ACLU intervened and the court accepted its arguments.

Another option to abate open-air drug trafficking is the proposal by the Mayor of Alexandria, Virginia, to arrest those who are "loitering for purposes of engaging in an unlawful drug transaction." Unlike old loitering laws which were used by the police to harass minorities, the new "loitering plus" statutes are designed to prevent such violations by defining eight conditions that must be met before an arrest can be made. The person must be on the street in a drug trafficking area for more than fifteen minutes during which he or she must have face-to-face contact with more than one person involving actions which indicate that they are concealing an object to be exchanged, and so on.

One may devise new measures designed to reduce the constitutional impact of the suggested adjustments. The Supreme Court, in June of 1990, approved of roadside sobriety checkpoints, which the ACLU had successfully opposed in several states. The searches at these checkpoints, the Supreme Court majority argued, are minimally intrusive and last less than thirty seconds. Going one step further, the "intrusion" of the checkpoints is diminished even more if the authorities systematically and repeatedly inform drivers that such checkpoints are being operated, without disclosing their precise locations. This hardly detracts from their efficiency but makes them less threatening to legal traditions, because once the potential of a search on a given road is posted, travel thereon can be construed as implied consent. Likewise, job requirements for all new train engineers, air traffic controllers, police per-
The job may be given a year's time to relocate if they
traffic jams and insist that there will be safe places for
drivers to pull off the road and that drivers have ade-
quate warning that they must stop, etc. Indeed, the fact
that these tests last less than half a minute is in their
favor. So is the short delay airport searches impose.
The objection that urine tests are highly intrusive, that,
as one judge said, they "require employees to perform
an excretory function traditionally shielded by great
privacy," is quite compelling. While it is both useful
and convenient to distinguish between legal and prac-
tical considerations, it should be noted that they are
intertwined. To wit, practical burdens could rise to a
point that they become a form of government harass-
ment which is one of the main infractions from which
the Bill of Rights is meant to protect us.

In short, far from yielding to demands to gun down
any private, unidentified airplane or speed boat that
approaches a United States border, break down doors
of people’s homes at midnight, quarantine all HIV positive persons, and so on, to combat drugs and AIDS,
we see justification to introduce measures that are
minimally intrusive, in either legal or practical terms.
Thus, sobriety checkpoints, searches of cars on public
roads, testing of train engineers, pilots, air traffic con-
trollers and other individuals whose jobs entail high
risks to others, and requiring AIDS patients to disclose
sexual partners if the precautions indicated are taken,
are overdue, legitimate adjustments.

Minimize Side Effects
Aside from checking policies against the listed cri-
teria, pains should be taken to reduce deleterious off-
shoots of a given policy. For example, AIDS testing
and contact-tracing can lead to the loss of a job and
health insurance if confidentiality is not maintained.
Hence, any introduction of such a program should be
accompanied by a thorough review of control of access
to lists of names of those tested, procedures used in
contacting sexual partners, professional education pro-
grams on the need for confidentiality, and penalties
for unauthorized disclosure and especially for those
who discriminate against AIDS patients or HIV car-
ders. All this may seem quite cumbersome, but in view
of the great dangers AIDS poses for individuals and
the high costs to society, these measures are clearly
appropriate. A good example of a program that has
kept negative side effects to a minimum and has en-
hanced its acceptability is the use of x-rays and metal
detectors at airports to uncover weapons that may
otherwise be brought on board and prevents high-jack-
ing. The searches are deliberately not used to stop drug
trafficking and other crimes.

Misuse of Efficiency
An examination of numerous writings, court briefs,
and congressional testimony of radical individualists
reveals a common pattern. Much more attention is paid
to the alleged inefficiencies of the suggested policy
modifications than to the constitutional and moral legi-
timacy. This is surprising, because the opponents of
the suggested adjustments are, as a rule, not particular-
ly schooled or trained in technical evaluation of the
policies involved and hardly care to find new or re-
modeled government “interventions" that work effec-
tively. It seems that the underlying motivation is not a
genuine quest for efficiency or cost-benefit assess-
ment, an examination that definitely has its place next
to, and in addition to, moral/constitutional evaluation.
Obviously, if one can show that a planned step or
program cannot work, or worse, that it is counter-
productive, this is a more compelling way to lay it to
rest than arguing that protecting, for example, some
interpretation of the Fourth Amendment is more im-
portant than, say, preventing drunk and stoned train
engineers from derailing trains, or removing guns from
the schools.

