

## Constitutions, Democracy, and the Rule of Law

### Do Constitutions Constrain?

October 16, 2003

### Welcome and Introduction

#### Welcome by Lee C. Bollinger, President, Columbia University

**President Lee C. Bollinger:** Thank you for coming to this conference, this panel, on "Constitutions, Democracy, and the Rule of Law" symposium. I want to thank our very, very distinguished panelists for coming to Columbia and for those who are already part of Columbia for participating in this. We have tried to celebrate the 250th anniversary of Columbia by doing what we like to do, which is to try to think as hard as we can about serious matters. And this particular subject is of obvious importance in the world today, and the other panel that we will have at this point in the celebration of the 250th—on genomics and the implications for our world—is equally important and somewhat less obvious, but it really is something that should occupy our attentions.

Constitutions are a phenomena that I feel particularly close to, having gone to law school here in the late sixties, in a decade during which the process of thinking about a constitution and its role in both preserving the structure and defining the structure of society, that had, in a sense, reached a height of activity. And I was one of many who naturally gravitated toward this subject and I have since spent my whole career largely thinking about one fraction of that, of that constitution, that is the First Amendment. And one of the things that became clear at that time was that thinking about a constitution and what it means is not only thinking about what the law should be, but about what the fundamental values of a culture, of a society should be. And how that happened, and whether that's a good or bad thing, whether that's a good process in which to do that is, I think, a fascinating and highly important question. I'm sure it will be taken up in the discussions today and tomorrow.

It is my pleasure to introduce Alan Brinkley, who is one of the most distinguished historians and perhaps the most distinguished of modern American history. He has joined the ranks of university administrators here as provost, it is my great good fortune to have him to work with. It is Columbia's enormous good fortune to have him guiding us in the academic decision-making and beyond. His

knowledge about what we're talking about is deep, extensive; his judgment is unbelievably balanced and nuanced, and to have him take us through this subject is a great blessing for all of us.

The 250th, of course, reminds us that Columbia has many, many distinguished alums and faculty who participated in constitution-making and constitutional interpretation, and over the course of the next year I hope that we will be able to sort of regain some of that history and make it more part of our current conception and future conception of Columbia than perhaps we have. Alan?

### **Introduction by Alan Brinkley, Provost, Columbia University**

**Alan Brinkley:** Thank you, Lee. I too am really pleased to be here and to join President Bollinger in welcoming our distinguished guests to this panel, and welcoming all of you to this first of the symposia that we have organized to help Columbia celebrate its 250th anniversary. Despite President Bollinger's very generous remarks, whatever deep knowledge I may or may not have about the Constitution will not be visible to you today since I'm here simply to introduce the panel and not to participate in it. But I am very happy to do that.

Columbia, in celebrating its 250th anniversary, has organized a series of such symposia throughout the year between now and October 2004, which is the actual birthday of Columbia. And it's as Lee has said, it's very appropriate that the first of these symposia be about constitutions, because along with universities, the Constitution is among the oldest institutions in our history, one of the oldest surviving institutions and like universities, it is a complicated and often disputed institution that's played an enormous role in our society, as well as in the societies of the rest of the world. Arguably, the United States was the first nation in the world to create a written constitution, but written constitutions have now spread throughout the world, partly by our example, and sometimes at our urging or even coercion, often successfully, sometimes not. Constitutions have taken many different forms around the world, some of them quite different from ours, and we all have much to learn from each other's political systems. And so it's particularly appropriate I think that we begin this observance of Columbia's 250th year with this symposium.

It's my pleasure now to introduce the moderator of today's panel, Jon Elster, the Robert Merton Professor of Social Sciences here at Columbia, one of the most distinguished American scholars of political theory and political thought. And he will introduce the rest of the panelists and begin the symposium, and I hope you all enjoy it. Thank you very much.

## Opening Remarks by Jon Elster, Department of Political Science, Columbia University

**Jon Elster:** Thank you, Alan. I'm very pleased to introduce this first session of the symposium "Constitutions, Democracy, and the Rule of Law." The topic of this session, as you know, is "Do Constitutions Constrain?" The topic of tomorrow's session, which will be moderated by Akeel Bilgrami, is "Terror and Civil Liberties." Let me say just a couple of words about the two sessions and how they relate to each other.

The topic of today's session is quite general. We have asked the participants to address two questions: The factual question, how much do constitutions constrain the free interaction of political agents, and a normative question, how tight ought those constraints to be? For answers to these questions we can draw on the experience of two eminent politicians, Michel Rocard and Antanas Mockus, who can tell us about the extent to which they have found constitutional constraints to be welcome or unwelcome, hard and soft. The second question, the normative one, also invites theoretical reflections on the desirable incentive structures to be established through the constitution. On this topic our third presenter, Adam Przeworski, will, I conjecture, provide that perspective.

Tomorrow's session will consider this general issue that I just described with regard to the topical question of terrorism and civil liberties. A classic statement of the tension between the fight against terrorism and defense of civil liberties was that of Justice Robert Jackson, fresh back from Newburgh, when he said that the Bill of Rights is not a suicide pact. Even older, of course, is the adage, Let justice be done even though the heavens might fall. Again, there is both a factual question of how much the heavens would in fact fall down, and a normative question about the costs society should be willing to pay for justice to be done.

Before I introduce the speakers this morning, let me say a little bit about how we shall proceed. This morning each of the three speakers will talk for about thirty minutes. We shall break for lunch at noon and resume at two o'clock with comments by the three panelists who will speak for 20–25 minutes each. After the presentations and the comments, we'll have a discussion among the speakers and the panelists, open-ended discussion, and if there is time, as I hope there will be, we'll have participation by the audience. And I like to just tell you how that participation will be organized.

If you think you might want to say something toward the end of the afternoon session, please come up here to the podium at the end of the morning session with a piece of paper with your name, the speaker or speakers you want to ask a question, and one or two questions. Then depending on time, and depending on how many people submit questions, I will select some and call on some of you to

address, to ask those questions. But once again, this depends on how things work out and whether there will in fact be enough time.

I'm going to introduce all the three speakers now so that I don't have to break the flow of the presentations later. And I'll be brief since you have the biographies of all of them. But first I would like to introduce a nonspeaker, professor and former provost Jonathan Cole, through whose initiative this event is largely due. We in fact asked Jonathan Cole to be a speaker in this symposium, since he has been very concerned with academic freedom in the post-September 11 world, but he had to decline since he is a moderator of another simultaneous symposium taking place on the campus.

Turning from this nonspeaker to the speakers, let me first say how happy I am to have Michel Rocard, former prime minister of France, as one of the speakers. He is currently a deputy in the European Parliament. If you will allow me a personal remark based on my deep and long-standing admiration for Mssr. Rocard, I see him as part of a great and pure tradition in French politics. Beginning about a century ago with Jean Jaurès, passing through Léon Blum, Pierre Mendès-France, and perhaps, although I hope I'm wrong, having Mssr. Rocard as currently at least the last incarnation. It is a tradition of generous and rigorous devotion to public service.

My recent friend Antanas Mockus is the mayor of Bogotá. In a country where the rule of law and civil liberties are on constant siege, I read in the *Financial Times* this morning that for the upcoming mayoral elections in Bogotá, 27 of the candidates had been assassinated and many others have declined. Candidates have declined to stand for office! Antanas—fortunately for him, perhaps—is prevented by the constitution from standing for office again. His term expires at the end of December. In his conspicuously successful response to violence in Colombia and Bogotá, Mr. Mockus has used imagination rather than counterviolence. His example shows that symbolic politics can have very tangible effects.

Now my very old friend Adam Przeworski is an outstanding academic who has also been for many years in dialogues with heads of states about institutional design. One of his earlier books was called *Paper Stones*, meaning the ballot as a tool for political change. Today I hope he will tell us about parchment barriers and their robustness as limits to change. So I give the floor to Prime Minister Rocard.

## **Do Constitutions Constrain? October 16, 2003**

**Michel Rocard, Member of European Parliament; Prime Minister of France, 1988–91**

### **Balancing Hard and Soft Constraints**

**Michel Rocard:** Mr. President, Mr. Moderator, ladies and gentlemen, dear friends: I have not completely explored the difficult question to know why on such theoretical and legal difficult question the board of Columbia University has had the strange idea to call a politician to speak about. Politicians are supposed to be superficial, and I had a second surprise, which was this strange question, because in a way at first sight it is a strange question. Any constitution will be evidently useless if it did not constrain seriously, under the threat of sanctions, at least the ways and means in which access to power is gained, and the limits of the authority of the principle power holder. Any violation of such provisions is usually called a coup d'état and as such is considered evil, so far at least. And when possible, punished. This is supposed to correspond to the definition of constraint.

My worry does not arise from this point, as you know and as Jon Elster just said, I have had to govern my country, and I perceived our constitution as highly constraining for all of our sakes. The constitution did constrain me, but partly for my own protection, too, as it protects our friend, the mayor of Bogotá. My worry arises from the fact that a body as serious as Columbia University, in spite of this evidence, considers such a question as open and deserving answer. Evidently there must be more to this question than meets the eye.

The preoccupation probably comes from current fashion. In the present state of world governance, and in spite of our growing difficulties concerning civil violence, criminality, delinquency, the concept of legal constraint has lost a large part of its respectability. These new paradigms most likely come from the field of economic theory. I propose to you this hypothesis. Market decisions, which contribute to the economic optimum, are more appropriate when they are so spontaneous than when they consist in obedience to orders, naturally. It is this kind of reflection which has underlined the distinction between hard power and soft power.

I suspect, Mr. Elster, that the authors of the question, "Do constitutions constrain?" are looking less for a yes or no answer than for an exploration of the conditions in which the various elements of all constitutions produce a certain degree of constraint. What kind of constraint? What are the limits of that constraint? What is the balance between hard and soft constraint?

The most significant part of the answer comes from the nature of constitutions themselves, but another part of the answer comes from the nature of what we call constraint, and the rest of the subject has to be studied in the light of questions coming from outside the legal order. Can we really dream of a social system without constraint? Can the market, which is the real competitor to constitutions as a basis for social order, fulfill this role? Is this global philosophical process toward the limitation or the elimination of constraint in our collective life in accordance with the contemporary evolution of humanity?

### **The Nature of Constitutions**

Concerning the nature of constitutions, I must begin by reminding you of a well-known pleonasm: a constitution is democratic by definition, and there is neither use nor meaning in joining the two words. The need for a constitution arises as soon as a source of power is no longer God, but the people. God's appointee has no separate, no specific, rule to follow. But the people need to formalize its social contract and to define the rules and procedure that regulate the society and the power system in it. While any dictatorship or power system based on force may decorate its internal regulations with a beautiful name of constitution, this doesn't change the substance of the situation. As we say in French, the habit doesn't make the monk. The name is not sufficient to transform police regulations into a constitution.

May I recall here Article 16 of the French Declaration des Droits de l'Homme et du Citoyen: "toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation de pouvoirs déterminée n'a point de constitution." [Any society in which the rights are not guaranteed, and the separation of power is not ensured, has no constitution.]

This being clear, it is clear as well that the nature and the degree of constraint inherent to a constitution varies according to its different elements.

One, when an element sometimes is taking the form of preamble, defines the values or principles which a given human community consider its own, and as the basis of its social life. Apparently, so far as I know, there is no innate constitution court specifically in charge of enforcing such values. But such constitutional provisions, even in preambles, are everywhere in democracies references for the judicial institutions and the courts, arguments for the judgments. This produces undoubtedly some sort of an indirect soft constraint.

The second section in most constitutions describes the rights that the people should enjoy. Here the meaning of the constraint is much stronger. It absolutely forbids the executive authorities to limit or to violate these rights. And on this point, any court-competent constitutional matters would vigorously punish any violation in this field of the rights.

The third section of the constitutional substance, this describes frequently with great precision the procedures that have to be followed in the competition for access to power. It is particularly in this creed that any violation is considered a coup d'état and that the competence of the specialized constitution court, if there is one, or of the highest court of justice in the other case, is clearly defined. It is only in the case of ambiguities or uncertainties in the constitution writing, in the constitutional text that the executive authorities find some margin of choice, and the court may then accept to give advice. We have then left hard constraint toward soft constraint.

The fourth section of a constitution generally describes the distribution of power, for instance, between the executive and the legislative branches, or between the chief of state and his government. According to the nature of what is power, and what are political competences, such a description cannot be rigid and may not even be very precise. Provisions have to be respected, under the risk of political conflicts, which opens up competence for the courts. But frequently, and we shall see that further, modifications of these arrangements between blocks of power will result from political negotiations, and express the changing balance of influences between forces, between persons in the legislative as well as in the executive body. If constraint then is here, it is evidently of the soft kind.

### **The Legitimacy of Constitutions**

This inventory of the calls for constraint that comes out of the different types of constitutional provisions has to be completed by two other considerations, each of these being capable to modify largely, very largely, the weight and the significance of the constraint involved as I analyze their sources.

The first is roughly the legitimacy of constitutions. Largely influenced by their age, by the conditions—consensual or conflictual of their adoption, by the spirit which has presided over the writing—they can be rigid or flexible, long or short, mostly limited to procedure or embracing most of the substance of social life. By the accidents of history with which they have been confronted, constitutions in fact do create around themselves a very variable climate of what I should call propensity to respect. Thinking about the United States, writing about his own country, Germany, with a great hope to see this country contribute to the development of a strong and powerful Europe, a great philosophical writer Jürgen Habermas has defined the concept, you know, the concept of constitutional patriotism. In the case of the American Constitution, the oldest in the world today, unchanged for two centuries, its majesty is linked to the fact that it has greatly contributed to the making of the United States and its history. The respect for the Constitution has reached there probably deeper than in any other country. To tell you the truth, I am jealous. It is not only an affair of time and history. The substance of the Constitution counts for much in the respect it deserves.

Brazil, after its period of military dictatorship, spent an enormous and admirable quantity of brains and of subtlety in organizing the transition from military power toward civil power. This process being military or civilian, every political group, every institution involved in the process wanted its own guarantees in terms of political orientations as well as in terms of procedure. The result has been a constitution with several hundred articles. My friend President Ferdinand Henrique Cardoso in his eight years of mandate could enforce practically no significant reform touching either public services or taxation or local authorities without modifying the constitution. This constitution appeared therefore as an obstacle to any form of political progress and in no way the democratic monument it should be, as it has been, during its first two or three years of existence. It is clear that in these conditions, the constitution of Brazil has not generated respect and that the idea of changing it may appear evident to anyone, all this diminishing largely the force of any reluctance to violate it.

### Constitutional Courts

Apart from this variable degree of legitimacy, another substantial difference and a more concrete one may characterize the constitutions. It is existence or nonexistence and the nature of a constitutional court.

In some cases there is no such institution. Great Britain is the best example there, you all know that. The French Third Republic approaches this solution, since Article 9 of the law of 24 of February, 1875, concerning the organization of the senate states, I quote, "The senate may be transformed into court of justice, in order to judge the president of the republic or the ministers, and to deliberate about attacks against the security of the state." End of quotation. The consequences are simple; it is only inside the political institutions that an explicit violation of constitution provisions can be sanctioned. Practically, it implies that parliament is the only authority capable of punishing an executive authority, head of state, prime minister, or minister in the case of a constitutionally improper behavior. The German Weimar Republic had a constitution of the same kind, giving more or less explicitly to political authorities the mandate to judge their peers.

In all those cases, the dominant interpretation will be that legal criteria are of a very weak importance and that any procedure against an executive authority will resolve in a political conflicts and be treated in terms of balance of strength rather than in legal terms you had all understood. There was no legal recourse when Chancellor Adolph Hitler, legally appointed—*legally appointed*—began to violate the constitution; nor in France, again, the parliamentary act that transferred in 1940 all powers to Marshall Pétain. It is no surprise to discover that military force belongs to the order of house constraint, and not to, nor to surmise that if Britain had not known any event of the kind for several centuries, it is more because of geographical—what a pleasure to be an island—or military reasons than because of the quality of her legal culture.

Most constitutions today include some provision concerning the constitutional judge. It can belong to two categories, either it is a specialized college limited to constitutional matters, or it is the major or highest court of the judicial institution which has received this capacity. The United States and many Latin American countries have chosen the second solution. France and Germany have chosen the first. I don't think it is possible, nor pertinent, to express here a preference for any of these solutions. Both methods respond to the need to have a practical, modest but efficient and current control on the legislative proposals. Both types of courts permit the prosaic and de-dramatized exercise of hard power, which after all is necessary, according to the importance of constitutional matters. One can say, maybe, that any supreme court uniting the functions of head of the judicial order and constitutional judge might gain in importance and dignity what it loses in excessive workloads, and in time to deal with the minor aspects of its constitutional duty.

On the contrary, a specialized organ ordinarily has time to deal with issues of secondary importance. Often, provisions of limited significance happen in certain historical situations to become the symbols of unacceptable rigidities or blockages, or, on the contrary, of terrible laxness. Thus, for instance, the French Conseil Constitutionnel has eroded some blocking temptations, and in this way undoubtedly made our constitutional life easier. On the contrary, it is absolutely obvious that enforcing legislation is unusually difficult in the United States, but it doesn't appear—to my eye, anyway—it doesn't appear that the Supreme Court is worried about this at all. A balance has to be found between the solemn Roman adage, "De minimis non curat praetor" [A magistrate does not deal with the details], and the popular answer, "The devil is in the details."

### **The Physiology of Constitutions**

This gives us some overall vision of the anatomy of constitutions from the point of view of constraint. Let us now look at the physiology. How does all this work?

It is the nature of constraints, which is the key of the development, the key of the developments we can observe, and the main point to make is probably that hard constraint is only effective within an area of general consensus for the current life of constitutional activities. But on the whole, significant changes, those that really alter the principle character of the constitution, do not occur generally thanks to the provision it includes concerning conflicts. On the one hand, no constitution has ever resisted force. We've seen it in the case of Germany in 1933 or in France in June 1940. It is clear for all the constitutions of the Eastern European countries in 1947–48, you will remember. It was clear too of most of the Latin American constitutions in the period of the epidemic of military dictatorships with a special mention for Chile thirty years ago, in 1973. On the other hand, what is essential for our subject is the discovery that the main changes in the way a

constitution steers and canalizes the political life of a given country generally finds their origin in the field of soft constraint.

The American constitution has evidently, I may be a bit partial here, you tell me if you disagree, to my view, the American constitution has evidently been written in order to impeach, if possible, and anyway to limit the emergence of a strong central power at the federal level. President Bush most likely thanks God every day for the continuous changes his numerous predecessors have promoted in the system to make it more powerful than it was designed to be. This happened with anything, anything at all, which could be characterized as violation of any constitutional provision, the nature of which would have called for hard constraint to be implemented.

Europe is full of other examples: The Third Republic in France was extremely weakened and finally disappeared mostly because the executive branch lacked any means to bring pressure to bear on the legislature. But the constitutional laws included the right for the government to disown the assembly. And it is only the total absence of any consensus on the significance of the first use of that right in 1877, which made it impossible to use it again. The nonuse of a constitutional right, the use to, the right to dissolution, the nonuse of this right became an element of some constraint. In this matter, the absence of a constitution gives more rigidity to traditions and precedents because there is no procedure to modify them, thus in Britain the King's or the Queen's veto of legislation disappeared as soon as 1706. Thank God, what a happy parliament! And no one can imagine any way, system, or procedure to reintroduce it, naturally.

### **The Importance of Political Personalities**

For the practical management of our countries, constitutions are not the only conditioning instruments. In fact, electoral laws and the number of political parties are parameters of equivalent importance, even though they have much weaker symbolic value. And this explains how and why there is room under the same constitutions for very different practices. This is even more true if we look at the importance of political personalities of great capacity.

Think one minute. Chancellor Konrad Adenauer was approaching 75 years of age when appointed to this function, roughly that of a prime minister. The Federal Republic's constitution was a classical parliamentary one and still is. But Adenauer lived long enough to organize the absorption of quite a lot of small political parties into the Christian Democratic Union. Ladies and gentlemen, had Adenauer died much earlier, German political life would appear more like that of Belgium or France of the Fourth Republic than what it is.

The same observation can be made the other way around. Had de Gasperi—Alcide de Gasperi, great Italian—survived a long time instead of dying in 1954, I

am sure that the Italian constitution would have evidently permitted a much more stable political life with long-living governments.

In 1951, a sniper shot at Charles de Gaulle and missed him by ten centimeters. Ballistic observers are sure. Had he succeeded, France would almost certainly have fallen again into the facilities and poisons of an assembly regime and paralyzed short-lived governments. We knew that, it's our national characteristic. Alas. Thank you for your smile.

The importance of tradition and precedents in the creation of what soft constraint protects later appears in many fields. Another example is as follows: The European Union before the coming enlargement unites 15 countries, 17 kingdoms, and 8 republics. All these republics are of the parliamentary type, with governments accountable to the assembly. We are supposed to be civilized. Among these republics, no fewer than five have presidents elected by universal suffrage. Constitutional texts do not differ much. These presidents are guarantors of national independence, of territorial integrity, and of the respect of international treaties.

Other constitutional statements appear modest. The president accredits ambassadors. It's in the French constitution; I suppose the same thing in the others. The president is commander and chief in the army, and I think this position is general, even if decorated. Then it is only the tradition. Without significant constitutional provision, it's only the tradition created by de Gaulle, which explains the enormous difference of the powers of the French president compared with those of his Austrian, Finnish, Irish, and Portuguese colleagues. But this difference is not protected by the soft power of tradition and would probably be defended by the constitutional counsel if another case comes. Sometimes coming from the past, constraint, sorry, something coming from the past constrains present and future, but is not only made of the written elements of our constitution. Furthermore, any British citizen could probably admit that it is much more difficult to introduce change in political practices in the absence of any constitution than it is when there is one.

### **The Quality of Constitutions**

This leads us to another remark. The reflections on this subject are not only of analytical interest. They should contribute to our capacity to facilitate political life in the future in the light of the judgment we can make on the constraint we live with. Are they beneficial, those constraints, or are they evil? Thus is opened a debate on the quality of constitutions. Why is a constitution good or bad? How can a constitution be improved? Here, again, it is clear that hard writing leading to hard constraint is more rigid and less capable of evolution than less-demanding provisions.

Napoléon, pardon me on my set of quotations. Napoléon, who, however cultured he was, was a dictator, once voiced this remarkable dictum, "A good constitution must be short and obscure." End of quotation. Doubt is not permitted. Napoleon expressed clearly that in his view, the practicability and the changes of long life for a constitution rely much more on soft constraint than on rigidity.

The flexibility, the adaptability without which constitutions die, can be measured in other ways, such as the number of articles, or the number of modifications. Having no constitution, the United Kingdom counts 0 articles as fundamental law. The United States, not quite 30 (but we have there a difficulty, those 30 are rather sections more than articles when compared to the others; still, it is 30 sections); France, 89 (we are becoming reasonable, which is a new thing in French history, as you know); Spain, 169; Germany, around 141 (I had doubt in my sources); Poland, 243; and Portugal, possible as a military balance precaution, 288.

The greater the number of articles, the greater the number of fields in which constitutional provisions must face technological, scientific, social, cultural, or legal changes, the greater the demand for amendments or modifications.

The excessive difficulty of amending a constitution can constitute a blockage, continuing to call for hard constraint when a provision appears obsolete. Now, 45 years old, the French constitution has been modified nine times. Some people consider it has been modified a bit too often. Modification is an attempt to get to majesty of the constitution. Anyway, at least it has shown a great flexibility. In Spain, it has been absolutely impossible in some thirty years to modify the constitution, which probably, ladies and gentlemen, is dangerous for the future.

The American situation is a very interesting case. Any revision of the constitution needs two-thirds of the votes in both federal assemblies, plus the majority in three-quarters of the chambers of all fifty states. In practice, these conditions are now very difficult, if not quasi-impossible, to be fulfilled. But in truth, the number of states has increased; the complexity has increased. But in two centuries, 27 amendments have been adopted, many in the first thirty years. In the future, some blockages could occur, especially in the field of territorial administration, territorial authorities. But fortunately, let us rejoice, the American constitution is short and obscure!

At this stage, things are clear. No constitutional system can be implemented without some elements of hard constraint around its most decisive provisions. But on the whole, in the aim of protecting the general spirit of a democratic political system in a given society with history, conflicts, and divisions, it is the flexibility, the adaptability, and the soft character of the constraint that characterizes it, which permits a constitution to last a long time. Inside the socially endorsed limits of constitutional authority, hard constraint is accepted and sometime needed. Outside, it brooks outside its limits, only consensus or

force. Only consensus permits change, and consensus can emerge only thanks to soft constraint.

### Contemporary Developments

Contemporary developments, though contradictory in many ways, show a diminishing confidence in constraining law and a growing demand for contracts, self-fulfilling obligations, and nonconstraining agreements. It is particularly visible in the international negotiations and world governance, but this kind of preoccupation appears here or there in matters such as road safety, [where there is] more prevention and information and less controls and sanctions; or public medical insurance, [where there is] more responsibility for the doctors and fewer financial controls. We all discuss these balances. There are, in state-management doctrines, a growing interest in incentives and deterrents rather than orders and prohibitions. In the matter of constitutions, the fact of soft constraint is a better instrument for evolution than hard constraint, prompts reflection on how to diminish still further the degree of hard constraint that remains.

The fact is, remember that people like Jean-Jacques Rousseau or Karl Marx both have described in detail their conception of humanity, according to which violence is of artificial, social origin. Thinkers for whom the human person is good by nature—aren't you, am I?—and transformed into a violent being by social and economic institutions and practices, those persons are in fact very numerous. And this was one of the dreams of a social organization without hard constraint of any sort.

Monetarist economists generally lend their support to this conception. If one concedes that economic principles are the dominating paradigms about which modern societies can be built—which I do not concede, but if one concedes—then market behaviors have to be encouraged not only for reasons of efficiency, which are true reasons, but also because they yield the straight, the best possible social attitude. And we undoubtedly observe in world economic and financial governance, a very strong and still-growing tendency to solve problems through the negotiation of nonconstraining agreements. Contracts, more and more, are considered as substitutes for norms.

In a way, this development can be considered a philosophical step forward. Humanity becoming more and more cultured, educated, and responsible can more and more rely on its own moral resources to regulate collective life without a permanent big stick. I shall not even try to deny that something of the kind can be observed in the most advanced developed countries. Social life, it is true, is most likely much less cruel in present North America and Europe than it was two centuries ago, we all agree. But I think it necessary to conclude with a strong expression of my disagreement with all this vision for two reasons.

The first is philosophical and concerns human nature. I do not know if the Creator underestimated or misconceived his product. I don't know. But I am sure that the capacity for evil is a constitutive part of any human being and will remain so. Social institutions have among their tasks to protect humanity against these defects, and this needs a significant use of hard constraints.

My second reason has its roots in the major changes that mankind has witnessed since the middle of the twentieth century. Before this period, resources seemed to be unlimited, nature seemed to be untouchable in its eternal purity, and every human community, call it national community, could organize its own internal peace and security while rejecting outside the borders the other, the enemy, the barbarian.

And suddenly, because in historical terms this is awfully fast, we discover that we now have to take care of limited resources, that we can pollute dangerously for our grandchildren, and that we have to look after our ecological home. Furthermore, since the end of the Cold War, nations have no more national enemies. There is, ladies and gentlemen, no exterior in which we can reject the enemy, the other, the strange, the barbarian. Mankind has now no greater enemy than its own internal barbarism. I don't think these new challenges will be managed peacefully.

And then my question is, in this situation, does mankind not need a larger measure of hard constraint included in the constitution than is generally accepted, subject naturally, to the conditions of a real collective management of our world destiny? Thank you very much.

