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ARTICLES

REFLECTIONS ON HUMAN RIGHTS AND CIVIL LIBERTIES IN LIGHT OF THE UNITED KINGDOM'S HUMAN RIGHTS ACT 1998

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I. INTRODUCTION

It seems at times as though the entire world has become addicted to human rights. The United States has, of course, had its famed Bill of Rights\(^1\) for generations. The United Kingdom's Human Rights Act has recently come into force.\(^2\) That measure also applies to Northern Ireland,\(^3\) with human rights issues appearing in the Good Friday Agreement.\(^4\) Both Britain and Ireland have adopted the model of the European Convention on Human Rights and Fundamental Freedoms,\(^5\) a charter agreed to on November 4,

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\* Professor of Human Rights Law, King's College London. My thanks are due to the Leverhulme Trust for an award that has given me a much fuller opportunity than I would otherwise have had to conduct the research upon which this article is based, and to secure the time to be able to write up my conclusions. My thanks also go to Dean John R. Pagan and the members of the University of Richmond School of Law for having extended such a warm welcome to my family and me during our visit to the school in Spring 2000, and for having provided me with such a delightful, scholarly environment in which to work.

1. U.S. CONST. amend. I-X.
1950, by western European nations emerging from a dark age of fascist totalitarianism. The body which gave birth to that charter, the Council of Europe, used to be comprised of a small group of nations broadly allied to the west in the great Cold War argument. Now, having re-energized itself after 1989, the organization boasts no fewer than forty-one member states, drawn from as far afield as Turkey, Macedonia, Moldova, and Iceland. Each of these countries has also incorporated the European Convention on Human Rights into their domestic law in some shape or form. Most of them also have their own constitutional rights system, sometimes based upon the United States model. The European Union has recently joined the “rights party,” with its own Charter of Rights, agreed to at the end of 2000, albeit in the teeth of strong opposition from some parts of the business sector. There is of course already in place a plethora of other rights instruments and a plan for an international criminal court. Clear evidence can be found that western judges are taking more seriously than ever their enforcement responsibilities with respect to these various legal mandates.

Despite all this extraordinary activity, the idea of human rights remains as elusive as ever. It is tempting to refuse to accord any clear meaning to the phrase and then to deploy it politi-

6. For a good general background to the Convention, see FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS (2000).
8. Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 5, art. 1, 213 U.N.T.S. at 224 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”).
10. Martin Fletcher, CBI Leads Attack on EU Charter’s Right to Strike, TIMES (London), Sept. 21, 2000, at 17. The CBI is Britain’s foremost organization for employers.
11. For a comprehensive list, see INTERNATIONAL HUMAN RIGHTS: DOCUMENTS AND INTRODUCTORY NOTES (Felix Ermacora et al. eds., 1993).
cally as a tool to achieve one’s own moral ends by trumping the arguments of others with one’s own conclusive, moral interventions. The risk with this approach to human rights is two-fold. First, there is the risk that the term will become useless through overuse. (How can you play the game of politics when all the cards are trumps?) Second, there is the risk that the powerful in society will use the phrase as an ally in their constant battle with the disadvantaged majority to keep a disproportionate share of their community’s resources. If we care at all about equality and justice, this last eventuality should particularly disturb us. A way to counter it would be to fashion a strong meaning for the idea of human rights that locates the phrase firmly on the side of the poor and the disadvantaged. But this takes us back full circle to the fact that the intellectual coherence of the term is, to put it mildly, not obvious.

II. THE LEGACY OF BENTHAM AND MARX

The shallowness of the concept of human rights has been known for over two hundred years, a fact that makes all the more curious the huge resurgence of rights talk in recent decades. The idea was first paraded through the streets of post-Enlightenment Europe in the course of the French Revolution with the Declaration of the Rights of Man and of the Citizen (“the Declaration”). Though perhaps more rhetorical than philosophical in intent, it was as the latter that the great nineteenth-century thinker Jeremy Bentham tore it apart in his justly celebrated Anarchical Fallacies. In this age of glib generalities, it is worth recalling what Bentham had to say about the deployment of the kind of language that he believed was epitomized in talk of human rights:

15. The phrase “rights as trumps” is, of course, that of Ronald Dworkin. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977). For a very good introduction to the ideas of this hugely influential figure, see RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA (1993).
17. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789).
The more abstract—that is, the more extensive the proposition is, the more liable is it to involve a fallacy.

Hasty generalization, the great stumbling-block of intellectual vanity!—hasty generalization, the rock that even genius itself is so apt to split upon!—hasty generalization, the bane of prudence and science!\(^{19}\)

Bentham’s criticism of the Declaration flowed from this skeptical starting position. Article I of the Declaration, which states that “Men (all men) are born and remain free,”\(^{20}\) drew from him the following withering response: “No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection—the subjection of a helpless child to the parents on whom he depends every moment for his existence.”\(^{21}\)

Article II’s assertion of the “natural and imprescriptible rights of... liberty, property, security and resistance to oppression”\(^{22}\) inspired Bentham to make one of the most famous assaults on human rights ever mounted in the history of human thought:

> In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not that right—want is not supply—hunger is not bread.

