Walking the line: Preserving liberty in times of insecurity
Baroness Kennedy
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Introduction by Lord Sutherland of Houndwood, KT, FBA, Provost of Gresham College:

My lord, ladies and gentlemen, welcome to this annual Gresham lecture to commemorate the beneficence of Sir Thomas Gresham, who founded Gresham College. This is always a very special occasion for us, and we are delighted that this year we are in the hall of the Goldsmiths' Company, and I want to pay tribute to them and thank them very warmly for making it possible and for being so helpful, and indeed to the many members of staff who have helped.

There are, in each generation, some women and some men who help form public opinion and public debate, and who inform public opinion and public debate. Our lecturer tonight is one of these: Baroness Helena Kennedy, a name well known I am sure to all of you. We have had to turn away so many people, and no doubt that is tribute to our lecturer and to the topic that she has chosen for tonight. She is a barrister, specialising in human rights issues and women's issues. She has been a magnificent public servant, and continues to be so in the House of Lords, where she is a gadfly and a stimulus and someone who ensures that the attention of those responsible is drawn to this, that and the next thing, just as it should be. She has been Chairman of the British Council and performed many, many demanding duties for them, including travel overseas significantly; Chairman of the Human Genetics Commission; she has been Chancellor of Oxford Brookes University; and so on it goes on … Chairman of the Haldane Society – I shall not run through all of these, but it is a magnificent contribution that continues to be made, to the public life of our country.

One of our great geniuses of course is selection not just of content of lectures and books, but of title. Anyone who can write a book called "Eve was Framed" clearly is good at the title side, but of course, more importantly, the substance and the content. I have no doubt that that will apply to tonight's lecture, the title of which is "Walking the line", and I look forward to the substance with interest and anticipation. Please welcome Baroness Helena Kennedy…

Baroness Helena Kennedy

Lord Sutherland, ladies and gentlemen, it is a great pleasure to be here. It is a very lovely event and I was very flattered to be invited. Chairman, I have on occasion been introduced as Helena Kennedy, the lawyer who represents women and other criminals! I blushed when you described the list of things that I have done and do, but we Scots – and you are another of them – are usually brought up by mothers who bring us back down to earth with a thump. Apparently, my mother was with some women in Scotland and one of them said, “Mrs Kennedy, how does your daughter manage to do all the things that she does?” My mother looked at her and said, “But you haven’t seen her skirting boards!”

I just want to start with a little brief anecdote. On the 7th of July, I went to the Old Bailey for an early hearing on a terrorist trial, in which I had been instructed. The trial had been set down to start in October, but an alleged co-conspirator had been arrested by the FBI in New York and he had turned state witness as part of a plea bargain, so that he was going to receive a very much lesser sentence than might have been the case in return for his giving evidence against others, including those in the British trial. His evidence had just been served on the defence, in the British trial, with the intention that he testified against the accused in their case. The date for the trial, as a result, on the application of the Crown, would have to be vacated and moved to some months later. My client, who was the youngest of those accused and a kid brother of an older, more sophisticated defendant, was involved in a perhaps more tangential aspect of the case. In light of the delay and the health problems he was suffering, I intended to apply for bail for him, expecting very stringent conditions, if bail were considered at all.

But that morning, the morning of the 7th of July, the lawyers in the courtroom became aware of the rumours of explosions on the Underground. At first, it was suggested that a gas main had exploded at Aldgate. Court staff had been delayed in getting to court. Jurors in other courts had failed to arrive. There was a pall hanging in the air, and soon the news was clear. There had been bombs all over London, in the Underground, the bus in Soouthampton Row. The courts are now havens of new technology, so no visit to the clients in the cells takes place any more for those sorts of preliminary hearings. We now often have conferences and consultations by video link with the prison where the accused is being detained. Modernity is not absent from the criminal justice system, whatever others would tell you. So I went down to the video conferencing room, and I told the grainy screen that contained my sad-eyed client, all the way over in Belmarsh. There he was, with his Cockney accent and his baseball cap, not looking very different from other boys you would see in and around London. I explained to him that there would be no bail application. All had changed, changed utterly, in the words of Yates.

While the chance for bail had been slim anyway, it was now non-existent, because of course judges don’t operate within a vacuum. They are not unaffected by the impact of public events. They are all too aware of the social contract that is inherent in criminal law. The state takes on the role of accusing and punishing those who have committed wrongs against the citizenry so that there are no lawless reprisals by individuals and groups. That is the nature of our criminal law, that the state takes on personal wrongs and prosecutes them, because a wrong to one of us is a wrong to all of us. In that way, we deal with powerful, vengeful emotions, which so often exist after crime, and in that way, we seek to maintain social order and the courts seek to absorb incredible anger. Judges have to develop well-attuned antennae. They cannot be out of step with profound public feelings, but nor should they respond to crude populism. They have to safeguard the accused from unfairness. They have to be true to the law and legal principle. Justice exists within that tension, between the rights of an accused and the rights of those who have suffered through crime. On the 7th of July last year, no person accused of terrorism was going to get bail, and I started the long walk back to Chambers.

