

# REFLECTIONS ON CIVIL LIBERTIES IN AN AGE OF COUNTERTERRORISM<sup>©</sup>

BY CONOR GEARTY\*

This article examines the historical origins of civil liberties and shows their importance to systems of government rooted in the principles of representative democracy. It argues that the subject of civil liberties needs to be distinguished from issues related to criminal justice and human rights, and that too broad a deployment of the language of civil liberties can lead to the importance of civil liberties being underappreciated by the wider public. The article considers how the integrity of the language of civil liberties and the representative system of democracy as a whole can be preserved in the face of the strong challenge to these values that has become increasingly apparent since the 9/11 attacks.

Cet article examine les origines historiques des libertés civiles, et montre leur importance pour les systèmes de gouvernement enracinés dans les principes de la démocratie représentative. Il avance que le sujet des libertés civiles doit se distinguer des problèmes liés à la justice criminelle et aux droits de la personne, et qu'un développement effréné du langage des libertés civiles peut faire que l'importance des libertés civiles soit sous-appréciée du grand public. L'article analyse comment l'intégrité du langage des libertés civiles et le système représentatif de la démocratie dans son ensemble peuvent être préservés face au défi farouche lancé à ces valeurs qui s'affirme de plus en plus depuis les attentats du 11 septembre.

I.	THE PROBLEM DEFINED .....	186
II.	THE ORIGINS OF CIVIL LIBERTIES .....	191
III.	THE TAMING OF DEMOCRACY .....	195
IV.	THE DOUBLE-EDGED PROMISE OF HUMAN RIGHTS .....	199
V.	THE PROBLEM ADDRESSED .....	206

The philosophical formulation of the question of rational law—the question of how an association of free and equal citizens can be constructed through the means of positive law—forms the emancipatory horizon of expectation within which the resistance to what appears as an unreasonable reality becomes visible.

—Jürgen Habermas, *The Postnational Constellation*<sup>1</sup>

## I. THE PROBLEM DEFINED

---

<sup>©</sup> 2003, C. Gearty.

\* Professor of Human Rights Law and Rausing Director of the Centre for the Study of Human Rights, London School of Economics.

<sup>1</sup> (Cambridge: Polity Press, 2001) at 58.

The critical perspective that we bring to the present state of the law, or to this or that proposal for change, is formed in large part by our understanding of what we, as a political society, are committed to, and of what we believe ourselves to be capable. This set of expectations is in turn made possible by the kind of institutional structure within which we, as active citizens, find ourselves. The better our framework, the more open it claims to be, the more justice it delivers, then the more critical we are of decisions that, to our eyes, involve departures from what we believe the system to be capable of achieving, and from what, furthermore, we think it ought to provide. Hence, the great disappointments are always suffered by egalitarian campaigners in democratic systems, not only under occasional reactionary administrations but under left-wing and social democratic ones as well. Enough is never done because enough can never be done (short of the achievement of an egalitarian revolution that the twentieth century has taught us will produce, at best, a brief mirage of progress, and, at worst, unnecessary bloodshed and counter-reaction).

The fate of the socialist-minded activist in modern democratic politics is that of the perpetual bemoaner, lamenting the reactionary zeal of the Right or the betrayals of the governing Left, as the case may be. Even when progress is acknowledged to be evident, it is inevitably condemned by such critics as too little, too late, or (even worse) as a token morsel thrown down to put them off the scent. The tone of politics on the Left in contemporary democracy is routinely one of doom and gloom, of betrayal and anger, rather than of optimism and pragmatic policy ambition. Such language is at odds with the sunnier idealism with which socialist ideas started and neither is it particularly appealing at election time. The attraction of the third way to very successful left-leaning politicians like Bill Clinton and Tony Blair lies in the way it has allowed them to escape the negative rhetoric of their political heartlands without formally entering the enemy's right-wing territory. The goal of democratic success in the societies in which they have found themselves has necessitated that both men switch away from their respective political bases—the bastions of the left-wing political activists with their dreams of equality and their constant disappointments—towards a middle ground populated by a quite different sort of person, one with much more run-of-the-mill ambitions for the state and for what it can and should do for those within its jurisdiction.

These people, and there are far more of them than there are political enthusiasts of any sort, have a different set of assumptions about the framework of government than those of the actively involved and, as a result, their critical perspective on what can and cannot be achieved will often be very different from that of the engaged political player. And because many of these individuals vote, it is their version of achievability, of what is to be expected, of what emancipatory initiatives should be undertaken, that really counts. This

is frustrating for the political activist who is involved in agitation, meetings, and planning around the clock, such being their nature. It is also annoying for the thinker who has sat quietly in his or her office and worked out exactly why equality is a moral imperative. Why should the version of the possible to which the activist and the scholar have come be usurped by these once-every-four-years citizens? It may be democracy and they are stuck with it, they know that. But they cannot help accusing their own leadership of letting them down, of even betraying them when (in the hope of re-election) that leadership notices these whimsical occasional citizens, who may only vote every four years but who read the papers and form judgments everyday. The disappointments of the Left flow from the minority status of its emancipatory horizon of expectation, which in turn results from its ambitious and (other than at the level of woolly rhetoric) self-defeatingly sectional view of both how effectively to construct an association of free and equal citizens and which policies to promulgate within such a body.

The area of civil liberties provides an extreme example of this dissonance between persons who are politically engaged (usually on the Left), on the one hand, and the general population, on the other. Few subjects excite the political activist, the liberal, and the concerned lawyer more than the need to protect civil liberties. The term is frequently called into action as a shield against governmental proposals for change in a wide range of areas, such as police powers, criminal justice, prisons, terrorism, public order, criminal procedure, data protection, surveillance, and identity cards. Indeed there are many others; civil liberties has become a catch-all phrase, denoting many kinds of conduct that may not self-evidently seem to engage the term but that have been dragged within its remit by government attack. Where privacy is concerned, often there is not even any individual behaviour involved, but rather some part of a person, such as voice, genetic code, or blood, that it is considered necessary to protect from the state. Organizations deeply rooted in civil society devote themselves to the protection of civil liberties, the subject being defined in this reactive way. Lawyers' associations are usually also committed in the same manner. There is rarely talk of "the enhancement of civil liberties" with a consequent need for focus on and discrimination as to what the term entails. As a result of this reactive nature, the effort of identification and definition only rarely arises; a civil liberty becomes known by the fact of a government attack upon it.

It may be because of this openness of meaning that the language of civil liberties is so often deployed against so many proposals for action by the state, but the truth would seem to be that the wider community does not invariably show the same solicitude for civil liberties that is revealed so persistently and so frequently by the political activist, the liberal intellectual, and the public lawyer. Seats in parliament do not usually depend on a representative's voting

record on civil liberties. Nor do the opinion polls punish politicians for making proposals condemned as invasions of our civil liberties. Indeed, the opposite may even be the case; such criticisms have the entirely counterproductive effect of causing the electorate to believe that the government might indeed be on to something worthwhile, concerning drug control, for example, or serious crime or anti-social behaviour. Having been condemned consistently by civil liberties groups for his cavalier approach to freedom, U.K. Home Secretary David Blunkett was nevertheless rated the third most popular member of the British cabinet in a poll taken shortly after the 2003 attack on Iraq began.<sup>2</sup> His rating remained exactly as it had been a year before, notwithstanding the enactment in the interim of draconian anti-terrorism legislation that excited the indignation of civil libertarian activists as few bills have in recent years.

