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# The Concept of a Free Society

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Norman Barry<sup>o</sup>

In this essay I am concerned with ideas about freedom or liberty, I use the two words interchangeably, not with existing social and political orders that might call themselves free or liberal. However, it cannot be denied that theorising about freedom is closely, connected with public policy or that examples of unfreedom in the real world are rooted in serious mistakes at the conceptual level.

The first thing to notice about freedom is that it is an ‘essentially contested concept’.<sup>1</sup> By this I mean that there are irreconcilable disputes as to its meaning at the foundational level. It is not just that there are intense differences about public policy that dominate political argument but there are also fierce differences about basic meanings. For example, does justice refer to the procedural rules that govern individual behaviour in a social practice, e.g. the prohibitions on theft, fraud violence, with little concern for the outcome, in terms of income distribution, that might emerge from a strict adherence to its procedural rules. The great rival in discourse about justice is entirely to do with the justice or injustice of the outcomes of a social practice. This justice concept here might properly be called *social* justice. A society can be unjust and not merely individuals in their conduct. Similar disputes are evident in arguments about ‘democracy’: is it simply majority rule or must it refer to extensive popular participation in government? And is there a conceptual difference between liberal democracy and its rival social democracy?

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<sup>o</sup> Norman Barry, İngiltere’de Buckingham Üniversitesi’nde siyaset ve sosyal teori profesörüdür.

<sup>1</sup> See W. B. Gallie, *Philosophy and the Historical Understanding* (London: Chatto and Windus, 964).

Perhaps the clearest demonstration that freedom is an essentially contested concept came with Isaiah Berlin's celebrated essay, 'Two Concepts of Liberty'<sup>2</sup>. Here Berlin makes the now standard distinction between *negative* and *positive* liberty. The negative sense is contained in the answer to the question: 'what is the area within which the subject is or should be left to do or be what he is able to be, without interference by other persons?'<sup>3</sup> The positive sense is concerned with the answer to the question: 'what, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'<sup>4</sup>. Negative liberty, which features in the English liberal tradition from Locke through to John Stuart Mill and beyond associates freedom especially with being left alone by the state and is perhaps the defining philosophical characteristic of free market economics. It is important to note that Hayek is not exclusively a negative theorist of liberty. He associates lack of freedom with the illiberalism of a command economy, such as the compulsory direction of labour. A perfectly general law that does not command the person to do anything is consistent with liberty for Hayek.<sup>5</sup> However, liberty can also be restricted by perfectly general laws that don't actually tell the person to do anything, yet general laws that name no one are consistent with liberty for Hayek. But a rigorously formulated concept of a free society must account for and explain the need for the restraints produced by formally valid laws.

The positive concept of liberty understands freedom as not just the absence of restraint but the capacity or ability to do certain valuable things. A person would be unfree if he had little choice but to accept a low wage or face starvation; but is he not in effect coerced? Of course, this interpretation is an invitation to the state to create conditions of positive liberty by economic intervention which itself involves unfreedom. It is this kind of philosophy that underlay the emerging welfare state in Britain, and elsewhere, at the beginning of the twentieth century. It provided a philosophical critique of free market economics.

The negative/positive split has divided political theorists and the rise in positive liberty has done much to undermine the attractiveness of the market, especially capitalism. There is a further aspect of contestability which is less talked about but has had a dire effect on the philosophical persuasiveness of economic liberty. It concerns the growing, both in theory and practice, attitude of denying the unity of liberty. To a classical liberal of the nineteenth cen-

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<sup>2</sup> 'Two Concepts of Liberty' is reprinted in Berlin's *Four Essays on Liberty* (London: Oxford University Press, 1969).

<sup>3</sup> Berlin p. 121.

<sup>4</sup> Berlin p. 122.

<sup>5</sup> See F. A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960).

tury, economic freedom was theoretically part of the same package as religious liberty: a free society would protect both. But in the United States<sup>6</sup> especially in social philosophy, a distinction is made between civil liberties (e.g. freedom of expression, religion, sex etc) and economic liberties (e.g. the freedom to contract and the legitimate acquisition of property etc). And the new liberals in America rank liberties; giving priority to civil liberty and scarcely bothering to even mention economic freedom. This had a great influence on American law. For a time to the US Supreme Court interpreted the Constitution as embodying *economic* liberty. But this is no longer the case.