I called this lecture “Walking the line” because when asked to choose a title, I had just seen the Johnny Cash film of that name, in which he sings a song of that name. I promise you, I’m not going to sing to you tonight! Walking the line in fact is about remaining true, sticking to what is right. The phenomenon of terrorism is one of the great challenges to the rule of law. In the face of such provocation, the temptation to erode civil liberties is great, but this is precisely the repression that terrorists seek to stimulate and, if great care is not taken, emergency measures to combat terrorism end up undermining the very freedoms that we value. It is my strong belief that while legal steps are taken to deal with terrorism, it is essential that we remain true to legal principles.

I want to start by asserting something that I am sure that all of you will agree with, which is that law matters. It is the bedrock of a nation. It tells us who we are, what we value. It regulates our human relationships, one to the other, but it also regulates our relationships with the state, we as citizens with the

state. When politicians fumble for the meaning of Britishness, they need look no further than our law and our own great language and our great traditions of parliamentary democracy, yet we seem to be having a crisis of confidence about all three. Law is cultural. It is not just an instrument, as politicians so often seem to think. It is a fabric. It has a weft and a weave. It has checks and balances. It comes out of the deep well springs of experience within a country. Law matters.

The world is going through a period of dynamic change, presenting entirely new problems to nations and to the international community. Societies are now more complex and racially mixed than they were in the 20 th century. People are better educated and more demanding, much more conscious of their rights. The position of women has changed radically in developed countries. Attitudes to homosexuality, to marriage, to legitimacy, have also altered. The rigid divisions between classes have broken down, challenging political parties which were configured around an old order: the party that represented the boss class; the party that represented the working class. But now, it does not work like that any more, and the parties are having to re-invent themselves, with great difficulty. The police and security agencies now have an incredible array of technology at their disposal, which of course makes questions of privacy more pressing for us as citizens. Globalisation provides many benefits, with access to goods and commodities from all over the world, but the very developments that make global markets work – electronic transfer of money, telecommunications, the mobile 'phone, the internet, the web, the email, ease of travel, the softening of borders, deregulation, off-shore banking – all equally facilitate markets in other commodities, like drugs, arms, explosives, fissile material, the trafficking in people, women, children, babies, the trafficking in human eggs, in human organs. International crime and terrorism are the underbelly of globalisation. The things that make globalisation work, work too for evil purposes.

This new world has also brought increased levels of anxiety for our own populations. There is insecurity in work, flexible employment, which means that there is a risk of being sacked tomorrow because cheaper labour is available elsewhere. The rolling back of the welfare state because of its cost, the changed demographics which mean that many people are living for longer and there are fewer younger people as families have fewer children, and so there are fewer of the young to support the old. Longer lives are there exciting all of us with their possibilities, but there is also the fear of how we support that longevity, perhaps not in the best of health, perhaps not as fit as we would want to imagine ourselves. The fear we have about what happens to our pensions; will there be enough to make life worth living?

Then there is the whole issue of the arrival of new peoples in our midst. There is the anxiety that is created, and spoken of regularly in the press, about crime. We read those daily stories. The barbarian is not just at the border, but at, we would think, our front gate. In this uncertain, frightening world, it is very easy for people to turn to government, to seek out strong government, and for government to read this as a licence to authoritarianism. I recently chaired something called the Powell Inquiry, which produced a report. We looked into the state of British democracy, and the way in which there was a downturn in participation in elections, in participation in political parties. What became clear in the evidence that we took - travelling around the country, speaking to experts - what became clear is that democracy needs constant practise and renewal. But we have stopped telling the story of how liberal democracy came into being, of how the rule of law came to be. We have lost our historic memory for the reasons why we have civil liberties, and yet we have an extraordinary story to tell. Law is a glue. It is what makes the centre hold, the mortar that can fill the gaps between people and communities, creating a social bond, without which the quality of our lives would be greatly undermined. Yet we are in the process, I believe, of unpicking law's underlying principles. Politicians in our consumer society think that they are running a large corporation – Britain plc. They too often talk of their brand. They treat citizens as consumers of political commodities. Short-termism is the currency, and through focus groups they seek to supply what they understand the citizen wants. But some things require the longer view.