There is something almost stylized about the way that civil libertarian issues feed into the modern political discourse. A proposal is presented by a government minister on crime, immigration, terrorism, or some other contemporary issue. It is then attacked by the civil liberties lobby as was to be expected, indeed (for reasons mentioned above), perhaps as was even thought politically desirable by the minister. This or that change may or may not then be made, dependent on the strength of the “lobby” in the individual case. There is no particular sense of the civil libertarian perspective being integral to the debate, other than to the extent that the minister is satisfied that the measures being proposed do not unacceptably erode civil liberties. Such assertions are invariably made, with ministers rarely denying that civil liberties matter, instead claiming that civil liberties concerns have been “fully taken into account” (or some such phrase). What are not fully or (sometimes) even partially regarded are the views of the primary defenders of civil liberties, the activist non-governmental organizations (NGOs) and lawyers dedicated to their protection from government abuse. These defenders of civil liberties have become something akin to the trucking association or consumer groups: no more than a hurdle that occasionally lies in the way of enactment of legislation that may be hard or easy to get by depending on the particular issue.

In its modern form, the protection of civil liberties has become the work of a lobby, not the duty of the entire citizenry, whose claim to act on behalf of the whole of society is not shared by this wider audience; indeed the general public is far more likely to see the civil liberties crowd less as the defenders of their own freedom, and more as the shop stewards of thieves, terrorists, and “fat cat” lawyers. This is an attitude that is frequently encouraged by government. Sometimes even deeper, politically motivated hatred is directed at civil libertarians. The attacks on the American Civil Liberties Union (ACLU) in the

---

<sup>2</sup> Alan Travis, “War Makes Hoon, Straw Cabinet Stars” *The Guardian* (23 April 2003) 1.

United States have sometimes reached a pitch of hostility reminiscent of the Cold War era, as when Presidential Candidate Michael Dukakis was forced to defend his membership of the organization in the 1980s. In the United Kingdom, recent Labour Home Secretaries have been able to use their authority in a movement traditionally committed to civil liberties as a platform for serious efforts to distinguish the protection of civil liberties (to which they as ministers say they are and remain committed) from the ostensible protectors of those same freedoms (who are described as self-serving or fanatical or as “not living in the real world”).<sup>3</sup>

The world-changing events of September 11, 2001 (9/11) have had their own large effect on the traditional discourse of civil liberties, piling further pressure on the term, connecting it once more with anti-patriotic elements and widening still further the division between the popular and the liberal/activist perceptions of what the protection of civil liberty entails. This disconnect was already evident by the time of the attacks on the Twin Towers, the Pentagon, and United Airlines Flight 93 over Pennsylvania; it was not generated by those events. What is new about the era that has been ushered in by 9/11, however, has been the willingness of individuals within the leadership in certain democratic states to deepen further their hostility to the language of civil liberties, to open up a new front in their assault on the liberal/activist understanding of the phrase by asking publicly whether now is the right the time to give up on civil liberties altogether, at least insofar as certain suspect groups and perhaps also other undesirables are concerned. Since 9/11, the debate regarding civil liberties is no longer entirely about who protects civil liberties better, the politician or the civil libertarian; instead, it is increasingly about whether the civil liberties of certain groups can afford to be taken into account *at all*. This is a dramatic and relatively new twist, the first breach (in the democratic era outside of formal war at least) in a previously unqualified (at least rhetorically) commitment to the equal protection of the laws, and an indication perhaps of future assaults on the whole idea of civil liberties by a rival discourse rooted exclusively in concerns of national security and counterterrorism.<sup>4</sup>

The danger inherent in these developments (both pre- and post-9/11) for the activist or civil libertarian position simply cannot be exaggerated. If current

---

<sup>3</sup> The phrase is that of the United Kingdom’s Home Secretary David Blunkett, used in May 2003 in the course of a speech rebutting criticisms of certain legislative proposals from a retired senior judge: see John Steele, “Blunkett takes swipe at judges” *The Daily Telegraph* (15 May 2003), online: Telegraph News <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/05/15/nblunk15.xml>> (date accessed: 21 July 2003).

<sup>4</sup> A new perspective that has been able to build on the distinction between the resident or citizen and the non-resident or alien which has, to some extent, always been in the law.

trends continue, such citizens will find that the rhetorical and indeed practically-expressed priorities that they believe have been taken for granted for generations will be turned on their head: where there was freedom, there will now be security; where there was individual liberty, there will henceforth be the interests of the state; where there was due process, there will be almost casual executive discretion; and so on ad nauseam. The civil libertarian who persists in using the traditional language will cease not only to be at odds with the prevailing, more community-minded point of view, but will also become merely eccentric, of historical interest perhaps, a curiosity certainly, and irrelevant. The traditional Liberal's language kit will be full of tired metaphors redolent of a past era, while those who count—those who tell the police what to do and arrange the detention camps and the telephone intercepts, sanction the torture and so on—will have the renewed freshness of phraseology that flows from a rejuvenation of fear. The civil libertarian will become like the jaded priest clinging to homilies reminiscent of an age long past.

The major shift in language described above is not yet complete. The idea of civil liberties still carries some resonance not only with the liberal activists, but also with the wider community and with some political leaders. Behind the times as always, certain judicial cultures are only now developing strong civil libertarian perspectives (the American judicial culture, having been earlier in the civil libertarian game, are closer to the exit than the rest). There is still a sense of the idea of civil liberties being in conflict with more modern needs such as for national (or homeland) security, rather than having been wholly vanquished by such needs. It is still possible that a catastrophic overreach of state power (a guerilla-war defeat for U.S. forces in Iraq; a failed invasion; a pre-emptive attack on North Korea that goes wrong; U.S. economic collapse) or some monstrous overplaying of the anti-civil libertarian hand (mass detention; the careless use of torture) might reconfigure the political landscape so as to permit the re-emergence and reassertion of the traditional language. However, the more likely eventuality at the time of writing is a continuation of the slow and inexorable decline in the traditional idea of what is entailed by civil liberties, the continuation of its marginalization, and its eventual replacement by the new security paradigm.

In order to fight back effectively, something that (we have to believe) is still possible even at this late stage, proponents of civil liberties must develop a much clearer intellectual strategy than has been evident in the past. This strategy should be rooted in a proper understanding of the historical origins of the term, and should also express a clear view as to what civil liberties does (and, more to the point, does not) encompass. Slimmed down and historically aware, a new revitalized and confident language of civil liberties need not go down without a fight: we owe that at least to those generations of past activists without whose struggles we would have nothing now to defend.