## **Do Constitutions Constrain? October 16, 2003**

### **Antanas Mockus Sivickas, Mayor of Bogotá, Colombia Legal, Moral, and Cultural Self-Bindings to Prevent Shortcuts**

#### **Different Kinds of Bindings**

**Antanas Mockus Sivickas:** I wish to express my gratitude to Columbia University and to Professor John Elster for inviting me to participate in this forum. The short title of my presentation is "Do Constitutions Constrain: Self-Bindings to Prevent Shortcuts." The longer one is "Legal, Moral, and Cultural Self-Bindings to Prevent Shortcuts." I will present and discuss the relationship between the Colombian constitution and my personal work as mayor of Bogotá, taking into account the results of my research on the peaceful coexistence of youngsters in Bogotá. I will refer to the relationship between the constitution and the construction of moral and cultural self-bindings. I will argue that such bindings,

along with legal ones, helps to prevent what I will call *shortcut culture*—the privilege of shortcuts, or of short-term results, blindness about long-term consequences, and about consequences for people that are different from us.

First, I will present the three main regulation systems that help to prevent shortcut culture.

The first regulation system is the legal system, which includes constitutions, and this I will call, following Douglass North, formal rules. The second regulation system is morale, that is to say ethical behavior, while the third regulation system is culture, which is in part composed of social norms. Both morale and culture are informal rules. There is an additional contention system that I call agreements, which consists of particular arrangements between individuals. The latter frequently helps also to avoid opportunities and create rationality, create persecution of objectives by subjects. Individuals obey these three regulation systems and honor agreements either on good terms or on bad terms.

When Colombians are asked to determine which of these mechanisms most regulate their behavior, they usually say that moral principles (the second column) are what most regulate them, whereas the law is what regulates other people. And also they say that they understand norms on good terms, whereas other people understand norms only on bad terms, that is to say through fear and punishments. Conscience for me, law for you. Good terms for me, bad terms for you. Strong asymmetry.

### **Law, Morale, and Culture**

Usually discussions about the rule of law consider its enforcement only through the threat of legal punishment. In this regard, I remember something I heard from a Colombian philosopher in the seventies who said, "If one does not want to have a society full of jails and prisoners, one has to face strong feelings of guilt." Now, I know that social norms can also promote compliance with the law, and that a series of positive mechanisms can support obedience of moral principles and social norms. This model of law, morale, and culture is useful to deal with the problems that arise when the regulation systems diverge; that is, when they contradict each other.

These four columns can be read as means of self-binding. Below can be understood as a means of self-binding to democratic procedures, at least in democratic societies, of course. Moreover, morale can be understood as a means of self-binding to the construction of personal identity or of personal moral principles. Additionally, culture can be understood as a means of self-binding that results from a sense of belonging to a specific group. It is a sort of collective self-binding or implicit mutual binding based on shared identity.

Finally, agreements are clearly self-bindings and mutual bindings through the free decision of the parts. The latter bindings may help to attain ethical consistency, and to avoid opportunistic behavior. Let me know if I'm not consistent; it's one of the rules.

All of these agreements can be subject to change. In this sense they can be very versatile. The parts involved in an agreement, for example, can willingly introduce transformation, or make modifications to the agreement. Sometimes agreements include conditions and procedures to either make such modifications easier, or to make them more difficult.

The most interesting aspect of the question about self-bindings and mutual bindings is that the constitutional self-binding appears to be the most stable. Perhaps in reality, the cultural self-binding—the identity binding—is more stable. But in the first instance we can think about constitutions as the most stable self-binding—the most difficult to transform. However, constitutions do establish procedures to make amendments within their framework. Individuals or communities can attempt to transform the [constitutional order] through democratic procedures.

On the second column, in a post-Nietzschean perspective for example, individuals can freely transform morale. Or from more Kantian perspectives, at least they can engage in moral development. In this regard, some schools of ethics consider that there is a sort of universal path for moral development. An example of this is the work of Lawrence Kohlberg. Other theories of ethics are more relativistic or realistic. Moreover, the discussion of moral dilemmas, as we are promoting it in schools in Bogotá, can be helpful for example to stimulate moral development. But in democratic constitutions there is a very wide margin for moral pluralism.

Culture can also be transformed, and in fact it generally is, through spontaneous cultural change, often in unpredictable directions. More importantly, I believe culture can be transformed at least on very specific issues through collective processes such as the civic culture program implemented in Bogotá from 1995–97 and from 2001–03.

### **Harmony or Divorce**

The obedience of formal rules and to formal rules, and the coherence between these two kinds of rules reduce the cost of making agreements; that's the Douglass North thesis. If we accept this frame of ideas we can differentiate between types of behavior that are legally approved, and those that are not, outside the rectangle, the illegal. In a society where there is harmony between culture and law, culturally accepted behavior is part of legally approved behavior. Thus, merely behaving according to what is culturally accepted will immediately lead to uphold the law. And as you can see in this diagram of harmony between

law, morale, and culture, morale is, in the case of the harmony, more demanding than both cultural and legal norms.

Consequently, merely by being morally correct, one is behaving according to the legal regulations. This can help one understand why people obey laws without having, in a lot of cases, a concrete or detailed knowledge of them. But the harmony of law, morale, and culture is an ideal case. It allows for pluralism because both the culturally and morally accepted behavior can vary from one group to another, from one person to another.

The other case is when there is a divorce between law, morale, and culture. In this situation, certain types of legal behavior are culturally accepted and sometimes even morally justified, setting the conditions for corruption and violence. This is especially problematic when instead of being isolated from society, illegal behavior is accepted by an individual's morale, and a group's internal cultural rules.

The divorce of law, morale, and culture becomes apparent at three different levels. The divorce can take place concretely in behavior, regarding behavior. This happens when people engage in illegal activities that a certain community approves and which individuals deem morally acceptable. The divorce can also take place at the level of justifications. For example, when people behave according to the law, but justify either other's illegal behavior in actual situations, or their own in hypothetical ones. Finally, on a third level, the divorce of the systems can become visible in the inconsistency of bindings. A person can make a commitment to follow the constitution and the law, and at the same time make illegal, explicit agreements, for example with a political group, or implicit commitments to the group's rules. Even if the person does not have concrete conflicts after doing this, in that moment, he has made two bindings—one legal and one by agreement, or one legal and one cultural—that are not compatible.

### **Initiatives in Bogotá**

The following are some examples of programs carried out by the city government in Bogotá for the harmonization of law, morale, and culture. They have all promoted moral and cultural self-bindings, and mutual bindings.

One example: recently we have applied this model in a legal text. It may seem strange to create a legal text with cultural and moral prescriptions, but this is precisely the case of the new police code of Bogotá. The code supports specific types of behavior that promote coexistence. These are constitutional and legal bindings, which correspond to minimum legal requirements. For example, every hospital in the city has the legal obligation of giving medical attention to an injured person. The failure to comply with these norms may lead to penalties such as fines. On the other hand, the code includes duties that are basically moral and cultural self-bindings that entail maximum ethical obligations. One of

these general duties is to help victims and cooperate with the authorities in an emergency. Not fulfilling such duties does not lead to legal punishments. In this sense the code is an invitation to adopt higher ethical standards than those required by the law.

We have also made efforts to promote self-binding in different institutions and city companies to what we have called *probity pacts*. Probity pacts are public commitments to prevent corruption. These are public statements on the adoption of certain rules. Although these rules are frequently legal norms, the parties involved explicitly and publicly on the rights of such regulations. Probity pacts promote moral and cultural self-binding, regarding the constitutional principle of transparency in public administration. Employees are sometimes not very happy or have to underwrite exclusively the following of the rule in the face of a specific contract process. They say, I always do so. It doesn't matter, please, undersign in the face of other people. This is underwriting the law.

Another attempt to enact on legal, cultural, and moral bindings was carried out by means of the program *110 % with Bogotá*. Last year over 63,000 and this year over 46,000 families and/or companies have paid an extra 10 percent over the legal tax. By participating in this initiative, citizens explicitly commit to the city's development and to social inclusion to the democratic and redistributive mechanism of taxation. Such moral and cultural bindings are based on the constitutional principle of solidarity.

In my opinion, the civic-culture program in Bogotá has had a strong constitutional foundation. During inauguration day, the mayor of Bogotá, as with any other public officer, begins his term in office by making an oath to obey and to make others obey the constitution and the law. In this context, my approach regarding the problem of law enforcement has been to promote a pedagogical form of enforcement. I assume this approach in order to fulfill my commitment of achieving greater compliancy with the law. Specifically this is an explicit and open intervention on moral and on cultural references when they are not consistent with legal dispositions. One of the ways to make the rule of the law effective is by changing such cultural or moral preference. On the other side, all constitutions that I know protect moral pluralism and cultural pluralism, so there is a strong tension between the mandates of enforcement and the respect of diversity. The diversity does not allow a place for corruption or for violence.

### **Finding the Antidote to Anomy**

The work on the divorce between law, morale, and culture led me to study the behavior of youngsters and specifically how they justify violent behavior and how they justify the violation of legal dispositions. The main hypothesis of this research is the recognition of what I call shortcut culture. We Colombians pride ourselves in being very ingenious and corrective, and in being able to get out of specific problems with great ease through our own capacities. This ability for

innovation frequently leads to generate costly consequences or to affect other people in undesirable ways. I define shortcut culture, the social acceptance and even promotion of actions that are primarily aimed at obtaining immediate results. Without taking into account future costs or negative effects on socially or culturally distant individuals or communities. It implies a sort of difficulty to foresee consequences and to have consideration for those who are distant and different.

One could explain shortcut culture in the following way—according to Jon Elster's work in social sciences—first as the result of high discount rates when applied to future consequences. Also as an inability to project, what is a kind of shortsightedness. Moreover, certain emotions can also induce people to take short cuts. Here, for example, can make people disregard consequences and only focus on the problem at hand. This is sometimes the case with issues related to personal security. Shortcut culture can also be reinforced by certain social norms such as those of machismo, in which revenge is an imperative in certain situations. And another mechanism, which is perhaps the basis of shortcut culture, is that of unrestricted rationality, in which case the individual's optimization of results is not sufficiently controlled, neither by law, by morale, by culture, or by agreements.

In the research on coexistence of youngsters we were able to identify the manifestation of shortcut culture in relation to the law. We call this *anomy* in the sense that this inspired by some of the Robert Merton's writings. Anomy is defined as the pursuit of goals—frequently good goals—through unrestricted methods. Having conversation with corrupted leaders or with criminals, a lot of times you can find that they have good goals. This unrestricted pursuit of objectives is empirically associated with practical and cultural justifications for breaking the law. The typical responses of the youngsters classified as anomic were, I quote, "I justify breaking the law when it is a way to obtain great economic profit. Or when it is the only way to reach a goal. Or when it is socially accepted. Or when others who disobey obtain results."

In the empirical research we did a sample of youngsters, we also found that the antidote of anomy is the capacity to reach honor and specifically repair or mend agreements. Non-anomics are people able to mend agreements. Youngsters with this capacity have a low probability of justifying disobedience of the law, and of using violence to respond to violence or of taking justice into their own hands.

### **Clientelism and Violence**

I will illustrate two kinds of shortcuts in strategic interaction: clientelism, which is a sort of political patronage, and violence. In both of my terms as mayor, I have had to deal with these types of shortcuts.

Clientelism is the tendency to make appointments to government jobs and contracts for economical or political advantage. This is the use of public resources to make private favors in exchange for political support or particular decisions. Violence is the threat to use or the effective use of force in order to achieve a goal or to communicate a message.

Violence is clearly a shortcut in the face of nonviolent methods. In the Colombian context, people very rarely make the effort to build a threat-free relationship and reach a peaceful agreement. People do not negotiate with the benefits of agreements in mind, but rather they search for a mechanism to have the possibility of making threats or of harming others. This sort of relationship is doomed, because none of the parts communicate with each other and they just interact by means of threats or by harming others, resulting in a precarious equilibrium.

Now I would like to refer to some of the bindings against clientelism. Our initiatives in this matter were partially based on an approach akin to that of Jurgen Habermas. Through a team commitment, we decided to base the relationship between the mayor's office and the city council on deliberation rather than on any form of improper negotiation.

The Colombian constitution binds strongly against clienteles on the national level. I quote: "Congress must not interfere, neither by law nor by resolutions, in issues that are of the exclusive competence of other authorities." The same statement, with a small but very important modification, is made in the special law that orders Bogotá institutions. This is a law that has a constitutional basis, a constitutional status. This law, sanctioned in 1993, prohibits the council to interfere in any way, not only by decree or by resolution, in any way in issues that are of the exclusive competence of other authorities. Accordingly, city council members were completely excluded from the boards of city companies, and furthermore, the very powerful contracting board of which they were members was abolished. These are the legal bindings. In clientelistic culture, legal restrictions are commonly used to increase the value of complicity at the moment of violating the binding. In Colombia, the stronger the rules against clientelism get, the stronger the complicity among those engaged in clientelism becomes. This could be seen as a kind of perverse social capital. Clientelism is legally prohibited, but widely accepted in our culture. This is a very clear case of divorce between law and culture.

### **Proactive Self-Bindings**

In relation to these rules, I have made personal and collective self-bindings by public declarations. The second time I ran for mayor, I made this kind of statement along with all other candidates. It was a mutual binding and a public commitment to establish a transparent relationship with the council and no negotiation under the demands and pressures of clientelism. Similar public

commitments against clientelism have also been included in the current development plan. This is like saying the law establishes this restriction, but I commit explicitly with this legal obligation.

We have also made self-bindings against the shortcut of violence. The constitutional bindings in this matter are very clear. "The right to life is inviolable." That's a quotation. Consequently, there is no death penalty in Colombia. The enforcement of the law and the use of weapons must be exercised, with some exceptions, exclusively by the state. Colombia bound itself in the year 2000 to the Rome Statute, and we have worked in a similar resistance campaign, inviting people to make personal precommitments against extortion, against kidnapping, against vengeance, and against private justice. We have also carried out initiatives for the cultural enforcement of the legal obligation to inform authorities on criminal activity and specially on possible terrorist actions. We tried to change the social stigma that exists in our society against informers. It's not easy. *Croactivity* instead of rat or snitch or frog, as it is called in Colombia, was one of the central ideas. *Croactivity*—because the frog goes “croak croak”—is to be proactive with communication.

### **Fighting Shortcut Culture**

The kind of work we have done can perhaps be well illustrated by one particular example of shortcut culture, not in the strategic field—jaywalking. This is in everyday life. In Bogotá about four hundred pedestrians per year are killed in traffic accidents. When people jaywalk, they literally take a life-threatening shortcut. We have been trying to build moral and social bindings against jaywalking. In 1994, we put into effect an initiative that involved the pedagogical guidance of mimes on the streets. They couldn't put fines, they just could instruct people. This year we have marked by means of stars with a question mark inside, the places where pedestrians have died as a result of traffic accidents. There are nearly 1,500 stars on the places where people died during the last four years. These stars appeal to the citizen's conscience and they promote mutual regulation. This is how the thing looks on the street. It is about 3 feet long.

Now I would like to comment on some actions the city government has put into effect as part of the city culture programs, which are also related to the fight against shortcut culture. We have worked on the idea that civilians should not carry firearms, guns. Not even with a legal permit. When the ministry of defense withdrew its support for the major initiative to suspend fire-gun permits, an invitation to voluntary disarmament was made with support of Catholic Church. This disarmament can be understood as a unilateral and unconditional moral self-binding. It is an attempt to encourage the protection of life beyond what is established in the law. In this context, we also promoted the idea that private justice or the private use of violence is not valued or acceptable under any circumstance.

Furthermore, we put into effect our restriction on alcohol consumption. In the city it was culturally accepted to spend the whole night drinking or to stay up in parties and celebrations until three o'clock in the morning without taking the necessary precautions to drive safely. We prohibited the sale of alcohol and its consumption in public places after one o'clock in the morning. This law was put into effect for six and a half years. Recently, the mayor's office established the "optimistic hour," moving the restriction from one to three in the morning as an appeal for self-regulation, that is, for an opportune selection of safe behaviors. The combination of legal, moral, and cultural bindings has been effective in modifying people's drunk-driving habits. We have a very good information system that reports every month if this change has had bad consequences.

On another matter, we prohibited the use of fireworks by nonprofessionals. In this case there was an evident conflict between the widespread custom of using fireworks on Christmas, holidays, and the constitutional protection of life and the physical integrity of children. That's one of three or four cases where I made a decree just invoking constitution without having a regulametary law between constitution and my decision. Through campaigns showing the consequences of firework use, the city government stimulated moral and social support of the prohibition, achieving a substantial decrease of this custom and a 70 percent reduction of children injured by fireworks, from 204 in 1994 to 61 in 2002.

A final example is the city government's initiative for the respect of public urban spaces. In Bogotá the occupation of public spaces by informal commerce, fences, uncontrolled parking on sidewalks, etcetera, was an alarmingly frequent practice. The city government has managed to recover such spaces through construction and renovation efforts, but also by means of pedagogical strategies aimed at rising citizen awareness, by stimulating self-regulation and mutual-regulation mechanisms to achieve moral and conscious support of the law.

Two of the most outstanding achievements of Bogotá in the past years are related to the protection of life. On the one hand, there was a significant homicide reduction from 4,452 homicides in 1993 to 1,902 in 2002. On the other hand, fatalities in traffic accidents also descended.

### **Constitutions Bind, But Also Guide**

Clearly my work has found a great deal of support and guidance in the constitutional imperatives of protecting life and of protecting the independence between the branches of the state. However, I must also acknowledge the fact that I have stumbled into constitutional restrictions. For example, when we were organizing the first Woman's Night Out, we wanted to impose a curfew on men, partly to show that violence is gender related, but this violated individual rights. During the Christmas holidays in 1996, in order to prevent the use of firearms, I decided to declare the whole city the sight of public performances because in public performances, the mayor has the power to restrict firearms. I was legally

crushed on this decision by the chief of the armed forces in the courts, but fortunately I had other means of limiting the bearing of firearms during this festivities. In another example of how constitutions can restrict government action, the Colombian constitutional court banned anti-kidnapping laws to defend the individual right to life, and presumably through the same line of reasoning it would also ban anti-kidnapping precommitments—commitments of not paying ransom, for example. In this sense, we believe individual or group commitments to immobilize bank accounts and properties in case of being kidnapped would be probably invalidated by the constitutional court.

To sum up, I would say that constitutions bind, but they also guide and support very strongly governance, even if effecting cultural regulations or moral corporations that have constitutional protection. Thank you.

## **Do Constitutions Constrain? October 16, 2003**

**Adam Przeworski, Department of Politics, New York University**

### **Constitutions Regulate Future Conditions**

**Adam Przeworski:** The question before us is, do constitutions constrain? And I will take this question very literally, as a question about facts. Do they? My answer will come in two parts: First, it's obvious that at some times, they do not. Two, it is very hard to tell whether and when they do. I don't know whether the question had an immediate political inspiration, but it's apparent that the Bush administration is doing today things that, regardless of what the courts may be saying currently, would have been widely considered as unconstitutional before September 11.

More generally, constitutions are documents that are written under some historical conditions to regulate actions of government under future conditions. When these future conditions depart far from anticipations, constitutions either bend or break. But this is going to be a topic of discussion this afternoon I know, and I will say nothing more about conditions under which constitutions do not constrain.

I will focus on the other aspect of the question: How to tell if they do and when they do? Let me rush to admit that our intuitions tell us that sometimes they do, that constitutions prevent governments from doing what they would have otherwise done or induce them to do what otherwise they would not have done. But how can we know what governments would or would not have done if not for the constitution? That question entails counterfactuals, and counterfactuals, as logicians tell us, are dubious devices.

As you see, I found a way to evade the question by turning it into a methodological one. But this is an issue that has practical, policy consequences. It's an issue where actions based on unfounded beliefs may have disastrous consequences. Particularly now, when the U.S. government is engaged in wholesale institutional engineering in faraway lands, skepticism and prudence are in order.

### **Constitutional Legacies**

When the U.S. occupying forces left Japan and Germany after World War II, they left behind them democratic constitutions. These constitutions were somewhat adopted in both countries. They took roots, and until today, they continue to regulate the political life of these countries. When the U.S. occupying forces departed from Haiti in 1934, they left as their legacy a democratic constitution, authored by the U.S. assistant secretary of the Navy, who was none other than Franklin D. Roosevelt. Yet this constitution did not prevent President Vincent from becoming an absolute despot one year later.

One way to think of the question before us is thus, what kinds of constitutions constrain, by which I mean function, work, structure political life, under what conditions? To shake some of your faith in institutions, imagine the talk that you would have heard if we were celebrating only the 225th rather than the 250th of this august university, 25 years ago. Institutions are epiphenomenal you would have been told. They are a phenomenon that in the dictionary definition, quote, "occurs with and seems to result from another." Political institutions can, at most, organize power that lies elsewhere, in the relations of military force, in the economy, in the control of mass media. One cannot stop a coup d'état by an article in the constitution—any article in the constitution.

### **The Distribution of Power**

Suppose we are playing basketball. There are two teams, perfectly universalistic rules, and an impartial referee to administer them. But one team consists of players the height of Jon Elster, and the other one of people like me. The outcome of the game will be determined. Note the rules of the game are universalistic, they treat everyone equally, but this only means that the outcome determines on the resources people bring to the game, brute, preinstitutional power. If the rich can buy elections, democracy will serve the rich, you will have been told. You may retort, we could change the rules. Say lower the height of one of the baskets and equalize chances. But if the Elsters are the ones who decide what the height of the basket should be, if the people who have brute power are the ones who mold the institutions, they will never agree to it. After all, we can go back to Rousseau for this observation: institutions are established in a society that has some power relations, and they must reflect the distribution of

this power. Otherwise, they will not be respected. In the political science jargon, they will not be self-enforcing.

This is a speech you will have heard 25 years ago. Let me now give you a speech you hear over and over today.

### **Institutional Engineering**

Institutions matter, we're told. Institutions shape incentive, buy us information, generate expectations, induce norms. This is what students read in textbooks. The problem with Ecuador is that it does not have independent judiciary. This is what you're going to read in documents of the World Bank or the United Nations Development Program. Install independent judiciary, establish clear property rights, instigate the rule of law, create independent central banks, reduce regulation, and manna will fall from heaven. In the language of Washington consensus, this is called the third stage of reforms.

Indeed, the new passion, not only of the U.S. government but also many intergovernmental organizations is institutional engineering. Everybody wants to condition aid overseas, assistance on "good" governance as it's called in the bureaucracies. Either you do as your political institutions book will tell you to do, or else you will get no assistance. Moneys given to countries with bad governance are wasted, the argument goes. Countries should first reform their institutions and then they may get financial support for their development.

But somewhere in this peon to institutions you will still hear that institutions are indulging us, meaning that only some institutional arrangements can function effectively under particular historical conditions. And here lies the crux of the difficulty. If different institutions are possible only under different conditions, how can we tell whether what matters are institutions or the conditions under which they function? I'm always suspicious of the boxes in which the World Bank or the UNDP highlight the exceptional successes of the policies they advocate.

I suspect that these successes were exceptional because the circumstances were exceptional. Otherwise we would not see boxes but tables or graphs.

### **Choosing the Government by Elections**

To give you the flavor of what is involved, let me plunge into some examples. I will focus on one particular institution, choosing the government by elections. The question I want to analyze as an illustration of the general theme is, when do political parties obey the results of elections? The story goes back to Herodotus. If all men are equally strong and equally armed, Herodotus thought, then the reading of votes tells everyone what would happen if things came to blows. A group of men gathered on top of a hill shout approval of particular candidates or policies and everyone can hear which group is larger and therefore stronger. Or if

you wish, we count secret ballots, chads and all, and one party obtains a majority of votes. The winners move into the White House, pink house, blue house, perhaps even a palace, and the losers go home. Now why do the losers go home? Why don't they storm the palace? Is it because the constitution says that whoever obtains the majority should move in and whoever does not should go home? Or is it because the losers know that they will be beaten had they tried to move in? Does the constitution constrain the losers, or do they accept the verdict of the polls only because they are weaker?

Centuries later, after Herodotus, Condorcet, while interpreting voting in modern times as a reading of reason, observed that, quote, "When the practice of submitting all individuals to the will of the greatest number introduced itself into societies and when people accepted to regard the decision of the plurality as the will of all, they did not adopt this method as means to avoid errors and to conduct themselves on the basis of decisions based on truth, but they found that for the good of peace and general welfare, it was necessary to place authority where the force was."

But is voting today a reading of reason? Men are no longer equally armed as they were in Herodotus' time. Arms are controlled by specialized bureaucracies, hence votes no longer provide a reading of what would happen if a violent conflict were to erupt. But let's think generically. In general, what happens in elections? There are parties. People vote. Somebody is declared the winner according to rules. And the winners and the losers are instructed what to do and what not to do by some other rules. This is what a constitution is, a bunch of such rules.

The winners and the losers are instructed by such rules, but the losers we already know may still think that they would succeed in storming the palace. In turn, the winners may think that they could reside in it forever without submitting themselves to the risky venture of elections. Hence our question stands, why do the winners and the losers behave in a way that's consistent with the rules? Are they obeying the rules? Or are they doing what they would have done even if there were no such rules?

### **Compliance in Rich and Poor Countries**

Let me bring a piece of historical information: In rich countries, both the winners and the losers always obey the results of elections. No democracy ever fell in a country with a per capita income higher than that of Argentina in 1975, which was about \$6,000. This is a historical fact, given that 35 democracies spent more than one thousand years under more affluent conditions and not one died. Affluent democracies survived wars, riots, scandals, economic and governmental crises, hell or high water. Yet at the same time, about seventy democracies collapsed in poorer countries. Moreover the poorer the country, the less likely it is that the losers or the winners will obey the results of elections.

Let me give you some stories: There was an election in Costa Rica in 1848, when that country had per capita income of about \$1,500. The election was technically tight. The two candidates received almost the same number of votes. And there were widespread allegations of fraud, so that it was impossible to determine who in fact did win. It was not clear who should decide. But the congress took it upon itself to declare as the winner the candidate who officially received somewhat fewer votes. A civil war ensued. About three thousand people were killed, and the forces opposed to the declared winner prevailed.

At another time, there was an election in another country. The election was technically tied, the two candidates received almost the same number of votes, and there were widespread allegations of fraud, so it was impossible to determine who in fact did win. It was not clear who should decide, but a court appointed, in part by one of the candidate's father, took it upon itself to declare as the winner the candidate who officially received somewhat fewer votes. Then everybody went home in their SUVs to cultivate their gardens. They had SUVs and gardens, because this country had per capita income of about \$20,000. Whatever the reason for compliance, these facts tell us that political parties obey if the country is rich, while they may or may not if it's poor.

Note that the institutions, at least at some level of abstraction, were the same in the two countries. There were elections, winners were supposed to be those who won a majority of votes, there was a congress and a court, either of which could have picked the winner in case of a draw. What was different were the conditions, \$1,500 in one country, \$20,000 in the other. I am led to conclude therefore, that what mattered here were conditions, not institutions.

If a country is wealthier than Argentina was in 1975, all kinds of constitutions will be obeyed, whether the system is presidential or parliamentary, federal or unitary, uni- or bicameral with proportional representation and first past the post. In wealthy countries, winners and losers behave as if they were behaving their instructions, and if we observe that people behave in ways consistent with the instructions inherent in the constitution, we just cannot tell whether they're doing it because they are obeying the rules, or because they would be doing it whatever the rules. We only have one observation, and two rival stories to explain it.

### **The Role of Democratic Institutions**

But as I announced, I don't want to argue that constitutions do not matter, only that sometimes it's hard [to tell] whether they do. So let me focus on poorer countries, where political parties sometimes obey the results of elections, and at times, do not. By focusing on these situations I hope to highlight what I think is the essential role of democratic institutions.