Britain invented the rule of law, yet our young rarely know that. The concept of the rule of law has an evaluative as well as a purely descriptive dimension. If you talk to the Chinese, they are adamant that they too adhere to the rule of law. Laws are passed, they tell you, and all the people must obey them. But the rule of law, of course, is about more than that. It started its life here, in England, in the 16th Century; even the King, the sovereign lord, was subject to law, but the greatest story saw the roots of the rule of law, and of jury trial, in the Magna Carta: "No free man shall be taken or imprisoned or exiled or in any way destroyed," says the Charter, "except by the lawful judgement of his peers or the law of the land."

Not surprisingly, other countries which adopted common law systems, usually as a result, it's right, as a result of colonialism, absorbed that notion of the rule of law, that everyone, however great, however lowly, we are all subject to law. However, the central thesis that those who govern should not be outside law's

disciplines and that there should be restraint on the arbitrary use of power was so compelling that even beyond common law shores, other nations began to adopt this idea of the rule of law. By the 20th century, these had become adopted as central pillars of all democracies. Mention was made of my travelling for the British Council, but as I met human rights activists around the world, our system was looked to as a model. Western democratic societies display their commitment to the rule of law in a number of different ways. In the area of crime, this is done by having clearly defined laws, circumscribed police powers, access to lawyers, an open trial process, rules of evidence, rights of appeal, and an onerous burden of proof shouldered by the state. In international dialogue, adherence to such due process is urged by us on every nascent democracy.

But Britain has other things of which we can boast, except that it just isn't our way. We were the first nation in the world to outlaw torture, with our judges making it clear in the late 17th century that evidence obtained by torture would not be accepted in the courts. It was a way of saying to the king's men abusing prisoners is not going to find any counsel or comfort in the courts. In the early 18th century, Scotland was the first nation in the whole world to pass a statute banning torture and its products as evidence in courts.

Britain recognised that law needed public endorsement, and they promoted juries into a central role within the legal system, to bring the values of the community into the processes. Here in Britain too was created the role of the lay magistrate, as distinct from the professional judge, but again, someone who could bring the values of the community into the legal processes. The common law, in my view, and I think we should be more boastful, is the greatest legal system in the world. Its flexibility and capacity for development has meant it has none of the rigidity of Napoleonic codified systems. It is why it was never rejected after the end of those colonising efforts of ours: the United States, New Zealand, Canada, Australia, India, Nigeria, still proudly possessors of a common law system. It has also been argued that market economies have flourished best in common law systems because the real discretion that is vested in judges in fact makes for better resolution in civil litigation.

The recognition that judges had to be independent of Executive influence was also a concept developed in the common law world. The legal system could only win the respect of the people if it could be seen clearly not to be the instrument of politicians. So we had this separating out and an acceptance that judges must be independent; and yet we have seen recently assaults upon the judiciary by politicians, indeed including the Prime Minister, when judgements do not go the Government's way. This lack of respect for the rule of law has the knock-on effect of undermining public confidence in law. There is a proper mechanism for challenging judges, and that is through courts of appeal, but to denigrate our judiciary and personalise attacks on individual judges is an undermining of the rule of law.

But most important of all the elements built into the common law system, which I believe is so essential, is a healthy scepticism of state power. We know, from painful experience learned in the crucible of historic struggles, that power has the capacity to corrupt, and that those with power will often abuse it, whether it is a minister of government, or a police officer, or an immigration officer, or a prison guard, that once someone has some power, the temptation to abuse it is always there. Happily, most people don't, but we have to protect against the occasions when they will. We operate in the common law system from a preferred truth, and that preferred truth is that the individual, the citizen, is innocent, and that the burden of proving otherwise has to rest with the state. If the state wishes to punish, to imprison or in some way exercise control over us, it has to hold a trial, it has to carry that burden of proving a case. It has to prove it to a very high standard. It also means that we as citizens in this country, if stopped by a policeman in the street, always can say, "Why? Why do you want my name? Why do you want to know where I'm going?" and to seek a reason for that stopping or that searching. The system is built around the idea that the state is our servant, that it is here at our behest, and that we as citizens are not here at the behest of the state.

I am afraid that is not true in countries whose legal systems were established around the Napoleonic Code. There the systems are weighted in favour of the state. In the daily round, it may seem to make very little difference to most of us, but when we speak of Britishness, we reach for language to describe the things that we think are so essentially British, about pluckiness, British obduracy, standing up for the things that people believe in. That spirit does not come from nowhere; it in fact comes from the way in which we have our relationship with the state. There may be good reasons why Britain did not succumb to fascism in the middle of the 20th century, but amongst them is the fact that our relationship with the state is always a questioning one. We are always in a position where we can say "Why?" Once that relationship is altered, there are costs.

It is one of the reasons why identity cards should be viewed with such concern. I have no problem with more effective policing of our borders, with more sophisticated passports, carrying better means of identification, but what I do object to, and I think should concern us all, is the creation of an internal passport which we will inevitably be required to produce on request, creating the kind of passive citizenship which should be resisted.