Despite the welter of definitions of liberty that have surfaced in recent years the proponents of the essential contestability thesis still maintains that there is an *exemplar* of the concept which rival theorists are trying to attain. Of course, in their elucidation of rival conceptions the rival claimants are not merely arguing about words but are implicitly referring to different ways of life. Clearly proponents of the *unity* of liberty are referring to free market capitalism as part of an *exemplar* of liberty that values free market capitalism just as the believers in social justice have an *exemplar* in mind that authorises the state to make any corrections to the market which maximise the ideal of equality.

In this essay I shall try to recapture some of the features of the exemplar of freedom espoused by market theorists. I say 'recapture' because it has been lost for much of the twentieth century. This is partly to do with the rise of 'social' liberalism and the diminished importance of economics in the litany of liberalism. Also, in the examination of the correct meaning of freedom I shall make reference to public policy for it is the vast increase in the state's power throughout the world that has contributed so much to the decay of the original concept of a free society. Especially important here is the rise of the welfare state which has done so much to undermine the original exemplar of freedom.

## The Meaning of Freedom<sup>7</sup>

It is instructive to start with Berlin's negative concept of liberty because that captures better what is meant by freedom in ordinary speech. It is also, in comparison to positive liberty, less productive of confusion and less likely to license government action through mere definition. Whatever political action is justified must be validated by substantive moral and economic argument

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<sup>6</sup> For America's retreat from economic liberty see Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago press, 1980).

<sup>7</sup> Much of the following is taken from Norman Barry *An Introduction to Modern Political Theory* (London: Macmillan, 4<sup>th</sup> edition 2000).

and not presented as in inference from a definition, much of the propaganda of unfree societies persuades in this latter way.

I start from an aspect of Berlin's famous distinction between negative and positive freedom. Liberty does to a great extent depend not being restrained. A person is free to the extent that his choices are not foreclosed by laws and other prohibitions. But these prohibitions must refer to alterable constraints imposed by man and more specifically by political authorities. A person is not unfree when he faces the Atlantic ocean but only when his own country prevents him travelling. Again, freedom is not identified by the satisfaction of wants. We are too familiar with a state maximising want-satisfaction for that to be a genuine account of liberty. And what about the person who values the comfort and security of prison, or slavery, so he chooses servitude over liberty? Does this count as freedom? Hardly. His present desires might be satisfied but his future *choices* are obliterated. It is also important to note that market society might occasionally fail to maximise liberty. Our choices maybe freely limited by the free choices of others, as when a racist freely restricts choices and is prepared to suffer the economic loss from so doing as when he discriminates in a prosperity reducing way.

Also, freedom is not the same thing as being 'able to'. Many interventionist governments have increased people's powers, say, by income redistribution in the mistaken belief that they are also increasing their liberties. But what about the rich black man who could well afford to stay in an expensive hotel but is restricted by racist and segregationist laws or practices? His freedom is reduced but he is still 'able'. We must also distinguish between free acts from right or virtuous acts. Freedom must involve the right to do wrong and a genuine free society involves the possibility of the right to do wrong or make mistakes.

Freedom is best described as the non-restriction of options. This is perhaps better than simple negative liberty. Many theorists of the latter make too close a connection between *law* and liberty. As I have noted, Hayek, for example, does not regard perfectly general laws which are consistent with the rule of law as being restrictive of liberty. A person is only unfree when he is told or ordered to do something. But this is false. Perfectly general laws can restrict options, as those in strictly religious societies clearly do. And the moral concept of a free society requires a critique of such laws. Also, law, from a different perspective, does not restrict liberty for some writers. We are always free to disobey the law and endure the consequences. In the Hobbesian conception of liberty, a person is only unfree when he is under compulsion or physically bound and chained. But freedom can be restricted by other than physical restraints. Freedom as non-restriction of options gets over this problem for under such circumstances a freedom is foreclosed: the freedom to perform an act without painful consequences.

There is, though, a connection between freedom and morality. I refer here to freedom and responsibility. A person is morally responsible for his actions only when he is free to perform them. The criminal law presupposes that a person could have acted other than he did, otherwise he is not liable for punishment. Of course, there are many disputes about the meaning of responsibility but the principle is clear enough. Genuine liberty entails some notion of responsibility for action. A person compelled to act is not a free and responsible agent.