Suppose a party lost an election and now it contemplates whether to obey the verdict or to storm the palace. Suppose further that the loser sees almost no chance of winning in the future. Under democracy, these losers are condemned forever to remain losers, whatever that designation entails. Then they may be tempted to say if we can never win under these rules, these rules are bad and we will not obey them. In turn, suppose that the losers think that even though they lost this time, they are quite likely to win the next time around. Then they will conclude that even if they have to wait for a few years, and even if waiting is unpleasant, fighting with all its risks is not worth it, and that wait they should.

This is what democracy can do. It can enable losers to wait. Open intertemporal and intertemporal perspective to political conflict. It's not voting or participating otherwise that matters here, but the sheer possibility that you may be among the winners next time around. To stress the point, let me draw a caricature. Suppose that instead of voting we would decide who will govern by flipping a coin. Note that when we flip coins, we sever the relation of accountability between governments and voters. Whether the incumbents are reelected does not depend on their performance. Yet the very prospect of alternation in office may be sufficient to induce the current losers to wait for their turn.

Now, you may say that the chances of winning depend on conditions. Say on the structure of ethnic cleavages. An ethnic minority, as John Stewart Mill observed, will always have a low chance to win under the majority rule. Hence again, in the end, it's conditions rather than institutions that matter. And if you said that, you'd be right. Democracy is less likely to survive in poorer societies if they are ethnically divided. But we can tweak, we can manipulate the electoral system in such a way as to place ethnic minorities on the winning side from time to time.

Lani Guinier tells a story in which her, I think, 5-year-old son reported that three kids on the playground wanted to play baseball, while two wanted to play basketball. So he played baseball, she surmised. No, first we played baseball, and then basketball, her son replied. When people behave according to rules, they behave according to particular rules. In some countries, they may, they vote for one candidate. In another country, they may vote for five. Now it may be that an ethnic minority would obey if it has a chance to vote for multiple candidates under proportional representation system, but it would not obey if it could vote only for one, first past the post. This is at least what some political scientists think. My point is that if, but only if, different institutions can function under the same conditions, institutions can possibly matter.

### **Conclusion**

Since I'm afraid that you may think that I'm splitting hairs, let me conclude. Thirty years ago, a British philosopher, Alasdair MacIntyre published an essay entitled "Is the Science of Comparative Politics Possible?" A question to which, for some of the reasons I outlined today, he responded with a resounding *no!* I must admit

that when I read it for the first time, I treated this essay as an obscurantist salvo. But in the past few years, I was invited by some intergovernmental organizations and some nongovernmental organizations to assist them in their efforts at institutional engineering, and as I read about the impact of political institutions I was struck by how little robust reliable knowledge we have. I was forced to ask MacIntyre's question: Is it that we do not know yet, just because our knowledge is fragmentary, and our methods imperfect? Or is it because some answers are unknowable, unknowable because it's impossible to sort out the impact of institutions from the impact of conditions under which we observe them?

My answer is hesitant. I'm willing to believe that where history was kind enough to have generated different institutions under the same conditions, we will know more and we will know better. But history may deviously generate different institutions under different conditions, and this would make our task next to impossible.

Hence, to go back to practical issues, with which I began, we need to be skeptical about our beliefs in the power of institutions, and we need to be prudent in our actions. Projects of institutional reform must take as their point of departure the actual conditions, not blueprints, based on institutions that have been successful elsewhere. As the former Brazilian Minister of Federal Administration and Reform of the State Luis Carlos Bresser Pereira remarked, institutions can at most be imported, but never exported.

## **Do Constitutions Constrain?** **October 16, 2003**

### **Panel Response and Discussion**

#### **Introduction by Jon Elster**

Welcome back. We are ready for the second part of this session with comment by three discussants, a free-for-all among speakers and discussants, and if there is time, which I hope, questions from the audience. I received about a dozen, perhaps fifteen questions, I think some of them can be grouped together, and I'll just select those that seem to me to be the most focused, relative to the presentations of the speakers.

There has been a slight change in order of the discussants. The first discussant will be John Ferejohn, professor of political science and fellow of the Hoover Institution at Stanford University. The second will be Bernard Manin, professor at NYU in the politics department, and at the Coalition Politic in Paris, and the third will be my colleague from Columbia, Jeremy Waldron at the law school. John?

## Comments by John Ferejohn

Thank you. I'm very happy to be here and I very much enjoyed the morning's presentations. If you weren't there, they were very stimulating papers. And it's unusual and a pleasure to have people who come at a topic like this from very different experiences and I think, to some extent, those experiences are reflected in what was spoken about. And I think it will help us think about, you know, why they're taking views, different views, on the question of whether constitutions constrain.

As you might expect, Adam Przeworski's perspective is at least partially a methodological perspective, how could we tell if they did or not? And it's motivated by doubts that they could be constraining in all circumstances and, of course, we're living through a period now when it's doubtful that at least some of the practices of the current administration are being very constrained by our constitution. Mayor Mockus' perspective seems to be more driven by sort of, I would say, the phenomenon of office, of leadership in some ways. That is, he's dealing with a constitutional system that has what I'll talk about later using Prime Minister Rocard's vocabulary—hard or soft constraints. So there's sometimes resources for achieving change that he wants, that he sees as a desirable thing, but they also pose constraints, and I think that's a different perspective, and it's one in which he can feel available to you in action, you know, what might be resisting or helping you in your project. And then, Prime Minister Rocard has not been prime minister for a while, so he takes the perspective of a constitutional designer, I would say. That is, one who is comparing broadly among different kinds of constitutions and their properties and so it's sort of an old, I would say, a scholarly view and a comparative view about constitutions, and it's a somewhat different perspective.

And I guess what I want to do is to really explore a couple of the issues that seem to me to come up across the papers even as they were discussing different vocabularies as a way to open up some issues for further discussion. And the first one that I wanted to talk about was this issue that Prime Minister Rocard talked about, about hard versus soft constraints. And I found this a very interesting way to think about constitutions and I think it's an interesting way more generally to think about law. I think what he means by *hard* is a constraint which is either enforced with punishments effectively, or threats of punishment. And that could happen through legal institutions or it could happen militarily through the application of force. And I think what he means by *soft*, is everything else that is nevertheless a constraint. So this seems like an interesting category, and I would say to begin with that. And it applies, I think, as well to ordinary law as it does to constitutions, and I think when you think about hard and soft with respect to ordinary law in addition to constitutions, it raises some issues that weren't addressed so much.

Second, there's a question of what actually counts as a soft constraint and how that bears on other issues that Prime Minister Rocard talked about, which is the issue of, for example, a written-ness of a constitution or non-written-ness. And he gave an example of Great Britain having an unwritten constitution and therefore having no sections I guess or articles, and contrasted it with the American constitution, the German constitution, and the French constitution, which had more than that. And I would say, but listening to the rest of his talk, there was reason to think that all of these constitutions, in addition to the British, have probably what are best understood as unwritten components that are at some points very important. An example of that might be to think about what it is that constitutes executive authority in the United States. I mean we have a very short article in the constitution, Article II, which says what the executive power is and who holds it. And it is exemplary in the sense that the prime minister gave of being short and obscure; that is, it invests the executive power in the president, and it says he should take care to execute the laws of the constitution, and a couple of others. He's commander in chief of the army, but none of these are very spelled out, so they're all quite vague. And, as he rightly pointed out, in the history of American constitutional structure, the powers of the president in particular have grown enormously. And they've grown enormously in ways that are not defined or confined by the words in the constitution. They're confined or defined in some other unwritten way, I would say, so it raises a question for me about written-ness and unwritten-ness; I think is an interesting question. The prime minister said that unwritten constitutions are sort of more difficult to change than written constitutions. I think if you think about the history of the American presidency, you'd have to wonder if that's actually true about the powers of the presidency. After all, if you think as I do, that many of those powers are defined by unwritten ways, and that there's been enormous change over the two hundred years of the constitution, then they must be changeable, even though they're unwritten. So they must be changeable in enormous ways. And I think in the years since September 11, we can see pretty good evidence that the powers of the president have changed, even in a short period of time, even though they're unwritten. So what constitutes the power to take care that laws be faithfully executed, what constitutes the power, what is the power of the commander in chief? I think those things have changed and I think are in the process of changing.

So I think if you accept the idea that written-ness and unwritten-ness is sort of a different category and it's a complex issue. It's not obvious to me, for example, in Great Britain that the constitutional practices are hard to change or even as hard to change as they are in the United States. During the 1970s, the Callaghan administration did not resign after losing important votes, which in earlier years would have triggered a resignation, and the nonresignation was accepted for the most part. And then the Thatcher administration did the same thing, that is, failing to resign after votes that were thought to be of constitutional significance, so it looks as though many observers say there was a change in the British constitution, in the unwritten British constitution, exactly this period. Whether it's

permanent and whether it's real, that's another question. But it seems to me at least disputable that unwritten constitutions are as hard to change as written ones are, as a matter of category.

Now we go back to the hard and soft constraints. Let's speak at the constitutional level first. It seems to me that since World War II, in Europe especially, there has been a move toward adopting a mechanism of constitutional adjudication that could be capable of enforcing hard constraints on legal institutions, and this is the constitutional court. And as you know the constitutional courts were essentially devised after the war in Germany, in Italy, later on in Spain and Portugal, later on still after the collapse of the Soviet system in the ex-Soviet states or Eastern Europe and parts of the former Soviet Union. And these were, you know, institutions that for the first time in European history had this capacity to actually make what might have been previously soft constraints into hard constraints. That is, actually hold official decision-makers liable under law in some ways to obey legal norms and to hold them accountable if they failed to do so.

There are a couple of observations that we can make: First of all, the procedures of those courts differ quite a bit. And notice I didn't mention France, because in France there is something that's coming closer to being a constitutional court that's evolved over the last twenty or thirty years. First of all they didn't do it right after World War II, they did it much later in 1958, and when the body in question was created, it was not created as a court, it was created as a device by which the assembly might be managed. And it became later on more court-like in a sequence of activities that I'll talk about in a second.

But the point is that these institutions—constitutional courts—have different mechanisms. But it seems all the ones that I've talked about so far have one way of controlling existing legal decision-makers, be they courts, agencies, or legislatures in their ordinary activities, in a hard fashion. That is to say, make these people liable to sanction in some way. So one could say, possibly that in Europe since World War II, there's been a move in the direction of more hard constraints, precisely because there has been an institution which is capable of enforcing those hard constraints when there hadn't been one before. So that would be one. I mean, Prime Minister Rocard doesn't say that, but I'm wondering whether or not there's a tendency in this direction. It seems possible to me.

But the French case is different as I said because in France, the Constitutional Counsel was created as part of the 1958 constitution to essentially manage the assembly. And the only way to appeal to the Constitutional Counsel at that point was for the president of the senate or the president of the assembly, and I guess some other people could possibly appeal, but always essentially majoritarian interests could appeal to the Constitutional Counsel, and minorities couldn't do that. And that was true until 1974 when Giscard d'Estaing was at that time prime minister. I think although the prime minister might dispute this, was worried about the Right possibly losing the next election, and was worried about the socialists

nationalizing various industries, and in light of those worries, induced a change in the constitution. He had the sufficient majorities to do that, to permit minorities, legislative minorities, to appeal directly to the Constitutional Counsel, which happened in 1974. That meant that whenever, that meant the Right, when they were out of power, would have the capacity to protest or introduce something before the Constitutional Counsel if they objected to a legislative program, for example to nationalization. And this of course happened later on in 1981, when finally the Right was defeated by the socialists and when the socialists began to push for nationalizing legislation, the Right did appeal to the Constitutional Counsel, and they were successful in the sense that the Constitutional Counsel blocked the legislative project to nationalize various industries and required that the legislature actually set up procedures and establish values in a way that effectively raised the cost of that legislation quite a bit. So it changed, in this respect, even in France the project, the legal projects that the socialists were intending to pursue. This is a good problem for Adam, incidentally—for Adam Przeworski—because this looks like a case in which the prime minister told me that had they been successful in pushing the nationalizations through without blockage by the Constitutional Counsel. It would have, let's see, it ended up costing, he said, something like 250 billion more francs because of this blockage, you know, essentially. So with that, to respond to Adam's question, "Do institutions matter?" on this account here's a case where they do matter, and we can put a price on how much they matter—250 billion francs is what the institutional effect was. So it seems like at least, you know, in this case, there is a reason to think that there may have been some tangible effect to a decision ruling.

The point is, though, that even in France there's now this project in place, or this institution in place, the Constitutional Counsel, which can review and does in fact review virtually all controversial legislation and has done so since 1974. And while it has other peculiarities in terms of how you get onto its agenda, it is the case that it's a significant, it seems to me, a significant constraint, a hard constraint, on what laws can be enacted, all right. And if that's true, then it seems to be the case throughout Europe, including France, well, throughout the states of Europe that I mentioned, that is Germany and Italy, Spain and Portugal, the former Soviet-bloc states, that there are modes of hard control or hard constraint.

Now one observation to make in addition is that this is not true of the old democracies. That is to say that it's not the case that old democracies like the Netherlands or Norway or Sweden. Norway is a special case, but Sweden or Great Britain have adopted constitutional courts. By and large, old democracies didn't do that in the same period and that's why I think the French example is particularly interesting from the standpoint of an evolution toward hard constraints. Because France is an old democracy, and it somehow adopted a set of institutions of this complex political way, which has this capacity, and so this may be a way to think about possibilities for increasing hard constraints on old democracies, that is like Britain, like the Netherlands, like Denmark. I mean the

ones that didn't think they had a problem with their authoritarian background that was in need of a constitutional adjudication body, but nevertheless may benefit possibly from the imposition of such practices.

Now I have a question for Adam. There's a lot of other questions that come about hard and soft constraints, let me just put this first to Mayor Mockus, which is the following: Listening to his talk in light of Prime Minister Rocard's talk, it seemed to me that the constitution played two different roles in Colombia perhaps. You know one is in the early part of his talk, the constitution's soft constraints seemed to be providing principles that he could build on as mayor and that could fuel projects, the city culture project and other projects. Later on in the talk, I don't know chronologically in Colombia, hard constraints in the constitution interfered with the carrying out of some projects. For example, the projects with respect to kidnapping or undermining violence in a way that might require handguns. That is to say the constitution, the hard constraints of the constitution got in the way, so it seems like the hard and soft constraint dichotomy that the prime minister introduced might be useful in actually thinking through what the opportunities and constraints facing the mayor were. And it suggests also that maybe the language of constraint is a little, itself is a little limiting. Because the way in which the mayor is thinking about the constitution is, it seems to me, it could be talked about as constraints, but it's really in terms of principles that could be called upon in a positive way. Like in his dichotomy that's to whether you have bad sanctions or good inducements, many of the desirable features of the constitution you know are called upon not to constrain behavior but to get people to do more than would be required constitutionally, for example, the *110 percent for Bogotá* initiative. That means to me not well described as a constraint, but rather as something else. So it seems like the hard and soft seems useful, but I'm not sure constraint really connotes the right category for you.

Now let me talk for a minute about Adam's paper. You remember Adam's question is basically, "How can we tell if constitutions matter?" And it's a good question. And I wish I had a general answer rather than sort of occasional stories. But I thought it might be useful to talk about American practices a little bit, about, in particular, coups. Adam suggests gently that we had a coup in 2000, that is to say there was an election and arguably the person who took power was not the person who actually won and the losers didn't go home but instead they fought and they won. And I would say that's one example possibly of a coup, but it's not the only one in American history, and it's sort of interesting to put on the table some other examples. So after the first real election that transferred power in the United States between one party and another in 1800, Thomas Jefferson campaigned against the incumbent Adams administration. And in those days, the election, I think it was probably over in November as I recall, but the president wasn't installed until March. And the votes at that time essentially put Adams' and Jefferson's vote in nearly a tie with Aaron Burr, who was ostensibly running for vice president. But as it turned out there was a little bit of weasel room there, and so there was a cabal among the Federalists in

Congress about whether they were going to obey the results of the election and it was a big question about whether to obey it. That is, they thought Jefferson's administration would be a disaster—he didn't stand for Federalist principles, he was dangerous to all kinds of things that the Federalists thought were important to the American constitutional life—and there was an effort to see if they could organize a way to retain power in spite of the electoral results.

Now there were certainly Federalists in this who are in or out of this cabal that thought they shouldn't do it because it would be disobeying the constitution, and so it may be the reason they didn't go through with it was because they were obeying the rules. But there's another fact that occurred at the time, which is that Thomas Jefferson is from Virginia. The militia of Virginia was mobilized, and they're right next to Washington, and so it was pretty plain that there was a sensible military reason to obey the results of the election in addition to the institutional prescriptions of the constitution. So this is a case that counts one for Adam I think. But it's an interesting case that maybe he didn't know.

A second one is after Lincoln's election in 1861, Southern states decided before the inauguration that they could not abide with the installation of this person as president and so beginning with South Carolina they began a process of seceding. This is a way of not obeying, in Adam's terms, the results of the election. The losers essentially were trying to go home in a certain sense. It wasn't quite the way Adam puts it, but I don't know how to interpret it. I mean you could say that while they carried off the coup in the sense that they did secede, or you know in a military sense, and waged a large battle, or you could say that well, it's true the war was a long war, but in the end they were brought back in and so effectively the rules were enforced. It was a little ugly, but the rules were enforced. That's another possible coup. Shortly after that there is an election that you could have described, Adam could have described it exactly the same way as he described the Bush-Gore election, which is between Rutherford Hayes and Samuel Tilden, which again, it was very close, pretty clear to almost everybody who studied it, I think, that Tilden really was the winner.

But in any event there were allegations of corruption on both sides. And there was a continuing fact that the military governance were still in the Southern states, and so the Southerners agreed to not stand in the way of the Rutherford Hayes election, the Republican election, in exchange for withdrawal of Union troops from the southern states. And I'm not sure if that cuts for Adam. I mean I would say that the Southern states were in a position to make that bargain meant that the chips they had on the table, that is, their votes in the electoral college were valuable, and that's an institutional fact. But I'm not sure that's the right interpretation, but that seems like these cases of coups or near-coups in the United States are worth thinking about.

Well, I guess the last question I have is, I'm going to return to this question of hard and soft constraints and it's this issue that I don't know how to resolve

about, which I broached already, about whether or not there is a, not just a tension but a contradiction between hard legal constraints and ordinary law and hard constitutional constraints. And just as—I said this briefly, in respect to Mayor Mockus' presentation, but I think it's a general question—it seems to me that as the Europeans, for example, have embraced institutions of constitutional adjudication that impose constitutional hard constraints, that this may have the effect of limiting the capacity of governance to use law, to impose hard constraints on behavior. That is to say that you know, projects they may have, to impose constraints on behavior may turn out to be unconstitutional. So it seems to me hardness may have a double effect. And if it's true that there is in the world a tendency in the direction of having hard constraints operate constitutionally, then does that not diminish the capacity of governance to use law to change what goes on in society outside of law itself? I mean does it not diminish the power of people like Mayor Mockus to use law, for example, to transform culture or transform morality or to induce transformations because the fact is that insofar as there are more constraints arising from the constitutional, at the constitutional level, that ordinary laws that may be otherwise undefective, now become defective in a way that can become an issue of constitutional legality. So I'm not sure whether people think there is a long-term tendency in the direction of hardness. I think, at the constitutional level, I think there may be, and I'm not sure if people believe that that entails causally a diminishing of hardness at the level of ordinary legality, at least in those countries which have constitutional methods of adjudication. But it seems to me a topic worth pursuing.

**Jon Elster:** Thank you. Bernard Manin, next discussant.

### **Comments by Bernard Manin**

I found particularly striking that two of our speakers this morning, Prime Minister Rocard and Adam Przeworski, said or claimed that never did a constitution prevent a coup. I thought it was an interesting overlap, and it struck me as one of these unassailable truths from which we should build, because that seems pretty, that's solid, almost self-evident. Then when I started thinking about it, I wondered how do we know this? How do we know that in fact never was a constitution able to prevent a coup?

And it seems that the reasoning that must be behind this is less solid than it might seem. The response I suppose must be as follows: We do observe attempted coups; that is, we observe here and there actions that constitute the beginnings of coups, such as storming the television and radio facilities, or sending tanks into the streets of the capital. Some of these incipient coups succeed. Others fail. But it's reasonable to say or to think that when we're at that point, the constitution doesn't matter much.

The problem, however, with this reasoning is its starting point, namely the observable actions by which a coup begins. I am thinking on reflection, I would

contend that this is a starting point that's too late to support the inference. When the intention of staging a coup begins to materialize, the decision of violating the constitution has already been made. In order to claim that a constitution never prevented a coup, we would need to count the cases in which the intention of launching a coup did not begin to materialize. There may be an untold number of generals who contemplated seizing power illegally, but were kept from taking action by the prospect of violating the constitution and facing resistance.

So I thought that, after all, I could turn, you know, the notion of the weakness of counterfactuals against my friend Adam. This is not turning an argument. It strikes me that this notion of the weakness of constitution in the face of force is less robust than it might seem.

Now what results, what would follow from this? If we do not know, suppose that we do not know for a fact that the constitution cannot prevent a coup. That's uncertain, we cannot tell for sure, we would have to mine the memoirs and diaries, you know, of generals, of, you know, various—we cannot do that. Then, I would think or I would claim, that we, for purposes of action, we need to presume that institutions can make a difference. We need to presume this as a way of choosing between various kinds of errors. For what would be the consequence of adopting or following the purely skeptical position? We would be left with the notion that in any case, we cannot know whether institutions matter, so what can we do? It's conditions, it is institutions, there's not much we can do, there's not much we know.

In cases where we do not know, we may have reasons—what I would call practical reasons—for choosing one kind of error over another. Why, suppose that we were to ask or we were to say here, in the absence of certainty, we need to make . . . not only do we need to make a decision, but we need to choose which kind of error we are more, we think, is preferable. And I say, it seems to me that in drafting a constitution, we should proceed as if the constitution could prevent a coup, even though we do not know for a fact that this is the case. And that would be I thought too, that would be a case of presumption, or an interesting case of a presumption, as presumption, as philosophers, you know have observed, presumption is not so much about truth as about the kind of error we find more desirable. Presumption is an instruction to proceed as if, you know, not the paradigmatic case, a defendant must be considered and treated as innocent unless and until, you know, proven guilty. This has nothing to do with the true value of the innocence of the defendant, but it's an instruction to proceed as if. And so it's only an instruction with regard to action that's entailed here, not the truth value of say, the innocents, nor even the probabilities. We're not, you know, making any statements about probabilities when we are saying such things. But we are certainly making a choice among kinds of errors, such that and we even formulate this, we say better that a thousand guilty people go free, rather than that an innocent be convicted. That is what is entailed by the mechanism of presumption. I think we may find ourselves here in the same kind

of case; that is, we choose among the kinds of errors that we find on normative grounds to be more desirable.

Now this is not to say or I would, this is to open up discussion, of course presuming that human agency is involved and that we can do something about various situations, that is not a license for or to try to impose any kind of constitution regardless of the circumstances of the country, and there's obviously an old wisdom about reformers and we can find traces of this, you know, in various authors. That attention to the particulars of a situation, attention to the specific characters or characteristics of, you know, any given country, that is also a key element of practical, you know, prudence. So perhaps in designing institutions we ought to keep in mind that they must be suited to the particular circumstances in which they are going to operate. At the same time, we need, it seems to me, to proceed as if we could make a difference. There might be here a difference, it might be a difference between presumption and being, you know, presumptuous, that the efficacy of institutions and sometime it may be a sort of trivial point, but there is some optimal point that may be reached here.

The second point I wanted to raise or to discuss was in the same direction. It is probably true that a constitution will not survive long if the forces, that the real world forces, that support it are weaker than those opposing it. Ultimately, you know, as Karl Friedrich once observed, the survival of a constitution rests on the willingness of those who support it to stand up to would-be violators. In the final analysis it's the balance of forces as you know, Adam, you know, reiterated this morning, that determines the fate of a constitution. However, this may be unnecessary but not sufficient condition. We do know of countless situations in which people are willing to undertake a collective action and yet fail to take it. This is often the case when people are willing to take an action on the condition that others take the same action. Even suppose that a large majority is willing to stand up to the usurping generals or the transgressors. Resistance has to be coordinated in order to be effective. And in this way, the constitution may facilitate that coordination by signaling clearly when it gets violated. We would call this a sort of flag-raising probity of the constitution. That is it signals, it sends a, you know, a clear signal to, you know, the protagonists, various protagonists, that it's been, you know, transgressed.

No doubt, the coordination here lowers the costs to each individual. Obviously, standing up to the government, demonstrating, signing petitions, is enormously costly and doomed to fail if there's no mass movement. But we don't even need to think about this in apocalyptic terms. In apocalyptic terms, that structure doesn't hold only when it's a question of taking to the streets and facing repression. We can, might think, talk of milder cases that are nonetheless relevant. Defending a constitution that's transgressed by a government may take the form of just speaking out. Speaking out, say against the government or against the would-be, you know, transgressors. And speaking out alone may be

a very bleak or grim prospect, not, you know, everyone, not all people are heroes, the fear of stigmatization here or being branded as say unpatriotic.

Now things are obviously different or can get very different if a vast number of people speak out against the transgressors simultaneously. I was noting this because the structure of resistance and taking to the streets is only a paradigmatic case and sort of magnifying glass but the structure may apply to other forms of coordination in support of a constitution, less again apocalyptic.

Now one implication of this, if this is one of the qualities that we're expecting of a constitution, that it sends clear signals, or it signals when it gets violated. I would go back here to the notion of a constitution must be short and obscure, that is certainly the dictum of dictators. And whether it's Talleyrand or Napoleon doesn't matter much, you know, it can be attributed to Napoleon, an obscure constitution is precisely what permits the violation and more important, the opaque and decentralized we may want to say, decentralized or piecemeal violation of a constitution.

So in a position, I would think that clarity is here of the essence. I thought that, you know, Prime Minister Rocard mentioned Article 48 of the Weimar Constitution, and I would perhaps dispute the claim that you made today in the morning, whether or not Article 48 . . . that I perhaps should state what Article 48 was. Article 48 of the Weimar Constitution authorized the president, in case the security of the state was in danger, to suspend various, you know, rights, which were enumerated in Article 48, and to use force. It was actually that article that was used from, in February 1933 and thereafter from the fall of the Nazi regime. The point of this is that the way in which Article 48 of the Weimar Constitution was used during those critical months beginning in January 1933 is precisely that it was unclear what the chance, whether what the chancellor was doing was illegal or not, unconstitutional or not. And one of the charges that we may have against that kind of provision is to leave it unclear whether or not the constitution is violated. I could get into specifics here, but essentially we know, and this we know, it's not a counterfactual, we know that the clear and self-conscious project of the Nazi Party was to use the constitution. They had tried the violent ways in the early or mid-1920s and they came to the conclusion that they had to use the constitution and precisely the obscurity or the murky character of the violation was key in their using or in their ability to use that, in their ability actually to overthrow the Weimar Constitution. So I would think that this is a case in which clarity, we suddenly, you know, need clarity.

Which brings me to, you know, some other point that I wanted to make, I'm not going to claim that this was raised in the morning. This was just not exactly true, so I'm just making, to make that point, why not, you know, why not admit it? That is, of course, in connection with Article 48.

Obviously provisions dealing with emergency powers or unanticipated, you know, events as one of the speakers today said, these provisions are particularly likely to be abused and all kinds of caveats and observations might be made about that. However, I think that when we hear today these parts about protracted emergency or revising the emergency clause of the constitution, I mean this constitution, that kind of talk about the constitution strikes me as either useless or essentially dangerous and misguided. And this is for the following reason: One can say that constitutions, perhaps, are not very good at handling unknown or unanticipated cases. But I propose the following distinctions: We need to distinguish between particular events that may be unexpected, but it may be the particular occurrence of an event that's unexpected.

