Constitutions, Democracy, and the Rule of Law

Terror and Civil Liberties
October 17, 2003

Panel Response and Discussion

Introduction by Akeel Bilgrami

Welcome back. The plan for this afternoon's session is that the four panelists, in the following order, Professor Debra Satz, Professor Joe Stiglitz, Professor Stephen Holmes, and Professor Jon Elster, will speak for 15 minutes each, commenting on the morning's papers and raising questions, and they will be followed by the speakers replying to their comments for about five minutes each or thereabouts. Then I thought I would read out a few questions that have come from the floor to the morning speakers and let a sort of general discussion of that kind go for about twenty minutes or so, somewhat more, and then get the speakers and panelists if they have things in mind to say to come back again. All right, I'll now first ask Professor Debra Satz to speak.

Comments by Debra Satz

I'd like to thank the organizers of this conference and the paper-givers from this morning for delivering a very stimulating set of papers. I won't summarize the papers. I hope for those of you who weren't here in the morning, I'll say enough so that you can see what some of the issues were.

It seems to me there are three ways of evaluating emergency measures to combat terror. We can ask whether they are effective, we can ask whether they are legal, and we can ask whether they are moral. The papers from this morning give us some different inputs into this multidimensional assessment. So I want to try and step back and look at some of the convergences between the papers, some of the tensions, and then ask some questions.

So first on the questions, are emergency measures to combat terrorism effective? It's interesting that many people debating issues, the tradeoff between civil liberties and security, take that tradeoff as a kind of theorem but then reach different conclusions about its cost and benefits, much as generations of
economists assumed there was a theorem governing growth and equality. But some economists now think that great equality can actually be good for economic growth, at least in some circumstances.

So in a similar vein I think it's worth asking—and I don't mean this as a totally theoretical question, and I'll say more about the empirical parts of it—whether there are circumstances in which greater liberty might actually be good for our security or at least better than the liberty-depriving alternatives. At the very least features of the threat we face can be relevant in determining how we think about the costs and benefits.

For example, if the limit scenario that Jim Fearon outlined in his paper this morning were realized, that is, if everyone had a button on her cell phone that could destroy the planet, I don't think the theorem would hold. If the threat we faced had that structure, it's unclear that any possible level of civil liberties curtailment could ensure out safety. As a matter of fact, I think we should just enjoy our civil liberties in the few minutes that we had left before the buttons are pushed. While we're not in a situation of that structure, we don't really know exactly what structure of the threat we face has. That really came out I think in a number of the papers this morning. This morning's papers take a sideswipe at the tradeoff question, but I think it's worth subjecting it to more direct line of questioning. That's just to ask what we know about the effectiveness of antiterrorism measures.

So Christopher Hewitt in his book, *The Effectiveness of Anti-Terrorist Policies*, plots the level of emergency powers against death, explosions, and attacks, in five cases: Cyprus, Uruguay, North Ireland, Spain, and Italy. He concluded that in all cases, "there is no recognizable pattern whereby violence declines following the introduction of emergency powers. Sometimes violence declines, sometimes it increases, but most of the legislation has no discernable impact."

For example, in the case of Britain's use of emergency powers in North Ireland after 1973, violence actually increased following the use of internment and the enactment of stronger emergency powers. A cursory look at the news reveals that Israel's use of emergency powers, powers that have been in play more or less since Israel's founding, has not deterred a high level of terrorist violence in that country.

Of course, there is a kind of factual question that I don't know how to answer, which is, what would be the level of violence if not for these antiterrorist measures? It's of course possible that things could be worse, although it's hard to say how much worse they could be. The Israeli case opens up questions on fronts separate on terrorism that I won't talk about right now. There are some cases in which antiterrorist measures seem to work, that is, to be effective. Canada seems to have been effective in using emergency powers against the Liberation Front of Quebec. The emergency powers were suspended after a
year. That example might be worth looking into in more detail, since it looks like
the emergency legislation was effective, produced an equilibrium between civil
liberties and security, which served the interests of both, and then didn't seem to
have permanent destabilizing effects.

Why might antiterrorist legislation often not be effective? Well, some of the
reasons were pointed out this morning. Often when we're enacting antiterrorist
legislation we're in a fog. I think that's a new movie about McNamara called In a
Fog. I think we're often in a fog in response to great trauma. There are many
types of cognitive distortions that Diego Gambetta detailed this morning. There is
also I think very importantly the ratchet mechanism that was described by Jim
Fearon, also mentioned by George Fletcher. Once emergency powers are
enacted, it's often difficult for governments to give them up, especially when a
terrorist threat, while diminished, is not zero. No government wants to be seen as
having been negligent in failing to anticipate an attack. If a new attack occurs, the
older legislation often still in place just gets added to. This is the ratchet effect,
producing increasing limitations of civil liberties over time. As the restrictions get
ratcheted up, support often grows for the terrorists.

So in lots of cases around the world we see governments trying to use this
weapon in a fog, not being able to equilibrate its level and ratcheting up to such
an extent that the terrorists are neither defeated and actually grow. Some
features of the PATRIOT Act warrant precisely this concern, the fear that they will
generate support for our enemies. The Bush administration now holds many
hundreds of people, including American citizens, in jails with no access to
lawyers or relatives, no indictment of charge, and no indication of whether or
when they will be set free. It proposed secret military tribunals for some of these
people that lack constitutional safeguards and threatens to impose the death
penalty on those it convicts.

How would we ourselves respond to a foreign government that engaged in such
practices? Looking beyond the PATRIOT Act, it seems to me we can't say that
much of U.S. policy has been concerned with finding measures that aim at
optimizing our security. There is a question about focusing on the PATRIOT Act
alone, I think as some of the papers do, or thinking more broadly about the
various measures that we've been undertaking. Consider the use of preemptive
strikes, our recent history of supporting dictatorships, and then waging war on
them. Soon after our imposing protection of standards on poor countries while
denying them their right to do the same to us. If we want effective policies, we
have to worry not only about capturing existing terrorists but diffusing the
circumstances that help produce new ones.

I think then there is some reason to be skeptical of the effectiveness of
antiterrorist legislation in general and in particular with respect to the PATRIOT
Act, but I don't think any argument doubting effectiveness should be fully
convincing for several reasons. First, ratchet effects might not be inevitable. So
although there may be a tendency to ratchet up, there can be self-correcting mechanisms. Jim Fearon told a story, a plausible story, about the United States that I think does look to the possibility of corrections on mistakes that we make by overestimating threats. Second, although we suffer from cognitive defects and we’re in a fog, nobody can deny that we face a terrorist threat. Fear can be a rational response as well as an irrational one. So you can recall the old quip—you may be paranoid but that doesn’t mean that they are not trying to get you. Not only is there a proliferation of existing weapons, but there is a race to get new ones. I think here the kind of long-range worries that Jim Fearon raised this morning are serious. There is both the worry about the development of technology and then there is the fact that there is proliferation of existing technology and that many of the countries that have weapons of mass destruction are unstable, have shown no restrictions on maybe even selling off some of their weapons in exchange for new weapons.

There was an article in the *New York Times* some of you may have seen recently—I think it was over the summer—about international arms markets, a quite extraordinary article which talked about the existence of such markets and their toleration. I think unless the world gets serious about trying to deal with those things, we may well be on the road that Jim Fearon outlined this morning, and that means that arguments about effectiveness, while they go a certain way to at least cautioning us, can’t go all the way to blocking the move to use these things.

So that brings me quickly to my next topic, which is, if they were effective, are they legal? I think this raises some of the themes of George Fletcher’s paper this morning. Should the constitution itself allow for departures from its own terms? If so, what sort? There are two major views about this question. Actually, I think they are represented on the panel. The first view, which I think is the view George Fletcher took this morning, although there are some qualifications in his paper, is the view that constitutional rules are not and should not be relaxed during emergencies. The constitution should be enforced strictly; that is, the rules should be the same during emergencies and nonemergencies, and he cites a number of reasons including some that tie in with other themes of the papers, that we overreact, that there can be ratchet effects, but also I think importantly that he thinks it opens the door to deep violations of our core values. Call that an absolutist view.

There is a second view that emergencies justify relaxing or, even at the extreme, suspending constitutions. Eric Posner and Adrian Vermeule put it in an article recently defending this view, and here’s a quote: "If dissent awakens resolve, then dissent should be curtailed. If domestic security is at risk, then intrusive searches should be tolerated. The reason for relaxing constitutional norms during emergencies is the risks inherent in expansive executive power but those are justified by the national security benefits."
I think to some extent that view is implicit in Jim Fearon's paper. So I'm trying to bring out somewhat a disagreement. So you can think of two positions: One, which says that constitutional values should never be weakened, even in emergencies. Another, that says we should be trading off against our different interests.

There is a familiar quandary around both of these positions. On the one hand, the problems with absolutist positions of all kinds are that they seem to leave us powerless in the face of great evils. On the other hand, for those who adopt the language of tradeoffs, arguing that we must sometimes play dirty if the stakes are high enough, they seem to have no way of preventing a slide into policies which rationalize the violation of human rights and in the extremes large-scale killing.

Fletcher's paper raises some important and familiar challenges to the pragmatic tradeoff view. But what resources to constitutional absolutists have to respond to the objection that sticking to certain constitutional principles in certain times can seem unreasonable? There is another objection or another worry about the constitutional absolutism, which is, why assume that the laws we have now are the optimal laws for all circumstances, given that conditions can change and constitutions are instruments and shouldn't we think about getting the instruments to work well for us in different circumstances? I think it's worth thinking about what an absolutist can say in response to changing circumstances, and I have two suggestions for moves absolutists might make and I'm not sure that Professor Fletcher will accept either of them. But I think they're worth thinking about.

One is to look for reasons that are internal to the constitution that can help justify departures in emergency circumstances. So I'm going to call this a continuity strategy. What that basically says is constitutions are documents, they're not fully consistent. They allow for different rationales in different circumstances. We allow due process rights to apply differently in different contexts. The due process rights that apply, for example, to immigrants, to aliens, in courts about deportation are different from the due process rights that American citizens have. For example, aliens only get administrative court hearings. They don't get full courts with juries.

Second, the constitution allows that the government's actions can withstand a heightened level of judicial scrutiny when the government can cite a compelling interest. So there are parts of constitutions that themselves allow for us to balance in different ways different tactics in different circumstances. So what we would look for are policies that are continuing with our constitutional practices but they wouldn't necessarily be the same.

I think Jim Fearon brought up in his paper one of the things we might do, if we're going to have due process rights that are somewhat differently applied, we might have judicial scrutiny, division of powers, oversight, demanding that they meet
certain kinds of conditions. That's one strategy an absolutist could take, they could say, yes, we have to enforce the constitution but the constitution itself is a fluid document. I think there is another strategy open to a constitutional absolutist. That is the strategy of holding the constitution fixed but accepting that it's designed for normal circumstances. If circumstances get extreme enough, we'll have to violate its principles but we shouldn't pretend that in doing so we're upholding the law. This is what I'll call a dualist strategy, which admits of a discontinuity in extreme circumstances.