The misuse, indeed disingenuous, of the efficiency
argument on the part of the ACLU and others is evident
in several ways. First, when radical individualists eval-
uate any suggestions for government intervention,
they predictably find them always to be unreasonable,
unproductive, ineffectual, inefficient. Yet they reach
these conclusions without making any scientific at-
tempt to collect facts and interpret them systematically
and fairly. Instead, facts are picked and interwoven to
shape a “case” the way lawyers do while filing a brief,
rather than as scholars or scientists would.

A typical example of this is an ACLU position paper
that evaluates “mandatory contact tracing” of AIDS
patients in seven ways, finding no merits and only
deficiencies. First, the ACLU claims that contact-trac-
ing would drive people away from voluntary testing
sites and hence have a counterproductive effect. No
evidence is given, only conjecture. The question of
whether the policy is efficient on the grounds that
while some are driven away, many others are helped
to stop infecting still others, is not examined.
Next, the ACLU argues that "contact tracing depends on the cooperation of the tested person." It is argued that "requiring" disclosure is meaningless, that it is "no more likely to achieve its ultimate goal of notification than a voluntary model." No evidence is given, and the total experience of sanctioning by law (the fact that the fear of sanction is a factor in one's decision-making), the expressive role of law (it captures and communicates our values), and the interactive effect between law and voluntary morality (we tend to do what is right in part so nobody will make us do it) are all ignored, and so on.

Evidence that mandatory testing will drive people away is taken from a highly speculative story in the Chicago Tribune which deals with the first days of the program, before people had a chance to discover the extent to which its confidentiality was maintained. In another case, the ACLU cites a statement by Senator Jesse Helms of North Carolina, advocating isolation of those who test positive, as evidence of potential government action. In still another ACLU position paper, the standards according to which tests are deemed acceptable, are set so high, nothing could qualify. According to their view testing for the HIV virus is worthless because "there is as yet no way to cure AIDS or to render it incommunicable."

Finally, it is evident that even if somehow these interventions could be made or would turn out to be beneficial, the radical individualists would continue to oppose them as vehemently as before. For example, a major argument against testing train engineers for drugs, even after a wreck, is that the presence of drugs is said not to be evidence of impairment. However, the same radical individualists also oppose sobriety tests, despite the fact that the presence of alcohol above a certain level certainly does impair performance and judgment. Similarly, the ACLU states: "Even if there was empirical evidence indicating that Miranda has impeded law enforcement, this would be an insufficient basis to overturn the decision... thus, even though the Office of Legal Policy's evidence of a negative impact on law enforcement is extraordinarily weak, its argument for overturning Miranda would have to be rejected even if the argument were based on stronger evidence."

So the underlying structure of many of these arguments is 'Let's argue for the inefficiency, but if it turns out to be efficient, let's oppose it anyhow.' In short, one surely would not favor even a small adjustment of the balance between individual rights and social responsibilities in favor of, say, public safety, if the policy is inefficient; nor does even a major gain in efficiency justify setting aside a major constitutional tenet. But when the policies can be shown to be effective and the adjustment can be made to be limited, this is a direction in which we ought to go. The Constitution is a living creation; it has and will continue to be adjusted to new facts of life, although it needs to be tuned with great caution and care, never wantonly.

The world is not on fire, although to those caught in the cross fire of gangs in some parts of Los Angeles or between drug dealers in the nation's capital, may think otherwise. Hence, cries to set aside constitutional protections to "win the war" against drugs or any other enemy, are at this stage not justified. However, precisely because additional deterioration of the civic order may play into the hands of alarmists, and because the social needs they call to attention do constitute clear and present dangers, we need to act. Clearly, business as usual will not do. The purists, who wish to stick to their favorite interpretations of constitutional rights and not give an inch, do not allow us to adjust to the new societal realities.

Obviously much that needs to be done has to take place in other societal realms, from reforming schools to designing an economy that will provide better jobs for youngsters in ghettos. However, the moral climate is significant, as is its expression in the laws of the land. Unfortunately, there is a kernel of truth in the slogan that "me-ism" is rampant. To help shore up the civic order, Americans will need to give up some of their cherished rights to travel unencumbered, and those who work in high risk jobs will need to be tested for drugs; some will have to disclose names of sexual contacts and take other such measures that are far from appealing to a free people in a free society, but which seem quite justified under the circumstances. The details of working out what needs to be done may seem complicated and cumbersome. They may well not be dramatic enough to play on the evening news. However, given the fragile nature of all freedoms, adjustments should be made gingerly rather than sweeping, but adjustments should, nonetheless, be made.

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