The phenomenon in question may be recurring, in which case it is the particular events that are unexpected, although the phenomenon in question is recurring. In that case, we can have or it could be framed as a distinction or distinguishing between unexpected and unprecedented. We may have unexpected events, which are instances of events of a recurring character, in which case we can have rules about such generic phenomena even though the particular events remain unexpected. And of course that's of the nature of the event. And of course what I have in mind here is, you know, say terrorist attacks, but we can say the phenomenon that we are confronted with can have, and is very likely to have, a recurring character. If it has a recurring character then it can be subject to, I mean, we do have rules say for handling earthquakes. The phenomenon is unexpected, the event is unexpected in each case, but the phenomenon is recurring. So that's a false distinction. We need to distinguish between expected and unprecedented.

Now one needs to go, I would think, one step further. One can also argue that international terrorism was—and I'm speaking in the past tense—unprecedented. This is true. I mean it was unprecedented in the sense that there were antecedents of domestic terrorism but not of international terrorism. And so we could say that the existing body of, you know, either domestic criminal law or, and the combination of international law, the laws of war, did not apply or do not apply easily. International terrorists, as has been observed many times, were or are neither quite like criminals nor quite like soldiers of other sovereign states.

But what this unprecedented character calls for is not some kind of further reflection about emergency powers. What it calls for is work of legal reasoning or legal imagination. We certainly do need new evidentiary rules, we need new rules about detention, perhaps detention without trial, and we could here use again the mechanism of presumption applied at the middle level. We may want to say the default rule ought to be that defendants ought to be treated as innocent until, you know, proven guilty. But there might be some cases, there might be some reasons to do otherwise. So that may be the default rule. The default rule, unless there is good cause or good reason to do otherwise. But it, of course, it

makes you know, a difference whether that good cause or reason has to be shown and is subject to some kind of review.

So let's say that we would need new rules, you know, about detention without trial in some cases, which certainly the European countries have, you know, authorized in the case of terrorism. But all of this likewise, we can say that we need with regard to international law, we need also new categories, but emphasize the, you know, the treatment of prisoners of war was designed in the context of war among you know sovereign entities and states. It becomes a different matter particularly when there's, about questions of, you know, interrogation.

But in any case, the point I wanted to make was that all of this is a call for legal imagination that may be consistent with principles and the principles of a constitution. So the talk about emergency powers is, here, I think, misguided. A, the phenomenon was unprecedented, but now there is a call for legal reasoning and imagination. And second, even if the particular events will be, as far as we can tell, will remain unexpected, the phenomenon in question might be recurring and therefore subject to rule. In that case, the notion of invoking the broad notion of residual discretionary power is just another name for legal laziness. So I would stop here.

### **Comments by Jeremy Waldron**

When we began the symposium this morning, Professor Elster mentioned that there were two questions we should be discussing. One was, "How do constitutions constrain?" which is a descriptive question about what Prime Minister Rocard called the physiology of constraint. The other question was a normative question, whether they constrain us too much, or whether they hobble us or handicap us too much, and I fear we're going to leave that second question mostly to the symposium that's addressing the issues of terrorism and security tomorrow. And most of my comments will be about the physiology of constitutional constraint, but I do want to end my comments, and I hope I get to this, by saying something about the physiology about the ways in which administrations facing security crises are able to evade constitutional constraint, because it seems to me that the physiology has to be able to explain the pathology in a certain sense as well.

Let me begin with some comments about this idea of hard constraint, because I want to question what all the panelists—not only this morning, but this afternoon—have in mind under the heading of hard constraint. Mssr. Rocard pointed out at the beginning of his comments this morning that in a way, the question, "Do constitutions constrain?" is an odd question to ask. A constitution is law; the notion of legal constraint is perfectly straightforward. If somebody plans to break the law they may not be completely deterred from doing so by the sanctions that will be applied to them, but it will have an effect on their

calculations. And at the margin it may have a decisive effect, and since constitution is law, presumably there are some other deterrents to unconstitutional action.

Now it seems to me that we cannot be content with that as an account of how constitutions constrain. We can't just answer that question by reference to legal sanctions, since the constitution is supposed to govern the conditions under which legal sanctions can be brought to bear. The constitution helps to constitute the police forces, the police power, the court—in the last resort, the armed forces of the country. The constitution is supposed to govern who has access to power, to govern the conditions under which the ability to use and deploy legal sanctions and other modes of coercion is permitted. So at least in the extreme case when we are talking about high-level unconstitutional action against the state. We are talking about people who are battling precisely for control of the means of legal coercion, and although they may be deterred by the prospect of failure, they will be punished only if they do fail. There is no sort of notion for punishing a successful criminal act in this area.

In other words, it may be in the extreme cases begging the question to say that unconstitutional or extra-constitutional action will be punished since it's often the behavior of those who have the power, or who have the assignment of the duty to punish that we are questioning under this heading. And so we cannot rest with the notion of hard constraint. It seems to me we are always driven to consider the soft constraints and the social, what Mayor Mockus called the cultural and the moral norms that supplement the constitutional norms, which may be in a way more resilient than legal sanctions, at least as a bulwark against unconstitutional action. Because the social norms, the moral norms, and the cultural norms are not necessarily themselves structured constitutionally, so there isn't the same question begging and assuming that they are there to be mobilized against unconstitutional action. An explanation which appeals to moral or cultural sanctions, then, is less question-begging than an explanation that appeals to legal sanctions. The appeal to legal sanctions presupposes that in some respects the constitution is still intact enough to be able to mobilize these.

Of course the price of this is that there is no guarantee that the moral and the cultural norms will be in harmony with the constitution that we want to protect. There may be what Mayor Mockus described as divorce between them, between the constitution and the law on the one hand, and morale and culture on the other hand. So this will be an imperfect bolster, not a perfect one.

All right, so we cannot assume that there is an ability to rely on preexisting power as a source of hard constraint. The other side of that coin, I think, is also more hopeful, because we can say, well, we can't simply assume that there is preexisting power that might threaten the constitution. That preexisting power itself has to constitute itself. That preexisting power itself has to build itself starting from a conspiracy, growing into the allocation of tasks among the various

conspirators, mobilizing whatever resources of power they have at their commands. They too have to constitute themselves in order to pose an effective threat to the constituted powers that protect the constitution.

So we need to recognize, I think, in general in this discussion that political power does not necessarily exist apart from the constitution or apart from some other equivalent mechanisms. I'm drawing here I guess a little bit on Hannah Arendt's conception of power as not just sheer force or sheer violence, but the ability to act in concert, including the ability to act in concert in the exercise of violence or force.

And this brings me to some comments I would like to make about constitutions and the task of coordination. In many ways this will follow up on what my friend Bernard Manin said about the role of constitutions and relation to coordination. You remember that a few minutes ago, Bernard spoke about the constitution having the function, among other things, of helping to coordinate resistance to abuses of power. That if somebody simply has a private grievance or a private opinion about an abuse of power then he stands up as a solitary, opinionated person and that may be a dangerous thing to do. But if he can point to his fellow citizens through some provision of the constitution that has been violated, there was, as it were, the prospect of a common point of orientation, some common point or reference that people can use in deciding to act together, taking the risk of acting together. That's a constitution as a coordinating device for resistance against the abusive power.

Now think also, this is a second, much more mundane notion of coordination, what constitutions do under the best circumstances is simply perform the task of coordinating the business of governance. The business of governing or ruling a country requires an immense amount of coordination among vast numbers of officials in various agencies and various branches of government. Resources have to be mobilized. Budgets have to be approved. Taxes have to be raised. Directives have to be issued, agencies set up and abolished, laws passed, litigation dealt with and so on and there is an immense amount of coordination just for the ordinary business of governing a society and that's primarily one of the things at a very high level that constitutions do or that constitutions orchestrate. They provide simply the fabric of social coordination. So those are two coordinating ideas.

I want to mention this third that I alluded to a few seconds ago. Those who challenge the constitution or who want to act against it, are going to have to presumably find some other basis on which they can coordinate the action of their fellow conspirators, and their supporters and whoever else they want to mobilize. The soldiers they want to mobilize if they're mobilizing soldiers, the officials they at least want to immobilize if they want to pacify and prevent resistance.

Here, what I have in mind, are some comments by Machiavelli in book 3 of *The Discourses*. Book 3, chapter 6 of *The Discourses*, the great chapter on conspiracies, where he talks about how dangerous and difficult it is to maintain a successful conspiracy or to maintain a successful coup as we talk about. I entirely want to agree with Professor Manin on what counts as beginning or initiating a coup. Machiavelli says there are dangers for conspirators in the very beginnings of a coup, in the actual act of beginning the conspiracy itself, there are dangers for them in the execution of the coup as they go about the business of seizing the sinews of power. And there are dangers for them in the consummation of the coup and in the transition from the coup if they succeed, in the transition from the coup to the business of having themselves perceived as a properly appointed rulers in the aftermath. So there are dangers at the beginning, there are dangers during the progress, and there are dangers in the consummation. And many of those dangers stem from this business of coordination, and reliance, particularly at the early stages, coordination and reliance and secrecy and confidence in conditions where the stakes are high, perhaps fatal for those who are involved.

So what I have in mind here is that what the constitution of a country does is that it doesn't just coordinate resistance if there is to be a coup, and it doesn't just coordinate the ordinary business of governance. The constitution also tries to crowd out the available coordination space. The constitution tries to make it more and more difficult for the conspirators to coordinate themselves. It tries to present itself as the only game in town. So you are having to take a great risk with ragged and surreptitious and incomplete coordination, particularly as you move from the first initiation stage to the second execution stage, where you may need to rely on people's actions or inactions who are not initially among the parties of conspirators.

Now in relation to what Bernard said—do we ever know whether coups fail because of constitutions?—I would want to mention one particular case. It's lurid and it's controversial but it's the alleged case of the conspiracy in 1968 among certain generals and politicians and members of the royal family in Britain to have a coup against the government of Harold Wilson and perhaps to replace it with a government of national salvation headed, by of all people, Lord Mountbatten, and I believe the thing dissolved. It was the very early stage, when a number of people simply stormed from the room saying this is unconstitutional, this is treason, and I will have nothing to do with it, right? It didn't get as far as the stage of mobilizing resources. But when you do begin to mobilize resources, and when you do begin to move to seize the sinews of power, you are getting into a situation where you are having to deal with people and trying to organize the governance of the country involving people who have no initial commitment to the plot, but you still have to coordinate their action. You still have to somehow transmit orders to the provinces and immobilize various resources. So this business of the constitution trying to crowd out rival points of coordination, it does seem to me to be very interesting.

Now I believe that in this regard, the comments that Mayor Mockus made about the relation of constitutionalism to the rule of law is very important. I want to introduce an exasperatingly British take on this. One of the most ill-tempered pieces of Anglo-Saxon chauvinism was the discussion of the rule of law in Dicey's great book, *The Introduction to the Law of the Constitution* from 1885. And Dicey set out three principles of the rule of law, two of which are not really relevant to us, but they were that the law should be the same for everybody, and to use this as a basis of an ill-tempered attack on French institutions, the law should be the same as everybody. He used this to attack the idea of *droit administratif*. Second, that nobody should be made to suffer any penalty except in accordance with a preexisting law. And third, this is the one I wanted to focus on, he said the rule of law is best exemplified in a system where constitutional constraints do not stand apart from the rest of the law, but are integrally related, embedded in the detail texture of the ordinary law. He thought this was a reason for favoring the unwritten British Constitution because the principals of liberty, the principals of protecting the rights of the subject were implicit and embedded and instinct in the ordinary functioning of the common law courts, rather than being set aside on a separate declaration that could be suspended or abolished without affecting the ability of the ordinary legal system to operate. Now, Dicey was generous enough to say that if you blur your eyes sufficiently, the United States can be brought under this model as well, and it is partly, I think, dependent on the feature of the federal courts which uphold constitutional law, also being regular courts of law, not set aside from regular courts of law. But I wanted to drive this point again toward this issue of the constitution being the only game in town.

To the extent to which the constitution can integrate itself into the ordinary operation of law and the ordinary ethos of law-abiding us, then it seems to me, you have dense tissue connecting constitutional coordination with the ordinary way in which under governance and under the rule of law, commercial personal activities are coordinated. And again, you allow the constitution and the legal context into which it is integrated to become this overwhelmingly dominant, coordinating device. And the idea is then that the denser the tissue connecting constitutional protections to the rule of law, generally, the more pervasively the coordination afforded by the constitution extends. And the more difficult it is to organize extra-constitutionally because the extra-constitutional act is, find the legal difficulties popping up all over the place, particularly in the second and third phases of their conspiracy. They find legal difficulties popping up here and there and everywhere, at every turn, as everybody they need to deal with, every official they need to control or coordinate with starts asking embarrassing questions about the law and legality. Now you have to have an ethos that makes that possible, but I think that's important.

Now I'm mindful of Adam Przeworski's point that we should not do too much of this thinking a priori and we should certainly not invest too much confidence in our a priori speculations about coordination games and this sort of effect. It does

seem to me that we need to ask about other aspects of a social system that might enhance or sustain the sense in which the constitution properly established is the only coordinated game of governance in town, and again to the extent that you can bring moral or social devices to support this and to make this more transparent, that will certainly help. Whether the prospect of alternation in office is important here (I rather think it is), but perhaps not for exactly the reason that Adam cited. Adam's suggestion was, well, the losers in the election won't necessarily storm the palace because they have a chance of taking over next time, so they can afford to wait. But the other thing is that if you have regular alternation in office, you can also say that the losers in the election must have been prepared to win, they must have been prepared to begin to act in the context of constitutional coordination. And there's a sense in which opposition parties that have a reasonable prospect of success have to already prepare themselves to operate in a constitutional context. And even small parties that have a reasonable prospect of appearing in a coalition have to already prepare themselves and become responsible enough, not just in ethos, but in organization so that they can be prepared to act. So again, the coordination effect of the constitution being the only game in town extends even to opposition groups in this way.

Finally, how far can this be taken? I go back to Machiavelli, who said, "There are interesting differences between conspiracies by outsiders, that is, people who are not within the ruling circle, and conspiracies by insiders, that is, by people who already have connections or tasks assigned to them under government." There is a difference between a coup by a minister and a coup by an outsider.

And it does seem to me that we might want to notice here an interesting distinction between unconstitutional action by somebody who already has constitutionally conferred authority, this person is a judge or a president, and he has a task to perform. He has authority assigned already by legitimate procedure, but now that person is proposing to perform some action, say incarcerate some prisoners in an unconstitutional way. We must distinguish between that and the case of the pure outsider, the person who might be tempted to mobilize some coup or who is acting in a way that is plainly incompatible with the terms of his authority, like a general or a leader of our troops.

It seems to me that at this stage we need to consider how on earth do coup plotters plan to coordinate their action if the action is visibly and clearly unconstitutional? Presumably they would do so by reference to some alternative ethos or ideal that might allow them to appeal to the solidarity and to the support and to the coordinated action of other people. So occasionally you'll find when a general mobilizes for a coup he appeals to the goal of national salvation, which is seen as some sort of background device that ought to rivet the attention of all citizens, and rivet the attention even of all civil servants who are loyal to the principals of the state. Which will distract them from the coordination provided by

the ruling government and rivet their attention on some background set of political values.

It seems to me that it is much, much easier for somebody to do this, and much, much easier for this claim to be accepted if it is done by somebody who already has a title of authority. Somebody like a president, for example, who often has, as Prime Minister Rocard reminds us, often has a job description that assigns him ultimate responsibility for the integrity of the state or ultimate responsibility for protecting national security. Under these circumstances, with already established authority, he might be able to appeal to that as the device that will stop these embarrassing questions popping up all over the place and enable the judges to coordinate with them, and the troops to coordinate with them, and the diplomats to coordinate with them in a way that they wouldn't be able to coordinate if we were doing business as usual in the area of constitutional action.

In this sense I think it is very important to distinguish two types of unconstitutional action. These are two types, two of the four types that Mssr. Rocard mentioned in his comments this morning. Unconstitutional, or think of constitutional constraints which define who is entitled to occupy which office, constitutional constraints that determine the regularity of elections, and constitutional constraints which determine what those who occupy an office may do, like rights and restraints on power. It seems to me that it might be much harder to succeed in violating the first class of constitutional constraints about who is entitled to occupy which office under which procedures, because that goes to the very basis of your authority and your right to appeal to the nation in the name of the norm of national security. It may be much harder to do that than with an already secure job in government at the helm of the ship of state, to act unconstitutionally in violation of various rights constraints.

So all this is by way of trying to understand not only why constitutions constrain when they do constrain, but also what's at work, what explains the ability to coordinate when constitutions fail, and to try and understand some of the conditions under this.

Let me just add one last thing, and this is, those who know my views about constitutional review and constitutional courts will have been maybe expecting me to talk about little else. There are people in this room, there are people on this platform, who in times of peace, have defended the practice of constitutional courts, defended the existence of constitutional courts, and defended the practice of judicial review on the grounds that we need to have this institution in place. We need to have antimajoritarian institutions in place as precommitments or as restraints against the prospect of majoritarian panic in circumstances where the majority suddenly becomes terrified or irrational, or in the grip of some delirium. Now what it seems to me the last two years have shown us, is that when the majority is in the grip of some panic, or when the majority is terrified, that terror and panic tend to affect the courts as well, and so it is as even Ronald Dworkin

has stated, a terrible mistake for us to think that we should rely on the courts to vindicate civil liberties in times of this sort of crisis.

Which leaves one wondering then, why on earth is it justified in peacetime if not for the prospect that it will work under conditions of insecurity. But I think it does illustrate the power of national security, or freedom from terror as an alternative coordinating device, there available, in extremis, whether to judges or to presidents as an alternative coordinating device for organizing government. I think it's the only one that really has a prayer of succeeding at least at the level of macro-challenges to the constitution. Thank you very much.

**Jon Elster:** Well, thank you all, I think I'll now give the microphone to the speakers of this morning, maybe, I don't know, in reverse order. For the time being, I'll not impose any time constraints, but I may do so at some point.

### **Response by Adam Przeworski**

So here's where I stand: I think constitutions work when people who are supposed to follow them want to do so, given what other people do or want to do. Now, does that mean that one cannot alter behavior, one cannot alter the patterns in which people behave and governments behave by changing institutions? No, I don't think so. I think one can. I gave examples of electoral laws, which we tend to believe alter or would alter outcomes of conflict and viability of democracy in ethnically divided societies. Proportional representation systems, which people would give some role to the minorities maybe more conducive to stable democracies and ethnically divided societies than majoritarian systems. At least that's a widespread opinion among political scientists.

Let me give you another example, which is just an anecdote. When the communists in Poland were negotiating with the opposition in April of 1989, the communists could not afford electoral competition because they knew they would lose. On the other hand, dissidents, pro-democratic forces, could not agree to anything that would not involve electoral competition because they would completely lose credibility and this was their main, this was one of their chief values. And it seemed the situation was without a solution until actually the gentleman who is currently the president of Poland, invented an institution. He said, well, okay so let's invent an institution of a senate that would have practically no powers, and let's agree that we're going to have free elections to the senate, but not to the other institutions, and with this, indeed, the agreement was struck. Well, then it turned out that the senate usurped powers that originally were not planned for it, so now it's a full-fledged senate. But here you have an example of sort of institutional device, changing what people would want to do.

What I think is not possible, is to deviate too far from what people want to do, or, if you wish, from the existing conditions. And this was the ground for my

skepticism. The Argentine Constitution guarantees everybody the right to employment and decent living. Well, some citizens went to court in Argentina suing the government because they were unemployed or arguing that the government is not providing conditions for decent living. The courts turned it down. I mean this way I was struck, Michel Rocard, that you said at one time that if the soft constraints, if the real practice went to court, the courts would have upheld the practice. In this case they did. They said no, even though the constitution says that the government cannot be held responsible to individuals for decent conditions of their life.

Let me give you a flagrant example, which is what happened in Indonesia right after independence. The constitution was purely presidential. It was almost like the United States' and at one time the president just didn't have enough power. There were political conflicts, a rival political party, and one of the leaders of the rival political party called himself prime minister and formed a government. He formed a government and the president tolerated that. More than that, eventually the government lost a vote of nonconfidence in the congress and stepped down, and another prime minister was chosen and formed a government. So you had a constitution that was de jure presidential and de facto parliamentary. It's hard to tell what the real constitution was, but again, given the relations of political forces in Indonesia it seemed that a presidential system and a majoritarian electoral system just could not hold, that power had to be divided somewhere, I mean somehow, differently. So this is why I was trying to emphasize, one can change things by institutions, but one can't go too far. One has to start from actual conditions and sort of ask and that obviously requires ingenuity, perhaps brilliance. One has to ask, so how much can we change just by operating on institutions?

I also think it raises the question but which I'm really incompetent to speak about, but the question then at the end—so what is the constitution? John is emphasizing so much of it is unwritten. If we look at the Indonesian case, the written constitution says this is a presidential system. If we observe what's happening and describe it exposed, we would say no, this is a parliamentary system. And de facto that constitution is a parliamentary constitution. So there are sort of . . . eventually life takes revenge, and I think that real conditions assert themselves, hopefully some regular patterns of interaction emerge, hopefully they are not so bad. I am not sure that courts, you know, are the proper test of whether things are constitutional for reasons that Jeremy just mentioned. Namely that—or maybe that you mentioned Mssr. Rocard—namely, if this is the established political practice, and if public opinion supports it and perhaps, you know, with military forces supporting in some case, courts are not going to go against it. So ultimately we don't have a test for it.

## Response by Antanas Mockus Sivickas

Well, one of the remarks that strikes me, it's constitutions are not suicide pacts. My strange intuition is that in countries like Colombia, you have to act as if it were a suicide pact. And that is very close to the idea of, proceed as if laws are effective because a lot of people proceed as it was an effect, even if we have statistics of strong impunity and so on.

That's one idea. The other thing is, for example, in the coup against Charras, my personal feeling, I'm not a researcher and lesson political science, but I feel that those that made the coup began to make not one but two, three, four decisions against the constitution and generally the idea is not only the level at which the ex-constitutional action takes place. Even if it takes place at the head. But if people in a few hours feel confident that all the other coordination will be respected, the coup has a lot of opportunities to maintain, but if the new government begins to change the court or the jurists, the known, the not knowledge of the constitutional frame is a strong handicap for these people. There are very strong uncertainty costs. If there is uncertainty, the people that try to make the coup don't have success.

I think it's, yes the general idea in cases like in Colombia you feel is as long people can have trust in some people and have trust that these people will respect formal rules, this helps to build a nonlegal obligation. Trust obliges. If you have trust in someone, that person pays a bigger price in terms of social norms or respect and recognition from the society. But it's a strange way of looking at it. I think in other countries the same discussion takes places, when you have the explanation like sometimes criminologists do about the behavior of people. Some of these explanations reduce responsibility to follow rules, and a lot of the work is act as if you were free. Act as if you were responsible. That helps to have more social and more moral pressure on obeying laws.

But I was very struck by the idea that constitutions are not suicide pacts. It could have two senses. One is you have to change it if it goes to a very dangerous place, but the other idea is you can, for practical reasons, get out of the constitutional order. I think that people should imagine that a lot of people like me that are working in public places, we work completely committed to work, as if it is the only option. Getting out of the constitution is not allowed as a possibility. But is the force of frictions, perhaps, that, but myself in a country like Colombia, I feel that the faith that following constitution and following constitutional rules for change, the constitution is too constraining, it's part of a sort of performative condition of a democratic government.

## Response by Michel Rocard

I began this morning, I have to finish this afternoon before your questions. I have had a great problem: English is not my native language, I'm not real bilingual, I am not very sure I got precisely all the points on which there is matter to discuss. Sorry, that's a fact of life.

What, in what I perceived, my feeling is that there is no major disagreement between all of us. But frequently some differences of emphasis or accent on such and such, parameter of our subject, and I feel it rather this way. For instance, when Manin says, "Let's get rid of Napoleon or Talleyrand, we need a clarity in constitutions," he most likely is right, but it might change according to the points of interest we have. Same thing in a way for, I think it is Adam who said that the observation that new coup, constitution difficulty, finished in violence for those countries which are over a certain ratio of gross national product, etcetera. Which pushes me to conclude not to answer, because it would be useless. It's a problem of entering in some details of rhetoric.

But to propose you the fact that in reality, and it's part of ourselves, which probably a great responsibility on my side, we have in fact centered most of this discussion on developed countries. And I'm not sure we accepted the sufficient difference between the fact that a country has some hundred or two hundred years of democratic practice and the long experience and the country we quoted this afternoon and this morning, as if they had the same condition. The country which has never known any democracy or begins, or has a constitution democracy for the first time since four or five years.

When listening this morning to Adam I agreed with what he said on force regarding rules, but I thought that this way of thinking, which is roughly true for a reverse, is not how do I say, is not pertinent, but I would say is not sufficient to treat with seriousness, subjectivity, and sympathy. The very difficult problem of how can democracy can emerge in Africa? There are in my life a few things I do know. Constitutional law is not in this category. Finance is, a bit. Africa is something, a continent I do know quite well, and most of our reflections here are made not pertinent by a cultural gap in a way, and this would send us to another subject. I feel a necessity in finishing all this to say that roughly we have spoken about developed countries, and then may I propose you all this vision that probably we have given too much, all of us, including me probably, too much attention to violence, constitutional shocks, and coup d'etat. Situations in which my neighbors are all right in what they say, and probably it's my fault not to have awakened enough sensitivity of another problem.

A great American, Benjamin Barber, has written a book which is called *Strong Democracy*, in which I leave you to wonder of the ideas suggested in recipes of the second part. But which is a masterpiece in the first part, in which he tries to describe why our parliamentary, representative democracies are weak. In

Europe, look at Poland, which is the most splendid example. Now with France, is about the same thing, and military preoccupations. In terrifying situations you have thousands of people, not only youngsters, men and women, who have struggled with the risk of their lives for democracy. Democracy comes; less than two years after, the number of people who go and vote begins vertical diminution; apathy begins in all our countries. No American president has been elected with more than 25 percent of the American electorate since the nineteenth century, so far as I know. France is in a situation in which the sum, by now, the sum of people not written on the electoral lists, people who have stayed, and people who vote for extremist forces with not any hope of governing, be they extreme right or extreme left, this sum adds up to 60 percent of our adult population. Governing forces have to share the 40 percent remaining, which is not very significant. Anyway, if we would open a new seminar on the crisis on democracy it will take some more time. It's not really my subject.

Concerning institutions, and I have the feeling that I did not make it very clear this morning, but that is why I insisted so much on flexibility. I think the main demand on our constitutions now does not concern the protection against the coup and against your positions. It concerns the capacity for our governing groups or classes whenever they are intelligent in culture, which is not absolutely always and everywhere the case, to have the state administration evaluate, instruct us in objectives, in methods according to this mutation—*c'est en anglais? mutation?*—structural changes, which our civilization lives. In fact, we have all kept a structure of governing authorities among the administration, which is vertical, including a strong feeling of hierarchy and sectorized, specialized. And we are facing massive problems, suburbs, difficulties, desert conversion of most rural territories, drug-consuming, youth problems, none of them being sectorial or vertical, all of them including criminality of delinquency, calling for nearly any structure of the administration.