So the constitution upholds rights in normal circumstances but sometimes we may find ourselves in circumstances so extreme that we're in the position of Lockeian rebels who must throw our hands up to heaven for there are no human institutions that can protect us. The dualist strategy tires to cordon off corruptions to the constitution and isolate the conditions under which its prescriptions do not apply. I think there are two moves absolutists could make. I'm not sure if he would accept either of them, and if not then how he responds to the objection that constitutions will then tie our hands in ways that seem, again on a common sense view, not to be justified. I'm uncertain which model is preferable, and I should say in passing that I doubt that the PATRIOT Act can be justified in terms of either strategy.

Dualism depends on there being a clear break between the emergency situation and normal circumstances. While the events of September 11 were horrible and tragic, I don't see evidence that we're currently in a state of the world in which our normal constitutional practices will wreak havoc. Of course, I think if the scenario that Jim Fearon outlined this morning comes about, then we will be in that situation and we'll have to think about what are the best ways of reacting are. Okay. Let me raise a third dimension, and of course out of time as I come to one which is most important, which is the moral. Is there any role in any of this in thinking about emergency legislation for a moral appraisal? So there is a question of its efficacy. There is a question of its legality. Then there is a question of, even if it's legal and even if it's effective, should we do it? And Ronald Dworkin I think rightly pointed out in a recent *New York Times* article, that it's too narrow to focus only on the question of constitutionality.

There is also a question about our common humanity and whether that puts some constraints on what we should do. The question of what rights people have is a contested question and people differ on the content of the right, but the question of human rights can't be ignored in discussions of combating terrorism because in assessing different antiterrorist measures we want to think about the kinds of rights violations they involve. Not all rights violations are equally serious from the point of view of human rights. There is an important distinction between giving government additional powers of search and seizure for the purpose of gaining evidence, and giving them powers which enable them to take prisoners indefinitely, deny them counsel, refuse them access to witnesses who charge them, and refuse to tell them the claims against them. We should distinguish
between extraordinary invasions of privacy and extraordinary violations of persons. It may be that we should refrain from extraordinary violations of persons, unless we find ourselves in the position of the Lockean rebels who, no matter what we do, if we don't violate persons, there is great evil and we reach a dead end. That is of course always the possibility that the world will go in that direction.

A second point, and I'm running out of time, so let me end on this point, that needs to be central to the discussion of tradeoffs, is a point I think George Fletcher made, also made quite eloquently by David Cole, simply in the title of his Boston Review essay, "Their Liberties, Our Security." The model of a rational person trying to balance her liberty and security interests in one model, but that's the not appropriate model for thinking about contemporary policy. Rather we are balancing the liberty interests of a minority, and in particular our male noncitizens, against the security interests of everyone else. Most white American citizens have very little to worry about with respect to the PATRIOT Act, at least for now. It's others who are vulnerable. A good rule of thumb in justifying a policy is to ask whether the justification could be accepted by those who bear the costs.

Some inequalities in treatment between citizens and noncitizens can be justified, I think, but how much is crucial question. While it's possible that Arab males might accept some of the indignities of ethnic profiling at airports, if it could actually be shown to be an effective way of capturing terrorists, which is highly doubtful, I don't believe that they could accept the possibility of imprisonment without right to counsel or a right to know the charges against them or to hear the evidence. Currently over 650 foreign citizens are being held in Guantanamo Bay in conditions so appalling that the Red Cross recently felt that it had to break ranks and publicly condemn the government. While incursions might be justified on noncitizens or citizens, it cannot be morally justified to lock human beings up and throw away the key without even charging them.

So I think there are two questions that we can ask when we're thinking about the nonideal circumstances that we face: The first is, what costs would we ourselves be willing to bear in order to strengthen our security? What kind of tradeoffs are we willing to make for ourselves? A second question is, what cost, if any, is it reasonable to ask others to bear for our safety? Then there is a difficult question to be asked, and I don't know quite how to put this but I ask it in the light of Gerry Cohen's paper this morning: who are we, given what we have done in the world, to ask them to bear the costs for us? So I'll stop here.

Comments by Joseph Stiglitz

In many ways Debra has outlined an approach that I was going to take. Let me just say at the beginning I found the four presentations this morning absolutely fascinating—very interesting. As an economist, we begin by thinking about tradeoffs, and find the notion of absolutes very difficult. We recognize that there
are risks in all cases, risks to liberty on the one hand, but the risks to security, which can even be viewed as a kind of liberty, a risk to liberty, a freedom from physical harm, as a kind of liberty. Which you believe, and I think the case has not yet been made, but if you believe that September 11 changed the underlying insecurity that we have, changed the balance of risks, it might lead one to say that one ought to change the way we balance our individual system of liberties.

The question that I want to address is, in fact, can we justify the change in policy of the kind that we have seen in any terms, at least in the kinds of risks that we face today, I think, in the face of even much greater risks? I'm not going to go to the extreme risks of the catastrophic terrorism, because I think that does pose challenges of the kind that Debra said. I'm going to suggest that in fact that there are some changes of risks, and particularly the kinds of risks that we face today, that may even require greater or at least different protections. That in fact we ought to be working toward a system in which we protect liberties even more than we have in the past.

In thinking about this I want to begin by picking up on Diego Gambetta’s very important and interesting contribution, where he emphasizes that there is a tendency in the face of these kinds of situations to excess reaction. There is a long historical evidence of that kind of excessive reaction. In the framing of the constitution one might argue that the framers were aware of this kind of excessive reaction and one of the reasons that they argue for deliberative a process and the whole Republican form of government was to slow down the reaction process and to make it a more deliberative process.

There is an interesting book that many of you may know by Cass Sunstein who talks about constitutions and discusses some of the psychological experiments that are along the kinds I think that Diego may have had in mind. It picks up some of the consequences of insiders and outsiders that George talked about in his talk. These experiments involve people who are drawing, for instance, three pieces of paper from an urn in a group and have to decide whether the three pieces of paper are of equal length. All but one of the people are artificial. There is one guy who is the real true experimental subject. The other people are part of the scenario. The other group, the other three, four, five people, will say that they are all the same length when they are patently not of the same length. What they find is consistently people will go along with that majority. If a majority says they are of the same length when they're not or that they are different lengths when they are, the person who is this experimental subject will go along with that majority.

The point of this is that there is this tendency for groups of people, particularly when they're isolated from other perspectives, to solidify behind particular views that may not accord in any way with reality. The deliberative process is intended to slow down the extremes to which groups may move in their discussions and their actions. The point is that given this tendency of extreme behavior, in the
face of a kind of event of the kind we are talking about where there is a tendency
to overreact, I would argue that rather than having a suspension or weakening of
the systems of checks and balances, which are so important, one could even
argue that one ought to have an increased system of checks and balances. Or to
put it another way, we all know that we are all human, all humans are fallible, at
least all other humans other than us. One of the hallmarks of authoritarianism is
complete distrust of others, that the person at the top says I have to make the
decision. If there are checks on me, it might stop me from doing the right thing.
On the other hand, we all recognize that the people at the top often do make
mistakes, as we’ve seen so frequently recently. It therefore becomes really I think
imperative that we have these checks and balances.

The extreme failures of societies have been cases where the people at the top
have not been checked and they’ve often been characterized by threats from the
outside that necessitate our not being checked. So I would argue that it’s exactly
at times like this where there are excessive passions in the public that we need
to check the authoritarian tendencies that are present in any government, and
therefore that we should not suspend the systems of checks and balances, and
perhaps even strengthen them. Many of the issues that we’ve talked about, it
would be easy to have some forms of checks. It would be easy to have judges
making judgments about what kinds of information could be collected, easy to
have a whole variety of mechanisms to make sure that there are not abuses.

One of the problems that was pointed out this morning was that quite often the
judiciary, people who are supposed to be providing the checks and balances,
don't have the requisite information and that particularly in these kinds of crises
they are likely to engage in deferring excessively to the authorities. I think that
some of the reforms that were talked about earlier are an argument for why we
ought to strengthen the checks and strengthen them even more in times of
crises. I want to comment, though, on this issue of lack of information, which is
an impediment for the people who are supposed to provide the checks to engage
in doing an effective job. I think one of the constraints that we ought to strengthen
is secrecy. It seems to me that we ought to strengthen our freedom of information
act or commitment to the right of citizens to know what their government is doing,
rather than weakening, which is what has been happening more recently.

I can say that I was on the National Security Council when I was chairman of the
Council of Economic Advisors, and so I had the advantage of having seen what it
means when you see highly secret information. I wouldn't rely on it.

But even more, much of it was not very secret. That is to say, you would take
public information and put on it a stamp saying secret, and then it becomes
secret. It was only to enhance the person reading it into thinking that this was
important rather than to have anything to do with public discourse.
Senator Moynihan wrote a very nice little book called *Secrecy*, in which he analyzed and discussed the impact of cold war secrecy on the United States. He provided some very effective argument that American security was weakened by our proclivity for excessive secrecy, that had we had more openness, more open discussions on the issues of the nature of the military threat, we would have recognized that there wasn't that kind of military threat. We would have redirected the way we would have structured our military. We would have saved an enormous amount of resources but we would actually have had a more secure country. I think I just want to reiterate the fact that because we pursue secrecy excessively, we impair the ability of the checks to work. We need to have a more effective check on the extent of secrecy.

The final set of points I want to make has to do with the rule of law in general. I can't go through the concept of rule of law but the intent of the rule of law is in some sense to stop the kinds of capriciousness that we are seeing today. There are many issues that this raises.

I think Professor Fletcher's remarks were very on target here. Should there be a difference between the treatment of insiders and outsiders, between noncitizens and citizens? I think the framework that he referred to, the Rawlsian framework, is a useful way of helping think about it, at least one that economists feel very comfortable with. How do we think about the principles? Rawls focused on how we think about the principles of distributive justice or more broadly social justice. Debra's remarks put it basically focusing on the same way. How would we feel behind a veil of ignorance where we didn't know whether we to be born as a citizen or noncitizen, whether we were going to be one of the people that would be arrested and put at Guantanamo Bay for an indefinite period without charges and without recourse to legal counsel? I think almost all of us would agree that that kind of a system is unacceptable, it's one that would make us worse off. You don't have to have any framework of thinking about this, in a framework of social justice, one would have to come to the conclusion that this is totally reprehensible, what is going on. On that regard, I think the distinction that we make between citizens and noncitizens, while it may be constitutional, does not accord with social justice. The distinction that we make between American citizens and noncitizens in Guantanamo Bay and whether it's legal or not in any sense is certainly immoral and does not comport with any sense of social justice.