> That which has no existence cannot be destroyed—that which cannot be destroyed cannot require anything to preserve it from destruction. *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.\(^{23}\)

Bentham thought the whole idea of a written document like the Declaration was misplaced:

> What should it have done, then? To this question an answer is scarcely within the province of this paper: the proposition with which I set out is, not that the Declaration of Rights should have been worded differently, but that nothing under any such name, or with any such design, should have been attempted.\(^{24}\)

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19. *Id.* at 47-48.
24. *Id.* at 62.
The alternative and better approach from Bentham’s perspective was to enact laws which were focused, targeted at particular ends, and which would have a far more effective (because realizable) enforcement mechanism than could ever accompany declarations of human rights.\textsuperscript{25}

As though Bentham’s strictures had not been enough, French style human rights also received severe intellectual punishment from that other towering figure in nineteenth-century political philosophy, Karl Marx. In Marx’s essay \textit{On the Jewish Question},\textsuperscript{26} Marx excoriated the individualism and the selfishness of human rights. The right to liberty was the “freedom . . . of a man treated as an isolated monad and withdrawn into himself.”\textsuperscript{27} The right of a man to property was “the right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society, the right of selfishness.”\textsuperscript{28} The right to equality merely guaranteed that “each man shall without discrimination be treated as a self-sufficient monad.”\textsuperscript{29} None of these “so-called rights of man [went] beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community.”\textsuperscript{30}

Marx did not, however, dismiss out of hand the possibility that some kind of rights approach might be helpful. In particular, he developed the distinction that the Declaration had made between the rights of \textit{man} and the rights of the \textit{citizen}.\textsuperscript{31} The distinction is well stated by Jeremy Waldron:

The former, “as different from the rights of the citizen,” are to Marx nothing but the rights of egoistic man. But citizens’ rights, as such, cannot be so easily dismissed. The right to participate in shaping the general will (Article III), the free communication of thoughts and opinions (Article XI), the right to demand an account from public officials (Article XV), and democratic rights in general: none of these can be made sense of as the rights of “an isolated monad withdrawn into himself” or even as the right to do something “without regard for

\begin{itemize}
\item \textsuperscript{25} See id. at 69.
\item \textsuperscript{26} Karl Marx, \textit{On the Jewish Question}, in \textit{NONSENSE UPON STILTS, supra} note 18, at 137.
\item \textsuperscript{27} Id. at 146.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 147.
\item \textsuperscript{31} See id. at 145.
\end{itemize}
other men." On the contrary such rights are explicitly constitutive of certain forms of action in common with others, and Marx recognizes that. In political community, he writes, man "counts as a species being" and "is valued as a communal being," as "a moral person." Political rights, he goes on, are "rights that are only exercised in community with other men." The suggestion seems to be that, in their form at least, these rights help to constitute the sort of community that Marx expects to see in the final phase of human emancipation.32

III. THE RECONSTRUCTION OF RIGHTS TALK

The combined effect of Bentham and Marx was to undermine the language of human and natural rights in a way that must have seemed for generations as entirely fatal. Instead, in the nineteenth and early twentieth centuries the emphasis was on securing the kind of civil liberties to which Marx was at least partly sympathetic, pre-eminently the right to vote, to engage in political debate, and to associate with others for political purposes. Once these were achieved, Bentham's insight that the correct way to maximize public benefit was through targeted legislation came into play, with the legislatures about which Bentham was so enthusiastic now having the added legitimacy of being composed on a properly representative basis.

The unexpected renaissance of human rights in the second half of the twentieth century was made possible by enormous tragedy. After 1945, it seemed impossibly pedantic to argue that human rights could have no place in the new world being constructed from the ashes of the old. Whatever the logic of the argument, confidence in the virtues of Benthamite positivism could not survive a realization of the crimes against humanity that were committed by elected leaders unrestrained by law. Moreover, in the immediate post-war period, Marx's legacy appeared to be appropriated by an all-powerful ruler in the Soviet Union who seemed to view citizens' rights, if anything, as even more subversive than the human rights that Marx so despised. So western Europe turned back to human rights, as a means of defending itself from both the democratic centralism to its east and the fascism that would lurk forever in its past. The West German and Italian Con-

stitutions were reconstructed with strong rights components. The European Convention on Human Rights was agreed, as was the Universal Declaration of Human Rights, and the Genocide Convention.

The criticisms made so effectively by Bentham and Marx were implicitly met in the new culture of human rights that began after 1945 and which has gathered so much pace recently. These various international instruments and constitutional documents are both more wide-ranging and paradoxically less ambitious in their remit than the French Declaration two centuries prior. Thus, the Universal Declaration of Human Rights dealt with liberty, equality, property, and speech in a way that Marx would have recognized and excoriated, but it also included citizens' social and economic rights about which Marx would have been enthusiastic. These rights include the right to take part in government, the right to social security, the right to work, the right to a decent standard of living, and the right to education. This trend towards inclusivity was continued in the United Nations Covenants that eventually followed the Universal Declaration in 1966. The fact that there were two such documents, one on civil and political rights and another on economic, social,
and cultural rights, indicates the breadth of the new international language of human rights. This fact is further reflected in many of the other instruments agreed to under this rubric in recent decades.

However, in an important sense, these documents were not the powerful instruments that their language might lead the observer to assume. The Universal Declaration was just that, a declaration, rather than a piece of legislation in the traditional or international legal sense. Its pronouncement changed nothing in any tangible way. It was a reaffirmation of human dignity intended to inform rather than predetermine political debate. Had some post war Benthamite disciple attacked the Universal Declaration’s “anarchical fallacies,” the document’s drafters would have been entitled to respond that the criticism missed the point entirely. The same is true, albeit to a lesser extent, of the other human rights instruments that have been promulgated. Though these instruments do contain enforcement mechanisms, they are not of powerful design or intended for instant deployment. Committees of experts meet and report to other committees which review national records and perhaps cross-examine local officials.