It is clear that the dominating parameters now are well informed, and intelligent public action must have not specialization and division of tasks as the main paradigm, but relations. Network work. Not only for the Web, for administrative action. No government agency can seriously act alone, and isolating itself from a global system in which all parameters have to play. Three years as prime minister in a difficult country, because in charge of the weight of history and all this we have celebrated the millennium and half of the crowning of Clovis, the beginning of France. You happy people have less past to carry on your shoulders. Now, don't laugh, you have a fantastic benefit, which you cannot measure. Still, having such countries evaluating in this direction of synergic administrative work, of a conceptive administrative action which would not be organized on specialization, sectorization, but on networks. The objectives being defined for quite an undetermined administrative population, etcetera. I won't insist.

Take just the problem of the school system and its efficiency, which is a budget problem, constitutionally unsolvable in the United States, plus a culture—you know that? Plus a huge cultural problem, plus a health problem, etcetera. And my fear on this twenty-first century in which we see all limits, resources are short, we're polluting our home dangerously and quickly. And we have nowhere to expulse outside barbarians, they're inside. This will call for very new types of action. And let me put it otherwise: A French general, not retired, he had problems because while writing a book in service he was sanctioned. He wrote three years ago a book called *The Violence That Comes*. I think we need a perspective on violence in our societies. Methods can be there, we're not used to that. We're all people of civil and quiet times. My prognosis on the twentieth century is not that calm is on the horizon. And the main service we could demand to our constitutions is not to oppose innovating changes of governing authorities whenever they are cultured, which is more and more rare. This job cannot be done now, but it's another subject. That is for all of you, and especially Bernard, the reasons for which I don't so much bother on the hard part to help constitutions to respond to coups. Coups are not the problem in our countries. Kalashnikovs are asymmetrically distributed. And this is convincing for the revolutionary population. I have spent 12 years of my life in the so-called revolutionary population in France, I know them. They are courageous, but not too much. Not dangerously.

So our problem is to have good state answers to our real difficulties. And they need such a degree of innovation in governing practice that this is my main worry on constitutions, which probably give to my opening of this morning and to my intellectual activity in general another type of approach, another angle of approach than those of my neighbors. But I don't think this is matter for disagreement or disapproval, this is matter for another seminar.

**Jon Elster:** Thank you very much, I'll now take a few questions from the floor and leave I think maybe 15 minutes at the end to final responses or second thoughts from the speakers and the panelists. I will first like to call upon the former president of Ecuador who is here. I'm afraid I cannot pronounce his name properly: Sixto Durán-Ballén, where are you? I cannot see you. The president has formulated a written question to Adam Przeworski, but I thought I would let you present it yourself.

### **Question by President Sixto Durán-Ballén**

I'm a graduate of Columbia '45, that's a long time ago. Within four years of getting out of Avery, I started working in government as a city councilman in the city of Quito. So the affairs have been discussed this evening here are all familiar to me for more than half a century, so I think I might have something to add. And when I hope I pronounce your names—Przeworski, whatever it is, Adam, Adam is much better. A phrase that you said struck me. First let me say that when I read your topics of the 250th reunion, about the constitution, it was obvious at

first that this has to do with the U.S. Constitution. But through this panel and through the fact that three of the speechmakers are all internationally related, would mean that you are not talking only of the U.S. Constitution but constitutions elsewhere as well. And the fact that through the discussion it got into other aspects, [gave me the] impulse me to talk now, if you will excuse me. And your phrase, I think I took it right, said democracy is not likely to survive in the poorer countries. More or less this was your phrase.

During all these years I've been attending a lot of meetings, worldwide, in United Nations in '62, well, heavens knows, a lot of places. During this time I found that the developing countries, those already in full force growing up such as the U.S., were on one side of a field. And the developing, these poorer nations, were on the other side. The gap between the two was getting bigger and bigger all the time. Because the developed countries impose on the underdeveloped countries, both the price of what you buy from us as well as the price of what you sell to us. And this condition is getting worse and worse. So I thought that in this panel, maybe this is an occasion where we can maybe, as one of the most outstanding world universities, my alma mater, Columbia, have some sort of pronouncement toward the future. Because this gap is getting bigger and bigger.

It was mentioned here the World Bank and other such institutions, as well as when you get missions from the developed countries, you go to the poorer countries and you tell us don't keep on drilling for oil because it is spoils nature. Don't keep cutting roads in the beautiful mountains because you are ruining the country. Don't cut more trees because the ozone is getting shorter and shorter. And then you tell us as well that you have to do better in school and you have to do better in health, you have to incorporate people to go to better learning so they can be prepared for the future. And once when I was in the parliament in Holland, and I got this same type of message, the do's and the don'ts. I told them you have told me here, I have taken very, very full notice of what you have told me, what I should do as President of Ecuador, and the things that I shouldn't do as well. And I said—and please excuse my French—how the hell do you want me to do that if you don't allow me to get resources to do that, except loans? And what are the loans from the developing countries?

The loans are to all get additional sale of goods and services. But not really in terms of improving the countries. The loans, international loans, look at all the foreign debt our countries have, are all because we have been buying and buying and buying things that we really don't need. Catch by the credit, and all with the idea that if we want to sell more, whether goods or services, well, the only way to sell more is giving them credit and this is as a result the tremendous foreign debt.

It's quite an elaboration I have done . . . the elaboration that you asked me on this, but because I feel so deeply that this is really the big problem of the

twentieth century, the gap between the developed countries and the underdeveloped countries. Thank you.

**Jon Elster:** Several people in the audience have expressed a wish to hear Prime Minister Rocard say something about the European constitution that is in the process of being elaborated. If I may add just a personal wish, it is that it would say something about the constraints on making that constitution, and not only about how the constitution once made will constrain.

### **Michel Rocard on the European Constitution**

Right now? That's that trap. Europe is a very strange affair. Which—ah, you laugh there; the fact that you laugh is very worrying—in which we have . . . I am since 22 or 23 years an active European federalist. And I'm supposed to still be, though full of questions. We have reached an extraordinary level of edification of something in Europe, which curiously enough doesn't correspond hardly to what we hoped.

The intentions of the founders was clearly to establish peace between ourselves, and that was not easy. In 1945 after three wars in 120 years, and many others just before. Go to Heidelberg, the place of the ruin of the castle destroyed by the French of Louis Quatorze. Our relations were roughly as good as between Hutus and Tutsis except that there was more civilization in the art of killing. And we succeed. The unique experience of reconciliation. That was the first objective, which was completely fulfilled, to a level in which everyone has forgotten that war was dangerous and war was recent and everyone now in Europe judges on the sides and phantasms of local fears without forgetting this formidable achievement.

The second was to give a big, large market to our companies to make them profitable, which has succeeded, too. These are the only objectives that some day have been written collectively in the treaty and described as objectives. The founders had in mind to do much more than that, and to build an integration of countries which would play a role in world affairs. That means to put in synergy their strengths, not only economy, technology, and finance, but in diplomacy, military, peacekeeping, world defense, in general.

How did it begin? Many people had dreamt about Etats-Unis de l'Europe, the United States of Europe. This formula has been pronounced by Victor Hugo as a member of the National Assembly in 1861. It has been taken again by Stresemann and Briand between the two wars, and put out by parliaments, all nationalists, and Hitler got up thanks to that. These lessons have paid and the founders, Jean Monnet, Konrad Adenauer, Robert Schumann, Paul-Henri Spaak, and de Gasperi agreed on a method which would not . . . no more to try to obtain from parliaments to withdraw the flag, transfer sovereignty, military terms to an

anonymous committee in which you don't know how people vote. That is the problem of foreign policy in Europe.

And in the currency, and avoiding that to create some technical interdependences between countries with the hope that they would grow and become more and more important, those interdependent, technical interdependences, and through this mechanism, call for power. The demonstration of Europe, of what Europe has made is a fantastic field of exploration for all of you politologists. Power is never located where you believe it is, and you build a new institution to control it, you discover your new institution doesn't control anything, power has escaped somewhere. It's very interesting.

Anyway, a way to do it has been to negotiate international treaties, with the extraordinary difficulty of ratification for all of them. At the beginning it was seriously done. The *Traité de Rome*, the biggest treaty, was negotiated in fact in six weeks in Messine under the Catholic technique of conclave. We have surrounded by walls and forbidden to get out, a good sixty people, half politicians and half good experts, diplomats, and economists, to try to write something and it produced the *Traité de Rome*, the most complicated in history, probably one of the longest, but very logical, you can read it, and you won't fall asleep before the end. You can. Because of the technique. We have never dared, been able to reproduce this technique.

The edification of the economic part of Europe goes rather well until the period of [inaudible] 1982, I think, I don't remember, where we finished the internal market and decided on the principle of a single currency. But at that moment the fact that the first economic power in the world, in fact, and by far the first trading power, had absolutely no common will to express in foreign affairs, in world affairs, was not only a dwarf, an absence, when the former Yugoslavia exploded. An absence in the decision which had been taken to create a new environment for the former Soviet Republics of Central Europe. The decision of their integration into NATO has been taken much longer for the decision than entry in the common market.

And we carry not far from home the Middle East problem, treated from 6,000 miles away by the Americans, and in our proximity with the danger in our communities, one million Jews, four million Muslims, live in France. Same thing in Germany. This became to be ridiculous and in a way, meaningless. And that is why after the negotiation of [inaudible] in 1982, it was decided to open the field of the European building to two new fields, justice—we could not extradite from the one country to another, a completely stupid[y], we had to internationalize the conditions of criminality naturally—and foreign policy. Then comes a terrible episode, which is a European summit in 1987 or 1988, I think, in which the Council of Ministers, very rare, invited the president of the European Commission, Jacques Delors and said we want to integrate in the European vision some foreign policy, some judicial policy without the technical method. Delors answered it's very simple, don't complicate problems. If we have imagine

a community method, this community method is the commission has a proposal, a right of proposal, has the duty to implement decisions, but doesn't take the decisions. The decisions are taken by the Council of Ministers. More and more the third organs of parliament has voice on the decisions, were and [inaudible] co-decisions. The present state of Europe is, you can read as the European Parliament as a low chamber, and the Council of Ministers as the upper chamber, with the difference that compared to it, no other democracy, when the European Council of Ministers deliberate on legislations, it is secret. It's a great claim for us. Either we extend this procedure, which is efficient and has conducted us very far to foreign affairs, defense affairs, and judicial affairs, the reduction is simple. If you don't want that, don't take the illusion that [inaudible] system, it is intergovernment unanimity and you do it alone.

And then there was the roundtable and this story is very, not known. We were twelve at the time, before the arrival of Sweden, Finland, and Austria. Nine countries said okay, we have to put that in the community system. Two, naturally, always the same two, Britain and Denmark, say no, in no case in any way. And one abstained, France. Thanks to this situation, we were inspired by a fantastic sentence of an American president, which was the winner of the Civil War, Lincoln, who has said, remember this sentence it is written in a book, when four nine again, democracy has spoken . . . wherefore . . . that's what happened. The two countries gained, and . . . and then we come to the precise problem of the present constitution, the Council of Ministers in Europe decided to stop asking the commission its proposal in terms of reports. So the three following treaties, Maastricht, Amsterdam, and Nice are unreadable, don't try, even myself, chairman committee in European Parliament, have not been able to understand it. When you hear an article of the treaties quoted, you do not know in which treaty it is. Impossible. The law is unreadable. Why?

The Council of Ministers works too fast, and works with thistles and sticking . . . scotch? But that's all, and it's . . . and a horrible mess. The quality of the European treaties have been declining from these three and the degree of progress on the content is decreasing too. With this horrible Nice treaty which is a catastrophe.

I belong to the people who advocated the ratification, which we did, for the principle of the bicycle. So long you go forward, you don't fall. When you stop, you fall. That's Europe, we cannot stop, whatever the quality of what we are doing. After the massacre of Nice, the European Parliament under many impulsions, not only social democratic, many were in the Christian Democrats too, the European Parliament engaged a campaign on the theme we cannot go on like that. First, the status quo of the Nice treaty cannot stand. It will explode, it doesn't work, and second the method has to be changed.

Finally, after half of the governments of Europe say no in no case a convention, we won. First battle. A new organ, temporary, has been designed with 105

members, 2 of them being European commissioners, 16 of them being European members of the European Parliament, and the rest being shared between personal representatives of the government as such, that makes 50, and a certain number of representative, two per nation, I think, of the national parliaments. I hope I don't forget anything. Plus observers of the candidate countries. The document we are discussing we shall submit to ratification soon, which is not finished. That has already received the approval or disapproval, then negotiation of the amendments of our ten new countries. So Europe is factually already working at 25 people.

This has been extraordinary because you had for 14 or 15 months 105 people who had no other obligation and right to devote their time to anything else than producing a constitution possibly readable. Difficulties on who will preside that. As usual, France has been arrogant, oppressive and didn't listen much to smaller countries. My own candidate for this position would have been Wim Kok, a remarkable Dutch prime minister, after having been a remarkable general secretary of the big trade union in Holland. Holland is not France. I cannot imagine the secretary general of the union becoming prime minister in France.

Anyway, it was not Wim Kok, Jacques Chirac, our president, incumbent president, has a great need first to give his signature in all this, and second to get rid of Giscard d'Estaing in home-affairs politics. So he projected Giscard on the scenery, with the approval of the Social Democratic government which has at that time . . . we had at that time, presided by good old friend Lionel Jospin who did not see the case, anyway. He could have proposed either Jacques Delors or myself if he really wanted the French. My own vision is that history being too heavy, we should have avoided the French. Anyway, but that's too subtle. Immediately the best, one of the best prime ministers in Europe who is tough and strong in conviction would be who is the Belgian one, Verhofstadt said this reactionary guy, authoritarian has . . . impossible. We need to control it with two vice presidents. That was accepted with great approval anyway and we have the former-mentioned prime minister Delors and the former Italian prime minister D'Amato as vice presidents.

A climate grew in this group. We can isolate, but I should finish in two minutes and not in three quarter . . . it's a fascinating subject. It was a rotating majority in which the working system was not vote, it was consensus. Terrible. So there has been a rotating majority in which European Parliament plus the commission tried to catch attention, approval among the members of the national parliaments to win against the governments, the governments that we defeated on the right in stories, in European affairs. I won't tell this fascinating historical process, just a comment on the result.

The result is that the nominative refusal of the world by 15, by, sorry, five governments at the entering of the process, we have a project of the government which is called the constitution. Second, as a correction for the massacre of Nice,

the charter of fundamental rights in Europe, which had been adopted at Nice, but under the explicit condition demanded by Britain that it would not be connected with the treaties and not have any symbolical . . . any legal value of any sort, is included in that treaty. The third, that's from some 15 to 18 or even 20 different legislative procedures, we have a new treaty creating 4 or 5, we've gone down to 5. An enormous simplification. And another element in this project is the considerable extension of the majority vote in the council which calls for co-decision in parliament. Those competences on which there is majority vote in Europe are voted as even in a democracy, parliamentary, the Council of Ministers being the high chamber. But with the powers of the American Senate and not of the French Senate, naturally, yeah.

Unfortunately, this extension of majority votes doesn't go through foreign affairs to defense and neither to taxation. So we are now in a great integrated market, which for two-thirds of the country, the fantastic power of a single currency, and no capacity to enforce a harmonization of economic, global, macro-policies, budget, taxation, etcetera, etcetera. So there remains something chaotic. In the decision-making protests . . . process in Europe, the convention proposed by Giscard has a president of the Council of Ministers, who is supposed to stay two and a half years, which means to escape this six-month period rotating, which forbids any long-term, midterm action. And this president of the European Council should be elected by the peers, but have no more executive job at home. Which means a full-time and fully-devoted-to-this-task person, which means considerable reinforcement of the Council of Ministers. The commission on its side is reinforced by the fact that the authority of parliament to designate the commission even if the council proposes, and every one of the commissioners is a reinforcement too.

Clearly, we needed a restricted commission in order to have it working well. But no one has accepted to lose one commissioner. So what is proposed in Giscard's and . . . it's not Giscard's constitution. Giscard had proposed his own text he had written himself, alone, a [inaudible] constitution which was demolished piece by piece by the assembly and the project on which we discuss is [inaudible] of the convention. Giscard endorsed it, did not wish it on certain issues. On this issue on the number of commissioners, the commission decided to limit the number to 15 to be implemented in 2009, but when the 10 new members come they should have every country should have one commissioner to complete the number. The new ones being with no competence, no administrative service to govern, just a voting right and the position of service.

My prognosis is that it won't hold, and terribly enough we shall be obliged to save the whole thing to capitulate and accept the principle of a large commission having one commissioner with functions and services for every state. Which means that the opinion of the Luxembourgers or Slovenian commissioner will be as important and have the same weight as these of the German or French one. It will go this way, the fact that since a good ten years now Europe is paralyzed on

many subjects, is linked to the disinvolvement of the great states, furious to be that they have . . . they are relatively paralyzed by the defiance and attitudes of the small states. I will not here insult any Luxembourges, Belgian nor Dutch, they are all my friends, but it is true that most of this country, especially in the newcomers, but already . . . Greece, Sweden, Finland is complicated, but Austria. Most of these countries have joined Europe to make with Europe a great Switzerland. This system, which is horribly governed inside, in which we suffer conflicts, paralysis, stupidities, crisis, etcetera, etcetera, is a fantastic success in terms of peace consolidated at home. Suppose globally Tito's former Yugoslavia had joined the community before? Half a million people would have survived. And look at Ireland, Greece, Portugal, the quickness with which those countries have . . . *re . . . ratrappé?* . . . catch up . . . they are *retard*, they are handicapped in development compared with the big ones. Well this needs . . . or this creates a demand, a fantastic demand. But as all these countries have first, less than two percent of their gross national product devoted to defense. They all know that if they are to touch to defense, it should increase. They don't want it. Sorry, and that . . . well, to finish. On the last crisis, I'm finished with that.

Their language to me, for instance, after dinner and when wines were good, why do you embarrass us with Europe resource, Europe power? The Americans are pleased to be the gendarmes of the world. They pay for that. Why do you want to [inaudible] paying? Why do you want to expose our boys? And we discovered that in all countries, we have problems of identity cultural identity, and we thought that human rights being born roughly on this territory, peace making, exchanges and the writers and musicians, etcetera, would make a cultural cement. This is wrong. We discovered that the main identical cement to make one country is the feeling it has of its security. The French have a feeling of security thanks to the originality of the armament, nuclear armament. The British have a strong feeling of their security through the industrial . . . the solidity of their links with you, Americans. Finland, Austria, Sweden have this feeling in neutrality. You cannot explain to a Finn nor to an Austrian that neutrality is useless in front of terrorism and furthermore in front of pollutants. Useless. It's still supposed to work, which is tragically erroneous consent. All the rest, and especially the newcomers, have their feeling of security through their alliance with the United States. Which is true. No Polish citizen, no Czech citizen, can admit that his liberator is Europe. It has been the United States. So the idea that some people could have in their dreams that the European identification be a tool to compete or to alter the American diplomacy is a mistake.

The conclusion is that not necessarily that the United States are always right, and that all what they do is always perfectly right and should be followed, especially in this period. My knowledge of the Middle East and of Iraq and of Iran calls me to other visions. But that has been . . . has to be buried inside Europe. That is the mess in which we are presently, which is very, very exciting. It remains that we have peacefully the greatest economic power of all times in history, competing with yours, and it will not stop there. There will be some time,

but probably half century, a European identity and European consciousness. The fact that in the present state the constitution is a project with no serious answer to the problem of foreign policy, hardly any on the judicial, it's a bit better, in a Europe which only touches through economy, through unemployment, boring matters. Great matters of enthusiasm and youth, humanitarian, war and peace, are outside European competences now. Our voters are bothered, fed up, they don't want it; we are in the fantastic risk of nonratification.

However, it finishes, and we are under the risk too, that the Council of Ministers will split the job because governance considered they have made too much sacrifices for you. There you are. At this very time, that's all I can say.

**Jon Elster:** Well, thank you very much, we are running out of time, but that was worth it, I think. Let me just read maybe one or two questions and then go very quick around. There's one rather provocative question here, to Adam Przeworski and Mayor Mockus. Professor Przeworski asserted that compliance at constitutional law in some circumstances, like close elections, is determined solely by economic considerations. Professor Mockus—he is a professor, too—stressed the role of ethical, cultural considerations in poor countries like Colombia. Couldn't these contradictions be resolved by these two panelists? So that was one question.

Several questions reflect a frustration that this panel of specialists hasn't said or maybe haven't disclaimed that they could say anything constructive about what the Iraqi constitution should look like. It's not exactly part of the topic of the session, but it's clearly something that people would like to hear opinions about.

There is also a specific question for the Mayor of Bogotá, please explain specifically what in the constitution prevented the anti-kidnapping measures that were attempted.

Well, there are some very long questions for Adam Przeworski but I think I'll stop here to give the speakers and the discussants at least few minutes each, two minutes each to . . . to respond. Adam?

### **Question to Adam Przeworski**

Ten seconds and one minute and forty seconds. I think I said what the Iraqi constitution should look like: whatever the Iraqis decide.

I think it's too late to start going into the problem of how do we decide whether it's ethics or just you know economic incentives or other incentives. That's a very difficult problem, and one of the things I was trying to say is that perhaps that's just unknowable. Perhaps we don't know. We observe people behaving in a regular way, and we can say that's because they feel a sense of duty, that's because they feel a sense of obligation to follow, to obey the results of a

competition, the rules of which they have accepted, and perhaps it's for other reasons. It's just too hard to tell and it's too late to get into that.

I do want to say something about what President Durán said and with apologies, we're deviating a little bit again from our original topic, but I think it's worth saying. It has something to do with Africa as well.

In 1950, the ratio of the per capita income of the wealthiest to the poorest country in the world was 42. By 1990 it was 75, and now it's 83. So international income and equality across countries, not individuals, but countries, has certainly greatly increased. It probably increased for many reasons, but one of the main reasons are trade restrictions by developed countries and the policies of international organizations. The value of trade restrictions by the developed countries for the less developed countries now is greater than the total value of overseas assistance to the poorer countries. So they are just net losers.

The first culprit as far as Africa is concerned are agricultural subsidies. As long as developed countries subsidize their agriculture, production poor countries will never have a chance. But there are all kinds of barriers. The international organizations I think play a destructive role in this situation. Why IMF does what it does is I think incomprehensible. You can attribute to the IMF the worst motivation you might want to. You may think all the IMF cares is to just increase the value of Manhattan banks, and you'll still not understand why they force countries to follow the kind of policies, which are anti-gross, as they do.

The World Trade Organization is, I think, a pact by the developed countries to exploit less-developed countries. This is supposed to be an organization which facilitates free trade and it needs seven thousand pages to describe what free trade should look like? So I think that it's obvious that one international inequality across countries is increasing. Two, I think that policies of developed countries have a lot to do with it. The tie to democracy is that I think that the evidence is overwhelming that democracies are more likely to survive in more developed countries and wealthiest countries. It doesn't mean that they can not survive in poor countries for reasons that we didn't discuss and that are complex and some poorer countries they do, in some poorer countries they don't, it may have something to do with institutions, I am not certain. But one thing that is obvious is that economic development is certainly the most important factors in solidifying nascent democracies around the world.

### **Question to Antanas Mockus Sivickas**

I mention it, Douglass North works about economical development. The first interest in law, moral and culture, was about protection of life, reduction of violence, but one of the very enthusiastic steps was looking at the Douglass North version of why some countries develop more quickly than others. And roughly speaking where law and culture are on the same line, or adjusted on the

same [inaudible], you can get more easily agreements and accomplishment of agreements. It's easier. There will be in that country less laws. In Colombia there are very . . . too much laws. I'm not against laws, but the number of laws roughly describes the cost of what is called a transaction cost. So I think that the same path of obeying laws and social norms is also a path for peace, but also a path for economic development. In the Colombian case, the powerful economical class is very influential, of course. But it's time is less organically expressed in institutions. They like to have a good relationship with politicians but they do not have politicians as they used to, twenty or thirty years ago from the families. It's like accepting professional politicians or outsiders getting in the institutions. There are still manipulations, of course, influences, [inaudible], blackmailing in some sense, but I think things are changing.

Things are also changing in two ways. I agree the international treaties of commerce are complex, but the United States help for the military help for Colombia now is very strongly conditioned to not acting the army or the armed forces directly or indirectly in violations of human rights. So the standards are changing. In ten or twenty years we have different changes, the armed forces of our countries twenty or thirty years ago received an invitation, you have to win anyway. But anyway, in this moment the invitation is you have to win, but you have to win inside restrictions. So there is a strong change in that way.

In the same manner, four years ago European states have two kind of legislation about corruption. High standards inside, but very low standards when they made businesses in Africa or in Latin America. So in cases of business in Latin America or in Africa, they could put about 10 or 15 percent independent of the country of their costs without having to explain them, that were sort of nontransparent uses . . . not transparently used money.

So very shortly I think that when you have a pedagogy around constitution, and when you link moral feelings, moral experience, you have short examples of people that have their rights protected by the constitutional court, you can weld a sort of envelope of moral and cultural regulation around constitution, you can make an exercise of everybody being more consistent with these rules. Myself, I feel that something in that way is happening in our country.

In the anti-kidnapping law discussion, there was a law similar to that of Italy, saying that people who had parents kidnapped would have their propriety and their bank accounts immediately freezed for not letting them to pay first. And second, in some extent consider paying ransoms as an illegality, a nonlegal act. You can be punished if you pay for rescuing someone. This law that proposed that was [inaudible] by the constitutional court because it endangered the life protection of the people kidnapped. And it impeded familial people, the family of the kidnapped, to act to protect this life. This . . . this theory of the constitutional court was completely logic, if you take the right of life one by one. So you have the right to rescue each life. But putting a temporary frame, you always . . . you

can easily understand that you . . . with this law in conditions like Colombia, the number of kidnappings will as it happened will get upper and we have . . . well, this year it's better and last year was better than the 2002, 2001, but we reached three thousand kidnappings by . . . a year and it became one of the reasons why the people that have properties in Colombia were leaving Colombia. Were putting part of their investments out, outside.

So in this moment we will perhaps, we are making a lot of constitutional amendments in these months, and there will be a referendum about it, and perhaps one of these amendments will search to change that restriction. It's like saying the right to life, it's not defended just on an individual basis. It's a sort of calculation of what the rule can . . . what ethics can have the rule on . . . on the phenomenon aggregated not just case by case. And perhaps I should signal that in Colombia we have not had—as other countries in Latin America—populist governments. One of my friends says what will cost us that is very high price? But in this moment, constitutional court, time to time, makes in some sense demagogical pronouncements. One of them . . . it has interesting effects of popular support to constitution, or to constitutional court. But one of them, the last one, was banishing a tax reform that was extending the taxation to common life products. To basic products. It was a small tax that was agreed by the government and the congress for being made in place next year. And the constitutional court said it will effect the statement about the *estado social de derecho*—the social state of right. So constitutional court has acted—and not only in this case but in three or four cases—in a rather demagogical way, but gaining a lot of legitimacy for constitutional court and for constitution, that is perhaps a strange feature of Colombian history and situation. Constitutional court acts in part as a sort of political subject.

**Jon Elster:** Thank you very much. Since our time is up and since all the three speakers this morning had their chance for summing up, I think I will not extend the same opportunity to the discussants, so we close the session and thank all of you very much.

## **Terror and Civil Liberties**

### **October 17, 2003**

**Akeel Bilgrami, Department of Philosophy, Columbia University**

#### **“Democracies Die Behind Closed Doors”**

**Akeel Bilgrami:** The theme of our second day's symposium is more explicitly current than yesterday's. The PATRIOT Act, and a series of somewhat less publicized executive orders and interim regulations, have raised various issues of concern. This, to begin with the scaling up of secrecy, leads to the anxiety that

Judge Damon J. Keith memorably expressed when he said, “Democracies die behind closed doors.” There’s the issue of undermining and entrenched distinction between intelligence operations and law enforcement, by lowering the protections that individuals have against criminal investigation. There is the issue of the criminalization of dissent raised by the powers created to arrest or deport those who are members of—or even donors to—groups which are suspected of being associated with terrorism.