But the other thing that is often forgotten in current debates about the law is that human rights is not a foreign concept. Human rights also had their birth in the common law tradition. The great founder of human rights was the British born Tom Payne, whose pamphlet “The Rights of Man” led to the American and French Revolutions and changed the free world. The call for liberty, equality and fraternity had its beginnings in his work, and it was he who argued for democratic suffrage and recognition and respect for the essential humanity of all beings. A second wave of human rights came about after the terrible crimes against humanity committed in the Second World War.

The European Convention of Human Rights drew upon the common law legal tradition, and indeed it was drafted by common lawyers. By the early ’50s, our experience as colonialists had made us sensitive about insisting on others adopting our way of doing things, but the Convention, and the creation of that European Convention after the Second World War, drawing upon the Universal Declaration of Human Rights, was an attempt to say to Germany and to other European countries that there has to be a template of values against which all legal systems must be judged. Germany’s legal system had failed such a test. No such template had existed. So the judges, who eventually were tried at the equivalent of the Nuremburg Trials, as part of those trials, judges were also in the dock, because they had been co-opted by the Nazi regime to rubber-stamp some terrible atrocities towards German people, but they had failed, and they sought to justify their actions by saying, “We were only administering the laws as passed by the government of the day.” The Convention’s purpose, the purpose of human rights’ values, was to insert a gauge, a template, by which judges would have to test any laws passed by the governments of any day. We in Britain signed up because we knew that it was unlikely to pose very much problem for our system, because the values were essentially common law values, the values that were imbued in our own system of law. That is why it is such a mistake for those who have sense of history not to appreciate that human rights law is not an alien concept or alien to our tradition.

I want to just turn to the whole issue of terrorism, against that backdrop of why legal principle should not depart us, even when we are challenged by something as egregious as terrorism. The appropriate response to terrorism is not a war on terrorism, but is the use of the criminal justice processes.

After the events of September the 11th 2001, George Bush declared a war on terrorism. That was a folly. I know that George Bush at times is somewhat wayward with the English language, but on that occasion he was choosing his words carefully. I say it was a folly because it aggrandises the behaviour of political extremists. They want it to be considered war. They want to be considered warriors in a great war against Western values. The language, however, was intentional because war allows for the suspension of normal laws, and George Bush realised that. It allows for the suspension of laws, including habeas corpus, and it allows for us to do things with law that would be unacceptable at other times. Habeas corpus is one of the most ancient concepts in the common law tradition, deeply connected to the protection of liberty. It means that the state has to deliver up a detained person to the courts for judges to evaluate whether the detention is lawful and necessary. Even during the Second World War, when detention of enemy aliens was permitted under emergency laws, there was a challenge in the courts on the famous case of Liversage and Anderson to the suspension of habeas corpus. The argument was made that even in a time of war, like the Second World War, it was inconsistent with English tradition and English law. Lord Atkins is famously quoted as saying that “Even amidst the clash of arms, the law is not silent.”

The concern I have is that the current wave of terrorism is projected as likely to last long beyond any of our lifetimes and, that being so, we should be very cautious and alert to the fact that in suspending civil liberties now, we are unlikely ever to see them return. To surrender, at this time, a civil liberty would be a permanent loss.

Bad law is counter-productive. It often keeps alive and, in some cases, exacerbates the very antagonisms which underpin political violence. If particular communities feel that they are subjected to special laws, a sense of injustice is inflamed, and terrorism always has its roots in perceived injustice.

We learned, from internment in Northern Ireland, that a whole swathe of people, who might otherwise have in no way been of assistance even to those who were terrorists, became silent, and perhaps provided quiet support which they might otherwise not have done, but for the fact that they felt that they were at the

receiving end of special laws. Repressive special laws also make it easier for those who have bombed and maimed to claim to be political prisoners rather than criminals, because they have already been given special treatment by the state, a special nomenclature.

There is also another cost. Counter-terrorist laws, which give the police and the courts special powers, can set up a contagion which streams into the bloodstream of the legal and political system. It is impossible to seal hermetically anti-terrorism laws, and so they can play havoc with the mindset of police officers and those working in the legal system, even lawyers and judges. As a result, standards can shift, and those working the system can begin to lose sight of liberty's meaning, not just in the area that we are concerned with, terrorism, but in areas quite unconnected with terrorism. There is a coarsening of the sensibilities which make us good lawyers, good judges, decent policemen. It is no accident that so many miscarriages of justice that took place in the '70s and '80s, particularly for example in the West Midlands police force and the Metropolitan Police, were not all related to political terrorism, and it was partly because the police forces that dealt with those terrorist cases within those jurisdictions, within those areas, absorbed a culture of a particular kind of policing. I am afraid that, rather than just blaming the officers involved, those of us who should have been vigilant, the political class, in many ways turned their backs and denied what was happening.