## II. THE ORIGINS OF CIVIL LIBERTIES

Our first task is to clarify the terms that we are using. Let us begin by asserting that the heyday of civil liberties, the moment in time when this version of freedom imposed itself on the historical imagination, occurred in England in the seventeenth century. It was during the last decades of this period that the liberty and freedom (both in the broadest sense) of property owners were successfully asserted against the absolutist inclinations of the Stuart monarchy. After a few, quasi-democratic turnings that led nowhere, the constitutional settlement of 1688 eventually emerged, securing property owners the enjoyment of freedom and liberty in general, and the civil liberties that came with such freedom in particular: namely the right to vote for representatives in the sovereign parliament and the ancillary rights of expression and assembly that went with, and made meaningful, that right to vote. The connection between civil liberties and freedom at the abstract level of political theory was made very early, and the link between civil liberties and parliamentary sovereignty was likewise present at the birth of civil liberties in their modern form. The power of the phrase lay in its ability both to reach up into the clouds of abstract philosophy and, at the same time, down into the fields of pragmatic constitution-building (as we would call it today).

During the nineteenth century, there was a marked expansion of the categories of holders of civil liberties in what today we would call the old democracies.<sup>5</sup> During this period, the right to vote was extended beyond the property-owning men to men generally and then to women as well. The ancillary freedoms of liberty, expression, association, and assembly during this time also came to be enjoyed by a far wider set of persons than had previously been the case, with a climate of official tolerance gradually replacing the atmosphere of repression with which the period began. From being an essential tool in the elite's government in its own interest, civil liberties gradually emerged as an entitlement available to be claimed by all, and to the protection of which it was thought governments and other components of civil society ought to be dedicated.

How did these changes come about? Each political environment has its own story to tell. As far as Britain is concerned, the advances of the seventeenth century were secured via what we would call today civil disobedience (the deliberate, principled breach of a law judged unjust), but they

---

<sup>5</sup> For the present purposes we will define the nineteenth century as the Age of Democratization that extends from 1789 (French Revolution) to the general emergence of the universal franchise in the West (to use the term loosely) in the aftermath of the First World War. For a more extensive discussion of civil liberties see K.D. Ewing & C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford: Oxford University Press, 2000).

also required much more than this, embracing what we would now describe as terrorism (the indiscriminate killing of civilians or assaults on their property practised by subversive elements in order to communicate a message to government or to secure an advantage over the authorities) and military-style insurgency (attacks by organized subversive forces on the political and military authorities of the day). Because rival armies eventually took to the field, the conflict in seventeenth-century England also embraced civil war without resorting to the intervening stage of guerrilla warfare. After the radical changes of the 1690s, there were fairly robust coalitions of interests determined to obtain for themselves the civil liberties that earlier generation of revolutionaries had secured for the propertied. Realizing these ambitions required action on the streets and in the printing presses. There were lots of crowds shouting slogans and threatening revolution, assembling where they should not have done, and, generally (from the legal point of view), making criminal nuisances of themselves.

A brisk survey of the period will find plenty of examples of civil disobedience, direct action, and even terrorism. There was, of course, conventional parliamentary engagement as well, such as the reform legislation passed in Britain in 1832 and 1867. These various techniques of securing change were, in their nineteenth-century context, certainly about many things, but from the perspective of this article it is worth noting that they were at least partly about achieving a situation of general respect for civil liberties; civil liberties were the *end*, not the *means* to the end, as the other forms of action (terrorism, civil disobedience, and civil war) had been in the seventeenth century and were in the nineteenth. These other tools of political change were mechanisms for securing outcomes rather than—as was the case with civil liberties—efforts to achieve agreed democratic procedures for change. This important difference may explain why, historically, the Right has shared (in a frustratingly ill-defined, inconsistent, almost whimsical, romantic kind of way) the Left's attachment to civil liberties. The origins of the subject are deeply conservative: it is about joining the status quo, not subverting it.

Thus it was during this age of democratization that the meaning of civil liberties emphasized not the creation or enhancement of these freedoms, but rather the need for them to be accorded respect and protection. The subject was not about fabricating something wholly new; instead, it was about sharing out among the many something that was already available to the few. What then was that "something"? Clearly the right to vote was the first essential requirement. As for the ancillary freedoms of liberty, expression, association, and assembly, those seeking respect for their civil liberties (among a mixture of other goals) during this period were not demanding that they be given these rights in the way they were demanding the right to vote. Rather, they were insisting that they be allowed to exercise these rights without state interference.

They wanted to protest without being shot and to publish political pamphlets without being jailed. It is true that certain laws, against combinations, for example, or sedition, might well have been regarded by nineteenth-century radicals as irredeemably bad. But we can guess that the democratic agitators and union activists of the time would not have been conscious of calling for the abolition of all the laws that were deployed against them: those of trespass, breach of the peace, unlawful assembly, and binding over. It is more likely that to the extent that they thought about it at all, they believed it was necessary to have some public order law on the books. It was more a case of seeking to ensure that these laws were no longer exercised in a way that effectively destroyed their civil liberties.

This is a key point of principle. Under the traditional British system, theoretically everyone had these ancillary civil liberties, except insofar as they were removed by the operation of law. In practice, however, because the law extended so widely, a group's or an individual's civil liberties could be effectively extinguished by the hostile exercise of official discretion, if the authorities chose to act antagonistically. When we understand this point we can see why the subject of civil liberties so often resolves itself into a study of official discretion: consider the British and Irish cases of *Beatty v. Gillbanks*,<sup>6</sup> *O'Kelly v. Harvey*,<sup>7</sup> and *Duncan v. Jones*.<sup>8</sup> All three of these decisions involved not just the police and magistrates deciding to break up a hostile gathering: there was an element of pre-planning on both sides, especially in *Duncan v. Jones*. The law on the protection of civil liberties involves analysis of the hostile exercise of official discretion on the spot as it were. It also involves study of the hostile exercise of such discretion, provoked by the peaceful action of persons intent on asserting their civil liberties: Mrs. Jones outside the training centre, Mr. O'Kelly at his meeting, and Captain Beatty and his team of Salvationists. Here the subject of civil liberties comes very close to that of civil disobedience. The latter is about the principled defiance of a law judged unjust; these cases are about the principled defiance of an unjust exercise of a discretion under a law that might in itself not be regarded as unjust.

We should now briefly summarize what we have been saying so far. First, civil liberties are those freedoms that are necessary to the proper functioning of a decision-making assembly designed on the representative principle (the right to vote, the freedoms of speech, assembly, and association). Second, though pre-democratic in its origin, the concept of civil liberties was ideally suited to the democratic era: the wider the range of persons entitled to

---

<sup>6</sup> (1882), 9 Q.B.D. 308.

<sup>7</sup> (1883), 15 Cox C.C. 435.