### The Social and Political Framework of Liberty

Freedom as the non-restriction of options is little more than a definition. It tells us little about the value of liberty and the institutions that are required to make it socially valuable. I have already indicated that a distinction has to be made between liberty and law but there is nevertheless a connection between the moral ideal of the rule of law and the full realisation of liberty. It requires that laws be announced in advance, be non-retrospective, non-discriminatory and apply equally. Of course, oppressive laws have in the past satisfied these criteria: they are necessary, if not sufficient, conditions of liberty. These conditions also require an independent judiciary and possibly the separation of powers, though Britain does not have much of this formally and is still broadly a free society. But certainly a judiciary that acted at the whim of government could not effectively service a free society.

Along with the rule of law an important institution of a free society is private property. This must include the right to own, to pass on and dispose of private assets. It is not just the utilitarian argument that no free society has ever existed that denied this, it is the fundamental moral claim that the right to acquire and possess property is a feature of the unity of liberty. The right of ownership is just as important a consequence of liberty as the right to free expression or religious belief. Throughout the twentieth century it has been the victim of the dissolution of the unity of liberty. Thus the freedom to accumulate property is now simply a right that may or not be granted by government. It normally has no special constitutional protection and may be discarded by government in its pursuit of public policy. The right to property also includes the right to contract freely: as the owner of my body I can dispose of it as I wish. American constitutional practice is interesting. In the early part of the twentieth century, the right to free contract was seen as an intrinsic aspect of the constitution, demonstrated in the notorious case of *Lochner v. New York* (1905) in which a New York state statute that would have limited the hours a week a baker could work was struck down as being in breach of the Constitution. This precedent was used to resist many government, federal and state,

interventions. This lasted until the 1930s when the Supreme Court switched<sup>8</sup> and upheld many illiberal statist laws. In an important case the Court actually said the economic liberties were less important than civil liberties and that the Court would subject laws on them to much less scrutiny than those affecting free speech, discrimination etc.<sup>9</sup> Although there has been some protection for property in America now, the right to abortion has greater protection than economic liberty.

A particularly seductive version of the meaning of liberty is to link it with the concept of *autonomy*. While not quite the same as positive liberty it has some similarities. It arises out of the alleged emptiness of negative liberty. As the former libertarian John Gray writes: 'It is patently obvious that autonomy is far more than the absence of coercion by others.....that condition may exist with a complete inability to achieve any objective or purpose'<sup>10</sup>. Here a clear rejection of the classical liberal's priority of the right over the good is apparent. In that theory, it is crucial for a free society that there be a right to liberty regardless of what a person does with it, about which a classical liberal remains neutral. Its connection with state activity is clear in Joseph Raz's argument that: 'The provision of many collective goods is constitutive of the very idea of autonomy and it cannot be relegated to some subordinate role, compared with some right against coercion'<sup>11</sup>. Thus the freedom of market society in offering individuals a constant supply of consumer goods would not be true freedom because that society would not offer the full range of collective goods. Plenty of room for state intervention here. It is true that neither Gray nor Raz is suggesting positive liberty where the state pretends it is increasing liberty by subtly coercing us but it is a clear departure from the liberty of classical liberalism which does not mind what we do with our liberty as long as we do not harm others. From Gray and Raz it would seem that the market by not providing a range of collective goods somehow restrains us from making the choices of a properly free agent.

But liberty as autonomy faces insuperable problems as a conceptual account of liberty. Autonomy as a concept is indeterminate and very contested. There are as many accounts of what it means to be autonomous as there are rival political theories. And the role of the state becomes almost infinite. As Raz says: 'The government has an obligation to create an environment providing individuals with an adequate range of options and the opportunities to use them'<sup>12</sup>. And autonomy has an 'opportunity cost'. To acquire the somewhat

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<sup>8</sup> *West Coast Hotel v. Parish* (1937).

<sup>9</sup> *United States v. Carolene Products* (1938)

<sup>10</sup> John Gray *The Moral Foundations of Market Institutions*, London: Institute of Economic Affairs, 1992), p. 23.

<sup>11</sup> Joseph Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986, p. 207.

rarefied skills to enjoy liberty as autonomy means that the individual has to forego something else. We might criticise the mindless football supporter for wasting his time jeering and shouting abuse at the supporters of the opposing team but that is his choice and it would be a gross deprivation of his liberty to compel him to go to the opera.