Fear can always lull our vigilance as citizens in a society, and it can provide a blank cheque to government, who offer to protect us. The climate around terrorism can also silence many who are anxious not to be seen as appeasers or as sympathisers with those who are perpetrating the outrages. So very often, people who are unhappy and uneasy about laws that are being put in place feel unwilling to step forward, to speak out. Governments want to be seen to act because they are fearful that in a culture of blame that they will be accused of failure if another atrocity takes place.

Tony Blair's response to the atrocities of September 11th 2001 was to follow George Bush's line and to introduce the wartime measure of detention without trial for non-citizens. To do this, he had to derogate from the European Convention on Human Rights, which no other country in Europe did. This led ultimately to the famous Belmarsh detainee case in the House of Lords, where the House of Lords judges held that such detention contravened human rights because it operated in a discriminatory way, because it was directed only at non-citizens. They made it clear that they felt that what was being created here was a hierarchy of the value to be attached to certain human beings, and the whole point, of course, of human rights is to see the value in all humanity, to recognise our common humanity. In the holocaust, a Jew was seen as less human; so was a gypsy; so was a homosexual. So when we said "Never again," we were rejecting those very registers of difference when it came to basic rights, like the right to a trial, the right to be brought before a judge.

The Government could have ignored that judgement from the House of Lords, because we should make it clear that the judges in our country have no power to strike down legislation passed by our Parliament. Parliament is supreme. The sovereignty of Parliament is sacrosanct in the United Kingdom, and when the Human Rights Act was drafted, it was specifically drafted to retain Parliamentary sovereignty. So in fact at that moment when the judges said, "It is our view that this detention of non-citizens contravenes human rights," it was open to our political masters to say, "Well, we do not agree with you and Parliament takes a different view," and to have carried on detaining. The Government, however, accepted the ruling, not very graciously, but they accepted it, and in response, brought in a new set of laws which were control orders, which were to apply to citizens and non-citizens alike, and while they too greatly limit liberty, and they do so on a lower standard of proof than would be the case in other areas of crime, and they do so on the basis of intelligence, which is unavailable either to the accused or to the lawyer, the response of Government was to recognise that if the judges are saying, "Here is an abuse of human rights," that one should listen respectfully.

But after July the 7th, the Prime Minister was to insist that the rules of the game had to change, and by that he meant that there should be a re-think of the whole of our legal regime. He felt that there should be questions asked about the burden of proof. Should the state have to prove a case against accused persons charged with terrorism? Should the standard of proof be so high in criminal cases? Does there have to be jury trial? He is not very enthusiastic about jury trial. As for the use of intelligence, he was rather keen that ways were found to receive such intelligence into the processes, even if an accused might not have access to it. His first legislative effort after the 7th of July was to seek to introduce detention of up to 90 days without charge, and it was only because Parliament suddenly found its voice again that they rejected that and replaced it with detention of up to 28 days, of those who were being detained under the suspicion of terrorism.

Our law has changed in many different ways to deal with this threat. We have created a new duty to inform, so that anyone who has knowledge of anyone's involvement in terrorism will face charges if they do not go to the police. But we have also seen a huge extension of police powers to restrict lawful demonstrations around Parliament and Westminster, new powers given to the police to limit the movements of people within the whole of our capital city. The police can detain, can stop people, without having reasonable cause, which has always been the basis of the power of the police to stop people. There is a persuasive evidence that the police are using those powers in circumstances which are unrelated to terrorism, and the stop and search powers are being used disproportionately against people of minority ethnic background. So the fear that one would have is that there are people beginning to feel that laws are being made specially for them.

Our own rush to take sweeping powers to deal with terrorism is seized upon hungrily of course by regimes in other parts of the world, regimes which describe any opponent of government as a terrorist. This raises the important question of whether terrorism can be defined. Different legislation in different jurisdictions has attempted the task of defining terrorism, but they find it very difficult. Until there is an internationally recognised and sufficiently restrictive definition, it will be hard to have confidence that struggles, for example for self-determination and other political activities, will not be wrapped up in accusations of terrorism by despotic regimes. I think it is important to recognise that even where there is legitimate struggle against oppression or a movement for self-determination, there are always means which are impermissible: the necklacing of informers in South Africa, where petrol filled car tyres were placed around their necks and set alight; or the suicide bombings in Israel, where young Palestinians join a civilian gathering and cause mayhem as well as their own death. These are never the legitimate conduct of struggle. But there are other parts of the world, whether it be Burma, whether it be Zimbabwe, whether it be Putin's Russia, there are places where those who speak out against the behaviours of the regime in fact are accused of terrorism and subjected to unacceptable processes.