When the international community has embraced the language of human rights, it has been careful to ensure that in the process it has not thereby agreed to bring forth such rights. Thus, the rod that has been made for its back is rhetorical rather than legal.

The issue of enforcement is avoided less easily in the national sphere. The Declaration of the Rights of Man and of the Citizen was aimed, after all, only at France. Moreover, it was the un-

doubted capacity of the French authorities to act in realizing the statements in the document that added zest and punch to Bentham's critique. Human rights, in their domestic incarnation as constitutional or civil rights, are quintessentially part of a nation's legal system. As such, they are invariably able to avail the authority of law to ensure that their version of reality will prevail. Indeed, as constitutional or civil rights, most legal systems give human rights priority over other merely legislative or positive rights. Thus, if a country embraces a right to liberty or equality, for example, the Benthamite critique comes into play through the confident knowledge that this piece of "nonsense upon stilts" means something tangible, as opposed to the soft pseudo-dictates of international human rights that float somewhere in the global, legal stratosphere.

The answer, at the national level no less than at the international level, implicitly constructed to meet the Benthamite attack has depended on words that mean something different than they appear to mean. The United States has been a pioneer in this covert campaign of verbal distortion. The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press," but it is common knowledge that state and national authorities in the United States are perfectly entitled to make such laws and, indeed, have done so on many occasions. Not even in the United States is a person permitted to arrange the murder of his or her neighbor without fear of retribution, or casually shout fire in a crowded cinema just to test his or her theories on the effect of mass panic in enclosed spaces. Indeed, so obvious do we think all this to be that we do not even notice it. The linguistic distortion is so embedded that it has become a part of the meaning of words that seemingly say the opposite.

More recent constitutional instruments are more explicit about the concessions that the language of human rights must make to political reality. The Canadian Charter of Rights and the New

52. See, e.g., GRUNDEGESETZ [GG] [Constitution] (F.R.G.); Constitution of Ireland, 1937.
53. U.S. CONST. amend. I.
54. Cf. GRUNDEGESETZ [GG] [Constitution] (F.R.G.) (containing basic rights); Voss, supra note 33, at 152-53.
Zealand Bill of Rights\textsuperscript{56} both make the rights that they guarantee subject to override where particular necessity demands.\textsuperscript{57} The European Convention is perfectly frank about the degree to which it suggests rather than guarantees human rights and fundamental freedoms. Thus, Article 10 of the Convention declares that "[e]veryone has the right to freedom of expression."\textsuperscript{58} However, the right is qualified by reference to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{59}

Article 11 likewise restricts its guarantee of freedom of association and peaceful assembly by reference to what is "necessary in a democratic society,"\textsuperscript{60} for an almost equally wide category of reasons, including national security, public safety, the protection of health or morals, and the protection of the rights and freedoms of others.\textsuperscript{61} The Convention’s right to property is even more circumscribed, permitting the deprivation of possessions "in the public interest"\textsuperscript{62} and specifically empowering the State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . . ."\textsuperscript{63}

These are not exactly the kind of "human rights" that the French revolutionaries had in mind or that Bentham so effectively castigated. Instead, the effect of entrenching rights in law

\begin{itemize}
\item \textsuperscript{56} New Zealand Bill of Rights Act, 1990.
\item \textsuperscript{57} CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Fundamental Rights and Freedoms), § 1 (permitting interferences with rights only insofar as these can be said to be within “such reasonable limits as can be demonstrably justified in a free and democratic society.”); New Zealand Bill of Rights Act, 1990, pt. I, § 5 (stating that the rights set forth may be qualified only by reference to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” or by the overriding supremacy of the legislature).
\item \textsuperscript{58} Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 5, art. 10, 213 U.N.T.S. at 230.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. art. 11.
\item \textsuperscript{61} Id.
\item \textsuperscript{63} Id.
\end{itemize}
in such a qualified fashion is to give to the judiciary the power to determine when the rights should apply, and when they should be trumped by exceptions that permit them to be lawfully subverted. This is true even of the First Amendment to the United States Constitution, albeit to a lesser extent than it is in the European Convention and the Canadian and New Zealand constitutional initiatives. We are left with the paradox that the only way that it has been possible to rescue rights-analysis from intellectual absurdity is to contradict the very universality and im-prescriptibility that is said to be its essence. This is done not baldly, for that would be to give the game away entirely. Rather, this is done implicitly, by constructing constitutional instruments which bear the outward signs of “rights documents,” but which are in reality invitations to the judicial branch to resolve conflicts that inevitably arise when the rhetoric of rights collides with political and social reality. This is the reason the constitutionalization of rights always entails an increase in judicial power. Whether it also entails an improvement in the protection of civil liberties is the question to which we will soon turn, but not before we briefly consider the vulnerability of civil liberties in a political culture that has not traditionally had access to any overriding constitutional, civil, or human rights of any type. The United Kingdom is the best example because it was not subject to the cataclysmic tyranny that provoked the resurgence of rights-talk in other jurisdictions, nor has it been the subject of any dramatic internal revolution that opened the door to the creation of constitutional rights.