And there is the issue, even if not one of civil liberties directly, created by the very fact of a plethora of executive orders outside of the reach and the ratification of the legislature and the judiciary. That is the issue of the immersion of what is familiarly described as the system of checks and balances. This today, it came close to being suggested, that it is a source of wholesale skepticism about the element of judiciary review in this system. That the judiciary sometimes clamor to ratify rather than resist and its executive aspiration that we do not like. But that cannot be quite right. At any rate, it cannot be anymore right than it is to suppose that it is a source of wholesale skepticism about the system of democratic predictions. That it sometimes overwhelmingly produces electoral outcomes that we do not like.

The issues I mentioned speak to the rights registered in the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. But in fact, the situation in Guantanamo Bay speaks more widely as well to the basic tenets of international law and of human rights quite outside of the United States Constitution.

### **Civil Liberties**

Now, of course I put these matters tendentiously, one-sidedly. The question before us really is whether and to what extent the context of terror and the question of security that it raises may allow us to see these issues that I’ve mentioned as something that a doctrinal commitment to civil liberties may take within its stride. So to take just two examples, in the context of a very serious threat to public safety raised by terrorism, might we not see it now as an interpretatively more open matter? How much do you process the Fifth and Fourteenth Amendment to commitment to due process should be seen as demanding?

So also, might not the same context leave interpretatively more open what is to count as unreasonable in the Fourth Amendment than unreasonable searches and seizures? In a word, the question before us is how contextual should our constitutional understanding of these liberties be?

### **The Diverse Disciplines of the Speakers**

The speakers this morning who come from four different disciplines: law, sociology, political science, and philosophy, bring diverse angles to this question.

George Fletcher addresses the legal issues and takes a sturdy position on them. James Fearon complicates the question by looking to long- and short-term concerns about terror, and sees these as demanding differential response in each case. Diego Gambetta raises a higher-order question about whether we really are epistemically well placed to so much as take any definite position at all on civil liberties because of the difficulties of assessing the terrorist threat on the basis of information which is gathered and transmitted under assumptions that are murky and under pressures that discourage rational investigation. And G.A. Cohen, in a paper that is at once provocative and humane, stands aside from the civil liberties to ask an intriguing question in moral philosophy about what the appropriate location is for making moral judgments about terror.

I want to just add that it is a matter of real sorrow and regret for everyone on this platform, and many in the audience, that a remarkable philosopher and a remarkable man, Bernard Williams, who died a few months ago is not here to speak today as he was scheduled to do. This promises to be a day of great brilliance and great fun but it will be less brilliant and less fun because Bernard's not here. You have the biographies of each speaker in your hands, so I will not rehearse them now. I will just ask our own George Fletcher from the Columbia Law School to speak first.

## **Terror and Civil Liberties**

### **October 17, 2003**

#### **George Fletcher, School of Law, Columbia University**

#### **Liberty and Security Under Stress**

#### **A Uniquely Dangerous Time**

**George Fletcher:** Mr. Chairman, fellow panelists, ladies and gentlemen, good morning. My subject is entitled "Liberty and Security Under Stress." This is, they say, a uniquely dangerous time. Since 9/11 we have been conscious of risks to our security and safety that are supposedly have a quantity and magnitude different from what we have known since World War II. The conclusion is that we must curtail civil liberties in order to secure our homeland against terrorist threats. This is hardly the first time since World War II that we have perceived great danger. The first perceived threat in the postwar period was the fear of communism. With Eastern European countries collapsing, we thought that we too might suffer an internal revolution leading to knocks on the door in the middle of the night. The remedy was supposedly a form of loyalty test and security clearances known as McCarthyism. Senator Joe McCarthy sought to expose one communist after another to ensure our safety. And these exposures proceeded often on the basis of rumor and association. His campaign collapsed when he went after members of the United States Army, and their lawyer, Joseph Welch,

stood him down with a single question: "At long last, Senator, have you left no sense of decency?" That question brought us to our senses. The country held firm against those who wanted to use the fear of communism to undermine the legal projections of ordinary citizens.

The second major threat to our security was the wave of criminal behavior that hit our streets in the 1970s and 1980s. A threat that made Columbia students quiver in their shoes as they walked down Broadway and guaranteed that they avoided the streets north and east of campus. A professor in the law school was murdered when he got off at the wrong subway stop and found himself on the streets of Harlem. And in those days, we heard the recurrent conservative cry that we were too soft on criminals and that we must sacrifice civil liberties in order to ensure our safety on the streets.

In the previous two decades, the Supreme Court, under the leadership of Chief Justice Earl Warren, had greatly expanded the procedural guarantees enjoyed by criminal suspects. The shift was most dramatic in the fields of search and seizure, interrogation, assistance by counsel, the right to a speedy trial, and a powerful but short-lived attack on the death penalty. The conservatives wanted to tear it all down. Their slogan then, as always, "We must balance liberty against security." When I refer to conservatives, by the way, I mean no disrespect toward libertarians or toward Burkian traditionalists. The particular vice I wish to highlight is class warfare between insiders and outsiders. Between those who think of themselves as the "good" citizens and compare themselves with others who are thought to be outsiders and the threats to law and order. The liberal instinct in criminal justice is to deny the distinction between insiders and outsiders and to insist that when it comes to the preservation of liberty we are all equally at risk.

And a quip that made the rounds in the 1980s, a conservative is a liberal who has been mugged. A liberal is a conservative who has been audited. Though we faced the current assertion of difference between insiders and outsiders, we should be proud that when we were most in danger, when Eastern European states were suffering under communist dictatorship, when we could not walk the streets without fearing a mugging, we did not waiver in our commitment to the expansion of due process guarantees in the Warren Court. We resisted the pressure to sacrifice liberty for the sake of security.

We've resisted, that is, until September 11, 2001. With the attack against the Twin Towers and the Pentagon, we felt not only great sorrow but we experienced shock and disorientation in the aftermath of stench and smoke. An opportunity arose that had never existed in the twentieth century. In three rapid-fire blows from the end of September to mid-November 2001, the Justice Department and the White House brought about a basic redefinition of governmental power. First, knowing what hit us but not who hit us, the Attorney General rounded up some 1,200 suspects to see whether they could learn anything about terrorism in America. The department refused even to inform the families or the public of the

names of the detainees. The administration eventually released, or deported, all of those suspected but without having found a single person to prosecute for terrorist acts. Preventive detention on a mass scale became the new norm.

Second, the administration pushed the United States PATRIOT Act through a complacent Congress. And third, the president issued an executive order establishing so-called military tribunals for trying suspected terrorists. Both of these latter measures represented a major constitutional reorientation. The PATRIOT Act in the area of surveillance, investigation. And the military tribunals in the area of trials.

They represent the rollback that conservative insiders yearn for against the communists and against the petty criminal outsiders. In the fear of the moment, it was hard for the liberals to say no. That is for virtually everyone except Russ Feingold, the only dissenting vote in the Senate. The PATRIOT Act is the primary effect of increasing the possibility of governmental surveillance over computer files, telephone conversations, and reading material in libraries and bookstores.

The president's executive order of November 13 establishes special tribunals to try suspected foreign terrorists. The judges are military judges, there's no jury, and no appeal to civilian authorities. To call these military tribunals is an insult to military justice. A system that has now been refined and developed into a respectable system of procedures guaranteeing due process for people in the military. Because these special courts are so closely connected to the president himself, it would be better to call them *presidential tribunals*.

President Bush has not yet dared to invoke one of his special courts but he constantly threatens to do so. The latest threat is against Zacarias Moussaoui. The government tried to prosecute the alleged twentieth hijacker, but then he sought to subpoena a witness whom the government did not want to disclose. Because the government would not produce the witness—and, of course, Moussaoui has a constitutional right to confront the witnesses against him—the trial judge dismissed the charges that could've been refuted by the missing witness. Those are all the serious charges, including those that carried the death penalty.

The government now contemplates shifting its case to a presidential tribunal. Or worse, just holding Moussaoui in jail in preventive detention as an enemy combatant. Similar threats are pending against some of the fighters captured in Afghanistan, now held in limbo as detainees at the Guantanamo Bay military base without access to lawyers or an acknowledged right to legal proceedings to determine whether they are properly confined.

## Perceptions: What Is the Threat?

Apart from the impact on our concrete lives, the twin measures adopted after 9/11 have had an enormous impact on the perceptions and the discourse that has emerged in the United States and in the West about the military threat that we face. The first problem is perceiving the enemy outsiders, defining who they are. That is new. With the communists, we knew who the muggers were supposedly supposed to be. But who is the enemy today? In the Second World War, we could and did take all axis nationals to be our enemy. As German or Japanese citizens, their property was subject to forfeiture and all of them residing in the United States were subject to detention and deportation. We even went so far as to detain several thousand Japanese-Americans living on the West Coast for fear that they would constitute a fifth column in the event of a Japanese evasion. No one could say that all these people were disloyal. But then, nor were all the Japanese in their homeland, or all the Germans in their homeland, hostile toward the United States.

In a war, individual loyalties do not matter. Only three categories matter: friend, foe, and neutral. The classification proceeds not by cities, not by neighborhoods, not by households, but by nations as a whole. Then we knew who the outsiders were, but today, we do not. Many see the Islamic world as engaged in a clash of civilizations with the West. But because we respect religious liberty, we are inhibited about taking all Muslims or all fundamental Muslims to be the enemy. Or even to think of Islam as one of the factors defining who the enemy is. Particularly, I thought it was very amusing that both Prime Minister Blair and President Bush bent over backward in the month after 9/11 to praise Islam as a religion of peace. I haven't heard those remarks lately. But in the beginning, it was obvious that no one. We were protesting too much. People did, in fact, want to identify the fundamentalist Muslims as the enemy but they didn't dare say so.

Our default position as a result, is to fluctuate between two extremes, both of which are reflected in the triple measures taken by the administration after 9/11. At one extreme, the all-inclusive enemy consists of all foreigners. The line between citizen and foreigner has taken on new significance. Aliens are subject to immediate detention on suspicion, secret confinement, and to a trial before a presidential commission. Citizens are exempt from all these measures of summary justice. Aliens get the INS, citizens get the constitution. At least this was our first impression after 9/11. We did not think that discrimination against aliens as outsiders would harm us, namely the insiders, the citizens of the United States. And let me clarify that point—this persecution of foreigners is limited to administrative proceedings. It doesn't apply in ordinary criminal trials. But part of the tactic after 9/11 has been to avoid the system of criminal justice, circumvent it as much as possible.

In the long run, you cannot define the enemy by that sometime arbitrary characteristic called "citizenship." We have to devise an enemy whose actions

were closer to our insecurities; therefore, we found a word to bear the weight of all of our fears, precisely as we did with respect to the devious communists hiding under the bed in the 1950s or the mugger lurking in the shadows in the 1970s. I'm speaking of course of terrorists.

Fear of terrorism lies at the center, both of the PATRIOT Act and Bush's proposed tribunals. The only problem is that we are not sure exactly what terrorism is or who terrorists are. We assume that the 19 hijackers were terrorists. Suicide bombers in Iraq and in Israel are terrorists, though some people call them martyrs. Beyond these court cases, there's nothing but confusion.

We have a federal statutory definition of terrorism, which focuses on acts of violence designed to intimidate the public or otherwise influence the government. The worst part of this and many other definitions is that they fail to account even for 9/11. The motives of the 19 hijackers seem to have been to kill infidels and to wreak symbolic as well as concrete damages on the commercial values of the West. This is not intimidation as the statute requires because there is no specific demand that the United States failed to meet. The fears of the West derive not just from the threat of further attack, but from not knowing what we can do to assuage the needs of those who want to kill us.

### **The Conceptual Boundaries of Terrorism**

Drawing the proper conceptual boundaries of terrorism is far more difficult than meets the eye. Questions arise in at least six dimensions. Briefly, these are the following:

- Number one, who are the victims? Do the victims have to be civilians? If they are members of the military, are the attacks of suicide bombers not acts of terrorism? Al Qaeda blew up the USS Cole and most people described this as a terrorist attack. On the other hand, no one describes the Japanese surprise attack on Pearl Harbor as terrorism. Why not?
- Two, the perpetrators. Must the perpetrators be private parties or could they be soldiers or agents of the government? There's no reason and principle to exempt military personnel, except perhaps the desire to keep terrorism distinct from war crimes. This, by the way, is a major point of division between the western states and the association of Islamic states. The West insists that state terrorism be excluded from any UN definition. The Islamic states insist on including state terrorism as part of the concept.
- Point three: the relevance of just cause. The most controversial issue in the definition of terrorism is captured by the slogan, "One person's terrorist is another person's freedom fighter." The problem is whether a good

cause justifies the use of horrendous means. The Islamic states think that it does. And again, this group at the UN finds itself at odds with the dominant view in the West. Those who opt for terror always believe their cause is just. Sometimes it is, sometimes it is not. No American would be happy about branding the Boston Tea Party an act of a terrorist aggression against British property. Nor would supporters of the union and the American Civil War readily label General William Tecumseh Sherman's destructive march across Georgia as a campaign of terror against the southern population, which it was. Yet these acts of violence against property and people do not meet the conventional, or if they do meet the conventional types of terrorism, but people balk at the implications.

Now I want to turn to three other factors that are rarely discussed in thinking about terrorism, but I think that they are actually more influential and important than the three that I've already mentioned:

- The fourth is the element of organization. Can terrorists act by themselves or must they be part of an organization? On July 4, 2002, an Egyptian named Hasham Mohammed Hedayet open fired on a line of people waiting to check in at the El-Al counter at the Los Angeles International Airport. Hedayet killed two people and injured five. He was then shot, himself, by people at the airport—security guards. The FBI investigated but they were unsure whether this was a terrorist incident. In the end, they decided it was not because Hedayet had no known links with terrorist organizations. He was a loose cannon. This is a very revealing judgment because it suggests that some element of collective or organizational coordination informs our intuitions about what terrorism is. Why?
- Fifth element: the element of theater, never discussed. Crime often occurs in secret but terrorism always takes place in the public eye. Terrorists want to make a statement. They want to be seen, otherwise they cannot strike terror into the hearts of others. Not a single definition of terrorism, of many bandied about in the statute books and in the literature, recognizes either the element of organization or of publicity. Yet an adequate account of terrorism requires that we consider both of these because that's the only way to explain why terrorism strikes terror in the hearts of people.
- The sixth element is very intriguing. It's the element of guilt. Even more significant than the factors of organization and publicity is the fact that terrorists feel no guilt. They are always convinced that they are doing the right thing. This explains why they are so dangerous and why we fear them. Suppose we tried to define the terrorist dimension of 9/11 with this formula: "A violent organized and public attack by private parties on other civilians without guilt, regardless of the justice of the cause." The problem is that each of these six dimensions admits of counterexamples.

Sometimes the victims are military and the perpetrators are states. Sometimes the cause appears to be just. And one person, with speaking to the issue of organization, one person with enough weapons but no organization might wreak terror, for example, by sending out letters laced with anthrax. That last point also bears on the issue of publicity. And letters laced with anthrax do not strike terror by being a public statement. They are a series of private statements. And similarly, there might be many terrorists who, in fact, feel compunction or have bad feelings about what they take to be their necessary political actions.

All of our six dimensions of terrorism admit of counterexamples. But this should not be so surprising. Relationships of family resemblance are like this. Family relatives might share many characteristics—height, skin color, hair color, various physical features. Some members of the family might have some of these characteristics and not others. Others will have other characteristics, enough of the same. But there will be a sufficient commonality of shared characteristics to recognize members of the same family.

This is the way to understand terrorism; as a matter of family resemblance, as a conjunction of factors, each of which admits to some counterexamples. But this is hardly the way to define a crime in a federal statute. If terrorism is too complex to be contained in legal language, then we are understandably tempted to go to the other extreme and focus on the broader enemy, namely, all aliens.

We end up in a contradiction of conflicting ambitions. On the one hand, we cannot articulate precisely who the terrorists are or what the concept is. But we are convinced that we hate them and that we must strike out against them. On the other hand, we know precisely who the foreigners are, but we also know that it is irrational to hate them and unjust to persecute them. At least until the spring of 2002 we thought that citizens were safe. They could not be touched by the detention provisions in the PATRIOT Act, or by the threat of prosecution in a military tribunal. But in our confusion about the enemy, the bulwark of citizenship suffered a great reach. In April and May 2002, the government started arresting American citizens on American soil claiming that they were enemy combatants and not entitled to any legal protection. Not as suspects of crime, not as prisoners of war. These are the notorious cases of Yaser Hamdi and Jose Padilla. Both American citizens, both Muslims. Both now held incommunicado in American prisons. Padilla is supposed to be able to see a lawyer and Hamdi did not. But neither can expect to have a trial anytime soon.

They are treated as exactly as though they were among the so-called enemy combatants retained on the field in Afghanistan, which Hamdi was, rather than in the shadow of an American court that could afford them a trial based upon due process of law. We now have a jerry-built system of criminal justice that is probably one of the most self-contradictory in the civilized world. If you are a citizen suspected of a crime, you're entitled to a jury trial in a federal court. This is

true. And if you're a foreigner living in the United States and you're suspected of an ordinary crime not related to terrorism you have exactly the same rights. And this is true unless the government suspects, that is, when you bring up the subject of terrorism, it creates an entirely different line of potential prosecution. You can be subject to the military tribunals, you can be subject to special surveillance under the PATRIOT Act.

A foreign combatant who was kept offshore can be held without any right to a trial at all, and this is true, it turns out, if you are a citizen arrested in the United States but you're suspected of being affiliated with al Qaeda. In this area, there are no predictable rules of law. We live in a de facto state of marshal law in which the Bush administration can potentially imprison any suspect at any time. The sad fact of the matter is, that despite our early official tolerance toward Islam, if you are neither an Arab nor a Muslim, you have less to fear.

### **What Are the Liberties at Stake?**

My dire description of the state of criminal justice brings us to the question, "When we speak of liberty and security, what do we have in mind?" Their liberty and our security? All foreigners suspected of terrorism, all Muslim citizens suspected of terrorism, all noncitizens captured in foreign military trial in foreign territory, all of them live outside the protections of the constitution. They live under a minimalist regime of constitutional projections. They pay in liberty and we gain in security.

Or is the conflict between liberty and security about something that potentially affects all of our lives on a regular basis? Are we concerned, for example, about taking off our shoes at airport check-ins? I don't think so. This carries no stigma. It's a minor inconvenience. We who are privileged to be able to fly can bear it. A better example of the potential conflict would be the FBI's trying to sleuth out clues of terrorism by subpoenaing reading lists from libraries or bookstores or scanning e-mails for the use of incriminating words or reporting, demanding reports from universities about foreign students. Some people might be offended that the FBI could know what we read and whether we use provocative language when we do searches on Google. But this is not likely to be the primary concern of those who believe in balancing liberty against security.

First, because our rights to privacy have eroded for some time, particularly in the computer age. If we had really been concerned about our privacy, we would have fought back harder when it became clear to us that the government could search our e-mail records in ways that far exceeded its power over private papers and postal correspondence. The greater danger from governmental access to this information is not our sense of humiliation, it's rather that the government will generate profiles on the basis of the acquired information and that these profiles will lead to unfortunate consequences in a totally irrational way.

Security is hard to measure. Even if there were a basic human right to physical security, of course there's no right to security mentioned in the constitution. If there were a basic right to physical security, how much security would we be talking about? Never to be hit by a car? Never to be injured by a kitchen appliance? That's almost laughable. The relevant security that we must be concerned about is the right not to be killed by those who hate us collectively and seek to do us damage on a collective basis.

### **The Discourse of Balancing**

Remarkably, the Bush administration has induced a generation of scholars and commentators who believe that we should secure this form of security by compromising our liberty. Unfortunately, time prohibits me from giving you all of the examples, but my general thesis is that in the face of this enormous crisis in our constitutional structure, we in the law schools have not behaved well; we have not acted with courage. On the contrary, the general tendency has been to say, "Let us compromise, let us balance, let us seek pragmatic solutions, let us gain access to the halls of power by recognizing the authority of the government to proceed and to make suggestions to ameliorate here or to ameliorate there."

From the very beginning, the government tried to trade on the ambiguity between crime and war. They would not commit themselves on the issue of whether the attack on the Twin Towers was more like the Oklahoma City bombing or more like Pearl Harbor. In the beginning, the administration wanted it both ways: crime for purposes of seeking justice, war for purposes of justifying the massive use of deadly force. When it came time to decide what to do with the prisoners in Guantanamo, and now in Iraq, it turns out they want neither. Neither crime nor war. They will not treat their detainees as suspects of crime, nor will they follow international law and treat them as POWs.

Yet, this ambiguity coupled with the pervasive willingness to balance interest, security against liberty, has given the government a range of repressive options that they have not had since Abraham Lincoln suspended the writ of habeas corpus in the Civil War. The genius of Bush's proposing his own back office courts, the presidential tribunals, has been the fact that he has not implemented the order because if he had implemented the order there would've been test cases in the courts and he probably would've lost. But instead, by taking these measures and not enforcing them, the administration has generated a discourse of balancing interests, of balancing liberty against security, that establishes that they can proceed so long as they make the case to the public that in this situation or in some situation the value of a security is more important than the value of liberty.

## The Constitution Is Not a Suicide Pact

Of all the clichés marshaled in favor of the president's policies, the most understood is the claim that the constitution is not a suicide pact. Of course, it's not that the constitution is not a suicide pact—our purpose is to live well under the constitution, not to die under the constitution. But a careful study of all of the opinions in which the court has used this phrase reveals that they have something in mind that is fundamentally different from the way this phrase is used by commentators, pundits in the media.

In every case in which the court has said the constitution is not a suicide pact, they've also gone on to reason in this case there's a conflict between civil liberties and the power of the government. But in this case, the citizen wins. Sometime in the future there might be a crisis in which security will outweigh the interest in liberty. But right now, when we come to a test case, a concrete case, the citizen wins. That's in those cases where they've mentioned this phrase.

I think that we can gain a great deal in this debate by drawing on lessons taught in the early work of the early philosopher John Rawls. Rawls developed the idea that the principle of liberty must take logical precedence over our interest in welfare, including our interest in security. And the reason it must take logical precedence is that when we begin to compromise, without knowing whether we will be winners or losers, if we were deciding fairly, would we accept these compromises? Would we accept the indignities and the injustices that are inflicted upon foreigners today, not knowing whether you would be a citizen or a foreigner, would you accept that system? And the answer is you'd have to be a fool to accept that system. If you were thinking fairly and without bias and without knowing who was going to win and who was going to lose, you would have to be a fool to accept the system that we now have today.

I think there's much to be gained as well from a historical understanding; the traditional Burkan sense of the constitution and what it means. The constitution represents our accumulated wisdom over time. We, the present generation, have no authority to compromise its integrity. Its principles come first. They are lexically prior to considering measures that will enhance public safety and welfare.

Lincoln's case against southern succession was based exactly on this traditionalist argument. The American nation had become so entrenched in the course of "Four score and seven years . . ." that no generation had the authority to succeed and thus override the judgment of history. So it is with the constitution today. Its principles were cast with a long horizon. No particular generation or politicians or judges has the authority to subvert it. Preserving our constitution in the time of stress requires an attitude akin to love. We must see our national charter as the horizon of meaning in our political life. It must be the beginning and the end of our political thought. If we love the constitution and we are loyal to

it, then we can understand what Benjamin Franklin meant when he said, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

## **Terror and Civil Liberties**

### **October 17, 2003**

**James Fearon, Dept. of Political Science, Stanford University**  
**Catastrophic Terrorism and Civil Liberties in the Short and Long Run**

### **The Problem in the Long Run**

**James Fearon:** I'd like to begin by thanking the organizers for inviting me to participate in this event. A great celebration of a great university. And for giving me the opportunity to think through a set of issues that I haven't thought enough about and for giving me the opportunity to be corrected and possibly humiliated by an outstanding set of critics this afternoon. I'm going to talk today about civil liberties in the United States and the threat of catastrophic terrorism, not terrorism in general but catastrophic terrorism. By catastrophic terrorism, I mean not suicide bombings that kill five or twenty people or snipers or anthrax mailers who kill a few people at random here and there, but big-time stuff, using weapons of mass destruction or simpler methods to kill hundreds or thousands or possibly even millions of people.

At this scale, debates about the meaning of what terrorism means are largely beside the point, but just for the heck of it, let me say that by terrorism I'll take that to mean violent attacks on noncombatants, civilians, for the purpose of political pressure, political theater, influencing some third parties, or possibly kind of crazed self-expression.

### **The Bad News**

The talk will have three parts, which can be summarized very simply. First, there's bad news. Next, there is some good news, and then there's a forecast, which is probably bad. So it's generally, I would say, a depressing talk. Okay. Bad news. Forget about al Qaeda. I think we can even forget, in a certain sense, about violent Islamic fundamentalism. More broadly, these are just short-run or medium-run problems. The real bad news, I think, is that catastrophic terrorism is a long-run problem and it is a technological problem more than it's a political problem. And as such, I think it's going to remain and probably grow more dangerous long after al Qaeda is just a memory, if we should be so lucky. Why is it a technological and not so much a political or social problem? On the long run, the progress of science and technology and education are making it easier and easier for ever-smaller groups, possibly even individuals, to develop or acquire

weapons of mass destruction. It's easier and easier to get what you need to make nuclear weapons. Thanks to great universities like Columbia, more and more people know how, every year, all over the world. Likewise, it's getting easier and easier and we're learning more and more about how to do biochemical engineering so as to modify pathogens and toxins to make new, possibly unstoppable plagues.

I have a journalist friend who quipped in a conversation about this subject that we seem to be heading in the direction of a world where every single person has the capacity to blow up the entire planet by pushing a button on his or her cell phone. Now, this obviously is a big exaggeration and such a world will never exist, but it's useful to think about as a limiting case because such a world couldn't exist, right? It's immediately clear when you think about it because it's just not a feasible world. It would blow up immediately. You know, even if one million—as opposed to five billion—people had these cell phones, or even ten thousand people, you'd have to think that your expected life span would be a great deal shorter than it is now.

I think that the important point that this example makes is that in the long run we simply are not going to be able to save ourselves by redressing political or social grievances. This is the sense in which, I think, the problem is in the long run more technological than political or social. Of course, when there are legitimate grievances, governments ought to be redressing these in any event as a matter of justice and it could also be that in specific cases this could reduce a short-run or a short-term immediate threat of catastrophic terrorism. But in the long run, there will always be a constant trickle of angry, hate-filled individuals and messianic or ideologically crazed groups who are eager to kill and destroy for some kind of ideal or cause.

If the progress of science, technology, and education makes it easier and easier for them to do this, then we face a very real dilemma. And I think that this dilemma has not been acknowledged or even seriously dealt with in the debates on terrorism and civil liberties since September 11. The public debate and also the academic debate, at least what I've read of it, has been quite partisan, quite predictable, and I think pretty boring.

On the same side, you have traditional liberals who are up in arms and scandalized by the PATRIOT Act and the Bush administration's multiple transgressions against civil liberties. But they generally fail to acknowledge that there's a serious and new problem developing, let alone offer any serious or constructive suggestions about how to deal with it. Conservatives, on the other hand, tend to defend the PATRIOT Act, leaving aside some of the more libertarian conservatives. They tend to defend the PATRIOT Act, as they say well it's actually mild compared to U.S. responses to past threats of a similar order or less. And sometimes they insinuate that—they might even insinuate that—liberals are helping terrorists if they scream too much about civil liberties. They

too, I think, are highly focused on the short-run politics and the implications of this specific argument for this Republican administration.