<sup>8</sup> (1935), [1936] 1 K.B. 218.

representation, the more the civil liberties of the propertied few became the “rights” of the many. Third, civil liberties facilitate an effective system of representative government; they are not about achieving any particular political outcome; they differ, therefore, from forms of political agitation (civil disobedience, terrorism, military insurgency) that are extra-parliamentary in nature and that are invariably driven by a commitment to policy outcomes rather than procedural integrity. Fourth, while the subject of civil liberties does involve the imposition of certain positive obligations on the state (mainly related to the right to vote and the prevention of disruption of the civil liberties of others by private parties), it is primarily concerned with ensuring that there is no inappropriate interference by the state with those civil liberties (expression and assembly, for example) that are essential both to the proper exercise of that right to vote and to the political activity that occurs all the time in a democracy, whether or not a vote is in the offing. Fifth, the subject is, as a result of all that we have said, more narrowly defined than is commonly assumed; criminal justice, for example, should be regarded as outside the remit of civil liberties proper, as should prison law and police powers generally. It is recognized that all these subjects can impact on civil liberties to the extent that official discretion, exercisable under these laws, impacts on the right to vote or the ancillary rights of expression and assembly. Sixth, and finally, the special case of the right to vote apart, the subject is primarily about the exercise of official discretion under the law, rather than about the laws themselves. It follows that what especially interests the civil libertarian scholar is the practice of civil liberties, what the subject looks like on the streets rather than on the statute book.

### III. THE TAMING OF DEMOCRACY

From this vantage point, we can see that the triumph of democratic forms also represents a victory for the idea of civil liberties. The two are inextricably interconnected. Democracy is about ensuring that the representatives of any given community get to decide what is in the best interests of that community, with each elector having an equal say in the outcome of the elections that determine who is to sit in the representative assembly. Civil liberties are about guaranteeing that equal say. It might have been thought that the achievement of democracy would have secured the future of civil liberties for all time, making the current attacks on them literally impossible to imagine. But that is to underestimate the fragility of the hold that representative democracy has on our political imagination. The drift away from a commitment to civil liberties described in the first part of this article has not come out of nowhere. It is a subset of a wider and more fundamental corrosion in allegiance to the idea of representative democracy itself. This weakening of

confidence in democracy has made easier the assaults on civil liberties that have (as we have seen) nearly completely wrested from it its traditional, democracy-reinforcing meaning. While at the same time as the language of western-style democracy has been reaching further and further across the globe, what is entailed by democracy has been shifting before our eyes, becoming in the traditional western democracies, more and more about presidential-style, media-friendly, business-oriented leaders, and in the new democracies being less and less about process (the right to vote, expression) and more about outcomes (the “right” kind of market-sensitive policies; the most agreeable leadership to foreign eyes; Western or U.S. control of vital national assets; and so on).<sup>9</sup>

It is not entirely accurate to talk of the corrosion of the democratic ideal as though there was once a golden age of untrammelled commitment to the representative paradigm. The victory of the democratic principle was fragile even at the moment of its achievement and its hold on the twentieth-century imagination was always precarious. The hatred for democracy shown by nineteenth-century defenders of the capitalist status quo was rooted in the assumption that victory for the representative principle was bound to usher in a transformation of society that was guaranteed to lead to the extinction of their way of life. This is also what democratic socialists tended to believe<sup>10</sup> and what the propagandists of democracy maintained. The people were bound to vote for equality if given equality of voting power. From the socialist perspective, the problem with this approach lay in its commitment to process rather than outcomes. We have already noted that civil liberties have a procedural character that differentiates them from more outcome-based techniques of securing political change, such as terrorism or civil disobedience. What mattered about civil liberties was that the people should have the power to decide; less important was what, in fact, they chose to mandate their representatives to do.

Through this chink in the nineteenth-century coalition between the twin forces of socialism and democracy, reactionary elements were able to mount a brilliant rearguard action, accepting representative democracy in principle, but at the same time throwing up various smokescreens and performing innumerable tricks so as to confuse or dazzle the newly liberated masses onto their side. Some of these manoeuvres were relatively benign, even beneficial, such as the expansion of welfare provision that was enacted in many Western

---

<sup>9</sup> The most explicit exponents of this new brand of democracy are to be found in the Project for the New American Century, which is housed in the American Enterprise Institute, an organization with very close contact with the present U.S. administration. For a summary of their views see “Where Next?” *New Internationalist* 356 (May 2003) 4, online: <<http://newint.org/issue356/currents.htm>> (date accessed: 23 June 2003).

<sup>10</sup> See Edward Bernstein, *The Preconditions of Socialism*, ed. and trans. by Henry Tudor (Cambridge: Cambridge University Press, 1993).

states at around the same time. Less attractive was a new emphasis on imperialism, which in Britain, for example, created a basis in nationalism for the support that came to be shown by a substantial number of working-class people for the Conservative Party: Benjamin Disraeli is still revered by Tory ideologists precisely because he was the first to see that electoral reform did not necessarily entail the obliteration of the ruling class.

In the twentieth century, the mechanism for controlling the optimistic, egalitarian impulses of the democratic ideal has been constituted out of ingredients that can be described, using a familiar contemporary metaphor, as both “tough and tender.” As far as the latter is concerned, the concessions initiated by or wrought out of the rich and propertied classes have continued, accelerating after the Russian revolution of 1917 and the establishment of what, for many years, looked to be a real alternative to capitalist democracy. Substantial gains have been made, and continue to be made, for the majority of the people that would not have been available in the absence of the democratic assertion of the indelibility of the linkage between political power and the wishes of all those affected by the exercise of that power. By contrast, the tough side of the new democratic age has been evident in an emphasis on national security and the need to be ever-vigilant to protect the democratic system from threats (both external and internal) to its existence. The tension between these two models of politics, one taking democracy and equality as its starting point, the other focusing emphatically on national survival, has been a constant of the democratic era. The first model is hopeful, oriented towards freedom and civil liberties, optimistic and confident, inclined towards equality and social justice. The second is gloomier, more anxious, fearful of the future, and pessimistic about progress, with no time for ambitious programs or radical reform.

It has been through the language of war that the national security model has found its clearest expression. In the western democracies, the world wars of 1914–18 and 1939–45 provided many well-known opportunities for the evasion of democratic duties, from the postponement of elections through to the large-scale suspension of civil liberties. More interesting from the perspective of this article have been the “cold” wars that have been pursued (waged is perhaps not quite the right word) in times of peace. There was the “red scare” of the 1920s, the well-known activities of the McCarthyites, and (to use perhaps an apt term) their fellow travellers in the United States and abroad during the 1950s.<sup>11</sup> The actions taken against Left and socialist groups under the aegis of these various cold wars in the United States and Britain, but also across the democratic world, served to rein in the potentially wilder and more excessive enthusiasts of democracy, without disturbing the democratic ideal to which all were able to

---

<sup>11</sup> See Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990).

feel they remained committed. The persecution of left-wing activists simply belonged to a different discourse and therefore did not engage with the democratic self-image of these states, much less cause embarrassment to their democracy-loving citizens. The fence that surrounded the democratic playing field, reducing its space for action, was invisible to most of those who played the game. Believing themselves to be wholly sovereign, they did not notice that truly radical ideas never occurred to them; the few who wandered out of the designated playing area were quickly arrested and expelled from normal politics. Identified as threats to national security, left-wing activists were denied civil liberties.