IV. THE PROTECTION OF CIVIL LIBERTIES

We have seen how Marx was more prepared to accept the utility of citizens’ rights than he was the notion of human rights. It is an acceptance of this notion of citizens’ rights that lies behind the long acceptance of, and support for, the concept of civil liberties in Anglo-American jurisprudence. It is clear that civil liberties are not the same as human rights. Rather, civil liberties are

64. See supra notes 31-32 and accompanying text.
the freedoms essential to produce and maintain an effective system of representative democracy in any given state or country.\textsuperscript{66} Pre-eminent among such civil liberties is the right to vote, an entitlement without which no country can properly describe itself as democratic.\textsuperscript{67} Such a right can only be obtained by direct legislative action, which is positive in character, but the secondary civil liberties of expression, assembly, and association may be secured in any given society through a mixture of both legislative intervention and the guarantee of a more negative protection, and through the availability of common law remedies in the event of their abuse.\textsuperscript{68} The purpose of these civil liberties is to guarantee that there is in place a properly functioning representative assembly for the purpose of making laws.\textsuperscript{69} It is obvious that in such a scheme there is no room whatsoever for human rights as such. Instead, what “rights” exist are the consequence of legislation passed by the democratic assembly that specifically grants enforceable rights to particular classes of persons.\textsuperscript{70} These rights may be qualified, removed, restored, truncated, or expanded. They are not “human” at all. Rather, they are the contingent outcomes of a political process that is always in flux.\textsuperscript{71}

The United Kingdom has for generations been the paradigmatic model for this sort of representative democracy. The Constitution of the country has long been declared to be rooted in civil liberties, parliamentary sovereignty, and the rule of law.\textsuperscript{72} Even the Human Rights Act does not remove this ancient commitment to parliamentary supremacy.\textsuperscript{73} The protection of civil liberties within this framework depends, however, on the support of both the legislative and judicial branches. For generations this support has been widely assumed, at least by judges and lawyers, to be solidly in place. The classic role of the courts in this ideal model may be illustrated by just two cases, one very old and

\begin{itemize}
\item \textsuperscript{66} Id. at 33.
\item \textsuperscript{67} Id. at 18, 34.
\item \textsuperscript{68} Id. at 18-21.
\item \textsuperscript{69} See id. at 20-21 (discussing the role of Parliament in the development of political participation in England).
\item \textsuperscript{70} Id. at 34.
\item \textsuperscript{71} Id. at 22.
\item \textsuperscript{72} See A.V. Dicey, \textit{The Law of the Constitution} 469-73 (10th ed. 1959).
\item \textsuperscript{73} However, recent developments in European Union law mark a change where the law within the remit of the Union is concerned. \textit{See} R. v. Sec'y of State for Transport \textit{ex parte} Factortame, Ltd., [1990] 2 A.C. 85 (H.L. 1989) (appeal taken from Eng.).
\end{itemize}
justly celebrated, the other of much more recent origin. The first is Beatty v. Gillbanks\(^74\) in which the freedom to assemble was protected in a classic English fashion.\(^75\) The case arose out of the Salvation Army’s insistence in processing through the streets of a provincial town.\(^76\) Their hostility to the consumption of alcohol made them a controversial presence that drew the attention of a fairly disputatious and potentially hostile mob that called itself the Skeleton Army.\(^77\) On several previous occasions, the two “armies” had clashed when finally two local magistrates took it upon themselves to ban all assemblies in the town.\(^78\) When the Salvation Army next set out on a procession, their leader, William Beatty, was warned to desist or face arrest.\(^79\) Determined to proceed, Beatty and two of his colleagues were then arrested and bound over to keep the peace, it having been found that they were guilty of the offence of unlawful assembly.\(^80\) The case came before the Queen’s Bench by way of a challenge to the binding-over order.\(^81\) The context in which the case came before the court is important because no basic freedom or constitutional right was explicitly engaged. Instead, the case looks for all the world like a run of the mill application of tried and trusted criminal law principles.\(^82\)

This is not, however, how the judges hearing the appeal treated the case. Pointing out that there was “nothing in their conduct when they were assembled together which was either tumultuous or against the peace,”\(^83\) Judge Field thought it of vital importance that the violence that was anticipated would have been “caused by other people antagonistic to the appellants.”\(^84\) The judge went on to state that:

> [w]hat has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from

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74. [1882] 9 Q.B.D. 308.
75. See id. at 314-15.
76. Id. at 308-09.
77. Id. at 309.
78. Id. at 309-10.
79. Id. at 310-11.
80. Id. at 311.
81. Id. at 312.
82. See id. at 313 (stating that “before they can be convicted it must be shewn that this offense has been committed.”).
83. Id.
84. Id. at 314.
lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition . . . .

Accordingly, judgment was given for the Salvationists. The case is the classic statement of the right to freedom of assembly in Britain, and epitomizes the residual approach to the secondary civil liberties that has been such a traditional characteristic of English law. The Salvationists were free to march, not because of any positive assertion of such a right on their behalf, but because no law prevented such conduct. The judges were vigilant to protect the freedom from unjustified encroachment. The law may not be as clear as the First Amendment, but, as interpreted in this way by the judges, the effect was the same.

Our second example is far more recent. In *D.P.P. v. Jones*, at issue was not the common law simpliciter but rather the role of the judges in interpreting statutes in a way that was sympathetic to civil libertarian principles. The appellants were convicted of trespassory assembly, arising out of their presence within a four mile radius of Stonehenge. Their actions were contrary to a police order banning such assemblies for a period of three days around the summer solstice. Critically, none of the appellants was involved in any violence, nor had any of them made any threat of violence. Moreover, the gathering did not create any obstruction on the highway. On these facts and overturning the High Court, the House of Lords by the narrowest of majorities held that the offence was not proven—an outcome that was achieved only by an imaginative reworking of the law on trespass.