Terrorism is not, and never has been, in itself a criminal offence in this country. However, those who commit terrorist acts are committing acts which fall within the definitions of crime. We have chosen, as has most of Europe, unlike the United States, we have chosen to deal with terrorism through the criminal justice processes, and long may it be so. We recognise that terrorists commit murder, they attempt murder, they plan and conspire to murder, they commit criminal damage – the list is endless. We have added to that new crimes, of acts preparatory, new crimes which I am happy to endorse as being essential to deal with new forms of terrorism. We have added a new crime of going to training camps in places like Pakistan, which in fact are the ground where young people acquire the knowledge with which to create mayhem back in European cities.

Many liberal democracies have faced the dilemma of how to deal effectively with political violence. Most have sought to stigmatise those actions by the criminal label. If this is the adopted course, we have to establish the extent to which a state confronted with terrorism can and should depart from legal safeguards without jeopardising the essence and the principles of the rule of law. In dealing with terrorism, the police and the intelligence services do need to be empowered. Few would resist the creation of tougher laws coupled with heightened security and surveillance.

Controlling the money flow is often even more important than capturing any individual. The same is true in penetrating the heart of all organised crime, but getting the banking systems of the world to work together on this is not easy. Despite the immediate passing of a Security Council Resolution in the aftermath of September the 11 th, which demanded that all nations took legislative steps to deal with money laundering for terrorist purposes, it is still proving a real challenge to translate that into reality. While most banks will no longer accept suitcases full of unexplained notes, unveiling phoney companies or charities set up to provide cover for money transfer, that requires the sort of transparency which sometimes meets opposition even in democratic countries. Governments are often loathe to create a spotlight which may illuminate their own arms trade, or the financing of covert activities abroad by intelligence agencies, or the tax avoidance activities of their largest financial donors. The super-rich, with their offshore accounts, tax havens, and sophisticated methods of tax avoidance, are often very unhappy about greater scrutiny of money transfers, of trust funds, of companies in Lichtenstein. They want guarantees that intelligence gathering and anti-terrorist initiatives should be "outcome specific" is the term used, so that any uncovering of fiscal irregularity will not be used against them. So there are real problems about trying to get to the money.

New technologies and sophisticated methods of money laundering make modern terrorism very hard to combat. Citizens in developed liberal democracies, who have enjoyed growing freedom over the last century, have to consider what incursions into our civil liberties we are prepared to countenance. Counter-

terrorist campaigns inevitably involve some invasion of privacy, and the surrender of some of the rights that we have enjoyed. We now readily have ourselves searched on entering public buildings. We have become accustomed to the ever-present eyes of CCTV. We are prepared to forfeit sharp objects before air travel. We accept the monitoring of internet sites. In investigating terrorism, we should accept greater vigilance at ports of entry, the expansion of police powers to investigate bank accounts and emails with proper judicial oversight. We should expect that there should be, perhaps, a greater use of search warrants, with perhaps a change in the thresholds for doing so. We have to expect and encourage expanded intelligence gathering, particularly in the communities from which home-grown terrorism will be spawned. We have to accept electronic eavesdropping and surveillance. This trade-off by citizens of personal freedom for greater security is an understandable expectation.

The only way to counter international crime and terrorism is through working across borders, and law has to develop synergies and systems to meet new demands for collaboration with other police forces around the world, with other intelligence systems. We can do it. We can think of the co-operation that is necessary to make postal networks work worldwide. I mean, just think for a minute what makes it possible for your letter to arrive at some obscure place around the world… That is about collaboration. Even at their most estranged, Cuba has delivered letters from America and vice versa. But in creating such common modalities, we should be careful not to level down, and I say that particularly in relation to the issue of torture, and I will come to that shortly.

We should be aware of some of the serious issues inherent in this move towards closer international collaboration of intelligence agencies, and of closer links internally between the police and secret services. Traditionally, law enforcement or policing have focused on the investigation of crime and the collection of evidence for trial. The police are open to public scrutiny, and can be kept more effectively within the strict parameters of the law. In contrast, intelligence agencies have traditionally operated in secret. They, at times, act outside of the law, and they give the highest priority to protecting their sources. Our own domestic experience in Northern Ireland, and the domestic experience in the United States in the late ’60s and early ’70s, vividly illustrates that when law enforcement agencies and intelligence are allowed to work in tandem, innocent activity is monitored, catalogued, and retained for future use against individuals who find themselves at odds with the prevailing authority. But even more alarming is the recognition that the evidentiary value of material passed, for example, by MI5 or MI6 to the police, may in fact on occasions be questionable, because it has been received from foreign secret police and not obtained under the appropriate standards necessary for any process involving removal of liberty.