But the important point is that a person has to be free, i.e. unrestrained, before he can be autonomous. And political theory should concentrate on the proper restraints that a free society requires and not on what people do with their liberty. To put autonomy before liberty is to get the argument the wrong way round and to license a whole range of state interventions on the ground that that is the way to augment true freedom.

We have to return to my original account of freedom as the non-restriction of options. That has the advantage of silence on the options people choose and does not limit itself to the source of those restrictions. Of course, the state is the major restricter of options but it does not preclude the possibility that the market might limit choices, as when a racist discriminates against someone purely on the grounds of ethnic background but does not use coercion. Whether that should be permitted in a free society will have to be argued about in terms of politics; it is not a matter of the meanings of words.

## The Problems of Liberty Today

Given that liberty competes with other values there are serious public policy issues. Perhaps the most pressing is the question of security. John Stuart Mill provided the most famous answer: the ‘harm’ principle<sup>13</sup>. A person’s liberty should only be restricted if his actions cause harm to others. Although most writers start from this position what exactly Mill meant has been the cause of continuing controversy. What is meant by harm? Some interpreters have suggested that Mill meant harming the ‘interests’ of others? However it is interpreted the harm principle could either lead to very great personal liberty or excessive state control. And wasn’t Mill an elitist who believed that only a minority of the population was capable of exercising the cultivated autonomy and non-conformity he believed in? But he was right about one thing. His principles would permit the causing of ‘offence’. Our most deeply held, often religious, beliefs cannot be protected from public criticism, even ridicule, in a genuinely free society. The Danish newspaper that published the cartoons of the Prophet Mohammed had every right to do so even if their actions were tasteless and insensitive. After all, the singer Madonna has performed in ways

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<sup>12</sup> Raz, pp. 117-18.

<sup>13</sup> See Mill On Liberty in his *Utilitarianism, Liberty and Representative Government* (London: Dent 1960).

offensive to Catholics without demands that she be forbidden by law. Indeed, in a free society it is better that the restraints be voluntary, e.g. critical public pressure, than the product of coercive law.

A better, and more rigorous and consistent writer on liberty than Mill was Herbert Spencer. In his *Social Statics* he wrote : ‘Every man has the right to do what he wills, provided he infringes not the equal freedom of any other man’<sup>14</sup>. By putting the ‘equal freedom’ principle clearly in the rights form he avoids incessant debate about the meaning of ‘harm’ which afflicts Mill’s principle and the book itself is a rigorous defence of liberty in all its contexts. Spencer was, of course a consistent defender of the (very) minimal state and an early critic of not only socialism but also any state intervention as being inimical to liberty. He rightly saw all this as a movement towards the restoration of a ‘militant society’.

The law of equal freedom yields some very libertarian results. Let us look at some issues that have vexed Britain in the current ‘war against terrorism’. There have been some measures to limit freedom of speech and the offence of ‘inciting a terrorist act’ was originally invented allegedly to provide greater security. But according to a strict application of Spencer’s principle there should be no such offence. Verbally encouraging some one to commit a terrorist act does not deprive anyone of their equal rights, whereas actually committing an offence clearly does. Merely uttering words likely to provoke an offence cannot be wrong. By the same token, Britain’s strict libel laws, developed by Hayek’s beloved common law, are offensive to liberty. My right to equal liberty is not undermined if someone says unpleasant things about me, even if they are untrue. Not only are libel laws a serious restriction of liberty, they also reverse the principle of English law, the presumption of innocence. Defendants have to prove that they did not libel: always difficult and the claimant nearly always wins defamation cases.

It is also important to distinguish liberty from political liberty. Political freedoms i.e. the right to vote and participate in public affairs are genuine liberties but a society can still be free without them. David Hume, the great eighteenth century Scottish philosopher, noted that absolute monarchies in Europe had preserved literary freedoms more effectively than republics.<sup>15</sup> In the modern world democracies have seriously undermined economic liberty. Democratic politics are almost inevitably redistributive and egalitarianism is the enemy of liberty.

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<sup>14</sup> Herbert Spencer *Social Statics* (London: Chapman, 1851, p. 103)

<sup>15</sup> See his *Essays, Moral Political and Literary*, edited by Eugene F. Miller (Indianapolis: Liberty Classics, 1985).