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85. *Id.*
86. *Id.* at 15. The other judge on the court, Judge Cave, concurred in judgment without adding any comments of his own. *Id.*
87. *See id.* at 314 (stating that there was no evidence that the appellant “had any intention to commit any riotous act”).
88. [1999] 2 A.C. 240 (H.L.) (appeal taken from Eng.).
89. *See id.* at 242.
90. *Id.* at 252. Stonehenge is a famous, ancient monument where many have sought to congregate at times of pagan importance.
91. *Id.*
92. *Id.* at 251.
93. *Id.* at 251-52.
94. The House of Lords voted three to two to allow the appeal. *Id.* at 259, 265, 278, 281, 294.
95. The key majority opinion was that of the Lord Chancellor, Lord Irvine of Lairg.
In both *Beatty* and *Jones*, the courts were performing a function that the idealized version of Britain's unwritten constitution requires of them. Since there are no "human rights" guaranteed in any document, it is clear that the health of Britain's representative democracy depends both on the forbearance of Parliament in not legislating to erode civil liberties and on the vigilance of the judges in deploying their powers of adjudication and interpretation to protect civil liberties from legislative and executive attack. As far as legislation is concerned, however, the record is not at all good. In *Jones*, for example, what was at issue was a statute, recently passed and, insofar as this particular provision was concerned, designed to suffocate popular demonstrations on a matter of great importance to many, regardless of whether the assemblies under attack were in any way a threat to the peace or in other senses a nuisance. Depressing though its content is, this statutory provision must stand for the purpose of this article as emblematic of the approach that the legislative branch in Britain has taken to civil liberties during the entire democratic era. It is true, of course, that the primary civil liberty, the right to vote, has been secured by successive Acts of Parliament. But the secondary civil liberties necessary to make representative democracy work have been under perpetual attack. The draconian repression that prevailed during the war-time emergencies that punctuated the twentieth century may be explained, to some extent, in a historical context. But the legislative controls on free speech, freedom of assembly, and personal liberty that have flowed unendingly from successive parliaments in the decades since universal suffrage was achieved yield no straightforward explanation, other

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See id. at 251-59. Apart from being a senior judicial figure Lord Irving of Lairg, is also both Speaker in the House of Lords and a key figure in the Cabinet of the Prime Minister, Tony Blair. That the crucial speech in favor of civil liberties came from a member of the government in a case involving both the police and the prosecuting authorities is a nice challenge to those who assume without argument that separation of powers is a necessary feature of all properly functioning representative democracies.

96. *Id.* at 252. The defendants were charged with “trespassory assembly” under section 14A of the Public Order Act 1986. *Id.*

97. See id.

98. The process was started by the Great Reform Act, 1832, 2 & 3 Will. IV (Eng.) and the Representation of the People Act, 1867, 30 & 31 Vict. (Eng.), both of which were passed amid great controversy. The Great Reform Act, in particular, was not enthusiastically promulgated by a reform-minded legislative branch, but was rather to a large extent embraced as a means of preventing even more radical reform being foisted upon the Constitution by outside forces. See JOHN STEVENSON, POPULAR DISTURBANCES IN ENGLAND, 1700-1832, at 295-96 (2d ed. 1992).
than the temptingly obvious one that the legislative branch has never cared, or has cared only in a partisan or rhetorical sense, about the civil liberties that the idealized version of the unwritten British constitution would require it to defend.\textsuperscript{99}

Nor, \textit{Beatty} and \textit{Jones} notwithstanding, have the courts behaved much better. Indeed, these two cases represent a high proportion of the decisions delivered throughout the last century that succeed in being both positive and principled from a civil libertarian point of view. Time and again, the judges have shown their true colors by upholding war-time emergency powers,\textsuperscript{100} extending police powers of arrest,\textsuperscript{101} extending powers of search and seizure,\textsuperscript{102} and legitimizing executive attacks on freedom of political association.\textsuperscript{103} Crises such as the industrial disputes that racked the 1980s\textsuperscript{104} and the ongoing conflict in Northern Ireland\textsuperscript{105} have shown the English senior judiciary at least to be invariably on the side of the executive. Though celebrated for generations as the epitome of all that is good about the British Constitution, it might be better to view \textit{Beatty} as the exception that proves the far more dismal rule. The protection of civil liberties in Britain's non-rights based, unwritten constitution has been based on two false premises. The first is that Parliament would be careful about restricting civil liberties, and the second is that the judiciary would be vigilant in their support.\textsuperscript{106} Neither being the case, those seeking to assert their civil liberties in controversial circumstances have had next to nothing with which to defend themselves from executive aggression.

\textsuperscript{99} The empirical basis for these generalizations is set out at length in K.D. \textsc{Ewing} & C.A. \textsc{Gearty}, \textsc{Freedom Under Thatcher: Civil Liberties in Modern Britain} (1990) [hereinafter \textsc{Ewing \& Gearty, Freedom Under Thatcher}] and \textsc{Ewing \& Gearty, The Struggle for Civil Liberties, supra} note 65.

\textsuperscript{100} \textsc{Liversidge v. Anderson}, [1942] A.C. 206 (H.L. 1941) (appeal taken from Eng.).

\textsuperscript{101} \textsc{Duncan v. Jones}, [1936] 1 K.B. 218 (1935).

\textsuperscript{102} \textsc{Elias v. Pasmore}, [1934] 2 K.B. 164.

\textsuperscript{103} \textsc{McEldowney v. Forde}, [1971] A.C. 632 (H.L. 1969) (appeal taken from N. Ir.).