One of the things that I've written a great deal about more recently, I have focused on issues of globalization. As we become more integrated into a global world, we interact with others and we have to have rules of law that have to deal with how we deal with others. In that sense we have to have an international rule of law. I think that kind of international rule of law has to apply in issues of basic civil rights. That is what is being violated now. Even in the civil war there was a suspension by President Lincoln writ of habeas corpus. But remember that was a war in which the mixture of enemy combatants was even more. That is to say the
people in the north, there were many southern sympathizers within the north and many northern sympathizers within the south. So in some sense the problems of sorting out were even greater, and you might argue there was even a greater argument for this kind of writ of habeas corpus. But if I remember correctly the courts ruled that as long as the courts were open, it was not justified to have a suspension of writ of habeas corpus.

That's where I wanted to end my remarks. I think Professor Fletcher is right in that there is a deliberate attempt not to test that provision, these provisions, because if it were it would probably be, as in the previous case, ruled illegal. What is going on here is in a sense a form of terrorism. It's a terrorism of the mind, a terrorism of the sense of liberty. That is no less important than physical insecurity. That any of us, we may be white males, but we don't know the limits to which this government might go in its exercise of its so-called fight against terrorism. If I disclose information that the FBI is investigating some student at Columbia, I can be arrested. We don't know the limits to which the PATRIOT Act goes. We don't know even, the example that was given before, if I make a contribution and it turns out that that contribution happened to be for an organization, which they declare without a judicial process, is one that is supporting an organization that they don't like, I could be arrested.

So the fact is that the government, I think, is engaged in a kind of terrorism to make us feel insecure about our liberties. There is in this kind of terrorism an analogy to the physical terrorism that we are also opposed to, because the physical kind of terrorism is an attempt to effect a change in the state of mind, an extreme state of uncertainty, and hoping that by creating that state of uncertainty is to affect behavior. That is precisely what the PATRIOT Act and the other administrative actions of this administration is attempting to do. Thank you.

Comments by Stephen Holmes

My comments, I think, are going to be a little more miscellaneous. I'm going to take each paper in turn and start with my friend Professor Fletcher, who has presented himself as a liberal fundamentalist. You had these definitions of liberalism but the one I like is Robert Frost, who says a liberal is a man who can't take his own side in an argument. It's a little bit like that. You can't really take [it]. Are you sure you can take America's side in the war in terrorism? Of course you can. But this position of no compromise, no balance, love the constitution, liberty is an absolute does suggest some denigration of the threat itself, the idea that putting security in a position to compromise our liberties would be a mistake from a moral point of view.

But the question is not of course moral. The question is, what will the public accept? If the public views the Bill of Rights as a Trojan horse for terrorists, they're going to let John Ashcroft tear it up. Whether they view it that way or not is independent of the way the government presents itself and the way the
Democratic party responds. That's a political outcome itself. But if you want to know what the public will tolerate, and if the public does think this way, they're going to do this, whether you make a philosophical argument or not. It's not going to matter. You can say we should have more distrust of government. This goes to something Professor Stiglitz said. But if there was rampant contagious disease in the country, very contagious—Ebola or something—it probably would be a good time to distrust government. But people aren't going to do it. They won't. What is the psychology of a situation of panic and fear that you have to take into account?

My basic question to you, George, or objection a little bit, is about the political choices you make, because I sympathize with your approach. But I think you say we should not take the constitution as a security pact. The reply to you—this is very similar to Debra's argument—is to say yes, the constitution is a security pact, and they have really broken their contract. Bush has not made us more secure. Witness those weapons dumps that are being unguarded in Iraq. They have destroyed the command and control structure of a country that is full of dangerous weapons, including shoulder-held surface-to-air missiles that are now on the clandestine world arms market for $5,000 a piece. That's a product of their behavior. That hasn't made us more secure. When you ask local police to enforce federal immigration law, what happens is these local communities with many illegals turn away and run away from the police, do not provide information to the police, not only to solve crimes, but also to solve terrorism. So you're unleashing of the police does not actually make the police more intelligent. In fact, you can close off information flow, and since the basic instrument of crime control is not the gun but the snitch; that is, information, then this tactic is actually making us less secure.

I'm sure you wouldn't argue with this, but by claiming that liberty is an absolute, you miss this practical argument about the consequences of lifting—and I'll talk more about this when I discuss Diego Gambetta's paper. One of the main functions, it seems to me, of U.S. post-9/11 policy is to protect U.S. officials in our government from criticism, what's been happening here.

After 9/11, what did Ashcroft do? Of course it was a new situation. He was going to make some mistakes. But let's find out what he did, what he did right, what he did wrong. The imperative of protecting the people in power does not coincide with the imperative of improving our performance next time. I think we want to think about the failures, not just of yielding on our fundamental liberties, but of not being able to learn from our own mistakes, which we necessarily made, and having blame avoidance be the main imperative does not necessarily improve our situation.

You also seem to fear the PATRIOT Act, but it's not exactly clear why. You say that Ashcroft could have arrested everybody. He did without the PATRIOT Act. The Rehnquist court tore down a lot of the Warren court protections of suspects.
You make the point about computers. Our privacy has been invaded technologically. It's not the PATRIOT Act. It may be that the PATRIOT Act is just a show. It's just an attempt to prove that they're doing something when in fact they're really not doing anything at all. An example of this, or two examples that are relevant to this: One is that our legal system makes it possible to do things that we all feel uncomfortable with without changing the law, something I mentioned earlier to you.

Warrantless searches are illegal, but all you have to do—and I have been listening to guys who are training police around the country—what they do is they go to the police and they say you want to do a warrantless search, you call up the child welfare agency. There is child in the building. But tell them to go in and request a police escort. So they can go in without a warrant, look around, see what they want. Then they go back. So you can get around these rules pretty easily. You don't need a PATRIOT Act. I think that's what you said about the Ashcroft point.

Now, Guantanamo I think it is interesting here. It turns out, there's been a lot of talk about it and how horrible it is, and we're getting no information from anybody in Guantanamo. In fact, the American government no longer sends people to Guantanamo because it knows it gets no information. It has started instead to send them to Oman, but also to Syria, to Egypt, Cairo, because in those places the CIA can talk to the arrested person and say, if you don't want to talk to me, you're going to meet my friends, the Jordanian police, and then talk.

This is important because it means that simply putting a soldier outside the supervision of a judge does not make him willing to do anything. Those guys arrested know that the American soldiers are not going to use hot pokers in ways that I don't have to describe. They just won't do it. So there's a cultural fact here that means, whether there is a law or not or whether you're outside of the jurisdiction of a judge or not, is not actually so important. It is interesting here that the whole thing in Guantanamo, we talk about it a lot, it's useless to us. It's been useless in the fight against terrorism.

Last point, just to [speculate on] your question, because you mention this shift between the cold war and today. It's possible that the cold war, part of our identity during the cold war, was wrapped up with the idea of due process because our enemy was an enemy that actually put forward show trials and other things. The end of the cold war means that the idea of due process has less hold on us psychologically as a nation. That's pretty hard to reverse by simply clinging to liberty.

Jim Fearon's paper, which I also liked, has two main ideas: One is that we should worry about technology, not about al Qaeda, not about the Arab street. Second that the best analogy for terrorism is not crime or war but counterinsurgency or
insurgency and counterinsurgency. There is the obvious problem with these two theses are not compatible with each other because if it's an insurgency, it's not just technology. But maybe he could say something about that.

But each thesis also raises some questions: First of all, there is lot of politics in the way technology develops. VX gas, this was a nerve agent that the British government developed to compete with the G agents that the Germans, Nazis, developed. The United States spent millions of dollars probably aerosolizing anthrax. This was our money. It's very difficult to do. Once you do it, anybody can do it. This was a government program. Of course, it was justified because we had a Soviet enemy and so forth, but it was a political decision, a little bit like not guarding the weapons dumps. There are technological threats to us that are due to political choices. Controlling scientific research has to be an issue here. How do you do it, particularly in a time where we're still acting like we're in the cold war and had an enemy like the [former] Soviet Union. Nobody else is doing this research.

As you know, I think this must be a principle of international relations. Isn't it, Jim? Every weapons system ever invented falls into the hands of your enemy eventually. Although the Bush administration says the main threat to American urban centers are miniaturized nuclear weapons, they are proposing to spend hundreds of millions of dollars in research universities developing ways to miniaturize nuclear weapons. We don't have an enemy, an enemy that is a state, that could do this. So why are we doing it? That's a political choice. That is not technology's automatic unfolding.

About insurgency, I think the analogy between terrorism and insurgency is an interesting one. I like it in some ways. On the other hand, al Qaeda is certainly not out to seize our state. Something happens when you get a global movement that is the pooling of local insurgencies. The pooling of local insurgencies gives them an advantage against us that is not just technological. Think of the difference between the Basque terrorists—the Spanish government has to fight the Basque—and the IRA, because the IRA happened to have conational or sympathizers abroad that could funnel money to them, namely in the United States. That means they had offshore sources of support, very important.

Al Qaeda squared ten times, one hundred times, the availability of a pooled insurgency movement to hide, to find resources, to bring them to bear, to escape the attention of a counterinsurgency power like us is enormous. It is definitely overstretching our cognitive capacity. We simply have no way of knowing about the people who are confronting us who come from Baluchistan and so forth.

So, I think the pool insurgency thing, second, is an important factor. I like very much this idea that scorched earth counterinsurgency, which you seem to say maybe is effective locally in some cases, but also does have a problem of producing blow-back and pushing people who would otherwise be sitting on the
fence into the ranks of the insurgents. Still, it can be dangerous also for another reason, and that is one I would to say here, which is that it may destroy states completely. It's destroyed economies. You point that out, and I think that's a very good point, that if the only job a young man can get is as a terrorist or the best paying job that he can get is as a terrorist or as an insurgent because you've destroyed the economy—that think of Iraq—that's probably not a very intelligent policy. But it's also because failed states are an environment in which our enemies seem to thrive and this scorched earth, counterinsurgency, bombing people, weddings in Afghanistan and so forth, may have a bad effect on us.

Your basic point about liberals is that we're not going to be able to defend ourselves without violating civil liberties and liberals tend to have a gag reflex against doing this, and therefore they are not very rational. I agree with that. There is a liberal fundamentalism, maybe you and Fletcher should be arguing here, that could be self-destructive. There is also a second amendment fundamentalism. There is all kinds of conservative fundamentalisms too that have perverse consequences. I always wondered what Aschcroft would think of Musharraf rule against carrying handguns. He would say that's bad. We should let everyone in the northwest frontier province have as many guns as they want.