Really, our concern should be about the co-mingling of information, sometimes making it very difficult to evaluate the quality and origins of information. Information from foreign intelligence sources does not have the same assurance of reliability and accuracy as intelligence produced by our own secret services. Torture is used. Hearsay and gossip are included. Hearsay is one of the integral components of the foreign intelligence dynamic in many nations. Having discovered the wealth of hearsay evidence out there, it may in fact explain the rationale for our own Government’s enthusiasm to abandon the rules against hearsay in our own court system. Information is often obtained illegally by such covert means that agencies do not even want to discuss their methods, and our own agencies sometimes think it’s better not to ask – “don’t ask, don’t tell” being the approach. This is one of the reasons why the security services never want to go into the witness box and subject themselves to cross-examination, or they do so with reluctance. I am happy that there are eminent people in the security world who are now talking about the importance of ethics in the way in which we gather intelligence and make use of it. So although the nature of international terrorism may require us to increase co-ordination between policing and intelligence, the potential for the rapid and substantial erosion of civil liberties and fundamental human rights can be great.

During the Scott Arms to Iraq Inquiry, Lord Howe, who was then the Foreign Secretary, said of intelligence reports: “Many look at first sight to be important and interesting and significant, and then when we check them, they are not even straws in the wind; they are cornflakes in the wind.” Lord Hurt, his successor, made the same point: “There is nothing particularly truthful about a report simply because it is a secret one. People sometimes get excited because a report is secret, particularly politicians, and they think that therefore it has some particular validity. It is not always so in my experience.” We should also make a clear distinction between actions that involve incursions into our liberty to investigate or prevent acts of terrorism, acceptable, and the actions that are taken once persons are detained. No change should be countenanced which involves detaining people without charge and without the right to judicial review. There should be no lowering of the standards when it comes to establishing guilt. There should be no removal of jury trials in terrorist cases. The principles of equality before the law and of fairness demand that we extend the same

rights to everyone. Whenever we deny to one class of suspects rights that we treat as essential for others, we act unfairly, particularly when that class is politically vulnerable or identifiable racially or by religious or ethnic distinction. In a state of emergency, the principle of equality before the law should require, at the very least, a clear case that there is no alternative but the reliance on special powers or procedures.

So there are important questions for the legal community, and for all of us as citizens, to ask about what sort of departures from legal norms are acceptable when we are dealing with terrorism. Would we be justified in lowering the burden of proof so that the conviction could be based on the balance of probabilities? Lawrence Tribe, a great American professor at Harvard, tentatively argued immediately after September 11th that perhaps we should be re-thinking our system, that maybe it is better that we convict the innocent when we are dealing with terrorism. He has retreated from that position now that time has passed between those events and now. Is it ever acceptable to deny access to the lawyer of an accused person's choice? Is it right to eavesdrop on what are normally privileged client/lawyer consultations? Is it fair to subject suspected terrorists to a higher risk of unjust conviction? Would a state be justified in changing the standards of receiving evidence, by admitting hearsay, for example, by forgetting all about rules in relation to corroboration? Is it acceptable for information obtained under torture to have any place in our system of detaining persons? My answer to all of that is no, and I will seek to persuade our citizens that they too should be saying no.

But there are problems for the state where they have intelligence reports that cannot be revealed because the life of their informant, or because of a certain kind of trade craft, may be endangered. They may also not want to indicate that this detainee in fact is linked very closely to the person who is giving them the information, and so that person could be greatly endangered. The accused may be, in fact, the best person to challenge the validity of information of that kind, able to say "that person is making that up," because they had a particular reason for that kind of invention. They may be able to say, "I could not have been at the mosque on the occasion when it is said that I was encouraging terrorism. I was not there that day; I was not even in London." Having that special knowledge is one of the ways in which evidence can be challenged, but not so if the person is never told what the intelligence is. Sources of information are often people with a grievance or people who perceive a benefit from helping the security services, perhaps because they themselves are refugees, perhaps because they themselves have been involved in criminal activities and want a deal. However, should the state protect its own intelligence sources by refusing to make such evidence available to the accused? And does such a step undermine the concept of fairness and, if so, is such unfairness justifiable in the interests of the security of all of us? The argument made by the Government is that a trade-off is necessary between civil liberties and security, but the problem with the language of trade-off or balance is misleading since most citizens will never be required to make the trade-off. It is the rights of the other that are being traded.

So I come to the end of my submissions to you. In all the deliberations of legal change or modification, it should be acknowledged that short-term security victories can be purchased at the cost of long-term political estrangement, and if that is the case, then those victories are not successes at all, as they threaten to act like a spark in the dry tinder of existing grievances. There are rarely law and order solutions to political problems. The best weapon in dealing with terrorism is good intelligence, and with home-grown activists, that information will come from the communities in which they have lived. It is therefore vital that we do not lose the trust and confidence of the people in those communities. So how do we proceed if we are not going to give in to terrorism? How do we create legal modifications that are acceptable? Really, they should be tested, in my view, against the concept of proportionality. Do the new laws reflect pressing social need? Are the reasons for them necessary and sufficient? Could alternative methods be used which are less abusive of civil liberties and involve fewer departures from the ordinary legal arrangements? Is the deleterious effect on the law in terms of human rights and civil liberties proportionate to the value to the security forces? In Britain, we have a whole raft of legislation now around terrorism.