\textsuperscript{104} \textit{See generally \textsc{Ewing \& Gearty, Freedom Under Thatcher, supra} note 99, ch. 4.}

\textsuperscript{105} \textit{See generally C.A. \textsc{Gearty, The Cost of Human Rights: English Judges and the Northern Irish Troubles, 47 CLP 19} (1994).}

\textsuperscript{106} \textsc{Ewing \& Gearty, Freedom Under Thatcher, supra} note 99, at 9-13 (countering A.V. Dicey's assumptions in this regard).
V. THE PROTECTION OF CIVIL LIBERTIES BY MEANS OF CONSTITUTIONAL RIGHTS: THE LESSONS FROM THE UNITED STATES

It is dissatisfaction with the way in which the United Kingdom's unwritten constitution has functioned in recent years that has driven the recent campaign for a British Bill of Rights. This movement has now achieved fabulous success with the enactment and implementation of the Human Rights Act. As noted earlier, this document does not destroy parliamentary sovereignty entirely, but it does subvert it by introducing a new layer of rights and freedoms to which the executive and judicial branches are subject and in which all words in all statutes must henceforth be read. The assumption is that to enact a measure purporting to guarantee "human rights" is necessarily to enhance their protection. But how justified is this belief? In particular, since this inevitably involves a judicialization of rights-disputes, why should we now expect the judicial branch suddenly to change its spots and become the protector of civil liberties? This is, after all, a role that it has carefully avoided discharging properly for the entire democratic era.

The United States model is a highly appropriate one to examine at this juncture. The First Amendment to the United States Constitution guarantees the right to free speech in as unqualified a fashion as any document since the Declaration of the Rights of Man and of the Citizen. As we earlier saw, however, in an inevitable effort to preserve itself from absurdity, the terms of the First Amendment have been treated as less absolute than they appear. This task of tactical dilution has been entrusted to the judiciary, and in particular to the United States Supreme Court. From the lawyer's perspective, the results are surprisingly similar to those that we have already described in the supposedly constitutionally primitive United Kingdom.

Let us leave to one side for the purposes of this analysis the huge number of First Amendment cases that have flowed from the Supreme Court that have been related to free speech as other than a civil liberty, those that deal with commercial speech, ar-

tistic expression,\textsuperscript{109} pornography,\textsuperscript{110} and the like. The First Amendment merely declares itself to be there; it does not explain its purpose. Thus inevitably, like any hugely abstract statute, it has found many unlikely litigants attaching their interests to its coat-tails. It is only by an accident of language that these decisions can be characterized as constitutional cases, since few if any issues of civil libertarian principle are actually raised in them. This contrasts starkly with those cases on free speech as a political liberty that raise recognizable questions related to representative democracy and the importance of the protection of civil liberties to a healthy political culture.

The First Amendment record of the Supreme Court contains significant decisions unequivocally in favor of free speech. Certainly, there are more such cases in the United States, than there are in the United Kingdom. The libel decision of \textit{New York Times v. Sullivan},\textsuperscript{111} the Vietnam free speech cases,\textsuperscript{112} the \textit{Pentagon Papers} case,\textsuperscript{113} the famous flag burning decision from the late 1980s,\textsuperscript{114} and many other similar rulings offer an impression of a vibrant bench committed to the value of diverse political speech in an open-textured democracy. Viewed historically, however, the record looks rather different. The assaults on left-leaning views mounted by the executive and legislative branches of the United States government in the aftermath of World War I and World War II found enthusiastic allies on the judicial bench. The venomous anti-socialism of 1918-1930, which saw political agitators jailed for long terms and their organizations destroyed, was legitimized by a series of Supreme Court rulings.\textsuperscript{115} To the extent these cases are remembered at all today, it is through the opin-

\textsuperscript{111} 376 U.S. 254 (1964).
\textsuperscript{112} E.g., Cohen v. California, 403 U.S. 15 (1971).
\textsuperscript{113} N.Y. Times v. United States, 403 U.S. 713 (1971).
\textsuperscript{115} E.g., Whitney v. California, 274 U.S. 357, 368-69 (1927) (rejecting petitioner's claim that conviction under California's Criminal Syndicalism Act for involvement with the Communist labor party violated the Due Process and Equal Protection clauses); Gitlow v. New York, 268 U.S. 652, 668, 670 (1925) (finding constitutional a statute that prohibited advocating the overthrow of the government); Debs v. United States, 249 U.S. 211, 216 (1919) (holding that speech attempting to obstruct the recruiting service of the United States in violation of the Espionage Act was not protected by the First Amendment).
ions of Justices Holmes and Brandeis, who are seen as blazing a trail for the more liberal approach to speech that prevails today. Less often noticed is the fact that even these justices were not unequivocal in their support of principle at this difficult time.

The era of McCarthyism produced a Supreme Court decision of extraordinary deference to executive and legislative power, Dennis v. United States. The plurality and concurring opinions in Dennis provide a depressing answer to the question that every contemporary constitutional rights enthusiast should be asking all the time: Why did the First Amendment not protect United States citizens from McCarthyism? Surely support for the civil liberties of unpopular political groups is said to be a very large part of the rationale for the free speech guarantee? In reality, of course, politics cannot be avoided by deploying the tricks of the constitutional lawyers' trade. Grand rights claims in venerable documents merely divert the course of political energy into the courtroom, where the forces of the State reconstitute themselves dressed in the garb of constitutional necessity. The judges read the political runes as best they can, often without realizing that this is what they are doing, and express what their instincts tell them in the only language available to them, constitutional law.