The idea of terrorism has been around for a long time and has served for decades as an adjunct to the national security paradigm. The British government was able to persuade elected representatives in parliament to enact harsh anti-civil libertarian measures on the basis of the threat of Irish-based terrorism in 1939, 1974, 1976, and 1984.<sup>12</sup> The last of these measures, passed when the Cold War had entered what we can now see as its final phase, extended these powers to encompass international terrorists, a prescient indicator of how things were to develop. For with the end of the collapse of Soviet power and the consequent conclusion of the Cold War, the “terrorist threat” has come into its own as the primary basis for stifling the natural energy of the democratic ideal. It is not just about the laws, though these were beginning to come thick and fast well before 9/11, such as legislation in 1996, 1998, and 2000 in Britain, and in 1996 in the United States, for example.<sup>13</sup> It is also—and primarily perhaps—about the atmosphere that is engendered in democratic states by the endless talk of terrorism and the threat it poses to our whole way of life. How can a community concentrate on bettering its lot when it is constantly worried about its future? Fear is a great dissipater of political energy that might, if left alone, be effectively spent elsewhere, on tackling inequality for example, or on addressing world poverty. At very least, the attacks of 9/11 have served to make this point even more obvious, transforming the idea of counterterrorism from a residual weapon in a bigger war into a full-scale, self-standing, and permanent War on Terrorism, capable of being waged against visible and invisible enemies, in different ways as policy demands, and

---

<sup>12</sup> C.A. Gearty & J.A. Kimbell, *Terrorism and the Rule of Law: A Report on the Law Relating to Political Violence in Great Britain and Northern Ireland* (London: CLRU, School of Law, King’s College, 1995).

<sup>13</sup> See generally on the British side, Clive Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (Oxford: Oxford University Press, 2002).

without the need for very much action on the enemy side.<sup>14</sup> For those always searching (consciously or unconsciously, institutionally or individually) for ways to hinder democratic growth, this new war could not have been more perfectly designed.<sup>15</sup>

The battle over the language of civil liberties identified in the introduction is part of a larger conflict over what the idea of (representative) democracy entails. The public discourse in all democracies has invariably involved a tension between, on the one hand, the egalitarian/activist/liberal model of what democracy can achieve for its citizenry and, on the other, the national security/"we-are-all-doomed" paradigm, with its emphasis on survival at all costs. The events of 9/11, preceeded as they were by an extraordinary judge-made election in the world's most powerful democracy, have given a firm upper hand to those whose inclination is to emphasize the need for national security and whose view of democracy is driven more by the desire for it to deliver certain outcomes than for its procedure to be clear and fair. Since 9/11, the language of democracy itself is at risk of being turned into an adjunct to U.S. foreign policy, emphasizing American-style liberty and freedom rather than the need for elections and civil liberties.<sup>16</sup> From the perspective of the civil libertarian wedded to what the phrase used to mean, this is a gloomy scenario indeed. With the protection traditionally afforded civil liberties by society's commitment to democracy being washed away before their eyes, what hope do civil libertarians have of avoiding being drowned in the subsequent authoritarian deluge?

One big twentieth-century idea that looms large and loud in our contemporary discourses, achieving more notice than civil liberties protection has ever managed, has been missing so far from the analysis presented here. Where do human rights fit in the dismal catalogue of democratic decline which has just been mapped out in general terms? Was this not supposed to be the big

---

<sup>14</sup> See on the legislative and political reaction in the United States, Nancy Chang, *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten our Civil Liberties* (New York: Seven Stories Press, 2002) as well as two excellent reports by the Lawyers Committee for Human Rights: "A Year of Loss: Re-examining Civil Liberties Since September 11," online: <[http://www.lchr.org/us\\_law/loss/loss\\_main.htm](http://www.lchr.org/us_law/loss/loss_main.htm)> (date accessed: 19 June 2003) and "Imbalance of Power: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties," online: <[http://www.lchr.org/us\\_law/loss/imbalance/powers.pdf](http://www.lchr.org/us_law/loss/imbalance/powers.pdf)> (date accessed: 19 June 2003).

<sup>15</sup> Particularly worrying is the development of a U.S. military command for the United States. For the details see Robert Dreyfuss, "Bringing the War Home: in the name of fighting terrorism, the army has established a domestic command" *The Nation* (26 May 2003) 18.

<sup>16</sup> See Paul Berman, *Terror and Liberalism* (New York: W. W. Norton, 2003) arguing for a "new radicalism" and a "liberal American interventionism" to promote "democratic values throughout the world" (quotations from flyleaf).

idea of the post-Cold War age? Where is the language of human rights when it is most needed?

#### IV. THE DOUBLE-EDGED PROMISE OF HUMAN RIGHTS

In its modern form, the idea of human rights first took root in the immediate aftermath of the Second World War. Promoted by Franklin Roosevelt during the war, and given force by the *Universal Declaration on Human Rights*, this new language seemed to express well the desire of humanity to make a fresh start after the horrors of the years just past. As set out in the *Universal Declaration*, the range of human rights inherent in us all is vast, covering basic aspects of our individual dignity, many civil and political rights, and also a range of social and economic entitlements.<sup>17</sup> This United Nations (UN) document was, of course, intentionally unenforceable, self-consciously a mission statement for humanity rather than an immediately realizable set of goals for the people who read it. In their stronger, judicially-enforceable form, human rights of the immediate post-war period were narrower in focus, largely restricted to civil and political rights, or what we have called here civil liberties. The new constitutional arrangements for the defeated Fascist powers contained rights guarantees of this sort, and a novel regional co-operative arrangement in Europe (the Council of Europe) produced a judicially enforceable Convention primarily concerned with civil and political rights, the *European Convention on Human Rights and Fundamental Freedom*.