There is no doubt, in my view, that some extension of detention prior to charge is permissible in dealing with alleged terrorists, but safeguards must exist to ensure that such detention is consistent with human rights, and the judges are going to have to hold the ring and it is why we have to be respectful of the very difficult job that they do. Detention without trial must never be acceptable. Legislation which departs from the normal rules of law must be highly specific and targeted. It should also have in-built sunset clauses, declaring the lifespan of the law, so it does not sit permanently on the statute books.

What do we do about suspect foreign nationals whom we cannot deport back to their country of origin because they would be executed or tortured, and such an act by Britain would contravene our commitment to human rights? If they are here and we have sensitive intelligence that they are supporters of Al Qaida,

how should we proceed? It may be that the intelligence comes from telephone taps, or mobile 'phone satellite interception. Currently, such evidences, from telephone taps or from that interception, cannot be placed before a court, but even the Director of Public Prosecutions and many lawyers and judges, and many members of the public, are now calling for a change in the law to make such intercepts admissible. However, if the evidence is not good enough for a successful prosecution or is too sensitive for disclosure, then I am afraid that we do have to accept the possibility of allowing them to return to their homes here in Britain. It may be that we retain some element of surveillance. Is that a cost that we are prepared to pay?

We have to remind ourselves why we take such an absolute stand on torture. Every other human right that exists is a qualified right. Even the right to life is qualified, because we are allowed to kill someone else in order to defend ourselves. But the right not to be tortured is an absolute right, the only absolute right, and it is because torture is the fate worse than death: the deliberate infliction of pain, and then the pause in which mental anguish is a precursor to further physical pain. This is a behaviour which is the denial not just of someone else's humanity; it brutalises and dehumanises us, the perpetrator, or those who condone it. Sometimes we have to draw back from action because of what it will do to us, the holders of power. Sometimes we have to release a person whom we think might be guilty, because we know that to do otherwise will destroy something of far greater value.

Creating a world that is respectful of human rights, respectful of law, is a journey, but our only hope is a world governed by law and consent. Law is the autobiography of a nation, and some of the chapters make better reading than others, but we have a proud story to tell. There is an ethical component to our law, and we have to be the guardians of it when we face the challenge of something like terrorism, for to fail will be to inflict a serious wound on our great liberal democracy, and I think we cannot allow that to happen.

Vote of thanks from Lord Sutherland of Houndwood, KT FBA, Provost of Gresham College:

When I introduced Baroness Kennedy, I toyed with the fact that interesting titles, in her case, were always followed by substance and substantive comment and thought, and tonight you have the evidence of that in this very fine lecture. She covered the specifics, terrorism, torture, ID cards, detention, the way in which we assess information from intelligence sources, a whole range of issues that preoccupy any reflective person in this country now, but of course she set these in the much broader context, which is the place of the rule of law in our society and the way in which it forms the very structures and textures of that society.

Just a couple of examples: she mentioned, just in passing almost, even those who promote the market economy realise the importance of the rule of law. I will give you a good example of this… if you go to the Far East of the Asian continent, you will discover two immensely lively cities, Shanghai and Hong Kong, and they are tussling with each other, and indeed with others, about who will be the dominant source of the economy of that region, and that half-continent. The issue, in part, will be settled by whether Shanghai can aspire to the rule of law in the way that Hong Kong happily still does. The rule of law there sets the constraints to what is possible in the business world, and to what can be done with investments and how those investments are protected. If Shanghai can aspire to that, it will be a great rival, but if it cannot, it won't in the long run.

Law on checks and balances: law is our protection. It protects us from, well, once upon a time, from the robber barons, from those who could raise the biggest army or whose tribe was strongest or had the longest guns or the largest swords, or the pikestaffs that provoked and prodded. Of course, the law protects us in different ways, from that as well, but now from the dangers of certain forms of business practice, the dangers of certain forms of exploiting the press, and of course, most pre-eminently, as was laid out very clearly in the lecture, from the overuse and misuse of the powers of the state. That is where we find the strength of law.

I suggested, at the beginning, that Helena was, in the House of Lords, a gadfly. That may seem to some of you perhaps as being too insubstantial, because we had a deeply reflective lecture, dealing with issues of great substance and great profundity and issues that form, as I have said, the very texture of the lives we live. But from a philosopher, the compliment of being the gadfly, which of course was Socrates' title, is the highest compliment I can pay, and again, I think that has been borne out tonight. Thank you for a magnificent Gresham lecture!