Seen from this perspective, more recent advances in free speech principles in the United States can be viewed in a different way. The imposition of First Amendment guarantees in a case like Sullivan was made much easier for the Supreme Court by the fact that it was dealing with a preposterous manipulation of the law by state officials, on an issue, racial segregation, in

116. See, e.g., Gitlow, 268 U.S. at 672 (Holmes, J., dissenting) ("If . . . the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

117. The record, familiar of course to many United States law students, is briefly discussed in Conor Gearty, Citizenship and Freedom of Expression, in RIGHTS OF CITIZENSHIP 271, 275 (Robert Blackburn ed., 1993). Readers of this journal will be especially informed on this topic, on account of the many relevant (and excellent) contributions to the debate surrounding Mark Tushnet's Taking the Constitution Away from the Courts in 34 U. RICH. L. REV. 359, 359–566 (2000).

118. 341 U.S. 494 (1951).

119. For example, Justice Jackson in his concurrence stated that "even an individual cannot claim that the Constitution protects him in advocating or teaching overthrow of government by force or violence." Id. at 570. (Jackson, J., concurring).

120. See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST
which northern and elite opinion took a decidedly different view than that of southern political leaders. There was not one nation speaking with one voice in a way hostile to a minority group. Rather, there was a divided society, with the federal and state authorities taking very different lines on a key issue of principle. Against this background, the Supreme Court's assertion of First Amendment guarantees was hardly a brave or courageous act. Rather the reverse: not to have decided as it did would have been to expose the Court to far more criticism from far more influential quarters than it received for the decision it actually made. In the same way, the decisions of the Court in the late 1960s and early 1970s arising out of the Vietnam conflict, and in particular the Court's holding in the Pentagon Papers case, can be seen against a backdrop of great anxiety about the rationale, morality and future direction of the war. Once again, the Court was not siding with a despised minority against the anger of a united country; rather it was deploying the weapon of constitutional principle on one side of a public debate that had already manifestly divided the nation.

VI. CONCLUSION: CIVIL LIBERTIES IN THE UNITED KINGDOM UNDER THE HUMAN RIGHTS ACT

The United Kingdom's Human Rights Act represents the partial, but only partial, Americanization of the British constitution. As noted, it incorporates the European Convention on Human Rights into the law of the United Kingdom, but does so in a deliberately half-baked kind of way. A central feature of the measure from the perspective of this article is that it explicitly preserves parliamentary sovereignty, stating that judges do not have the power to strike down legislative measures for incompatibility with Convention rights. To this extent, the old British system is preserved. However, the Act also insists that "[s]o far as it is pos-

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122. Cf. LEWIS, supra note 120, at 41-42 (describing the changing political climate in the country at large during the early 1960s).
124. Human Rights Act 1998, c. 42, § 3(2)(b) (U.K.). But see id. §§ 4, 19 (regarding the declarations of incompatibility which can be issued under the Act and the requirement to regard human rights when introducing government measures in Parliament).
sible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." This is a large and intrusive new power of statutory interpretation. It purports to apply to all legislation, passed or to be passed. All previously settled versions of what statutes mean, together with all fresh approaches to previously unlitigated or recently enacted provisions, must now take into account this new mandate of human rights consistency. As if this were not enough, another provision imposes a new statutory duty on all public authorities not "to act in a way which is incompatible with a Convention right." Only official conduct which is absolutely required by primary legislation may flout the Convention rights with impunity.

Preserved though it technically is, there is not a great deal left of the parliamentary sovereignty that has sustained the British Constitution for generations. Like the United States Bill of Rights, but to an even more dramatic degree, the Human Rights Act can be expected to unleash a torrent of litigation in all sorts of directions while its implications for every realm of law are slowly worked out through the adversarial process. From the perspective of civil liberties, we should note that the Act includes Article 3 of the First Protocol of the Convention under which national authorities "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." In terms of the secondary civil liberties we should also here recall Article 10's declaration that "[e]veryone has the right to freedom of expression," as well as Article 11's guarantee of

125. Id. § 3(1).
126. Id. § 3(2)(a).
127. Id. § 6(1). The term "public authority" is not, however, defined in the Act. See id. §§ 6(1), (3), (5).
128. Id. § 6(2). Courts, however, may issue non-enforceable declarations of incompatibility. Id. § 4.
129. The subject is, of course, a vast one, with legal bookshops that had hitherto ignored human rights now groaning under the weight of rival texts of greater or lesser value. For a valuable introduction on the subject that places it in its historical and political context, see KLUG, supra note 6. For an excellent discussion of the legal essentials, see J. WADHAM AND H. MOUNTFIELD, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS (1999).
131. Id.
132. Id. pt. 1, art. 10, § 1.
“the right to freedom of peaceful assembly.” One should remember, however, the broad exception to each of these rights, which places in the judicial branch the responsibility of determining when infringement of either or both is excusable because the infringement is “necessary in a democratic society.”

How will the Human Rights Act change the way in which civil liberties are protected in the United Kingdom? In interpreting the Act, British judges are required to acknowledge the case law of the European Court of Human Rights and the European Commission of Human Rights. These two bodies were established under the European Convention to provide authoritative rulings at the international level where a state was alleged to have violated any of the Convention rights. The main work of these two institutions, the latter now superseded by a newly invigorated court, is to adjudicate disputes brought against member states by individuals within their jurisdiction that claim to be victims of a violation of their Convention rights. A huge body of case law has inevitably arisen, not the least of which is in the civil liberties arena. Thus, there is a corpus of law to which the judges in Britain will be able to refer when working out the effects of planting qualified “human rights” on a system in which civil liberties and a remedy-based approach to the protection of basic freedoms is already so well-entrenched, albeit defectively when viewed from the long historical perspective.