But I think the argument is, there is a rationality to the gag reflex that is important to take into account, not that you didn't now this, but you hadn't really focused on it too much, and it leads into Diego Gambetta's paper, which is there is something perverse about preemption, and that is unleashing lethal force on the basis of murky evidence. This is basically again the idea that if you give a government agent too much power, that can make them blind. I'm reaching a little bit into Gambetta's paper here but I'll come back to it, because of the elasticity of supply of crackpot informants. If you tell the world that you are going to unleash lethal force on the basis of murky evidence, you're going to get a lot of murky evidence, because people have many reasons to try to make you behave. If you show that a rumor will make you arrest someone and put him away, you're going to get a lot of rumors. So there is a question of what kind of information. By getting more power, what information is made available to you? It may be overload, there'll be congestion, you'll have confusion. There is an effect upon the quality of information and therefore an effect on the quality of security you are providing.

Finally, again this repeats a little bit of something Joe Stiglitz said, the failure of the toothless FISA [Foreign Intelligence Surveillance Act] courts. You could argue, is not an accident, because courts are really well placed to do these things. You're right. I think it's a very good point that instead of having just strict rules, you need a discretionary agent who can make the executive branch accountable. That discretionary agent has to operate somewhat under cover of secrecy because the accountability has to be compatible with secrecy and dispatch because you can't just announce all your vulnerabilities to the world because the terrorists are listening too.
But the fact is certain agents, let's say in Afghanistan, the British military are very well placed to question the American judgments about what to do because they actually have their own intelligence agency. No judge has such a thing. The freedom of information act is not going to solve this problem because there is need for secrecy in some of these areas. But we have to be imaginative enough to invent a liberal constitution for emergency regime to preserve the main aspect of liberalism, which I feel is threatened, which is not civil liberties but the capacity of self correction. Human beings are fallible. Governments are fallible. To throw away the mechanisms of self-correction is a mistake. Every prosecutor when he brings a case in court thinks his evidence is rock solid. Then he brings it in public, in the court, and it dissolves.

Making important political decisions on the basis of secret evidence is not a good idea, evidence that has never been checked, never been questioned, never been looked at by anybody else. That is not smart. We are moving in that direction. What's wrong with it is that, and this is the thesis of Diego Gambetta's paper to which I'll now turn, is that the main danger is not tyranny but stupidity. Too much power makes you blind. It produces all kinds of false positives. It makes you run off in all kinds of directions.

Since our resources are in any case limited—what are they called, currencies transfer reports, CTR? The treasury department under the Patriot Act now gets something like a million reports a month on currency. It can't handle this. It can't analyze them. You have more to see but there aren't that many more eyes. It's a cognitive overload. Gambetta's main [point], the spirit of his paper, is against alarmism and against what you could call post-traumatic-stress foreign policy, which I think is what the Americans have. It's based I think correctly on the existential threat felt by the highest decision-makers.

You have to realize that for the first time in the White House, every morning they are told—Dick Cheney is told—the city in which you live with your family may be destroyed in the middle of the night with no warning. That produces a panic, particularly in people, a certain class of people, who have never experienced random violence in their lives. That is white privileged people. They are very shocked, they are rocked by this. Therefore, they are willing to give too much credit to hair-raising intelligence reports, which Gambetta in a longer paper quotes somebody as calling corn flakes in the wind, which I like a lot.

Notice that this is not just the error, the cognitive error here is not only on the part of the decision maker. But the public as well is involved because part of the public willingness to go along with the American counter terrorism strategy, if you want to call it that, is the belief that on 9/11 we were hit from nowhere. Hit from nowhere means we don't know anything about the rest of the world. So for us it seemed like it came from nowhere. Therefore, we are justified at hitting back anywhere. It's a logic. But I'm not sure that's a cognitive bias. That sounds to me
like bad character, or at least aren't we responsible for our ignorance of the world to some extent? Our parochialism is somehow not just exactly cognitive bias.

Again here, the point, one obvious objection to anti-alarmism which I appreciate, I think it's a very strong point. However, it's obviously true that Pollyanna is just as bad as Cassandra, that wishful thinking is just as bad as fearful thinking, that head in the sand approaches to threats are just as bad as hying threats, and so on. Gambetta says something about this when he talks about the Pasqua story where before the threat we think about things too little and afterward we think about it too much. But I'm not sure that's adequate. So many reports about the Afghan camps were shelved. We knew there were 40 camps. People were training to kill Americans. That's what they were doing. We knew what they were doing. The effort to close them down was nil, very small. We couldn't do it. People knew about it, people in the intelligence community wanted to do it, but politically there was no way to respond to this.

What I'm saying here is that although panic of course is a source of irrationality in foreign policy, so is inertia. I think basically you're leaving out there is how much inertia still dominates our policy. Inertia would mean, how shall I put this? If there is a floor, if you're a horse, you could survive if you became an eel. But you don't because, it's in your interest to become an eel, it would be smart if you could, but you don't because you're a horse. You don't change. Our government is a horse. Our government has not really changed despite the Patriot Act. A lot of these changes are purely superficial. The CIA has not changed, the FBI has not changed. We have not corrected any of the things that led to 9/11. You are saying how we're panicking, we're flying off the handle. In fact, what's happening, you could argue—I think there is something to do and probably we need to combine these two ideas—is that there has been a failure to respond.

For example, appropriate counter terrorism strategies that would interfere with the activities of American businesses that have power in Washington have not been taken. Certain kinds of tracing financing and things like the businessmen don't want, we don't do those things. Actually, the financial provisions of the Patriot Act were passed against the Republicans. The Republicans didn't want them and they've never been implemented. There are no resources put into it because the business lobby is against it.

This is my last point on Gambetta—here is another way to think about the counter terrorism strategy developed by our government after 9/11, as opposed to being alarmist rather being dominated by inertia, is to notice how we have turned over our foreign policy to DOD. Turning over our foreign policy to DOD has meant, because the Defense Department, the Pentagon, has incredible capacities to deal with states. Therefore, it ignores problems that aren't. The only problem it can really see clearly is the problem of a rogue state. The problems that are more important, such as the proliferation, the only way to deal with proliferation is treaties. You have to deal with treaties. You have to create secure,
like European countries don't all have nuclear because they belong to a treaty-based security system where they're not afraid of their neighbor. So the way to slow down proliferation is by working internationally, multilaterally with treaties. That's not the DOD's interest. The way to deal with non-state actors is international policing. The international arrest warrant is a multilateral institution. That is not in the expertise of the Defense Department. So they have invented this fantasy of a rogue state handing nuclear weapons over to a terrorist group because the rogue state is the only thing they can deal with. If they can hype that threat, it justifies all of their power and wealth. That is not cognitive bias. In fact, that's not panic. That is sticking to their old system. If you'll notice, they've taken all of the new funding they've gotten, and you know what they're done with it? They've put it in old weapons programs that they had way before 9/11, missile shields. That's ridiculous. That has nothing to do with terrorism. So this is inertia, not panic. They got full account [inaudible].

Finally, Gerry Cohen. I'm not a philosopher, so I have maybe just some questions about the paper, which I thought was very eloquent, as always. One is that it seems to me the paper is built or assumes a distinction between those like the Israelis who are implicated actors, and therefore are not quite able to comment upon what strategies are legitimate or illegitimate for the Palestinians, and then those who are third parties who are outside or non-implicated. I just don't know who those people are. Certainly, I don't feel like you and I are those guys. In fact, the paper itself is very interesting because it's part of debate that is going on now between America and Europe about Israel and Palestine. It's part of a political debate, actually. Maybe you didn't think of it that way, but it feels to me like Americans and Europeans, whenever I talk to Europeans, friends, they talk differently about Israel and Palestine than I and my American friends do. For one thing, and this has to do with political culture—again, this is non-philosophical—but in American political culture, we do not call the Palestinians freedom fighters. We called Jonas Sambah, we call a lot of people freedom fighters who are not very savory creatures, so this is not about judging their characteristics. But it's something deep about us that doesn't make us want to do that. We are implicated. Also, we are implicated because of our alliance, and for the weapons and so forth, and Europe of course is implicated of course, not only because it's responsible for Israel's existence in the past, but also because its relations to Hamas and the PLO and so forth are different.

So I'm not sure about this unimplicated point of view. I think there is an analogy for your argument, which is more political and I also think is quite relevant here, which is that often the Israeli government will say that we have no partner with whom to negotiate. Arafat can't deliver on his promises to put down terrorism and so forth. But the coherence of the Palestinian political system is not unrelated to Israel's behavior in the past. It's a coherence of incoherence. So there is a political point about the claim we have no partners. You could extend your question, if you want to do that, but we have no partners justifies the way we
behave but really why don't you have a partner? Are you totally innocent and is the United States totally innocent for that?

I'll finish up with just a couple of last points. I do think you can extend what you said to the United States and Al Qaeda. Osama bin Laden has his own two quo-qua argument. He is constantly saying, oh yes the United States, what about Hiroshima? He has a very artful use of Hiroshima. You say you can't kill civilians? Oh yeah? You say you can't kill civilians en mass? Really? What about Hiroshima? So silencing—I don't know if it silences the voice of terrorism's critics, I doubt that, but it's relevant to us I think particularly because—and your argument is relevant to the United States, because it's not only that we as Americans have very little understanding of the rest of the world and of what happened in Afghanistan. We don't know what we have done in the rest of the world. We have no knowledge of this. Therefore, when people talk about our provocations, we say, what are you talking about? I think that again goes back to the question of character. We are responsible here for our own ignorance about the world.

Finally, beyond rhetoric a little bit, beyond the question about what kind of counterterrorism strategy is legitimate or morally justified or philosophically justified, I think it's important to recognize what a difficult situation the Israelis are in. It's a very difficult one because they would have a choice of two kinds of problems. One would be a policy of concession. One is a policy of repression. But the policy of repression of course swells the ranks of the terrorists. The policy of concessions whets the appetites of the extreme terrorists. What do they do in a situation like this? You could put it this way, that there are two kinds of people. People who are radicalized by despair and pacified by hope, and people who are pacified by despair and radicalized by hope. If you have a subject population in which you have the two groups mix, what do you do? Do you offer despair or hope? You'd have to be a genius to target exactly, and no political system is capable of doing that. I think the situation is so difficult on the ground that in a way the moral reflections don't lead us to a grasp of that problem.

Comments by Jon Elster

In my introduction yesterday morning, I distinguished between factual and normative aspects of the relation between civil liberties and terrorism. The factual question concerns what several papers call the tradeoff between liberty and security. Although I thought Debra Satz made some excellent objections to this idea, I'm going to go with it for the sake of argument and simplicity.

