The dance of delegitimation: Democratic government and the wars on terror

Philip C. Bobbitt

Perspective

Article history:
Received: 11 August 2016
Accepted: 11 August 2016
Published: 6 December 2016

Correspondence:
Philip C. Bobbitt: bobbitt@law.columbia.edu

Peer review:
Not peer reviewed

Publisher:
Veruscript, Unit 41, Pall Mall Deposit, 124-128 Barbby Road, London, W10 6BL, UK

Copyright:
© 2016 Bobbitt. © This is an open access article distributed under the Creative Commons Attribution License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited and its authors credited.

Keywords:
wars on terror; democratic values; war; legitimacy; terror

Citation:

Link to this article:
http://www.veruscript.com/a/RWDDVW/
The dance of delegitimation: Democratic government and the wars on terror

Philip C. Bobbitt
Columbia University, New York, NY, USA

Abstract

We commonly think about the relationship between the wars on terror and the values of a democratic republic in erroneous ways.

It is pretty standard fare to argue that in fighting a successful war on terror, we shall have to compromise some of our values. And while this is not altogether correct, it is certainly more insightful and candid than the claims that really nothing needs to change which the very events of 9/11 and its aftermath decisively refute. Nevertheless, this standard claim is wrong, but because it is wrong in a subtle, habitual way, it takes some analysis to get right.

First, let us begin with the celebrated “spectrum” view of human rights and powers of government that is so widely and unthinkingly held.

This is the view that our civil rights and civil liberties exist on an axis between the human rights on one end and the powers of government on the other; this view dominates our thinking these days. It was not always so. When Thomas Jefferson wrote that our people had inalienable rights whose protection was the purpose of government, he implicitly disavowed the spectrum metaphor. It would be a contradiction to say that the State required power — indeed could only justify the acquisition and exercise of power — to protect rights if this acquisition and exercise invariably diminished rights. Jefferson, like Alexander Hamilton in the Federalist Papers, saw how an increase in the power of government could lead to an increase in the rights held by its people. If you doubt this, look around the world at those societies whose governments are too weak to protect the rights of their peoples from either civil insurgencies or invading states.

Nevertheless, we often assume that, (i) in times of tranquility, our rights are most abundant and the powers of government are at its lowest; and (ii) in times of emergency, the balance shifts and the powers of government are increased at the expense of our personal and political rights.

Second, we must subject this habit of thinking to the logical criticism known as Parmenides’ Fallacy.

This fallacy indulges in the frequent, persistent assertion that we should compare the present state of affairs with the past in order to evaluate the policies that have gotten us to where we are now. In fact, we should compare our present situation with alternative outcomes that would have arisen from different policies, had they been chosen. This is true for prospective policies as well: it is a sophist’s argument to deride a proposed policy (say, social security reform or free trade) by simply saying that we will be worse off after the policy is implemented than we are now. That may well be true. But it could be true of even the wisest policy if other alternatives, including doing nothing, would make us even worse off in the future.
Let me give a famous example of Parmenides' Fallacy at work. The turning point in the United States’ 1980 presidential race came when Ronald Reagan criticized President Jimmy Carter’s record during a debate by asking the American people “Are you better off today than you were four years ago?” Though rhetorically devastating, this question is hardly the way to evaluate a presidency. After all, the condition of the nation will never stay the same for four years, regardless of who is in office. A more relevant question would have been, “Are you better off now than you would have been if Gerald Ford had remained the president and had to cope with rising oil prices, the Iranian Revolution, the Russian invasion of Afghanistan and soaring interest rates?” In the same way, we should reframe fallacious prospective questions such as “Will we be better off in five years than we are now if we adopt a certain policy?” The better question to ask is “Will we be better off in five years by adopting this policy than we will be in five years if we do not?”