The guidance from the European human rights institutions on the protection of civil liberties is not entirely unlike that from the United States Supreme Court regarding the First Amendment, though there are significant differences at the edges. The main body of cases has focused on expression and assembly. Within the parameters set by an overriding commitment to liberal de-
mocracy, the Court has been strongly supportive of political speech, recognizing its importance to democratic freedom. It has also been particularly skeptical about the contention that political speech needs to be truncated due to the necessities of democratic society.\textsuperscript{140} In an important series of decisions arising out of the British government's attempts to ban the book \textit{Spycatcher}\textsuperscript{141} in the 1980s, the Court affirmed these principles in a relatively controversial context. The Court, however, declined to go so far as to say that the Convention requires a ban on any kind of "prior restraint" of publication such as has been hewn out of the First Amendment.\textsuperscript{142}

In contrast to these cases, and in line with United States courts, the Court and Commission on Human Rights have been reluctant to be activist with respect to the civil liberties of highly controversial political activists against whom there has been a high degree of societal hostility and whose political engagement threatened the entire liberal democratic system.\textsuperscript{143} Thus, the Federal Republic of Germany's \textit{Berufsverbote} legislation, under which persons could be denied State jobs on account of their political views,\textsuperscript{144} was upheld in the face of a Convention attack until the end of the Cold War made it largely irrelevant.\textsuperscript{145} In the same country, attempts by the local Communist Party to challenge its prohibition on the basis of Article 11 proved equally unavailing.\textsuperscript{146}

\textsuperscript{140} The leading case is \textit{Lingens v. Austria}, App. No. 9815/82, 8 Eur. H.R. Rep. 407 (1986), where the principles the Court has subsequently regularly applied were set out for the first time. \textit{Id.} at 421.

\textsuperscript{141} \textsc{Peter Wright}, \textit{Spycatcher: The Candid Autobiography of a Secret Intelligence Officer} (1987).


\textsuperscript{143} To some extent this is at the present time merely a historical point, though there is no guarantee that it will remain so.


\textsuperscript{145} Compare \textit{Vogt v. Germany}, App. No. 17861/91, 21 Eur. H.R. Rep. 205, 239 (1996) (concluding that membership in the DKP—Germany's Communist party—was "not sufficient to establish convincingly that it was necessary in a democratic society to dismiss her"), \textit{with Glasenapp}, 9 Eur. H.R. Rep. at 46 (concluding that consideration of Glasenapp's "opinions and attitude merely . . . to satisfy itself as to whether she possessed one of the necessary personal qualifications . . . did not interfere with her rights to freedom of expression"), and \textit{Kosiek v. Germany}, App. No. 9404/82, 9 Eur. H.R. Rep. 328, 342 (1986) (concluding that consideration of Kosiek's "opinions and attitudes" to determine whether he was qualified to perform the job and whether he had behaved during the probationary period did not infringe upon his right to freedom of expression).

More surprisingly, in Britain both the decision to disband trade unions at the Government’s communications headquarters ("GCHQ") and the decision to prohibit members of the Northern Ireland based political party Sinn Féin from direct communication on radio and television were found not to raise serious Convention issues when challenges were mounted in the European Commission of Human Rights.\(^\text{147}\)

The Human Rights Act incorporates the European Convention on Human Rights which is, despite its name, an ideological document.\(^\text{148}\) It guarantees only certain rights and then only in a very particular way. The rights are mainly civil and political in substance, but they may be circumscribed in a way that permits State action if the structure of government is threatened by their exercise.\(^\text{149}\) In this sense, perhaps the most important Convention article is also one of the least noted: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."\(^\text{150}\) The political discourse is free, but only within certain limits. To this extent the Convention mirrors the traditional British constitution in that it is strong on civil and political liberty, but unrelenting in its antagonism to political expression that is not the rhetoric of "the right kind of freedom."\(^\text{151}\) It could be argued that the United States's differences on this matter are merely ones of degree, with the practical control on speech exercised by the market and the relative security of the country from internal and external threats allowing a closer fit between the theory and practice of political liberalism than might otherwise have been permitted.

The judicial branch cannot be expected to perform, and rarely if

\(^{\text{H.R.}}\)


\(^{\text{149.}}\) See supra notes 124-28 and accompanying text.


\(^{\text{151.}}\) The phrase was that of a British Home Secretary justifying the use of police powers against members of the Communist Party of Great Britain in the 1920s. See Ewing & Gearty, The Struggle for Civil Liberties, supra note 65, at 147-48.
ever performs, the role of defender of the politically subversive from the malignant exercise of hostile State power. Great political change can be achieved through the streets and sometimes also, if the conditions are right, through the ballot box, but it can rarely if ever be brought about by court order. That is not to say that litigation does not achieve some minimal successes for political campaigners and occasional successes for those seeking to exercise their civil liberties. It can also help create the conditions for radical political action, and thereby contribute to bringing about that which it cannot do alone. But litigation, even “human rights” litigation, is no substitute for politics. The Human Rights Act can be expected to provoke many cases rooted in civil libertarian principles, and some of these no doubt will be successful, particularly if the current climate of relative peace and security in Britain continues. But it does not remove political conflict; rather it merely transfers part of it from the legislative to the judicial arena. Only time will tell whether the protection of civil liberties gains from this partial relocation.

152. A challenge to the U.K.'s official secrets legislation is due imminently, with the prosecution of a former employee of the security service, David Shayler, likely to raise its compatibility with the Human Rights Act.