The normative question is how much we are willing to pay in terms of harm caused by terrorism to protect civil liberties or a given level of civil liberties? One might express this in a familiar language of indifference curves, the implication being that we should choose the feasible combination of liberty and security that lies on the highest indifference curve, although I don't think that has any
operational meaning at all. Before I proceed, let me follow some of the other
speakers and define the two key terms of this session, terrorism and civil
liberties. By terrorism I shall mean the intentional and random killing of non-
combatants for the purpose of spreading fear in the population at large as a
means of putting pressure on the government to give in to demands of those who
order the killings. Unlike George Fletcher I believe this definition does cover 9/11,
(at least if we accept the widespread contention that a goal of Al Qaeda was to
promote the departure of American troops from Saudi Arabia. My definition is of
course an arbitrary stipulation. One might also count as terrorism acts targeting
high officials for the purpose of scaring other high officials into capitulating. But I
believe that in discussing terrorism and civil liberties, the definition I proposed
might be more useful since high officials can be protected without violating
anyone's civil liberties.

It is more controversial whether this can be done for the population at large. I'll
return briefly to that question. By civil liberties I shall mean risks that individuals
have vis-a-vis the state. Notably, in the case that concerns us, the right not to be
subject to arbitrary search and seizure, and the right to due process, with its
various components. Again, other definitions are of course possible. When
Cohen asks, for instance, and I quote, "How much terrorism does a lack of civil
liberty justify?" he probably has another concept in mind. Maybe he could tell us.
Fearon argues that under some circumstances, some civil liberties have to be
sacrificed to prevent terrorism. To deny this, he said, would be simply insane.
Fletcher seems to disagree, but perhaps even he would concede that in a
carefully constructed hypothetical scenario, some violations of civil liberties might
be justified.

Let me focus the discussion by considering a more specific claim by Richard
Posner. He writes, "Only the most doctrinaire civil libertarians deny that if the
stakes are high enough, torture is permissible. No one who doubts that this is the
case," he goes on to say, "should be in a position of responsibility." I want to
focus on the word stakes. As usually understood the stakes simply refer to what
can be gained or lost in a risky choice. An instance of high stakes is provided by
the scenario of the explosion of a nuclear device in Manhattan. But I take it for
granted that Posner will not condone torture simply because of the existence of a
high-stakes risk because the probabilities much also enter into the decision. But
the likelihood that an explosion will happen if nothing is done and the likelihood
that it will happen if torture is used. More generally, I believe, the dangers of
terrorism can be classified along three dimensions: the degree of certainty of
their occurrence if nothing is done; the timing of their occurrence if nothing is
done; and their magnitude if they do occur.

I think an implication of Gambetta's paper is that the magnitude and imminence
of the danger have come to become the main arguments used by the
government to justify civil liberties violations. The imminence or alleged
imminence—because as we heard but Fearon and Fletcher dispute this
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imminence—but the alleged imminence is reflected in a constant reference to the
risks of inaction. The magnitude argument is implicit in the very language of
weapons of mass destruction. By contrast the certainty argument embodied in
the classical idea of emergency measures as a response to clear and present
danger has receded into the background. More about that in a moment. But first
let me observe another case in which magnitude and imminence seemingly
overwhelm probability, namely Pascal's wager. If the values of eternal salvation
and damnation can be presented by infinite positive and negative numbers, and
on some other psycho-theological assumptions, then we should wager on God, if
there is any small probability, however small, that God exists. Moreover, we
cannot afford the luxury of gathering more evidence to form a better-grounded
belief about whether God exists since death can strike us at any moment.

It sometimes seems as if this argument serves as an unconscious template for
some of those who advocate massive violations of civil liberties. The worst that
can happen is so bad and the danger awaiting so large that immediate action is
necessary. In the real world, of course, the stakes, while high, are never infinitely
high. We are facing ordinary decision problems with finite stakes and probabilities
that are either known or unknown. It is in this perspective I want to comment on
Gambetta's argument about what we might call, or what he called, I guess, the
epistemics of terrorist threats. Let me distinguish between two issues. There is a
first order problem: how the government can assess how large, how likely and
how imminent the threats are. Then there is a second order issue: how we the
public can know how much the government knows. The government in fact has
at least two reasons for not telling what they know or believe. On the one hand its
fight against terrorism might be less effective if the terrorists knew how much the
government knows, but on the other hand the electoral prospects of the
government might be hurt if the public knew how little the government knows.

There is no way the public can tell which of these reasons for secrecy is in fact
operating. But I'll focus on the first order problem: How does the government
form its beliefs about the risk of terrorist attacks? Let me first dwell on the
remarkable statement by Secretary Rumsfeld that the government has cited this
morning, involving the distinction among known unknowns and unknown
unknowns. The first category corresponds, I suppose, to ordinary decision-
making and the risk. The second corresponds to decision-making under
moderate uncertainty in which all possible outcomes are known but not the
probabilities with which they might occur. A third corresponds to radical
uncertainty under which we do not even know which outcomes might occur.
Decision-making under risk is well understood. Decision-making under moderate
uncertainty is a more fragile category. It is almost never the case that we know
nothing that is relevant to a probabilistic assessment of dangers.

But the problem, as Gambetta shows, is that the aggregation of dispersed and
unsystematic information into an overall assessment is very difficult and
vulnerable. I'll return to that in a moment. Another difficulty lies in distinguishing
the really possible from the merely conceivable. One might want to take precautions against very bad outcomes, even if we cannot quantify the probabilities, as long as they are in some illusive but real sense really possible and not a mere fancy. Such as the possibility that at the present moment as I'm speaking I'm merely the person in someone else's dream or nightmare. It could happen, but I discount the likelihood. I don’t think anyone has proposed a criterion for distinguishing the really possible from in what Quine called the slum of possibles. There are just too many conceivable possibilities.

But let us assume nevertheless a case of moderate uncertainty based on really possible outcomes. In such cases many advocate the use of worst-case scenarios, assume the worst, and act on that assumption, although the Bush Administration has not exactly been included to this kind of reasoning in the case of global warming. It might use it to justify the war on terrorism. The worst-case scenario need not however take the form of cracking down on all potential terrorists. One might also, without violating anyone's civil liberties, invest in protecting potential targets, although it would certainly be very expensive to provide adequate protection for the American borders, water supply, bridges, subway systems, airplanes and the like, it might not amount to more than the cost of war and reconstruction in Afghanistan and Iraq. This is what Fearon calls hardening the target, although he also expressed some skepticism about its efficacy.

In my list of targets for protection a few seconds ago, I used the open-ended phrase "and the like." Either this can be spelled out by an exhaustive enumeration or it cannot. In the latter case we're dealing with unknown unknowns, radical uncertainty. Here we do not even know what the dangers are or might be. Here, the worst-case strategy has no purchase, since we do not know what the worst is. Yet Secretary Rumsfeld seems, mysteriously to me, to suggest that it is a great mistake to ignore the existence of unknown unknowns. As far as I can see, the idea by definition is idling. It cannot connect up with the machinery of decision-making. These are somewhat scholastic matters. There is no reason to think that the Bush government is actually basing its decisions on sophisticated theories about rational choice under moderate or radical uncertainty.

It is more likely, as Gambetta argues, that it tends to form quite firm beliefs that are largely unwarranted by the evidence. Gambetta argues that these beliefs result from various kinds of irrationality. Some of them can be summarized in a French proverb: We believe easily what we hope and what we fear. In some cases wishful thinking makes us underestimate the difficulty of the task. In other cases, what we might call counter-wishful thinking makes us exaggerate the dangers we confront. Many years ago my colleague in the political science department here, Richard Betts, suggested that in planning the military tends to rely on counter-wishful thinking, but in operational practice on wishful thinking. These are not of course the only ways in which one can get things wrong. I'm
going to add to Diego's list by suggesting one way in which by perfectly rational information one might tend to systematically get it wrong.

Suppose we have a sequential process of belief formation that involves several actors, each of whom forms an opinion partly on the basis of the opinions expressed by others and partly on the basis of his own observations. The economic theory of informational cascades shows that rational belief formation at each state in the process may yield beliefs that are widely out of touch with reality. Because a process of collecting and processing intelligence is sequential in exactly this way, the output may be sub-optimal without any individual being at fault.

Let me change gears and take up Fearon's argument. Assume that the decision-maker confronts a danger that is certain, imminent and large, and that can be averted by violating someone's civil rights, for instance, by subjecting him or her to torture, although Fearon doesn't mention torture and can see nothing in his argument that would exclude this option. His approach to the problem is similar to that advocated by Alan Dershowitz for this very case, namely that any torture in terrorist cases should be proceeded by a torture warrant granted by a judge reviewing the alleged necessity of this step.

I'm not sure, however, and this pessimism I think has been expressed several times, that the American constitutional history supports the view that a system of checks and balances can temper excessive reactions to crises very effectively. The Senate, no less than the House of Representatives, voted for the Gulf of Tonkin resolution. So much for the famous cooling-down effect of the Senate. The American Supreme Court upheld the decision to intern the American Japanese. Even if, as Fearon says, checks and balance systems may be established in times of calm deliberation, they have to operate in the midst of crises. It's not at all clear that those who operate it, the agents of the checks and balances, might not be swept up by the same passions, irrationalities, as those whom they are supposed to check.

I will to use 30 seconds to ask a question to Gerry Cohen that has nothing to do with what I've been saying so far. It is related to the opening quote from the Ambassador Shtauber in his paper. The first sentence in the quote is, "no matter what the grievance, and I'm sure that the Palestinians have some legitimate grievances, nothing can justify the deliberate targeting of innocent civilians."