The drafters of these documents, essentially the victors in the Second World War, were dedicated supporters of democracy, but they were equally vehement opponents of communism, and indeed of any kind of radical form of socialism. The link between market freedom and democracy was in their minds an indelible one. They were therefore faced with the challenge that the democratic socialists of the nineteenth century had failed, and with which, for example, the current U.S. regime in Iraq is wrestling: how do you design a democratic system that always produces the answer you want? The civil libertarian/human rights charters of the post-war period provided part of an answer to this when they embraced the right to property within their remit and (usually) made it impossible for any legislature, however democratically constituted, to tamper with that right (other than as was permitted by the qualifications on the guarantee that were invariably set out in the framework document itself). These basic human rights documents also generally permitted exceptions to be made to civil liberties where these were judged to be required to protect the democratic character of the state. The rights to freedom of

---

<sup>17</sup> *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

expression, assembly, and association, for instance, can, in most human rights charters that matter (for instance, those that can bite on conduct at the political level), be set aside where the executive judges such action to be “necessary in a democratic society” or some-such phrase. Further exceptions can frequently be made for public emergencies and the like: a whole scholarship around “derogations” from basic human rights has grown up reflecting this fact.<sup>18</sup>

These characteristics of this immediate post-war wave<sup>19</sup> of human rights development, designed to copper-fasten democracy from both right- and (more to the point) left-wing attack, have been followed up in most of the domestic bills of rights that have been incorporated into the national arrangements of old and newly emerging (that is, post-colonial) states from the 1950s onwards. Civil and political rights—civil liberties—are given positive protection, but not as absolute entitlements: their protection must yield both in individual cases from time to time (where the one who deploys such freedom must be controlled in the interests of democracy) and also more generally in periods of acute political tension (a situation of public emergency). The explosion of rights talk that has followed the end of the Cold War reflects the beacon-like quality of this language as a repository of many of our better feelings about our fellow humans in an increasingly competitive world.<sup>20</sup> Its force has threatened to swamp more traditional discourses within it, such as that which has been under scrutiny in this article. Does the language of civil liberties gain from having been so enmeshed in this new human rights metaphor?

At one level, the constitutionalization of civil liberties protection in human rights charters and domestic bills of rights has clearly provided added protection for civil liberties. The old problem of a properly elected legislature choosing to attack civil liberties (a case of the democratic child biting the hand that feeds it its legitimacy) has always been a real one. It is a variant of the means/ends dilemma that is inherent in every democrat’s determination to see a fully-sovereign legislature in place—the definition of success is that there is no ready means of controlling what the elected assembly chooses to do. Locating civil liberties in a constitutional code that oversees such legislatures may diminish the sovereign purity of the latter, but it does at least give civil liberties a fighting chance of surviving, even in the teeth of some whipped-up

---

<sup>18</sup> A.W.B. Simpson, *Human Rights and the End of the Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001); Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992).

<sup>19</sup> Francesca Klug, *Values for a Godless Age: The Story of the UK’s New Bill of Rights* (London: Penguin Books, 2000).

<sup>20</sup> But for a critical appraisal of the trend, see Kristin Sellars, *The Rise and Rise of Human Rights* (Stroud: Sutton, 2002); Stephen Holmes & Cass R. Sunstein, *The Cost of Rights* (New York: W. W. Norton, 1999).

(or genuine) popular anger. There is plenty of evidence of the existence of such charters, codes, and bills of rights having had a disciplinary effect on the way that legislatures have approached the limiting of civil liberties within the jurisdictions for which they are responsible.<sup>21</sup> The more courts charged with the enforcement of such documents come to regard civil liberties as important, the more a fighting chance of their survival increases. And as suggested above, the old paradigm of a class-based judicial branch wholly immune to the necessity of protecting political activists outside the ruling elite no longer holds good, at least not to the same extent as in the past.<sup>22</sup>

On the other hand, the constitutionalization of civil liberties has proved less secure than might have been imagined. First, there are certain disadvantages in being caught up in a fungible kind of way in the ever-growing and ever-more-unwieldy basket of human rights. While it is perfectly true that the initial focus in the early international and domestic documents on human rights was on civil and political rights, the subject has greatly expanded since then, and the insights in the *Universal Declaration* about what it means to be human have been translated into further documents (at both the international and domestic levels) that deal with a far wider range of subjects than civil liberties.<sup>23</sup> Indeed, the extent of international human rights is now such that it presents a full and, to the social democrat, very pleasing account of how life should be, but it cannot by any stretch be described as politically uncontroversial, even in democratic systems of government of the best sort and particularly not where the openness of the electoral system has permitted the rise of authoritarian proponents of liberal capitalism. It has surely been quite proper to develop international law as a cutting edge in the changing of attitudes to equality, discrimination, poverty, and the abuses of minority groups across the world, but this forging ahead has left civil liberties looking like just a few freedoms among the many, with no special or different call on our attention.

Second, and following from this first point, in its (to this author at least) laudable drive to improve the lot of humanity, international human rights law has left the idea of democracy in its slipstream.<sup>24</sup> To the activist human rights

---

<sup>21</sup> For a European and U.K. perspective on this issue see C.A. Gearty, "Civil Liberties and Human Rights" in Peter Leyland & Nick Bamforth, eds., *The Contemporary Constitution* (Oxford: Hart) [forthcoming in 2003].

<sup>22</sup> A trend assisted in some jurisdictions by reforms to the process of judicial appointment. For an update on the fast-moving U.K. position, where a range of proposals for radical change have been made, see The Department of Constitutional Affairs, online: <<http://www.lcd.gov.uk/>> (date accessed: 21 July 2003).

<sup>23</sup> See generally Ian Brownlie & Guy S. Goodwin-Gill, *Basic Documents on Human Rights* 4th ed. (Oxford: Oxford University Press, 2002).

<sup>24</sup> "Democracy used to be a word that international legal commentators preferred to avoid": Susan Marks, "The End of History? Reflections on Some International Legal Theses" (1997) 8 E.J.I.L. 449. The "used to" here attests to some progress in the area, evidenced by the material covered in Marks' piece. See

lawyer, the nation state often seems to stand in the way of progress, to act as a barrier between the progressive ideas of human rights and the people these ideas are meant to serve. This is the case whether or not the representatives of such places are democratically elected. Of course, the more democratic a state, the more likely the government is to engage properly and fairly with the proponents of international human rights, but despite this convergence, the relationship remains an adversarial one, at least to some extent. Meanwhile, international law has provided no alternative democratic framework to facilitate the development of human rights standards, to rein in the international human rights activists where necessary, or to ensure the effective enforcement of the codes of rights that are agreed, properly connecting them (if need be) to democratic judgments about resources. The lack of this international democratic culture, allied to the habit of seeing national governments as standing in the way of change, has caused the international human rights lawyer to be less inclined to see that civil and political rights are as important as they were once believed to be. These rights are about consolidating democracy, but what good has democracy been in delivering the outcomes in which the proponents of international human rights profoundly believe? This division between human rights and civil and political rights has been to the marked disadvantage of the latter.

Third, there is the problem of the capacity for override available in most human rights charters that incorporate civil liberties within their remit. Exceptions and derogations can be made to human rights, the focus of which will usually be on civil and political rights rather than on other social and economic entitlements since it is to the limitation of the former that a state, even a democratic one, will usually look when trying (or asserting that it is trying) to defend itself. It is true that the relevant international and domestic documents usually provide an appropriately restrictive framework for the operation of exceptions to, and derogations from, fundamental human rights: there is much talk in the documents and the case law of necessity, a proportionately “pressing social need,” and the like. All this is excellent in that it disciplines the state authorities minded to depart from civil liberties to think before doing so. Nonetheless, certain disadvantages inevitably flow from the existence of such suspensory opportunities in human rights charters.