## The Concept of a Free Society

To understand a free society we have to start from the aforementioned idea of the unity of liberty. American ‘liberals’ have made the problem difficult by only writing of freedom in the context of civil liberties so that economic liberty becomes almost optional. It is something that society might choose to have but it is not constitutive of freedom and it might only be acceptable on utilitarian grounds; and if the justification is merely utilitarian all sorts of plausible reasons can be invented for restricting economic liberty. Still, free market economies lead to prosperity as most Americans realise, except perhaps the intellectuals. But even if economic liberty did not lead to aggregate well-being the right to trade, to contract and accumulate property would still be a necessary feature of a free society. To deny that liberty would be to restrict an option for no good reason. Indeed, how valuable would the civil liberties praised by Americans be without economic liberty. The right to free speech would be empty if there were no rights to own a publishing house or a printing press. And the possession of private property is an invaluable bulwark against the liberty-repressing state.

If economic liberty is a defining feature of freedom what is the philosophical concept of a free society? And here I turn to a famous conservative thinker Michael Oakeshott. He has never been associated with libertarianism, in fact he once said of Hayek’s *The Road to Serfdom* that ‘a plan to beat all planning may be better than its opposite but it belongs to the same style of politics’<sup>16</sup>; by that he meant that socialist rationalism that has characterised all collectivist politics from outright communism to moderate social democracy. Certainly an avowed traditionalist like Oakeshott would not have anything so vulgar as an economic policy but in his later work he outlined a sophisticated doctrine that provides a philosophical ‘plan’ for a free society. In *On Human Conduct*<sup>17</sup> he made an important distinction between the state as a ‘civil association’ and the state an ‘enterprise state’. In the former the state has no explicit purpose, it leaves people to pursue their own purposes. They simply follow ‘adverbial rules’; rules that do not instruct them to do anything but simply provide the legal framework for them to do whatever they wish to do: a neat summary of the real meaning of the rule of law. A state constantly issuing commands cannot provide the legal certainty that a free society requires. In the enterprise state the central body busies itself endlessly with public projects such as a national health service or a welfare state. In so doing it naturally limits their liberty. It is a matter of regret for Oakeshott that in post war Europe, and Britain especially, the state as a civil association has been replaced by the state as an

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<sup>16</sup> See his *Rationalism in Politics and other Essays*, (London, Methuen, 1962, p. 21)

<sup>17</sup> *On Human Conduct*, (London: Oxford University Press, 1975).

enterprise organisation. Of course, conventional conservatives had been complicit in this transformation which reached its apogee under the premiership of Edward Heath (1970-74).<sup>18</sup>

Conservatives, who like to invoke Oakeshott when they distance themselves from free market ideology, would be surprised to discover that their hero provided the groundwork for that very ideology. The threats to a free society are not exhausted by wholesale socialist revolution alone, they come from the long term effect of seemingly minor infractions of a civil association. In western countries that clearly is exemplified by the rise of the welfare state.<sup>19</sup> The mistaken assumption is that without public welfare individuals could not provide for their health, old age pensions or their children's education. Yet the interesting thing is that these things were provided before the state made their provision compulsory. They are now managed by an ever-growing band of civil servants. Bismarck's Germany introduced compulsory national insurance in the late nineteenth century ostensibly to forestall real socialism but it produced the destruction of real liberalism. This was copied in Britain with the National Insurance Act of 1911, the foundation of the modern welfare state. Yet all those problems which the new legislation addressed were already being solved by voluntary arrangements. The Friendly Societies and trade unions already provided unemployment insurance, health care and aid to widows. In fact, people would voluntarily spend more on these things than the coercive state does through taxation. There is no better example of this than the nationalised health system in Britain. The British have about the worst health system in the civilised world with massive waiting lists, delays to operations and the lowest cure rates in Europe for cancer and heart disease. In Britain we spend only 9% of GDP on health, France and Germany through a complicated social insurance system about 11-12% and the United States a staggering 15%. There reason is that British expenditure on health care is entirely tax funded and given the vagaries of democracy the voting system does not convey accurately to government the true nature of the demand for health care. If people were free to choose it is almost certain that they would prefer more spending on health that the state currently provides.

### The Prospects for a Free Society

With only North Korea and Cuba left as old-style Marxist totalitarian dictatorships and China securing a measure of economic liberty the prospects for freedom throughout the world appear to be good. But appearances can be

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<sup>18</sup> See Norman Barry, 'The New Right' in Kevin Hickson, *Conservative Political Thought since 1945* (London: Macmillan, 2005).