What he really meant was something like that following: I'm sure that the Palestinians have some legitimate grievances, but these cannot justify the deliberate targeting of innocent civilians. If that is what he meant, does the argument still go through? Thank you.
Response by George Fletcher

I feel basically very modest in the face of these brilliant comments. But I will try to respond very quickly on three points. First, let me just suggest a general warning against reasoning from hypothetical cases. This is a very dangerous procedure. Jon suggested that we do this. No lawyer, when he or she thinks about it, would want to determine whether or not you’re going to suspend civil liberties on the basis of a hypothetical case. That is, courts never act on the basis of hypothetical. No one ever acts on the basis of a hypothetical case. It's only in the classroom that you try to imagine, well, what if the bomb is ticking, it’s tick, tick, tick, and should you then torture someone in order to try to find the bomb? That is a very misleading and I would say almost insidious way of thinking about the problem. The real way to think about the problem is, how do you get the evidence? How do you know that the bomb is ticking? How do you know that it’s necessary to intervene? The idea of a torture warrant is self-contradictory because if necessity would justify torture under a warrant, then there would be some cases where there is absolutely no time even for the warrant, and you would have to proceed without it. So the proper approach I think it to recognize that there is always ambiguity, here drawing on some of Diego's arguments. There is always ambiguity. We don't know what the risk is. Therefore, you have to have a rule and a policy that would cover cases and ensure against governmental abuse. That is why we have—excuse me for mentioning something about the law and international law—an international commitment against terrorism, against all forms of terrorism. Despite the stress that Israel is under, the Israeli Supreme Court has also endorsed an absolute prohibition against terrorism. I think there is something that almost makes me angry. This is very polite and civilized conversation. But the way in which we as academics are willing to throw away fundamental values on the basis of hypothetical arguments caused me some embarrassment, I have to say. Let me turn quickly to one of the dangers of making these kinds of hypothetical cases. Torture is one. The second is a response to Gerry Cohen. I don't know whether Gerry Cohen is saying, let us imagine that the Palestinians have no alternative or he is asserting that the Palestinians have no alternative. I think in fact he is asserting it. Now, if Bill Clinton were here, he would say, what are you talking about? We offered Arafat a reasonable deal and the Palestinians turned it down. So I don't know what you're talking about. Again, if it's a purely hypothetical example, that again it's so farfetched, it's as farfetched as the example about the cell phones that you push a button and the world is going to explode. These are ways in which sensible people would not discuss problems. The way, it seems to me, to discuss the problem is to focus on the problem of getting the evidence, who is getting the evidence, who is deciding, and what policies should we put in place in order to prevent abuse and potential abuse of the power to decide? All the experience in American politics shows that when we compromise civil liberties on the basis of ex-anti fears, we make a mistake. I think Lincoln suspending habeas corpus during the civil war based upon a fear that Maryland would revolt and join the Confederacy, that was a mistake, and it was based upon an exaggerated fear.
The Korematsu decision, fearing a Japanese fifth column in California, putting American citizens in concentration camps, that was a mistake and it was based upon exaggerated ex-anti fears. The fear of the Red Army in the 1950s. We should have learned from experience that this was ridiculous. Right? There wasn't a legitimate basis. So I don't know of a case historically in which we have seriously compromised our civil liberties and we can demonstrate that it was based upon a legitimate fear. I actually am very grateful to Debra Satz for what I think was a brilliant critique of my position. I think that between the two alternatives posed, I would say that in some situations emergency powers, by analogy to the French Constitution, Article 16, would be preferable to interpreting the Constitution in order to accommodate it. Because, as Robert Jackson said, in the dissenting in the Korematsu case, once you compromise as we did today in the Korematsu case, you provide courts in the future with a loaded weapon. They can take that weapon and use it in the future in more dramatic and excessive cases. A provision for constitutional emergencies with sunset clauses, explicit recognition, regular congressional review, that kind of procedure, which is recognized in most European constitutions would provide whatever protection the United States would need in a true state of emergency. Thank you.

Response by James Fearon

I really appreciate the comments. I think the comments were excellent. I'm not going to try to respond to all of them. I guess, let me try with an immediate reaction to George's comment. In a way it filters through Debra's discussion of both of us. I think I very much agree with your characterization about the errors, the restrictions of civil liberties, the ex-post restrictions that the US government has undertaken on civil liberties in the past in response to these fears has been groundless or very, very hard to defend. In some cases, impossible to defend.

But by the same token the claim that we should never act on the basis of or even really consider hypothetical cases I find inconceivable. It's inconceivable to me that a government wouldn't spend a lot of its time doing precisely that, worrying about hypotheticals, in that this is precisely what you want a good government to do. I guess what I was trying to say in this case is that I don't think that we shouldn't just not think about it. I think that might be kind of a denial that is maybe another kind of psychological bias that Jon alluded to.

Just a couple of things about Stephen Homes' very good comments. I didn't mean to say that we shouldn't worry about Al Qaeda. I think we should worry about them in the short run. I wanted to say that I don't think that we can hope that the treat of catastrophic terrorism is going to disappear if and when Al Qaeda disappears. On the point about counter insurgency, you said, well, if it's analogous to counter insurgency, isn't that a contradiction because insurgency and counter insurgency are about politics, not just technology. What I wanted to say is I think that is a misreading of what I'm trying to say about technology,
although maybe I invited it. I can't be saying, and I don't mean to be saying, that technology somehow by itself acts to do these things. It has to work through humans and what humans do and politics and organizations and bureaucracies. I was making a more narrow point maybe that it's made clearest if compared to the Cold War. During the Cold War where the long struggle between Western capitalism and communism, one could hope on either side that the struggle would be over, right, that one side of the other would win, and that would be that.

But if you think about this problem, it's not where we can really feasibly hope that it will just end some day. Or if it did, we'd be living in some kind of society that was just too radically different really to imagine. That's the sense in which I think it's technological. Al Qaeda is not an insurgency. Right, it's not. With the analogy of an insurgency, yes there are some important differences between insurgencies within a country and the struggle with al Qaeda. What I wanted to say is that the problem that states confront in trying to counter this is structurally similar. You made the point nicely yourself, Steve, with this point that it's about snitches. It's all about information. It's about finding the needles in the haystack in both cases, and that's what I wanted to push on there.

Last point was not entirely connected to this. I wanted to make clear, I think. I think Diego and I agree about the shore-runner. I would agree that there is a great deal of exaggeration and I find credible that some of the psychological biases that he is referring to are behind it. I think I'd have a bit more of a political story for some of them, a little of which Steve Holmes referred to. But I also think that prior to 9/11 it's plausible that the public and to some extent government agencies were affected by another kind of psychological bias, which is kind of a denial. There were a lot of warning signs, ex-anti. Maybe this comes from spending too much time with people who are even more doom and gloom than I and spend like all their time thinking about ways that terrorists could blow us up, but arguably we weren't really thinking about the problem enough prior to 9/11, even if right now the reaction is too hysterical.

**Response by Diego Gambetta**

Finding the right balance is a difficult exercise and it seems as if Jim's comments and Steve's comments are about finding the right balance. So maybe before we were underestimating it or not finding the political energy to fight and now we're finding an energy which may be excessive and misdirected at the same time. I have no problem with that at all. In fact there is one point on which I very much agree with Jim's paper. I don't know whether you said that in your speech or not but you conclude your written paper saying that to a great extent we are hostage to terrorist luck, or lack thereof. I think this is a very important point, namely they could get lucky again. They could cause an awful lot of damage. There are things that they can do with very blunt instruments which don't involve any weapons of mass destruction at all and which we have enough to worry about without thinking about long-term scenarios. So if they get lucky again, what do we do?
Are we going to become completely hysterical given the effect that we have seen the first time around? I think my fear is not so much a fear of the strike but is a fear of what the strike may cause in the response. That would be my most rational fear, what I think is a rational fear. I think we should try to think of ways to make sure that if this occurs, should this unfortunately occur, we wouldn't be overwhelmed. There is a reason not to be overwhelmed. Not just morality and the possibility of leading normal lives and all the things we have been discussing. But there also the reason of effectiveness. There is a normative constraint. So suppose I was not too squeamish and I could put myself in bin Laden's shoes. What kind of response would I wish had been the response to 9/11? I think hard about this. My impression is that the response that did occur is fairly close to what my best desire would be. Not so much in terms of and I don't mean to say that this has been intentionally or anything of the sort. I stayed away from that character partly because of my own inclination but partly because I think that social scientists can only say something about bad information and cognitive biases, and when they want to say something about bad characters is when they become voters. That's a different matter. But I am not a politician. I understand your views on this and your worries. If I was American, I probably would be even more extremist, far more, I guess. But my sense is the response has been that of showing that terror pays off. It gets to the top of the agenda. It drives wars. It drives thinking. It just obscures everything in color, warps everything we do and think for the last two years. There is a normative point here to say one shouldn't do that just for the sake of not giving in. You have to keep cool and I know it is hysterical that an Italian should say that. We are not unknown to lose our temper and certainly not known for finding it again. Precisely because it comes from me, it must be good. Keeping a certain distance from this is extremely important, otherwise if I was bin Laden I would be basking in the attention. There are self-created effects of the approach which are especially connected to the view of terrorism. In the national security strategy document, the United States of America is fighting a war against terrorists of global reach. They probably didn't know they had a global reach. The enemy is not a single political regime or person or religion or ideology. Than what is it? The enemy is terrorism, premeditated, politically motivated violence perpetrated against innocents. This description is completely disembodied, sort of packaged in an abstract noun, terrorism, in which you don't understand who is doing what to whom and for what reason. It again is another not so rational framing of the situation, understanding of the situation, which can only play into the hand of terrorists. How does it play? Well, for instance, it fostered the automatic interpretation of any terrorist action as the fruit of the same tree. One upon a time in Sicily every murder used to be attributed to the Mafia. This was doing wonders for its reputation, because if you can persuade people that you are a member of the Mafia, then people would be very, very careful. So even in the face of a lot of murky evidence of authorship and multiple claims of authorship and so on, bin Laden and his crew have been seen by Washington, by the media, and by many people who have been writing about things terroristic as being behind every attack that has taken place since 9/11, even though for at least half of them we don't absolutely know. We have not
a clue. The local police give several interpretations of these and yet they have
become part of what they do. Obviously the terrorists themselves have an
incentive to say, yes, of course, we did it, didn't we? People have claimed the
black out on the East Coast. Jonathan called yesterday. He told me that people
were wondering whether the Staten Island ferry accident the day before
yesterday had been caused by terrorists. A couple of loonies have claimed that
their actions of shooting people or killing their daughters were inspired by Al
Qaeda. So by pushing the threat to such an extent you're play into the hands of
giving an enormous reputation and a reputation that may live on for a long time
because even when the current incumbents disappear, there will be others. I
mean, Al Qaeda is me. Let me conclude with an example about this. There is a
member of the Italian Red Brigades, a left-wing extremist violent organization.
She was arrested recently. From prison she released a document praising the
Twin Towers attack and claiming that the Arab and Islamic masses, and here I
cite, are the natural ally of the metropolitan proletariat. Gosh. What is looks like is
that if you in the business of terrorism, the best thing for you is joining the big
guys on the block. So you bend every political agenda to make it fit with the
agenda of whatever seems to be winning. Effectively this view of terrorism has a
unifying effect. There is a brand wagon effect here. They all join in under the
same. So in terms of effecting this, this I think is the worst that you could think of.
That's all. (Applause)