First, the very availability to the state of a course of conduct that can ignore (or greatly reduce) respect for civil liberties puts before the executive authorities an option for action that would previously have been unthinkable, there having been no words previously available to describe it: a wholesale departure from civil liberties without recourse to primary, democratically-rooted

---

generally the work of Thomas Franck, especially his “The Emerging Right to Democratic Governance” (1992) 86 Am. J. Int’l L. 46.

legislation to mandate such action. The override clauses contained in typical human rights charters can, in most states, be actualized without proper democratic accountability. Having been offered a button marked “self-destruct,” it would be surprising if governments—even non-malicious ones—did not occasionally succumb to the temptation to press it. This is especially so in the atmosphere after 9/11, and has already produced a derogation in the United Kingdom. Where legislation restrictive of civil liberties is promoted, often in tandem with the declaration of such states of emergency, this constitutional language of crisis and national security provides a ready shorthand for draconian action: witness the range of repressive initiatives taken in the aftermath of 9/11 in countries with theoretically impeccable bills of rights. We can only guess at what might have happened in the United States if the drafters of that country’s Bill of Rights had thought to put in it an emergency override clause.<sup>25</sup>

Second, there is the problem of the fragility of the linguistic safeguards built into the exception and derogation clauses in the typical human rights document. As noted above, the controlling words may read impressively, but the reality is that the judicial arm given the responsibility of overseeing their application, whether international or national, will invariably—and perhaps even (in democratic terms) rightly—accord the executive a high degree of latitude in its judgment as to what is required to protect the state. The point is attested to in case law from across the world.<sup>26</sup> Even the absolutist guarantees of the U.S. *Bill of Rights* have been shown not to be what they seem when interpreted by the judges in light of war or war-like domestic circumstances.<sup>27</sup> Save in wholly exceptional circumstances, judicial challenges to derogations from, and exceptions to, civil and political rights made in the name of national security usually end in failure.<sup>28</sup> This is the case even in those jurisdictions where the contemporary judicial fashion is for careful protection of civil liberties. Human rights may be a trump in the pack of political cards, but the interests of national security is the trump of trumps, carrying all before it.

Third, and following from the second point, there is the problem of legitimization. An attack on civil liberties that takes place baldly, either extra-legally or via legislation designed for just this purpose, has at least the virtue of

---

<sup>25</sup> For a taste of the implications for civil rights, due process of the changes in legislation, and in the political climate generally in the United States, see the reports of the Lawyers Committee for Human Rights, *supra* note 14, and *Al Odah v. United States*, 321 F. 3d 1134 (2003) (C.A. D.C.).

<sup>26</sup> See in the United Kingdom, *A v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502.

<sup>27</sup> A well-known example is *Dennis v. United States*, 341 U.S. 494 (1951) (S.D. N.Y.).

<sup>28</sup> An important European Court of Human Rights example is *Brannigan v. United Kingdom* (1993), 17 E.H.R.R. 539.

being out in the open, and, therefore, being clear for all to see.<sup>29</sup> Of course, there is still debate about the nature of the attack, how serious it is, and whether it is justifiable, but the discussion is at least framed in the appropriate way. But a restriction of civil liberties that takes place within the framework of a human rights document (either a “necessary” exception to free speech, for example, or an action to counter a “public emergency”) can be presented as not an attack at all, but rather as an action *mandated* by the state’s *commitment* to human rights. Far from infringing human rights, the repression is (fully) compatible with them. This legitimization of what might have been considered by the naïve to be an attack on civil liberties then draws added strength from the (almost inevitable) judicial decision upholding the emergency action as valid, that is, in accord with human rights standards. So internment, censorship, proscription, and the like are *consistent with* rather than *departures from* human rights standards. The repressive state can deepen its reactionary engagement with domestic political dissent while all the time asserting confidently and (in legal terms) correctly that it is *respecting* human rights standards. Most members of the population do not notice the shrinking of the political marketplace of ideas, or, if they do, they can be assured that the protestors they see being dragged away from the shopping mall,<sup>30</sup> the internees whom they read about being locked up without charge for years on end,<sup>31</sup> or the organizations they find it is no longer lawful to join<sup>32</sup> are actually all being dealt with in a way that is in perfect harmony with “the very best human rights standards,” a fact attested to by all the “human rights experts.” And it is not impossible to imagine that torture, called by another name of course, and surrounded by judicial safeguards (at least initially), could fit itself neatly into this new human rights paradigm.

## V. THE PROBLEM ADDRESSED

We end where we started with the problem of language. Just as in 1984 the Ministries of Peace and Love meant war and internal security,<sup>33</sup> so today we have departments of defence engaging in hostile action abroad, and a set of guaranteed human rights to underpin internal repression at home. Of course, the

---

<sup>29</sup> Where the action is truly heinous, there may be difficulties of detection of course, but “out in the open” means here self-evidently a departure from civil liberties standards.

<sup>30</sup> *Appleby v. United Kingdom* (6 May 2003), Strasbourg (Eur. Ct. H.R), online: <http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200305/appleby%20et%20al.%20-%2044306jnv.chb4%2006052003e.doc> (date accessed: 28 July 2003).

<sup>31</sup> *Supra* note 26.

<sup>32</sup> *O’Driscoll v. Secretary of State for the Home Department*, [2002] EWHC 2477 (Admin).

<sup>33</sup> George Orwell, *1984* (London: Penguin Books, 1989).

point is exaggerated, but with our political language changing at such speed and with so vast a power as the United States seemingly engaged in reshaping our understanding of what democracy means (both internally and externally), who can be so sure that the next longish resting place for the language that governs our social organization might not be along these lines? The battleground over which our next bit of this part of human history is being fought is the field demarcated “democracy” and it is to the patch in that area marked “civil liberties” that we need now to return. Proponents of the current drift away from traditional assumptions about what democracy and civil liberties mean are vocally scathing of the sectionalism, the lack of realism, and the self-interestedness of the civil liberties lobby. Defenders of political freedom counter with assertions about the importance of democracy and the need to respect our traditional liberties. Who is likely to emerge victoriously from this conflict?

At the moment it is no contest. Governments hold all of the cards, including a full set of both suits of trumps. Behind them, largely unaccountable and sometimes entirely secret, security organizations feed their democratic leaders chilling stories of imminent terrorism and easily usable weapons of mass destruction. These horrifying narratives are then passed on to the wider electorate shrouded in mystery and (more to the point) always (the issues being so sensitive) scantily dressed so far as any detail is concerned. Democratic cultures play their part in maintaining this atmosphere of fear, often whipping it up voluntarily, sometimes fabricating dramatic versions of the truth out of information supplied by the security state.<sup>34</sup> The intellectual community is even developing some momentum behind a radical critique of the whole idea of democracy, with authors beginning to stress—to the widespread praise of distinguished colleagues—the inconvenience and disadvantage of traditional ideas of representativeness and accountability.<sup>35</sup> At the very least, the content of what is meant by democracy is under scrutiny, with the substantive understanding that emphasizes U.S.-style freedom gradually supplanting the traditional, process-based commitment to free elections and the sovereignty of the people that used to be what the idea of representative democracy entailed.