### **Responding to the Threat of Catastrophic Terrorism**

In this talk, what I want to do is consider the long-run problem of catastrophic terrorism and then work backward to try to say something about what it might make sense to do now in the short run. Now, before getting to possible solutions to the long-run problem though, I'm going to say a bit more about the nature of the problem. In particular, why is it or how can I be so sure that in the long run we won't be able to protect ourselves without violating our traditional civil liberties, at least in their traditional form? Basically, I have two arguments here: One is an argument from common sense and the other is based on some evidence from a domain that I think provides the best analogy, the closest analogy, for efforts to counter the threat of catastrophic terrorism.

Okay, so first argument, the one from common sense. This is basically illustrated in a very extreme form by the nuclear cell-phone example. As it becomes easier and easier for small groups to acquire the means to kill thousands and thousands, it seems to me that it would be simply insane if government did not have the power to undertake secret investigations of individuals and groups that are giving off some kind of warning signs. It would be insane if government couldn't engage in some kind of preventive detention or collect information about individuals on the basis of suspicions or group-level indicators. In other words, engage in various forms of profiling. It might even make sense if we go far enough in the direction of this scary world to acquire security clearances for learning kinds of scientific knowledge and procedures.

Now, many traditional liberals, I think, seem to want to deny that the problem of terrorism will require anything new or different in terms of law enforcement and investigative powers. The idea or the analogy that's often used on this side of the argument is that terrorism is a form of crime and it can and it should be handled properly by the criminal justice system as it stands right now. But I think ordinary crime is just a bad analogy for the problem that's posed by the threat of catastrophic terrorism. The model for ordinary crime works something like this: It's basically that the model is that the police investigate crimes after they occur and by doing so, if they do it effectively, they get a high enough probability of catching the criminals that future crimes and future criminals are deterred from committing crimes.

Now, with catastrophic terrorism, we're talking about crimes that are so enormous and so horrible, a nuclear bomb in New York City, for example, that catching the criminals after the fact is just too cold a comfort. Liberals—and I count myself in this crowd—we would just be sticking our heads in the sand if we go around saying, "We must not compromise any civil liberties," if we don't actually engage the dilemma posed by the necessity of preventing this sort of

crime before it actually happens, not after the fact. In addition, the deterrence model for ordinary crime prevention just breaks down when you have terrorists who are willing to kill themselves or think they can escape detection, which is not implausible in the case of nuclear weapons, for example, secretly delivered to a major city.

There's another common analogy that we encounter all the time in the press, and from politicians, from thinking about terrorism and this is terrorism as war, or as the president says, the war on terrorism. This tends to be deployed more often by conservatives. I think if anything, this is an even more misleading analogy than the crime analogy. With an interstate or classical war, you know who the enemy is and where to find him. The problem in war, classically understood, is when and how to attack the enemy's forces. With terrorism on the other hand, the central problem is figuring out who and where the enemy is. And if you can do that, once you've done that, the problem is simple. The attacking part is easy because of the huge imbalance between the resources and power of the state versus small numbers of terrorists. The problem is figuring out who and where they are.

So neither the crime analogy nor the war analogy seems to be very helpful. A much better one for thinking about this problem is the analogy to counterinsurgency and civil wars. I believe that the vast—this isn't widely understood this way, but I think if you apply sort of the standard or a poor notion of what terrorist attack is—then the vast majority of terrorist attacks in the last fifty years, or for that matter in the last five or two years, have taken place not in the United States or Israel or developed countries, but rather in very poor countries where there are civil wars going on. Poor country civil wars.

Most civil wars, in the post-World War II period, and especially those in poor countries, have been fought as rural guerrilla wars, or insurgencies. Terrorist attacks appear in these when you have either the government or rebel forces massacring villages, it happens very often—civilians in villages who are suspected of supporting or helping the other side. And typically, they do this to deter other villages from doing the same or the alleged transgressions or to scare other villages into compliance with the government or the rebels' agenda.

Terrorism, when our media covers it, or when it kind of implicitly defines it, may kill one or five or ten or twenty people at a time, except in very rare cases like September 11. Terrorism in poor country civil wars, on the other hand, like in Sri Lanka, Angola, Sudan, Sierra Leone—there's a very long list, many more than that—regularly kills hundreds, even thousands or tens of thousands over the course of fairly short periods of time. The problem we face in confronting the threat of catastrophic terrorism, I think, is structurally similar to the problem that governments face in trying to conduct counterinsurgency operations.

In a nutshell, okay, what's the problem? In a nutshell, the problem is how do you distinguish the active rebels, or active combatants, from the rest of the population

if you kill or arrest too many noncombatants or the people who aren't actively involved in the rebellion? You may actually increase support for the other side and undermine support for your own. But on the other hand, if you don't kill or arrest active combatants, then you lose control of territory and you lose public confidence and support very quickly.

So the second reason why I think that in the long run, the problem of catastrophic terrorism has to be addressed in part by changing laws and law enforcement practices in ways that would cut against traditional, our traditional civil liberties, comes from this analogy to counterinsurgency. I've been studying civil wars in this post-World War II period for several years now and in the course of that have developed the impression that the problem of counterinsurgency is just an extremely difficult one for governments to solve. Most of them have a terrible time with it, even the relatively most bureaucratically, militarily competent and well-financed states have had tremendous difficulty with it—the U.S. in Vietnam, Britain in Northern Ireland, the [former] Soviet Union in Afghanistan, for example. It's a hard problem. I think on the basis of this evidence that the following two empirical claims are both accurate, even if they may at first glance seem a little contradictory.

So first, it's highly unlikely, I think, that a state can defeat or minimize an insurgency without committing significant abuses of civil liberties, including legal changes that are going to go well beyond what's necessary to counter ordinary crime. But at the same time, second claim, it seems clear that too much or too indiscriminate abuse of civil liberties and human rights can hurt, rather than help, encounter insurgency. So it seems there's this very tricky delicate balance to be struck, of which we have no great knowledge or rules and there probably aren't any for how to strike it. But I think how much to abuse or what's the optimal level and optimal ways to minimally restrict civil liberties in combating the problem faced by, you face in, an insurgency. Okay, on the basis of these two arguments, the one from common sense and the other from the grim experience of states with the problem of counterinsurgency, I think that in the long run the news has to be bad for our traditional civil liberties. The fact that technology and education are making catastrophic terrorism ever easier to carry out moves us in the direction of having to conduct, in effect, a continuous low-level counterinsurgency, and historically, if the analogy is right, this has been very bad for civil liberties.

### **The Good News**

That's the bad news, okay? Now, some good news. The good news is that these arguments really only apply in the long run. And if I had to be pinned down, I'd say that starts in ten or 15 years and gets increasingly long after that. This kind of nightmare scenario of nuclear cell-phones, that's clearly a long way off if it's not just a complete fantasy. In any event, in the short run, it remains extremely difficult for individuals, maybe impossible, to acquire nuclear weapons without the

active help of the state. It remains quite difficult to deliver biological or chemical weapons, or at least the ones that are currently known and feasible, in a way that would kill thousands.

What this means is that in the short run there's simply no good reason for our government to engage in a spasm of law-making that restricts civil liberties as our government has after both the Oklahoma City bombing and September 11. The threat is not orders of magnitude greater the day after the attack than it was before. If you face what's a long-run problem, it makes sense to think about, you know, not to panic but to think about the long run and work backward from there.

Obviously this would not be anything like the sole solution but it does seem to me that the nature of this problem is such that it would make sense. It's a great candidate for a presidential commission of constitutional lawyers, congressmen on the relevant committees, law enforcement officials, to make report recommendations to the relevant congressional committees about what we ought to do in the longer run, in terms of changing the laws and possibly also developing new institutions. This, it seems to me, would be much better than the correct de facto approach in which after each attack our representatives and the executive engage in a kind of mutual competition to see who can get toughest on terrorism. This produces bills and reforms and policies of dubious value for actually preventing further terrorist attacks and has also just run roughshod over parts of our constitution.

Now, I have no idea what such a commission would propose. This is far from my area of expertise. But I do think that there's an obvious type of solution to the long-run dilemma, which addresses the problem of how to prevent catastrophic terrorism while at the same time preserving something that's at least in the spirit of our traditional constitutional rights. And that's this. So basically, in the abstract you can think of two basic ways to check and balance the arbitrary use and abuse of government powers. First, there is just flat-out prohibiting certain actions in your constitution as we do in the Bill of Rights. Second, you can build multiple institutions within a government that are structured to check and monitor and balance each other. Our constitution famously does both of these things. If effective defense against catastrophic terrorism ultimately will require more intrusive law enforcement, that employs suspensions of habeas corpus, racial profiling, secret searches and the like, then these actions ought to be authorized and monitored and evaluated by new judicial powers and bodies.

This type of solution is so natural that we have already attempted it in the 1978 Foreign Intelligence Surveillance Act (FISA). This act set up some secret courts of federal district judges that hear Department of Justice requests for authority to conduct secret searches, I think. I believe also some wiretapping, in cases that involve claims of foreign espionage.

With the PATRIOT Act, one of the things it did was vastly broaden the authority or the potential use of these courts by saying that any case where the government claims that terrorism might have something to do with it can request authorization through these courts. Now at present, and even more a sense of the PATRIOT Act, I think if you look at the record—and so far as we can tell, they're very secretive—the record of these courts is not very good. I mean, they seem basically toothless. They rejected only five out of fourteen thousand requests between 1979 and 2001, for example. They aren't adversarial proceedings. There's no one arguing. The judges hear only the government's side, and so on. But it does seem to me that the idea's right and that reforms could give them some real bite. Have the courts randomly audit after-the-fact cases they've authorized to see if the authority was properly used or successfully used. Have the cases and search requests made available to the public after a decent interval of time, possibly in redacted form.

So to sum up on the good news, it seems to me we have time to work out new police and judicial arrangements to address the real dilemma of catastrophic terrorism while at the same time checking and monitoring the increased government powers that this is going to require. That's the good news. Okay. Now finally, a mixed forecast. What are our politicians actually likely to do? Will they carefully build new judicial institutions to monitor and control the application of new government powers? Or will they keep reacting in a spasmodic fashion, reacting to each new attack, with a new set of often ill-considered laws that just each time ratchet up, or spiral up, government powers of surveillance and investigation and detention?

### **A Mixed Forecast**

Now, as a political scientist, you might expect me to say, well, of course they're going to do the stupidest thing possible, the most short-run thing possible. And of course, you know, I wouldn't by any means dismiss that. It's entirely possible. But I actually do think that our political system does have the capacity to confront this dilemma in a reasonable and effective way. Congress has the capability, I think, in certain circumstances to do a reasonable job with it. The ambivalent forecast is that I think whether it does so depends largely on the factor that's outside of our control or Congress's control or the president's control, and that factor is how successful will terrorists be in the next few years by carrying out big attacks on U.S. soil?

So, if we go for five years or so without another big attack, it seems to me that Congress and the public are going to calm down enough that Congress and the courts will revisit the PATRIOT Act and associated things that have happened, executive branch orders and so on, in a more measured way, and hopefully—and possibly—in a more constructive way in terms of building some new judicial institutions or beefing up accords or things of that sort. On the other hand, if there are more successful attacks in the short run, the great fear will continue and

politicians will continue to face very powerful pressures to get tougher on terrorism each time an attack occurs.

And a scholar named Laura Donohue has documented in a couple of cases, especially in Northern Ireland, a sort of spiral, or ratchet effect, where with each new attack we've got to get tougher and you just kind of very quickly pile on and ratchet up these provisions. And as long as insurgency or a conflict is going on tend to stay on the books because no one can ... you know, if you say, "Well, I think we ought to tone this down a little bit," you're at risk of being accused, if you're a politician, of being soft on terrorism.

Now, this is actually an old pattern in the United States, what I'm describing, and it's worth briefly, very briefly considering how it has played out historically.

### **When the Fear Subsides**

In the last hundred years, the United States has faced a succession of apparent domestic security threats that led each time to spasms of legislation and police action. So after the First World War, there were a fairly small number of package bombings that led to what are now known as the Palmer raids, in 1919 and 1920, which locked up thousands of people, almost entirely noncitizens, on the presumption, basically, that they were communists or anarchists.

During World War II, as Professor Fletcher mentioned, the government interred thousands of people of Japanese descent in desert camps in the West. After World War II we had McCarthyism, which made alleged association with the Communist Party grounds for government harassment. And most recently, with Oklahoma City and September 11, these have inspired Congress to pass laws that look plainly on constitutions with regard to civil liberties and it's led the executive under Bush to arrogate powers of detention applied to noncitizens, mainly, that are truly frightening.

Now, for the first three of these historical cases. The three cases, except for the most recent episode, there's been an interesting pattern, a sequence which goes like this: During the time of the fear, public, government, and judges all largely support, or don't contest, these spasms of legal restrictions on civil liberties. Then, after the fear subsides a bit, the courts and judges start to revisit cases based on these legal restrictions and they declare them unconstitutional. In the course of which, they flesh out new constitutional precedents and clarifications that are intended to make further abuses of the same sort that had just happened much harder to do.

So in effect, when the fear subsides, the courts actually start doing their job of protecting the constitution, the Bill of Rights, by more or less fighting the last war. So, for example, the laws during and immediately after World War I criminalize speech very directly. You know, in one case they came to the Supreme Court,

when the Supreme Court supported the government's right to pass a law which made it illegal to distribute pamphlets opposing the draft for World War One.

Later the Supreme Court says, "Well, you just can't do it. It's directly contradicts the First Amendment. McCarthy-era law on politics criminalized—instead of speech directly—associations. You know, so think of the question: "Are you now or have ever been a member of the Communist Party?" Subsequent rulings in the late fifties and early sixties said, "Well, you just can't do that. It's against freedom of, you know, it contradicts freedom of association."

Now after Oklahoma City and 9/11, we have laws criminalizing the provision of material support, which is the phrase that has been used in almost all of the criminal prosecutions of terrorist activities. These laws make it illegal to ... well, it's somewhat unclear but it seems you can be put in jail for contributing to a group that undertakes activities that the State Department has deemed terrorist. The criteria for that have been declared and are not spelled out or justiciable. You can be put in jail for this, even if you had no intention that the money should be used for terrorist purposes. Now this pattern that I'm describing has been pointed out, and I basically take it from an article by a constitutional lawyer named David Cole. And he finds in this article ... he says, "This is just depressing. And it's awful. We're just repeating history. The government just keeps sneaking up new, more clever ways to subvert the constitution. There's no progress here. Just repetition of history."

I had a much different reaction to it, which is that it actually seems to me like notable progress if our political system is able to correct itself gradually over time by forcing government abuses to take ever more subtle forms. No, seriously. You know, that's better than if we were criminalizing speech. The interesting question, I think, is whether the self-correction part of this cycle is going to continue to operate in the present case with the threat of catastrophic terrorism? Will the fear subside enough that a political space opens up to allow the courts and Congress to think about the long-run problem in a way that pays attention to preserving the spirit of our traditional civil liberties? Or will periodic attacks produce a permanent condition like counterinsurgency in which basically everybody—courts, judges, the public—acquiesce to civil rights violations or laws that would formally have been thought to be massively inconsistent with the constitution and by a more powerful and arbitrary state?

All I can say, and I'll say in conclusion, I certainly hope not. And I hope U.S. foreign policy has changed in the short run in such a way as to lower rather than possibly increasing the risk of more short-run attacks. But, unfortunately, I think the matter's largely out of our hands and depends on the luck, or, I hope, the bad luck of the terrorists. Thank you.

## Terror and Civil Liberties October 17, 2003

**Diego Gambetta, All Souls College, Oxford University**  
**Of Truth and Terror: Through the Prism of 9/11**

### **Selling Uranium on the Black Market**

**Diego Gambetta:** I would like to thank very much the organizers, namely Akeel Bilgrami and Jon Elster for giving me this difficult challenge and for trusting me to rise to it more than I would have trusted myself. However, the challenge that I had was nothing with respect to the challenges that a group of mobsters had in the late 1990s in Italy. This was a strange group made up of Sicilian, Roman, and Calabrian organized criminals. That question was: How do you go about finding a buyer for eight bars of enriched uranium on the black market? I mean this is probably not a question many of you in the audience contemplated. And it's a difficult one fortunately.

These bars are steel cylinders, ninety centimeters long—three feet—each of which contains 200 two hundred grams of uranium. The bars I'm talking about were produced in the labs of the General Atomic in San Diego. And in 1971, they were sent, as a gift to Kinshasa to be used as nuclear fuel in a program rather unaptly known as "Atoms For Peace." Now according to Captain Roberto Ferroni of the Rome custom police, if they were blown up in Villa Borghese, which is in Rome, the center of Rome would become uninhabitable for a century.

Now from Kinshasa, the bars disappeared in 1997 when Mobutu's regime was overturned. They probably traveled with him to France. And after several sightings of these bars, they finally resurfaced in the hands of these 11 Italian mobsters about a year later. In the spring of '98, the mobsters thought that they at last found a buyer. The buyer introduced himself as "the Accountant." This was pre-Enron, so if you said, "*Accountant*," people trusted you, or you thought they did.

And he said that he was an emissary of an Arab country, and Islamic Jihad ultimately. Now the Accountant was, in reality, an undercover agent of the Italian custom police. So the police were investigating the mobsters for other crimes and had intercepted their telephone conversation and had overheard them talking about nuclear stuff, and decided to investigate the matter.

Now the agent—the Accountant—brought with him an engineer who was allowed to test one of the bars and found that it did indeed contain uranium. So the police then pretended to transfer a sum of \$12 million on a Swiss bank account after bargaining down the asking price that was twice as much, just in case anybody's interested.

And on the day that they had agreed to complete the transaction, the Mafiosi showed up but they came with a different bar that they had tested and failed to deliver the other seven bars. So quite characteristic, the Mafiosi cheated. But at that point, the cover was blown and the police could not wait any longer and had to arrest them. The current location of the seven bars is unknown. The 11 mobsters didn't speak. They are in jail with relatively short sentences but they never said where the bars are. For all we know, they could be hidden in a stable in the mountains of Calabria or Sicily, which should perhaps be added to the Axis of Evil.

### **The Terrorist Threat Dilemma**

Now the threat from weapons of mass destruction, or rather from some amateur variant of them, may not be where the coalition of the willing has been looking for but the threat is there. There is no doubt, I think, about some kind of threat. Eliza Manningham-Buller—with a name like this she couldn't be anything else but the head of MI-5—in June 2003, she said, "We have faced with the realistic possibility of some form of unconventional attack that could include chemical, biological and radiological, or nuclear attack."

She, however, she added that, "Before we become unduly alarmist, it is worth noting that the bomb and the suicide bomb remain the most effective tool in the terrorist arsenal." So before we get too alarmed, or too alarmist, I would like to review facts that could make us reflect a little bit. But first of all, if you look at terrorist acts, however you define them, 9/11 is what statisticians call an outlier, which is a very, very exceptional case in terms of magnitude. With respect not just to the distribution of any terrorist act around but also with respect to other actions attributed to al Qaeda.

The perpetrators themselves may be quite exceptional. There are not so many people around, I think, with Mohammed Atta's traits, namely— highly skilled, methodically inclined, and ready to die. They have all these traits at the same time. And finally, it looks as if they were extremely lucky not to be detected in time.

The second point is that failed attacks also reveal that the terrorists intend to use low-quality technology, not anything ... weapons of mass destruction of high quality or anything of the sort. There have been no cases of that kind. They may be in the distant future as Jim Fearon just said but we don't know. And they also exploit deranged individuals, marginal individuals, nothing of the caliber of Atta.

So there was the British ex-convict called Richard Reed who tried to blow up a plane by exploding his shoes. Then there was four Moroccan men arrested in Rome with a map of the Aqeduct and four kilos of potassium ferrocyanide, which was subsequently described by experts as a rather harmful substance

when distributed through water. And there were 16 North African men arrested in Spain who were cited, even by Colin Powell in his speech to the United Nations, as an example of the links between bin Laden and Baghdad. In May, they have been released, found completely innocent, and are now suing the Spanish prime minister for slander.

What about the thing that really was hair-raising? Apparently? So last January, five Algerian men were arrested in a small London flat playing with a chemistry set trying to produce ricin. Ricin is a very poisonous substance extracted from castor oil for which there is no antidote. Tony Blair said that the find showed that, quote, "This danger is present and real and with us now. And its potential is huge." But the quantities of ricin found were tiny. So tiny, in fact, that last week they could no longer find them. In a few days the prosecution's case has collapsed completely and the men are now free.

So having said ... a lot of these are scares rather than facts. Having said this, I'm not trying to deny that there is a dilemma here and a serious one. And I think it is epitomized by the Ohio truck driver who was arrested in the U.S. I don't remember the month in which he was arrested but it's early this year. And he was said to be plotting with leaders of al -Qaeda to destroy the Brooklyn Bridge by using blowtorches to cut the suspension cables of the bridge.

Now I'm sure the New Yorkers here are thinking fondly of the time in which the only thing that criminals tried to do with the Brooklyn Bridge was to try to sell it to you. But still, as the *New York Times* wrote, very aptly, I think, "This case was a reminder of why the American authorities in the 1990s found it hard to take terrorist plots seriously, even after a number had been uncovered. It all just seemed pathetically amateurish and unthreatening."

However, the dilemma is there because as the same article in the *Times* concluded, "Now that we know what 19 young men with box-cutters can do, we cannot dismiss a truck driver with a blowtorch." So they could get lucky twice. And so it's clear that police and intelligence have to be on guard.

So the dilemma is there, although there are reasons to keep cool, as it were. And the importance of establishing the real size and the real kind of threat that we are facing is crucial for fighting it effectively. And I will say something about this later if I get to that. It is also important, more relevant to the theme of the symposium because the bigger and the nastier the threat is portrayed to be, the harsher are the infringements to civil liberties that can be justified, and that we may be prepared to accept. So one way to defend them, other than appeal it to abstract principle, is therefore to be very, very alert to the forces that could unintentionally exaggerate and distort the threat.

So my paper, which is a bit longer than what I say here, is essentially an exploration of all the various ways in which the threat may be exaggerated. And

I'm not referring to the deliberate exaggerations and, possibly, lies by both the U.S. and U.K. governments, which have been quickly exposed, as we all know. I'm not interested in insidious mechanisms that under a serious terrorist threat can generate untruth, over and above the actor's will to deceive us. So I'm more concerned with government biases and bad information, than with bad character.

### **Exaggerations of the Truth**

So let me consider a few of these effects that could exaggerate this truth. I mean, think first of all of a psychological effect, which affects us all. It has nothing to do with politicians or policy makers or anything like that. When something of the caliber of 9/11 happens, nasty events suddenly become salient. They appear on our radars. And people ... and we start to revise upward the probability that other attacks like this may occur again, and that we may even be the victims of them. So for instance, when the sniper in Virginia struck, people were terrified. Even though, as the rationally inclined pointed out, their chances of dying in a car accident were much greater than being shot by the sniper.

So for instance, in the *New York Times* poll of September 2003, two-thirds of the thousand New Yorkers who were interviewed said that they were still very concerned about another attack in New York, slightly more than felt that way a year ago. There is another partially related effect, namely that after a massive attack, as discontinuous as 9/11 with respect to previous terrorist acts, we feel inclined to infer that if that is possible, then anything is. So people don't only worry about a similar attack, they also worry about other attacks of similar magnitude.

Now, play a little mental experiment. Suppose that the 19 men had been stopped. This is a plausible counterfactual; they could have been stopped. September 11 could have been foiled because of some lucky circumstance, thanks to a set of coincidences, which would be unrelated to the nature and the size of the overall threat. Had they been stopped and 9/11 not happened, the threat would not be any greater or any smaller than it is now because of that. Still, had it not happened, our perception of the threat would be infinitely more optimistic.

And I have a fact to show you that this is indeed what goes on in our minds. On Christmas Eve of 1994, four Algerian terrorists of the GIA hijacked a French plane in Algiers. They wanted to be flown to Paris. But because of insufficient fuel, the captain landed at Marseille, where French elite troops stormed the plane and killed the hijackers. The French interior minister, Charles Pasqua, claimed that the terrorists planned to fly the passenger jet to Paris in a suicide operation, either exploding it over the city or ramming into the Eiffel Tower.

At that time, it didn't happen. They were stopped. And Pasqua was almost derided for exaggerating the threat, which now retrospectively looks plausible. So

psychologically, when we think about low-probability events, we are easily trapped between two extremes. We just do not think about them at all. In ex poste, we may think about them too much.

### **Political Calculations**

There is another effect that has to do with political calculations. Here again, I'm not referring to anything bad or that the politician may or may not do. But even if the huge political cost of an attack of this scale were to be repeated, it makes sense for policymakers to be overzealous in issuing public warnings. So before a terror event of 9/11 magnitude, there is an interest in playing these kind of threats down. You don't want to be seen as a Cassandra. And you don't want to upset the citizens and the economy unnecessarily. But after 9/11, governments can get more support by playing the threat up and issuing constant warnings. Because if nothing bad happens, it will be seen as thanks to their policing efforts. And if something bad happens, they cannot be accused, at least, of not having done all they could, including informing us of the impending threat.

Now these incentives to do that is probably beginning to wane now. If nothing bad happens for long enough, any further warning begins to ring unduly alarmist, at which point the situation reverses back to the previous tranquil equilibrium, where people try not to sound the alarm bell too much. So politically too, as psychologically, there are two-prong pressure towards opposite states. Example, playing and ex poste overplaying of a threat.

But there is a lot more of importance that went on after 9/11. And the threat was assessed in very specific and very nonobvious ways by policymakers. As you all know, the first nonobvious choice was to define the response as a war, the war on terror. And this, as Nicholas Lemann has written, this idea has had a constraining force on how we think about the U.S. response. It is now difficult to think that this was not the sole, inevitable, logical consequence of the attacks. This idea just isn't in circulation.

### **Known Unknowns and Unknown Unknowns**

Two further grand features were attached to that of war, each of which is again, not obvious. One is that this war is global. The word *global* recurs very much in this. And that it is of an uncertain duration. Yet another belief is that, held by the U.S. administration, is that not only 9/11 is in itself unprecedented, but that the further threats down the road are unprecedented. Namely, as Secretary Rumsfeld said, they are different that at any time of the history of the world. While the first thing is clear, that 9/11 was exceptional, it is not so clear the further threats it heralds are so unprecedented. At least it's not clear to me.

Another thing that Rumsfeld has been thinking about this is that the leap between terrorism and weapons of mass destruction, that the real situation about this link

is worse than the facts show. And what he said at the press conference in June 2002 is worth quoting, because it shows what a dramatic mind set shift there has been as a result of 9/11. Rumsfeld said—and here I'm shortening a long and interesting speech he makes—he said, "All of us in this business read intelligence information." These are his words. "And we read it daily and we think about it. And it becomes, in our mind, essentially what exists. And that's wrong. It is not what exists. I found that there are very important pieces of intelligence information that countries did not know. They didn't know some significant event for two years after it happened, for four years after it happened, for six years after it happened. In some cases, 11, 12, and 13 years after it happened." It's not clear what information he had in mind.

And then he concluded, probably you all know what he said at this point, "What is the message there? The message is there are no knowns. There are things that we know that we know. There are known unknowns; that is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."

Now, this assessment of the threat as unprecedented, large, and written with U U's, (unknown unknowns), gelled in the doctrine of preemptive war. And this I read from the National Security Strategy document, in which it said, "The greater the threat, the greater is the risk of inaction. And the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains, as to the time and place of the enemy's attack. To forestall such hostile acts by our adversaries, the United States will, if necessary act preemptively."