Response by G. A. Cohen

Let me respond to the comments on my paper made by Stephen Holmes, Jon
Elster and George Fletcher. Stephen Holmes' comments are essentially friendly.
This is not meant to discredit what he said. The paper indeed assumes a
distinction between implicated actors and third parties who are not implicated as
you say, and of course you don't challenge that distinction in general terms. You
question its reach in the real world and you ask the good question, who other
than Israel itself might be implicated in the very existence of the state and in the
policies that state pursues? That's something about which I said nothing and
about which I don't want to say anything now because I think the whole issue of
who represents the agency of a policy is difficult and deep and not one that I've
thought about enough. Jon Elster asks in critical vein, I believe it's in critical vein,
whether the criticisms that I make of Ambassador Shtauber's posture would have
been robust, that is to say, would survive, could still be leveled, if he had said
something different, namely not what he did say, not matter what the grievance,
nothing can justify the deliberate targeting of innocent civilians. But if he had
said, although they have some legitimate grievances, they are not of a sort to
justify these terrorist techniques? Had he said that, could I have still written
anything at all like the paper that I did? The answer is no. But if the suggestion
that that would have been a notational variant or a slightly different thing to say,
then the answer to that suggestion is that is preposterous. If he had said what
you construct, then what he had said would have been a prelude to a discussion
of the actual quality of the grievances that they have. But what he said was an
attempt to say that the quality of the grievances are not relevant to the choice of these techniques. Notice that the different statement that you've intended for him would have to be of the following spirit. For it to be different in the required way, he would have to be saying, there are indeed circumstances in which such terrorism is justified but not these. Now, to imagine that he would have been happy to accept the attribution of that statement to him is entirely unrealistic. But even if it were realistic, even if he were making quite so nuanced a statement as you're suggesting, then of course the paper would not have purchased against what he said. But it isn't as though the statement that he actually made and that I pin him to is a careless statement that people don't make. People on his side of the argument are constantly saying that whatever the cause may be, terrorism is a paradigm case of what so many people regard as a form of means that is unacceptable no matter what the grievance may be. And I'm not rejecting that position, or embracing it. I'm simply saying the person, that the person who is the putative source of the grievance isn't in a position to make that kind of statement.

Now, I mean, the fundamental point is that you can't just criticize the means as horrible, and yet set aside what the inspiration to the action is, if you are the enemy against whom those means are being used. Now, George asks whether I'm simply assuming, for the sake of argument, that the Palestinians have no alternative or I'm affirming that they have no alternative. Of course, I'm not affirming that they have no alternative, but I am assuming it, for the sake of argument, and it may be, the issue of whether it is legitimate for me to assume it for the sake of argument, is a sensitive issue, about which I'm not 100 percent sure, but I'll just lay out my thinking, which is the following: That if somebody says that nothing can justify the deliberate targeting of innocent civilians, then it follows logically that the deliberate targeting of innocent civilians can't be justified, even if it's the only alternative available.

Now, once again, that's not a position that I reject. I think that it could well—if somebody wants to claim that you mustn't torture under any circumstances whatsoever, and you mustn't deliberately target innocent civilians under any circumstances whatsoever—that might well be the moral truth. But a person who putatively puts another in a position where all they can do is obtain torture, or the only form of resistance that they can make is a morally ghastly one, isn't entitled to make that statement.

So I stand by what I said in the paper. Sorry. Anybody else? I mean, it's a controversial moral question, hard to decide in the abstract, whether it's ever morally legitimate to choose terrorist means to certain ends. But even if it's never morally legitimate, I say that someone who puts somebody else in a position where those are the only means he can use, can't criticize him for using those means, unless he can justify having put him in that position. And, therefore, the issue of grievance can't be set aside by the party to the conflict, the way it could be by a third party.
Akeel Bilgrami: George, you’re biting your tongue.

George Fletcher: I think you say you wanted to avoid the agency problem, but I think you're making an assumption, two assumptions, factual assumptions, or moral assumptions, that the ambassador speaks for, or the ambassador has a position that is burdened by all the actions of the Jewish people, and the Israeli government, and that disqualifies the ambassador per se. But, I don't know who would be in that category of people who would be disqualified. Every member of the Knesset? Every member of the government? Every member of the opposition in Israel? Every citizen on the street? Everyone is disqualified by virtue of identification with the oppressor, I would gather, is the implication of your argument. But then you have to have a theory about when the individual has to stand for the collective, which is a very difficult question, obviously.

And, then this question, there's a verb here that you use, put the person in the situation. Therefore, I thought, you know, you used this example of a Nazi guard who tells someone do something, and then wants to blame him for it. So you need a stronger theory of what it means "to put." I think your example of the Nazi guard is actually persuasive. But, you have to say, what does it mean to put someone in that position? And, to what extent do, and particularly in modern politics, do people like the Palestinians bear responsibility for the situation they're in. Now, I don't know whether it's ever the case that any people actually put someone in the position where there's no choice. That's the real problem, I think. So again, that's my objection to the hypothetical nature of the statement.

Akeel BIlgrami: Yes? Gerry, will you be very quick? Because we've got lots of other topics.

G. A. Cohen: Well, by being very quick, I don't have to take the full measure of what you said. Well, the issue of who is the agent is orthogonal to all this. I mean, that there are some agents, it's clear that ambassadors that represent states have to take responsibility for what the state has done is absolutely clear. That every average Israeli citizen is not similarly implicated seems to me also absolutely clear. Where you draw the line is not a matter for this paper. That's a separate question. I'm making claims about what the agents are responsible for, that's separate from who the agent is.

And even if the agent in question doesn't make terrorism the only recourse, it may nevertheless make terrorism particularly effective. And, I think some of the same problems arise then. But I mean, I know that there's something artificial about my paper, in that he's saying, well, we're going to forget about what the grievances are. And, so I'm saying, okay, I'm taking you at your word, we're not talking about the actual grievances.

Whereas, you're animated by a sense that I'm being extremely unfair, since in your opinion, which is a much more controversial one than you allow, I mean,
you know, people have different opinions about this, the Palestinians have rejected legitimate solutions to their conflict. But, that isn't the basis on which he stands. He's speaking to a British public, which doesn't necessarily accept that, where there's a lot of sympathy for the Palestinian position in Britain, and he's trying to secure an ideological victory by condemning the means, as such, while closing off the issues, the discourse that you yourself think should be opened.

And in your very appeal to the history of the conflict, in your very appeal to the failure of the Palestinians to accept Camp David, you're supporting my view that that's what needs to be discussed. He was trying to set that aside. And, it isn't true that in so construing him, I'm creating a straw man. It happens all the time.

**Akeel Bilgrami:** Gerry, can I just ask you to, just so that people don't go away with the impression that the position you take is too tied to the particular example you discussed, you are getting self-conscious and coy about it being artificial in the way it's been set up and so on, and I think it may really help if you could state, in terms of some generality, all right, what conclusion you've come to, that isn't tied to the particular example about the location from which certain moral judgments can be made. Could you actually, so that people get a more general philosophical sense of your point?

**G. A. Cohen:** No, I don't understand, are you asking me for what my position is? You're not asking me what my position is on the Palestinian-Israeli conflict?

**Akeel Bilgrami:** No.

**G. A. Cohen:** What are you asking me?

**Akeel Bilgrami:** I'm asking you about why you think location from where you speak, or make a moral judgment, is important in the very idea of making moral judgments? Obviously something . . .

**G. A. Cohen:** Well, because examples, as George accepts, in the case of the Nazi giving the orders, or as one can, because location is manifestly relevant. For example, a kidnapper kidnaps my children, and makes a demand on me. And, then I say, “No, I'm not going to accede to the demand.” And, the kidnapper says, “I'm horrified that you should regard your children in such a casual way.” Well, manifestly, he's not in a position to say that, but my brother-in-law certainly is. So, it's just evident that, who can say . . . [applause].

No, but I mean, there are many different kinds of example. You and I are burgling a house at the same time, and I say, we're doing it together, and I say, do you realize how horrible what you're doing is? You know? I mean, so it is not only possible, but I think it is extremely common in moral discourse and that it's partly, one of the reasons why it's common is because nobody knows how to prove things from first principles, but people do know how to discredit other people.
Question and Answer Period

Akeel Bilgrami: Okay, there are some questions on the floor. There were lots of questions of varying degrees of politeness and sobriety addressed to Gerry, but I think they were actually encapsulated with great sobriety by George's question, so I'm not going to pose it again. Here's a question for George, actually. George, a number of people are interested in how the law school and its professors and students should think about these issues. I mean, what should universities in general, and people pursuing the study of law in universities, how should they, for somebody who takes as definite and strong a position as you do, in the present context, what sort of response should there be, and more generally, are universities in any sense the target of such a loss of civil liberties, and should we be more active in responding, and more anxious than perhaps is [inaudible].

George Fletcher: I should say that I appreciate the opportunity to present my views here, because I do think that I am in the minority in the law school, this law school, and in the profession as a whole. There aren't many people who would regard themselves as absolutists on this question. I know that it's unfashionable intellectually, because what's intellectually more fashionable is the economic point of view, trade-offs, pragmatism, there's no such thing as an absolute commitment.

Actually, I was in a debate with Richard Posner a couple of years ago, and he accused me of being a legal theologian, and I said, that's great, I'll accept the title. But, you see, I think that my own view is that we should be a greater source of resistance, that we are privileged people in the university. That we know that something really awful is happening to the American constitutional tradition, whatever our particular methodology might be, and that we should be fighting against these developments.

I think it was a major embarrassment for me and my profession that the major spokesperson against the military tribunals was not a law professor, but William Safire of the New York Times. He was the first person who came public and said this is an outrage. Right? Now, that shouldn't be the case. I think the university should be taking a much more active role. Now, on the second point, I actually am not on top of all of the insidious reporting requirements that are imposed on the university to keep it, to spy on Arab students, and to report back, but this is, insofar as the Bush administration is forcing universities to participate in surveillance, I think we should be resisting. And, that we should become an avenue . . . [applause].

I mean, we have to recognize that we have a privilege that other people do not have. We have tenure. We have a guarantee, I mean, we have extraordinary privileges that should invite a deeper commitment, and greater courage.
Akeel Bilgrami: Professor Steven Lukes, who's in the audience, has two questions which I think, though they've surfaced in some of the commentary, they have actually sort of gotten lost in the responses. So, I'll pose one of them, one at a time. The question for Professor Fletcher is quite direct. Are there any circumstances in which the constitutional guarantees of liberties can be limited in the interests of security, and if so when?

George Fletcher: That is obviously an invitation to a hypothetical case, right? So, I'm supposed to state what the hypothetical case is. I don't think that that is the appropriate question. The appropriate question would be to provide a dossier with all sorts of witnesses, depositions, information, and then try to construct from that dossier, a judgment about what the risk is. Now, I guess there is obviously one implicit power, but it's not a suppression of civil liberties. That is, I think that the Congress has the absolute power to declare war, something that we've been disregarding for the last sixty years. But the Constitution is clear on this. Only Congress can declare war. It has no authority to issue authorizations to the president to use force whenever he or she wants to, and this is totally a-constitutional. Now, if there are, if there is an attack underway against the United States, and there's no time to go to Congress, then of course the president as commander-in-chief can use military force to repel the attack. That power is implicit in the structure of the Constitution. But, that's not a violation of civil liberties. I think that the, and again, one of the problems is the abstract nature of the conversation about civil liberties. We'd have to talk about, you know . . . the Pentagon Papers case was extremely interesting. The government argued that publishing the Pentagon Papers in the New York Times was absolutely outrageous, this compromised our security, we should never have allowed it. Fortunately, the court was more intelligent, and didn't listen to that argument.