To take another example, during the first year of the Clinton presidency, the administration proposed a healthcare reform measure to Congress. A USA Today/CNN/Gallup poll conducted shortly after the president’s speech to a joint session of Congress found that 57% of Americans approved the plan. Six months later, after a highly successful advertising campaign by the insurance industry, approval had dropped some 20 points and the measure was dead in Congress. The heart of this campaign was a series of television ads featuring a middle-class couple, Harry and Louise, discussing the proposed legislation. It would, they concluded, result in diminished coverage for themselves and higher prices. Only the bureaucrats in Washington could possibly endorse such idiocy. As a result, the reform plan was crushed. Who would support a program that made its recipients worse off? And two decades later, we know that — without reform — coverage diminished and prices rose even more steeply than the claims of Harry and Louise.

Third, we can apply the concept of Parmenides' Fallacy to the problem of the tradeoffs between humane values and personal rights, and the defeat of terror.

We begin at Time\(_1\) — the current state of affairs that has, shall we say, a civil liberties value (CLV) of 10 and a national security value (NSV) of say 10. A policy is proposed — for example, the collection of intelligence metadata by machines — that will yield values of say 9 with respect to CLV and NSV of say 11 at Time\(_2\), say one year later. It is very tempting to say that the balance has been redrawn (it has) and, therefore, that our civil liberties and the humane values they protect are worse off because of the adoption of the new policy (which is not necessarily true). Note that the real comparison is not whether we are “worse off than we were before,” a true but trivial statement because we know from Parmenides’ Fallacy that Time\(_1\) is not an indefinitely enduring option. Rather, the real question which will determine whether we are worse off at Time\(_2\) is whether we would have been better off at Time\(_2\) had the NSV not increased. (Parmenides, a pre-Socratic philosopher held that all change was illusion; it is his “fallacy” because of the mistaken attempt to assess a situation by measuring it against the past, which cannot be infinitely perpetuated, as opposed to comparing the new situation against other possible present states of affairs; it is equally a mistake to compare a proposed future world against the present world — which will necessarily be subject to change — instead of against other possible future worlds.)

Now there are many difficulties in applying this analysis: (1) How do we know what things would’ve been like in worlds that were never realized; perhaps increasing state power has failed to make us safer (e.g., the assumption that torture never works obviates any utility of torture in any conceivable future world). (2) Some critics have suggested that this kind of analysis can retrospectively justify any course of action — no matter how badly things turn out — because there is always a counterfactual hypothesis that suggests they could be worse.

These criticisms remind me of the arguments made by the Critical Legal Studies movement back in the 1980s, which asserted that law was indeterminate because one can always make a legal argument for any position. Such a claim could only be made by someone who has never tried to persuade a judge, and the claim that a counterfactual hypothesis can justify any course of action is
the sort of rhetoric that could only be employed by someone who has never had to make responsible decisions or persuade anyone.

In fact, difficult though it may be, such assessments are always the case with estimative intelligence. Because we can never know the future, we can never know the possible futures that did not come into being. Decision-making requires guesses about just such alternative futures and guesses that may be more or less wise but are never a matter of technological certainty.

Still, we go on: how many editorials and speeches have been made asking whether we were better off now than we were before and who’s to blame if we were not. Reflective people know this is fallacious but to correct for it just seems too difficult. It reminds me of the familiar story of a man who comes out of a bar and finds another man, obviously drunk, on all fours looking for something beneath the streetlamp. The first man says, “Are you all right? Can I help you?” The second man replies, “I’ve lost my keys.” The first man asks, “Where did you last see them?” The second man replies, “Over there, by my car.” The first man says, “Then why are you looking here?” The second man says, “Because the light’s better here.”

There we remain. Similar to those Regency balls, where an outer circle of men and an inner circle of women danced with minimal contact, the “nothing should change” crowd (who take every proposed policy as the herald of a police state and the death of the Constitution) are in a slow cotillion with the “we must compromise our values to survive” crowd who exaggerate every threat. They are dancing toward the delegitimation of democratic parliamentary government. Where will we be when the music stops?

**Funding sources**

None.

**Declaration of interest**

Professor Bobbitt declares that he has no conflict of interest.