Against these forces are ranged a puny alliance of intellectuals, liberals, lawyers, and dissidents who are not even clear about what they mean by civil liberties. The fashion of postmodernism does not help here, with its distaste for objective meaning and its reluctance to commit itself to any true sense of right

---

<sup>34</sup> On the media, see Arundhati Roy, “The Ordinary Person’s Guide to Empire” *In These Times* 27:12 (26 May 2003) 17.

<sup>35</sup> See Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* 1st ed. (New York: W.W. Norton, 2003), reviewed by Niall Ferguson, “Overdoing democracy” in *The New York Times Book Review* (13 April 2003) 9.

and wrong. As the influential philosopher Richard Rorty has remarked, it is “central to the idea of a liberal society that, in respect to words as opposed to deeds, persuasion as opposed to force, anything goes.”<sup>36</sup> It follows that a “liberal society is one which is content to call ‘true’ whatever the upshot of such encounters [as between openminded forces] turns out to be.”<sup>37</sup> The various governments in power in the liberal democracies of the world have set about such a redescription with gusto since 9/11, though whether any true-blooded liberal or even Rorty’s liberal ironist would regard it as an improvement is not so much an open as a rhetorical question, destined to elicit an automatic negative.

The winners in this unequal battle of the labels should not be called right merely because they have won, or are winning. Such passivity ill-suits the civil libertarian Left, which forged its identity in action, often against seemingly hopeless odds. It is not inevitable that Rorty and his fellow ironists are right and there is nothing worth fighting for out there, beyond words: modified forms of foundationalism that demand that there is still space for democracy, civil liberties, and human rights remain available for use by those temperamentally so inclined, and these perspectives fit such activists better than the jaded “know-all/know nothing” superiority of the postmodern scholar.<sup>38</sup> But even if Rorty and his school are right, then we nevertheless owe it to past generations of fighters and activists who struggled for democracy and civil liberties, often dying for these causes, or being imprisoned, or treated harshly for holding fast to their convictions, not to forsake their world view without so much as a murmur of dissent. Even the flightiest of language tricksters appreciates the power of the idea of solidarity, and if all we had left was a sense of solidarity with the brave democratic souls of the past who have made us what we are, then that should be enough to energize a fight back.

What is to be done? Firstly, there is some intellectual pruning that is urgently needed. The branches on the tree of (civil) liberty marked “criminal justice,” “prisoners’ rights,” “civil actions against the police,” and so on need to be lopped off and sent across to other discourses. Civil liberty is not about the length of a criminal sentence, the state of a country’s jails, or whether a victim should be compensated for alleged police brutality. These are important issues to be sure, but they belong elsewhere, and the controversy that surrounds them has confused the subject of civil liberties and debilitated its capacity to

---

<sup>36</sup> *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989) at 51-52.

<sup>37</sup> *Ibid.* at 52 [emphasis in original].

<sup>38</sup> Particularly good are Habermas, *supra* note 1 at 113-29, and Steven Lukes, “Five Fables about Human Rights” in Stephen Shute & Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures, 1993* (New York: Basic Books, 1993) 19.

communicate its message.<sup>39</sup> The core of the subject lies in the protection of political freedom. Civil liberties is concerned with making representative democracy work. Its perspective on the world idealizes the arrangement of our public space in a way desired by the people within that space, with each being accorded equality of respect so far as their choice is concerned. Thus, civil liberties is about securing free and fair elections and ensuring that wealth does not dominate such elections. It is also about ensuring that the political atmosphere around such elections, and in society generally, is free and open with all views being able to be heard, even if not believed. Though once invariably wedded to a particular outcome (socialism), today's civil libertarians are committed to the process rather than to what it is likely to deliver; they may have private opinions on the latter, but these do not make them more or less civil libertarian in their perspective.

Secondly, having sharpened the remit of the subject, adherents to it should go on the attack. They should challenge current assumptions about the national security state, hold conferences in which they propose change—on campaign funding, on media ownership, on political speech—rather than merely react defensively to the latest piece of aggressive speculation by the post-democratic liberal extremists. A broad front should be possible, from the unions concerned about freedom of association on the Left to nostalgic civil libertarians on the Right. The need to redress the international law presumption away from democracy and towards human rights should preoccupy the modern civil libertarian whose energies should be as sharply focused on the global as on the local.<sup>40</sup> Politics is certain to present flashpoints around which mass campaigns can be built, the purpose of which should be to reindulcate into the wider public some grasp of the importance of freedom and civil liberties. The consciousness-raising that occurred before and during the Anglo-American attack on Iraq in the spring of 2003 might, with care, be extrapolated into a broader political agenda. The requirement for an explicit renewal of anti-terrorism laws in the United Kingdom provides an opportunity for critical engagement with the national security state.<sup>41</sup> The U.S. Senate has already had to back down from making permanent “the sweeping antiterrorism powers” in the 2001 Act, though this is seen by informed observers as a retreat that “clears

---

<sup>39</sup> For an original and penetrating analysis of the field of criminal justice see Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet & Maxwell, 2002).

<sup>40</sup> See Harry Shutt, *A New Democracy: Alternatives to a Bankrupt World Order* (London: Zed Books, 2001); Alison Brysk, *Globalization and Human Rights* (Berkeley: University of California Press, 2002); Tim Dunne & Nicholas J. Wheeler, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999).

<sup>41</sup> The committee of privy counsellors charged with reviewing the 2001 Act is expected to report by the end of the year.

[the] way for [a] new bill.”<sup>42</sup> Nevertheless, there is still a fight out there to be had: the atmosphere in the United States may be bleak, but it is not (yet) so awful that a debate cannot even be had.

Finally, the advocates of civil liberties need to grit their teeth and remember afresh some of the techniques of political campaigning that they have forgotten and that their opponents have mastered in recent years. Civil libertarian campaigners need to relearn the virtues of patience and focus, and to remind themselves of the importance of such traditional socialist values as fraternity and solidarity. They need to reach out to the wider community, and use techniques of communication that connect with this audience and that are not to be sniffed at merely because they were not used in generations gone by. Advertising and branding need not be the exclusive weapons of the anti-civil libertarians, nor should money be on one side only. The aim should be for a scholarly reassertion of what civil liberties mean and why democracy matters, which can then be focused on particular political campaigns. These movements would then be able to draw support from a global coalition of civil libertarian-minded citizens fully aware of the intellectual underpinnings of what they were arguing for. A link between the scholar, the liberal lawyer, and the trade unions seems vital here. If properly funded, such a campaign would be able to enjoy the benefits of modern techniques of communication and marketing. This does not require a single movement, but it does suggest more coordination than is at present to be found; anarchy remains as attractive as it has always been, and just as futile. If the democratic and civil libertarian agenda is in place and working, the outcomes—fairness, justice, and equality of opportunity for all—will come over time.

---

<sup>42</sup> Eric Lichtblau, “Aftereffects: Surveillance, G.O.P. Makes Deal in Senate to Widen Antiterror Power” *New York Times* (9 May 2003) 1.