Akeel Bilgrami: And, Professor Lukes would like, I think, just a more explicit confrontation between you and James Fearon, who seems to have taken different views on this, and perhaps to put it more specifically. Do you have a view about the distinction between long- and short-term problems about terrorism that James Fearon raised perhaps that's a way to get started, and then James could reply.

George Fletcher: Will it get much worse for technological reasons?

James Fearon: It's hypothetical…

George Fletcher: I know. I mean, doesn't technology work on both sides? I mean, aren't our surveillance techniques much more sophisticated, even within the boundaries of legal operations? Our surveillance techniques are much more sophisticated to the same degree that the problem of dissemination of nuclear weapons is an increasing threat. I don't know whether that's just a problem of terrorism. There is a general problem in the international arena of controlling the proliferation of weapons. I think that, again, I think that one of the first responses
should be, let's use whatever resources we have now, to combat the threat, and once we've exhausted all the resources we have, then we can worry about making changes in the legal structure.

**Akeel Bilgrami:** Jim?

**James Fearon:** Well, I think there is a difference, and it’s a difference that, or the sharpest difference concerns what has been characterized as an absolutist interpretation of the constitution, and it would be true that, and I think there are other people who have taken this position as well. I don't think I would hold an absolutist's view that, say, Debra ascribed, on the constitution, that Debra ascribed to George. If the constitution really was a suicide pact, I wouldn't want to have any part of it, in that situation. But, it also seems to me that this is not really a realistic alternative. I mean, I have, I'm out of my depth, I'm not a constitutional scholar, a lawyer, I sometimes have trouble remembering which amendment is which. But it just seems to me unrealistic, it's hard for me to imagine that there is an absolutist interpretation of the Constitution in that, as the prime minister said yesterday, it's a short an obscure document. It has to be interpreted. And, it seems to me that inevitably, in reality, what you’re going to get is what Debra described I think as the fluid alternative, right? Where it’s intrinsically flexible, and it has to be interpreted by courts and judges, and as even the most casual look at history shows, it's been interpreted rather differently over time. And, if that's the case, and I think it's also reasonable that that be so. So I just don't really see how an absolutist interpretation is even kind of coherent.

**Akeel Bilgrami:** Yes, sure.

**Joseph Stiglitz:** That is a concrete example, and it’s on the right to privacy, more than the kinds of rights that we feel much more strongly about. And it deals with information. And it’s one that the government faced a few years ago, and that had to do with encryption technology, where the issue was whether the government could restrict the use of encryption technologies, such that any encryption technology that was produced in the United States, and assume that we could have enforced this, and that was one of the issues, but assume that you could have enforced it, that would have given the government a key, a mechanism to de-encrypt. And the argument was it was important for the government to be able to spy on drug dealers, and others, as a source of information. But then the issue was also a question of that would give it the ability to violate civil liberties. Do you have any feeling about reaction to that controversy?

**George Fletcher:** Well, I think that's an interesting example, because of course I agree that the Constitution is a living document, it's interpreted over time, but our experience so far has been the expansion of civil liberties, and privacy is a very good example. There's nothing in the Constitution about privacy. We have a constitutional right to privacy on the basis of the courts' interpretation of the
Constitution. And obviously there are many borderline cases in trying to work out the contours of exactly what is the right to an abortion under the, I mean, all of these things are hotly debated questions. So there's no way . . . I'm not a textualist in the sense that I think you can just read the document and figure out the answer. So what's new and what's different is the tendency now to apply this idea of a living document, not in any sense that the document is flourishing, but that somehow the constitutional tradition should wither, should retreat, should start de-recognizing the great achievements of the last several decades. That's, I think, what's different, and the government, the tendency of the government to use 9/11 for these purposes, serves many purposes, is obviously overdetermined. They have some concern about terrorism and security, but they also have a long-standing agenda, as we now see, they have a long-standing agenda to suppress ordinary criminal activity, and I think a number of people have said this, the danger is the way in which it will be abused.

Akeel Bilgrami: Okay, Stephen Holmes.

Stephen Holmes: Just to cover, one example for Gerry of a [inaudible] argument. The best defense I heard over the Iraq War, was on of course, TV Cinq—French TV. And, it went the following way. You'd have panel after panel with, say, four people from Arab countries, one from Egypt, two Tunisia, and so on. They'd say, America is evil, it's killing Iraqis. America is evil, it's killing Iraqis. At the end of the line, there would be an Iraqi. And he said, you bastards, when Saddam was killing Iraqis, you said nothing, you're just trying opportunistically. So it was very, very powerful actually, and interesting why that kind of thing wasn't heard in the States. George, there's a way in which, despite everything, I think this is the strongest way to put the criticism of the liberty-security distinction, is that you are helping Ashcroft. Every time you scream about violations of civil liberties, it makes him look like he's doing something, and actually he's not.

The perversity of the doctrine of preemption, over to Jim, I think one way to get at it, this idea that the threat is so great that even if our evidence is totally insubstantial, we have to unleash lethal force to respond. A good example, and I think it brings out the moral problem, is the checkpoint, checkpoints in Iraq, particularly. You know, when you have say, a pregnant woman coming up to an American check point. And there's a decision to be made whether you are more afraid of false negatives, or false positives. False negative means that you'll be dead. False positive means that she'll be dead. Well, I guess it turns out that the soldier has the gun, and she's dead.

The problem here, the reason it's not just a question, is that our ignorance is due to the fact that our soldiers don't know Arabic. They don't know Arabic. They don't know about the culture. Even in Israel, where they do know Arabic, and they do know about the culture, they make mistakes. But to send forces in this condition, preemption, the reason we're preempting, it's partly because of what
we know, and that is not something for which we are not at all responsible. This isn't just an objective situation, that's all.

Finally, with Diego, I think the bad character, I mean, you're right, your distinction between bad character, and cognitive bias, I like it, I think it's a good way to go, and I don't use that distinction, because I'm being political when I think about this administration. I think they do have a bad character. And their way of dealing with problems such as a bias—to only look at problems that can be solved definitively by us alone, which is a very small subset of the real problems, instead of the one Jim has mentioned—the real problems can only be managed, they have to be worked, they're going to take a long period of time, and we have to do it with others. You exclude those, is that a cognitive bias? That sounds like bad character. Or never listening to anyone outside my small clique. Kennedy had Republicans in his cabinet when he faced the Cuban Missile Crisis. It wasn't an isolation chamber of people. Now is that a cognitive bias, or isn't that really, aren't they politically responsible for not having reached out for other points of view?

Debra Satz: I wanted to say a few things. On the security-liberty trade-off, I think that there’s just got to be more public discussion of how inept that is for the particular measures that are being . . . I mean, there’s been no public rationale for most of the measures, in terms of increasing our security, and there are so many other things you could be thinking of doing to increase security. So I think we shouldn’t accept it in this case. I think there are reasons to be suspicious of the language of the trade-off, in a lot of senses. But I wanted to say something about hypotheticals, and to actually make one point that I think is important. I hate hypotheticals. I'm in the wrong profession, because philosophers do nothing but talk about hypotheticals. I think we'd be much better off talking about what's happening in Guantanamo than theoretical questions that may or may not apply. But I think there is one thing about hypotheticals, which is they force you to think about the values that are at stake. And I'm going to give you an example of something that is not hypothetical, because I read about it in the Times last year, so it must be true. And, it's a case that happened in Germany, where a kidnapper was apprehended. Had kidnapped a young boy, demanding a ransom. The boy, his mouth was taped, his nose was taped, and he was wrapped in plastic, and when he was apprehended, he refused to say where the kid was hidden. And so this is a real case. And the question was, what to do? And the policemen threatened torture. And, under the threat of torture, the kidnapper confessed. And I actually in that situation, perfectly well understand why the policeman did what he did. And what I would want to do is make a distinction that we haven't been, I think, as attentive to, which is there's a difference between what we want to see happen in a situation, and what we think the law should be. And I might be perfectly understandable in that situation to say look, it was understandable, now let's have the policeman go before the courts, and make his case for mitigation. It's a different matter whether we should have a law that says, torture is okay, with its official stamps and documents that deprives the victim of any standing to
the abuse. And I don't know how this plays with the absolutism, but it's worth keeping in mind that sometimes what we want to happen may be different from the law, but law is a special category, and there can be reasons to hold on the law, even when in various cases we'll allow for circumstances that depart from it.

**George Fletcher:** I think that's a terrific analysis. You're evoking a model of civil disobedience, and civil disobedience by officials, and there are situations in which it might make sense for you as an official to break the law, but then to stand responsible for it. And you might say look, I don't really have much of a choice here. I know that this is criminal, but I am going to do it, and I will accept responsibility for it. That might mean resigning, that might mean pleading for mitigation before the court, but I think it's important to uphold the principle, to affirm the legal commitment, and to require people who are civilly disobedient to take responsibility for it.

**Jon Elster:** I would like to have a last stab at objecting to Gerry Cohen's argument by quoting from his paper. If the Palestinians had normal democratic sovereignty, and normal civil liberty, they would have a normal army which is not equipped merely to police its own people, an army which of course they would not need to use to seek . . . Their grievance is centrally that of a lack of state, and therefore among other things, the approved means of violence that a normal army possesses. Well, I think I agree with George in that they lack a state, but they could have had one.

**G. A. Cohen:** Well, this just goes back to what I said before. I'm not against the discourse of who's responsible for the impasse in the Middle East, which goes back to the Balfour Declaration, and I think there's a hell of a lot of relevant history. And the fact that the [inaudible] of Jerusalem encouraged Himmler is absolutely relevant to this history. And I have no professional competence, much as I'm interested in it, to comment on the distribution of the burden of guilt across this history, and how it structures present perceptions, and attitudes and so forth. I'm simply saying that all has to be opened. His attempt was one to close it. And, it happens every day. I mean, every outrage that happens, Israeli spokespeople try to recruit international sympathy for Israel, by pointing to nothing but the character of the means that their enemy, who don't have nuclear weapons like they do, and so forth, are using. And I'm saying that's not enough. And that point is robust against your challenge.

**Akeel Bilgrami:** With a day that has had so much substance, it would be foolish to do anything very ceremonial by way of conclusion, so let me just say that it is a measure of, and a tribute to, Columbia's reputation and achievements that such fine and distinguished scholars and public figures came so readily to celebrate its anniversary. Thank you very much.