### **Preemptive Attacks**

So the strengths of the risk of inaction in preemptive attacks, by definition, imply that wars can now be waged without a clear *cassus belli*. A threat does not need to be proved as true or even imminent to motivate a war. Now, if you were in the hot seats, after 9/11, I don't know how you would have reacted. So I think we may like or dislike the current present administration, but we may not dislike it because we were sitting in that hot seat.

So it is an understandable way of responding to the trauma. It's totally *unobvious*. I mean, you could have responded in many other ways. But it's an understandable response to the trauma of 9/11. The question, however, is understandable or not, how conducive to rationality is this approach? What kind of decision, when you go around with these beliefs in your head, are you likely to take? Put them together in a list. Now we take them for granted. But if you put them in a list, this is the list. You are at war; try to really think hard about you having all the following beliefs: you believe you are at war; you believe the war is global; you believe it's going on for an uncertain amount of time, length of time; you believe you are at war against an enemy that you sort of know, but also

against unknown unknowns, that the dangers are unprecedented, but in any case, very large; and that inaction is risky. And this justifies preemptive attacks.

I've been searching for a precedent. I've been searching for somebody who has in history gone around with this bundle of beliefs. And I haven't found anyone. Absolutely no one. The only thing you can think of are science-fiction characters or fiction characters. You may think of Don Quixote, for instance. He had beliefs of this kind, that he was at war with anybody, that dangers were everywhere.

So with a framing like this, it's very likely that you will generate, whether you are honest and truthful and all that—this is what I prefer to assume of everybody—so even if you honestly believe this kind of thing, you are likely to get into consequences which are inimical to rational action. As this approach undermines your ability to form well-founded beliefs about what is and is not true.

One thing that it does, is that it attracts bad reasons. Because if you have that kind of belief, you begin to think that any sign of threat should be taken as valid, even a flimsy one. And if you respond to any evidence of threat, what happens to you is that you find yourself with a lot of options. You don't know what to do. Should I attack A, B, C? Should I investigate C, D, or E? So this kind of worst-case scenario, “unknown unknowns” thinking, leads you to an indeterminate situation. You don't know what to do. It's not a prescription for action. So you end up like Buridan's Ass, the ass that was presented with two equally attractive sacks of hay, and had to decide which one to eat first, and he died of starvation because he couldn't make up his mind.

If you don't want to end up like above-mentioned ass, you have to find ancillary reasons for doing something or other than not.

And these type of conundrums are typically a magnet for laws, which for whatever reason or passion nurture strong values on the value of doing X rather than Y. So religious believers, ideologues, expatriates, devotees of Leo Strauss, economic or political lobbies, legal supporter and what not, I mean, if conspiracies of these kind had any effect on deciding the war on Iraq, my impression is that this was because the new strategic mindset that followed 9/11 allowed them to do so. It was like an open net, anybody could say anything, because anything looked plausible and dangerous enough.

### **Incestuous Amplification**

There are also “group think” effects, because when you have no evidence that it is better to do X rather than Y, what do you do? [If] you are a believer that X is better than Y, you tend to develop a sectarian mentality. And you tend to join with like-minded individuals. And you leave yourself open to an effect which has been defined as incestuous amplification, an effect which occurs when one only listens

to those who are already in lockstep agreement, reinforcing said belief and creating a situation ripe for miscalculations.

And then when you have said beliefs about doing something rather than something else, when you have no real strong evidence and a lot of pressure to act and so on, you tend to become prone to you become prone to misreading the evidence, to wishful thinking and wishful reading of the evidence. And the many cases that have been described as exaggeration and lies by government, some of them seems to me to be too *overstaggering* incompetence to be just ruses to fool us. It seems to me as if there was a genuine fervor to believe bad evidence and do that with a very rash kind of mind.

## Conclusion

So in conclusion, it seems to me, at least, the war on Iraq seems to have been driven by backward-looking reasoning, rather than forward-looking calculations. And Secretary Rumsfeld again admitted that much when he told the Senate Arms Service Committee that, and I cite, "The coalition did not act in Iraq because we had discovered dramatic new evidence of Iraq's pursuit of weapons of mass murder. We acted because we saw the existing evidence in a new light, through the prism of our experience of 9/11."

So how much should we really trust that prism? This is, in my view, an open question. And now you could hope that intelligence services are the guys to whom we should look up to. The guys that can square the circle between over- and underestimation. And they would tell us what the risks really are, who the enemies really are. But as I have argued at length in the paper for this symposium, there are lots and lots of pitfalls in which even well-meaning spies incur, especially under pressure post- 9/11.

Remember that during the Cold War they got many things wrong. And that there was something very clear that's observable and centralized to spy on. So imagine how much harder it is now to get something clear on this very difficult, dispersed, fragmented case of the terrorist threat. For instance, they also got, by the way, many more overestimates of Soviet threat than they got underestimates of Soviet threat. This is based on extensive analysis by Michael Herman, that is one of the top experts in intelligence services.

Now seasoned politicians know very well that intelligence reports should not be trusted blindly. Yet, in times of terror, that wisdom is easily forgotten. So combining the tendency of secret services to overestimate threats, add the psychological, the political, and other effects, which I didn't have time to mention. Add a sprinkle of unknown unknowns, and what you have are forces pushing together to saddle us with the burden of a high terrorist threat for years to come. Which is, by the way, self- fulfilling for us. And, which I, unfortunately, don't have time to mention.

So to help our minds hijacked daily by the fear of terrorism is surely better than being the victims of a real hijacking. However, we don't want to be scared unduly, ending our lives as a result. We may be prepared to put up with some infringements to our civil liberties, but we can do without those that come from an overestimation of the threat. Thank you.

## **Terror and Civil Liberties**

### **October 17, 2003**

**G. A. Cohen, All Souls College, Oxford University**  
**Casting the First Stone: Who Can, and Who Can't, Blame the Terrorists?**

#### **Preliminaries**

**G. A. Cohen:** In April 1997, my son Gideon was dining out with his then wife-to-be [Carol] in the Blue Tops restaurant in the center of Addis Ababa. Suddenly, a hand grenade sailed into the room. The explosion killed one woman and severely injured several other people, but Gideon and Carol protected themselves by pushing their table over and crouching behind it. While Carol was physically unharmed, shrapnel hit and entered Gideon's right temple. It was removed three-and-a-half years later after it had caused bad headaches. Not only the identity, but even the inspiration of the Blue Tops terrorist remains, up to now, unknown.

One year later, and one country away, in the Sudan, in 1998, my daughter Sarah was less anonymously menaced. For she was one mile from the Khartoum factory, said by President Clinton to be producing chemical weapons and bombed by him in what was presented as an appropriate response to then recent anti-American terrorism in Africa.

Many thought that the American action, or at least its timing, was intended to distract attention from certain facts that had come to light about Clinton's sexual history. I could not judge whether that discrediting explanation of the action was correct, but even if the moot of explanation was false, and the calumny, the bombing of the pharmaceutical facility in Khartoum, a pharmaceutical facility which was merely maybe also a weapons factory, with Sarah nearby, enabled me to identify what the victims of superpower military force, more than a western person normally might. Hundreds of miles away, I could share Sarah's fear of further Khartoum bombing.

These experiences caused me to ruminate, more than I otherwise would have done, on the similarities and differences between the little bombs of the underdog, and the big bombs of the overdog. And I thank Columbia University for the opportunity to pursue some of that rumination in public today.

On May 1, 2003, Dr. Zvi Shtauber, who is Israel's ambassador to Britain, said what you've got on the [projection] screen, on British radio: "No matter what the grievance," he said, "and I'm sure that the Palestinians have some legitimate grievances, nothing can justify the deliberate targeting of innocent civilians. If they were attacking our soldiers, it would be a different matter."

Now Shtauber's statement made me angry. And I want to explain why it did so. I was not angry because I disagreed with what he said, and in fact, I shall not challenge the truth of what he said this morning. I shall neither deny it nor affirm it. That doesn't mean I have no opinion about the truth of his statement, but it means it's irrelevant to the considerations that I want to put before you this morning.

Rather, I shall raise some questions about the ambassador's right to say what he said, or at any rate, about his right to say it with the vehemence and indignation that he displayed. A lot of people who think it impossible to justify terrorism nevertheless find condemnations of terrorism by some westerners and by some Israelis repugnant. Yet if terrorism is impossible to justify, why can't just anybody at all say so? I offer an attempt to answer that question.

A lot of people have tried to define the word *terrorism*. But my topic is not the definition of the word. For my purposes, we can let terrorism be what Shtauber objected to, namely, the deliberate targeting of innocent civilians. If that is not what terrorism is, it is certainly what most people object to in what most people call terrorism. And most people think, as Shtauber manifestly does, and as I do, too, that deliberately targeting innocent civilians is, other things equal, morally worse than deliberately targeting soldiers. Notice, though, that sometimes other things are not equal; because, for example, the overdogs use what are truly weapons of mass destruction that the underdogs find it pretty hard to get. Or because justice isn't equally present on the two sides and so on.

A final preliminary point: I shall assume throughout that terrorism, or at any rate the terrorism that concerns us here, effectively serve the terrorists' aims. This is an artificial assumption, but it has an intellectual justification, because I want to focus on issues of principle. If terrorism, or a given case of terrorism, is anyhow counterproductive, with respect to the aims of the terrorists themselves, then for practical purposes, no questions of principle arise, because no sane person would say that some principle justifies counterproductive terrorism. But note, that anybody who condemns terrorism on the ground that it is counterproductive, and/or on the equally merely factual ground that it is never the sole possible resort of the aggrieved, anyone who condemns terrorism on those grounds, and who also thinks that such factual claims are essential to the case for condemning terrorism, has conceded a large point of principle to the terrorists.

The criticism that terror is counterproductive doesn't criticize it as terror. More approved forms of violence are also sometimes counterproductive. And Shtauber's complaint was that terrorism will not succeed, or that it will make it harder for Israel to agree to peace terms, though he would no doubt have added such claims, have the distinct question of the efficacy of Palestinian terrorism been raised. Shtauber's judgment was one of pure principle, and it is issues of principle, not difficult questions of fact, that will fall under my inspection here.

The rest of my discussion is inspired by reflection on the Israeli / Palestinian conflict. But although what I say relates to that conflict, I offer no conclusions about it. People who agree with my observations would apply them in different ways, according to their divergent further convictions. I model certain aspects of the conflict, more particularly some aspects of the discourse that surrounds it, for the same of philosophical discussion. But the practical significance of what I have to say will depend on the answers to controversial questions of fact and principle, about which I shall say nothing. I have in mind controversial factual questions about what happened in 1948 and in 1967 and earlier and later, and other factual questions about what the intentions of various parties to the conflict are now. I also have in mind difficult questions of principle, such as whether a people, or at any rate a massively abused people, has a right to a state. And if so, at whose expense, and at how much of their expense? All that will be set aside here.

As a Jewish person, I am exercised, indeed I am agonized, as so many Jewish people are, and as many people, both Jewish and non-Jewish, I would imagine in this audience, must be, by the Israeli/Palestinian conflict. But I seek to make some philosophical points that you should accept or reject quite independently of what you ultimately think about that conflict. The bearing of my points on the conflict, should my points be accepted, depends, as I said, on many other considerations, only some of which were mentioned a moment ago. This is not an investigation of the Israeli/Palestinian dispute per se, but a study of certain forms of argument and rhetoric that characterize the way the dispute is conducted.

Examination of those forms may help to illuminate at least the mindsets that clash in the dispute, but the properly intellectual content of what I shall offer is focused within the forms of argument themselves.

### **Who Can Criticize Whom?**

Much philosophy seeks to discover a consistent path between inconsistent propositions, both or all of which we have some inclination to infer. We are, for example, inclined to affirm both that we are responsible for our choices, and that sign shows that we are not. Both that we know a lot of undeniable truths and that we can be certain of almost nothing. Both that moral judgments are objective, since otherwise they would have no force. And that moral judgments are merely subjective, since there is no way of showing them to be true.

And to approach the territory of present concern, we are inclined to affirm, on the one hand, that certain conditions of extreme injustice should not be tolerated; that people should do everything within their power to remove them, or at any rate that the sufferers of that extreme injustice are themselves entitled to do anything that they can do to remove them. But we are also inclined to affirm that certain means of fighting injustice should never, under any circumstances be used. Yet, what should we say about circumstances that display the contemplated conditions of extreme injustice in which the forbidden means are the only means available? When we acknowledge that possibility, we are forced to revise some of our convictions about what morality says.

And in what turns out to be our preferred revision, morality might say to some victims, sorry, your cause is just, but you are so effectively deprived of all decent means of resistance by your oppressor, that the only means of resistance that remain open to you are morally forbidden means. Morality might say that, because that might happen to be the sad, moral truth of the matter. But can just anybody say that on morality's behalf? Can the oppressor herself say that? Can the oppressor, whoever that may be—and I'm making no assumptions about who is oppressing whom here—can the oppressor say, can the oppressor get away with saying, I am sorry, your cause is just, but you are so effectively deprived, as it happens, by me, of all decent means of resistance, that the only means open to you are morally forbidden?

As that example suggests, the force, the effect of a moral admonition varies according to who is speaking and who is listening. Admonition or blame may be sound and in place, but some may be poorly placed who offer it. When a person replies to a critic by saying, where do you get off criticizing me for that? She's not denying or of course affirming the inherent soundness of the critic's criticism. She's denying her critic's right to make that criticism. Her rejoinder achieves its effect without confronting the content of her critic's judgment. She challenges instead her critic's right to sit in judgment and to pass that judgment.

Let me step back a bit. We can distinguish three ways in which a person may seek to silence or to blunt the edge of a critic's condemnation. First, she may seek to show that she did not, in fact, perform the action under criticism, or that it has been misdescribed. Second, and without denying that she performed that action, she may claim that the action does not warrant moral condemnation, because there was an adequate justification for it, or at least a legitimate excuse for performing it.

But third, while not denying that the action was performed, and that it is to be condemned, which is not to say while agreeing that it's to be condemned, but setting aside the issue of the moral justification of the action, the perpetrator of the action can seek to discredit her critic's standing as a bona fide condemner of the relevant action. And that third form of defense is of great importance in the

political world, where it matters enormously who can say what to whom, credibly and sincerely. The political world is not populated by saints who can readily justify themselves by appeal to accepted standards, but by non-saints, who have a better hope of deflecting criticism, not by trying to justify what they did, but by implicating their criticizing their fellow non-saints in the same or similar charges. And this happens all the time.

### “Look Who’s Talking”

Two contrasting ways of discrediting a critic's standing will concern me here. They both occur widely in moral discourse and they occur saliently in exchanges of condemnation about terrorism and, in particular, in exchanges between Israelis and their supporters and Palestinians and their supporters. The first of these techniques for silencing a critic's voice, extremely common, was signaled in my childhood by the retort, look who's talking!? Harry might say, “Hey, Solly, how come you didn't come to the club last night? All the guys were expecting you.” And Solly might reply, “Look who's talking? Twice last week you didn't show up.” Now, unless Harry could now point to some relevant differences, his moral voice was silenced, whether or not the criticism he originally made of Solly was sound. And in places that are more genteel than the immigrant Jewish streets of postwar Montreal where I grew up, people don't say look who's talking, but that's the pot calling the kettle black. If I, the putative kettle, make that reply under criticism to the putative black pot, I'm not denying that I am tarnished, I am saying that since the pot is blacker still than I am, the pot must see to its own hue before it presumes to criticize mine. And a still more elevated epithet that occurs in the contemplated range of silencing replies is more elevated still because it's in Latin. I have in mind the sentence, also pronounced with a British accent, *tu quoque*, which means you too.

Now for this first subtype of discrediting response, I have three good labels. I think they're good labels. Look who's talking, pot calling the kettle black, and *tu quoque*. For my contrasting second subtype, I have no good vernacular or Latin tag that covers all and only the required cases. But I will point you in the right direction by reminding you of retorts to criticism like, well, you made me do it. Or you started it. Even those phrases don't ... even though those phrases don't cover all the variants of the second subtype.

In this second subtype, you are disabled from criticizing me not because you're responsible for something similar, or worse, yourself. That's the first type. But because you bear at least some responsibility for my having done the very thing that you're seeking to criticize. My Nazi superior cannot criticize me for doing what he ordered me on pain of death to do, even if someone else can say that I should have disobeyed that order and accepted death.

It is the first subtype that I want to reflect on first, the case where the criticism is rebutted by some sort of *tu quoque* that in some way undermines the moral

capacity of the critic to make the stated criticism, without prejudice to the aptness of the criticism when it is considered simply on its own. Tu quoque clearly plays a large role in Palestinian responses to Israeli criticism of Palestinian terrorism. And also some role in Israel responses to Palestinian criticism of Israelis.

Now was I angered by Ambassador Shtauber's statement because it's vulnerable to the look who's talking reply? No, because I have no definite view about who comes out worse, the Israeli government, or Palestinian terrorists when the discourse of tu quoque is applied. Many Israelis who are very critical of their own government believe that that government may nevertheless credibly criticize Palestinian terrorism because that terrorism is morally much worse than any violence that the Israeli government itself commits. In response to the claim that Israeli criticism of Palestinian terror is silenced by the fact that Israelis kill many more Palestinians and a lot more children, these Israelis argue that Israeli killing is not as bad as Palestinian killing.

Now some of these Israelis invoke the principle of double effect, which distinguishes between killing innocent people as a foreseeable side effect of otherwise targeted action, and killing innocent people who are your target. Our government can criticize them, these Israelis might say, because although that government kills more innocent people than they do, it does not aim at innocent people.

Now, I myself believe, I always have done, in the principle of double effect, or at any rate in the judgments about cases that are meant to illustrate that principle. But I also believe that the only same form of the principle of double effect is comparative rather than absolute. Let me explain: I believe, for example, that holding everything else equal, such as for instance, the amount of justice that there is in the cause, killing one hundred innocents through foreseeable side effect is actually worse than killing one innocent who is your target. It seems to me ludicrous for us to say that you committed an outrage, when you set your sights on and killed three civilians with your petrol bomb, but that we did not commit an outrage, when we merely foreseeably killed two hundred when our planes took out the ammunition dump next to where the two hundred lived.

And we also have to take into account how careful people are to avoid killing civilians. It's possible not to aim at killing them, but to be utterly reckless of their safety. And the observer from afar can be excused his impression that Israeli soldiers become more reckless, in some cases willfully reckless, as the antagonism between the peoples deepens. So it's not at all clear that Israel criticism of Palestinian terrorism can shelter under doctrine of double effect.

But Palestinian terrorists and their apologists also face a powerful tu quoque challenge. Palestinians complain that they lack a state. They complain that their rights are denied. But how can they then justify a terror that denies the right to life of innocent others? They might protest that they aim not at innocents, but only at

Israelis who are complicit in causing their grievance. But no defensible doctrine of complicity will cover everybody in Tel Aviv cafes, including the children and non-citizens of Israel who may happen to be there. In face of that fact, can Palestinian terrorists invoke the principle of double effect, and claim that they are aiming only at the complicit citizens in the Tel Aviv bars and the other deaths are side effects? I, for one, do not find that posture credible.

But again, how does it differ from the posture of Israeli assassination squads who blow up homes because Hamas supporters live there, even when they know that innocent people who also live there may well lose their homes and their livelihoods and even their lives. In sum, I'm not sure what tu quoque tells us in the present case. I don't think it delivers judgments that are straightforward enough to serve as an immediate provocation to the anger that I felt when I heard Shtauber's statement.

### **“You Made Me Do It”**

I now want to consider Ambassador Shtauber's statement within what, for convenience, I'm calling the "you made me do it" framework. I focus first on the concession at the opening of his statement, a concession that is often heard in Israeli/Palestinian debate, and in discourse about terrorism more generally. The concession says well, look, your grievance may be just, I'm not denying that. I'm setting that aside. But I believe that there is a problem about proceeding to condemn the terrorist's means after you've expressed a willingness, in principle, to concede the grievance, when you, the critic, are the source of the grievance, if there is one.

I shall argue that whether or not the Palestinians have a legitimate grievance, and whether or not those Palestinians who use terrorism in pursuit of a supposed grievance are justified in doing so, Shtauber's statement is indefensible on his lips because they are the lips of the spokesperson for Israel. An Israel spokesperson is not morally qualified to make, though no matter what the grievance concession, when it's followed by the nothing-can-justify admonition. Because the character of the grievance that the Palestinians allege has a special bearing on the moral capacity of Israelis in particular to criticize the means some Palestinians use to pursue that grievance.

I must again emphasize, and I realize it's a refined point which people unused to philosophy are unused to taking on board. But I do it to protect myself. I must emphasize my present claim is mutual, with respect to whether the Palestinians actually have a grievance, or a grievance on a scale that might justify terrorism. I'm simply saying you cannot set that issue aside if you are the putative causer of the grievance. A third party may do so.

If the Palestinians have normal democratic sovereignty and normal civil liberty, they would have a normal army, which is not equipped merely to police its own

people. Their grievance is centrally that they lack a state. And therefore, among other things, the approved means of violence that a normal army possesses. So it's a very lack of what they claim to have a right to, it's the grievance itself that if anything does, justifies their mode of pursuing it. It is after all only by unconventional means that you can pursue the grievance that you lack conventional means of pursuing grievances.

And it seems to me to follow that the question of the justice of the Palestinian grievance cannot be put aside by those who deprive them of conventional means of redress in a discussion of the particular unconventional means that they use to pursue their grievance. Consider a Wild West parallel. If a certain varmint is not allowed to own a gun, when everybody else has one, then whoever took away his gun must justify his removal of it, if he wants to criticize the varmint's recourse to whatever it is that is worse than a gun that he uses instead. If you've got someone up against the wall, don't complain if he kicks you in the balls, unless you can justify your action of putting him up against the wall.

If it is you who have disarmed the people, if it is you that deprived them of weaponry that is effective against your soldiers, or at least ensure that they cannot get such weaponry—I mean, Shtauber isn't saying if they were attacking our soldiers, it would be a different matter—therefore when the ships come in the Mediterranean towards Gaza, with weaponry that's suitable against soldiers in particular, we'll let them come because we want them to be able to fight us decently. Of course, he's not saying that. That is an extreme hypocrisy of the last form of the last element in that statement.

You cannot complain if your opponent uses unconventional weaponry against non-soldiers unless you can deny that they have a grievance against you. So you can't say what Shtauber said, namely, whatever the rights and wrongs of the cause may be, only conventional or more conventional procedures are permissible in its pursuit.

In sum, even if it is the moral truth, that one should never attack civilians in terrorist fashion, the Israelis in particular can't condemn Palestinians for attacking civilians, regardless of the justice of their grievance. You can't ignore the character of the grievance if it is you who disarmed or who ensures the armlessness of the opponent. You must then claim that you had a right to do that, and thereby, you perforce take a stand, a negative one, as to whether they have a just grievance. You can complain, when a homicidal criminal that you have disarmed tries to strangle you, but that's because disarming him was justified. After all, he made you do it.

Now I said that among the broad variance of this reply to criticism are, "You started it!" And, "You made me do it!" But they won't cover all the cases and I've not found a phrase that does so, except perhaps, "You're in it, too," which is pretty insipid.

The riposte I'm considering has many subvariants, with, "It's your fault that I did it," at one end of an extreme, and, "You helped me to do it," at another. And note that if it's your fault in whole or in part that I did it, then it can be your fault for structurally different reasons. Here is part of the relevant wide array: "You ordered me to do it;" "You asked me to do it;" "You forced me to do it;" "You left me with no reasonable alternative;" "You gave me the means to do it, perhaps by selling me the arms that I needed."

When such responses from a criticized agent are in place, they silence criticism that comes from the now-impugned critic, while leaving third parties entirely free to criticize that agent. When, as a child, I tried to excuse an action on the grounds that somebody else had told me to perform it, my mother would say, so if they told you to jump off the Empire State Building, you would do that too? The inferior functionary who followed Nazi orders can't be criticized by his superiors for following those orders, but he can nevertheless be criticized by us.

Notice now how this second subtype differs from the first. Look who's talking. In the second subtype, you made me do it, the responding criticized person need make no judgment about whether her critic has herself committed a similar or worse crime. Look who's talking says, how can you condemn me when you yourself are responsible for something similar or worse? You made me do it, it says, how can you criticize me for doing this when you are yourself responsible or at least co-responsible for this very thing that I did? The responsibility can run from physically forcing at one end to merely abetting at the other. If you thought it was wrong for me to rob the bank, why did you gladly give me the safe-lock number?

So the general form of this response is, "Well, you the critic are implicated in the commission of this act as its co-responsible stimulus, commander, guard, assistant, or whatever." An important subcase of "You made me do it," is "You left me with no responsible or acceptable alternative."

Notice that your having left me with no reasonable alternative to doing some ghastly thing does not in itself entail that I was forced to do that ghastly thing if only because I might nevertheless have not done it. I might have accepted my death rather than do this horrible thing. So I had no reasonable alternative, because accepting my death isn't reasonable, to doing some awful thing, but nevertheless I wasn't forced to do it. I didn't. Nor does your having left me with no reasonable alternative entail that I was justified in doing the thing. Suppose that I did do it? Having no acceptable alternative to using terror means may be a necessary condition of being justified in using terror but it doesn't follow that it is a sufficient condition of being justified in using terror.

I might be in the powerless condition that I have no acceptable choice at all, but terror might nevertheless be more unacceptable than one or more of my other

unacceptable courses. I might have to choose between disaster for me and a course so morally horrible that the only decent thing I can do is to choose disaster for me. But how can you, in particular, complain if I refuse to choose disaster for me if it was you who deprived me of all acceptable alternatives unless you can justify your having done so?

If someone has no acceptable alternative, then there is a case to answer against whoever made that true. If the sad moral truth is that although the alternatives to terrorism are unacceptable, my terrorism is nevertheless unjustified, then how, even so, can the person who deprived me of acceptable alternatives and so drove me to admittedly unjustifiable terrorism, condemn that resort, without justifying the action that disabled me? That person must respond to my grievance that she left me with no acceptable alternative to a morally heinous and forbidden action. The terrorists say, "Your occupation makes us use these methods." The Israelis say, "Your terrorism necessitates the continuation of our occupation."

These claims can't be adjudicated in the absence of some view about who has what sort of justified grievance. So whatever else is true is this highly contested case, Shtauber should not have said what he did, and I think that's what made me angry when I heard his statement.

### **Alternatives to Terrorism**

Finally, I've assumed—and I noted the peculiarity and artificiality of the assumption, and I'm grateful for the patience you've shown, at least you haven't fidgeted a lot, you know—in, well, appearing to accept it for the purposes of argument. I assume, in order to expose some lines of moral principle, that Palestinian terrorism is an effective strategy. But it's not hard to think of more effective nonterror strategies that they might adopt. Suicide protests, which killed only the protestors—suicide without homicide—might be far more effective because of the reaction of world opinion. But Shtauber couldn't decently recommend pure suicide as an alternative, even if third parties could do so. Third parties could decently say to prospective Palestinian suicide bombers, "Why do you have to take other people with you when you do it?" Or suppose that the Palestinians retire their anti-Israeli armed struggle and demonstrate wholly peacefully against the apartheid colonial status that they may not have now, but that they will come to have under Israeli rule if Israeli rule continues? Can anyone doubt that this would in time produce a potent international and Israeli outcry against Israeli rule?

Perhaps Ambassador Shtauber should recommend that Ghandian course. I'm very grateful to you for listening to my perhaps unconventional views on these matters. Thank you very much.

## **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 our 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 kinds 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 Lockean rebels who must throw our hands up to heaven for there are no human institutions that can protect us. The dualist strategy tries 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 conationals 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 overstressing 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—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 hyping 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 Svambi, 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 quod quod 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 does 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 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 preceded 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, indefensible.

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 arguable 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 pushing 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 it looks like is that if you are 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, is obtain information by 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? Every newspaper? 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 and 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 two [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—these 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.