<sup>19</sup> See Norman Barry, *Welfare*, (2<sup>nd</sup> edition 1999, Open University Press)

deceptive, especially in nominally free societies. Despite the triumph of free markets throughout the world there is little chance of a diminishing role for the state. To take Britain as an example: public spending as a proportion of Gross Domestic Product has grown from 37% to 44% under the allegedly freedom friendly New Labour. The Conservative opposition have explicitly ruled out tax cuts, should they return to office, and have indicated that they will retain Labour's public spending plans. Even George W. Bush's America, despite a substantial Republican majority in Congress has increased such spending and has also run up huge public sector deficit, wiping out the zero deficit, a legacy of the Clinton era.

Oddly enough, some of the great strides towards economic freedom have been made by nominally Labour governments. The best example is New Zealand, whose finance minister, Roger Douglas started to cut inflation, reduce public spending, privatise extensively and freed the labour market from the over-weening power of the trade unions. The process was continued by Ruth Richardson. Douglas had inherited a huge welfare state from a previous nationalist (conservative) government. And in Australia, which had been bedevilled by excessive economic protectionism for decades, only dismantled the impediments to free trade under Hawke and Keating of Labour. Notice that all of these cases are examples of my earlier understanding of liberty as the 'non-restriction of options'. They are all economic and feature as part of the essential unity of liberty which has been such a victim of the twentieth century's distortion of the concept. But this is not to rank economic liberty ahead of the other liberties. Chiang Kei shek's Taiwan did precisely this: the island state off the coast of China certainly had the market but very few other liberties: not unlike formally communist China today. But it is not for the theorists of liberty to rank the respective liberties, all are equally important. But in practice it might be better for societies struggling to become free to seek economic liberty first. Historically the transition from economic freedom to civil liberty seems to be smoother than from civil liberty to economic freedom.

But how can liberties be protected? Theorists of a free society must surely suggest measures for the preservation of all liberties but that may not be possible or even necessary. Many countries have elaborate constitutional guarantees of liberty but in practice had very few freedoms. And Britain which has none constitutionally still has a broadly free society. Perhaps it is the cultural background of a society that makes liberty possible regardless of the formal political system.

But one thing is certain: majoritarian democracy, despite its emotional appeal, is no guarantor of freedom and maybe a threat to it. The majority is likely to be composed of those who have some sociological binding force, often religion, and are hostile to minorities. Such sociological facts are likely

to be more persuasive for the public than abstract ideals of liberty and tolerance. It does not mean that liberty is more appropriate for people of a certain development and inappropriate for others but it is undoubtedly the case that it seems more cherished in some countries and traditions than others. But nevertheless the theorist of a free society starts from the assumption that liberty is attainable for all and its moral prescriptions fully universalisable.

Right now, the biggest immediate threat to liberty in the West comes not even from the state but from religious extremists and terrorist groups who themselves have no respect for freedom and tolerance. To protect our own citizens and freedoms the state might have to do things that are themselves illiberal. Does the threat of terrorism, and the way it is dealt with pose insoluble problems for liberty? In one sense yes, for the state has always used ‘necessity’ to attenuate our liberties. But a classical liberal, not an anarchist, can deal with the problem. After all there is at least one legitimate function of the state: the production of the genuine ‘public good’ of security.<sup>20</sup> As I have mentioned earlier, this does not validate laws against incitement, where there is no actual crime committed, but it does authorise the state to take action where our lives liberties and property are threatened. Of course, whatever the state does must be conducted within the rule of law, otherwise all our liberties will be lost and we are no better than the terrorists that threaten us. Indeed, one wonders whether traditional rules, by common law or statute, are sufficient and make the necessity of special terrorist law unnecessary? Such laws usually mean a relaxation of the rules that make it obligatory for the state to bring a suspect before the courts within a short period of time: an attenuation of the invaluable habeas corpus rule. Britain tried last year to allow the police to hold people in custody without charge for up to 90 days. The excuse was that the police would require more time to do their investigations. Fortunately parliament had the good sense to reject this draconian measure but the time limit was still increased to 28 days (from). One suspects that liberty is better protected by the more efficient enforcement of traditional criminal law than the invention of new state powers. After all, the most significant accumulation of the state’s powers has come about through war. Here Mill’s imprecise harm principle is most easily stretched to breaking point. Spencer’s equal liberty principle is more appropriate precisely because it is more limited in scope. As the old adage has it, the price of liberty is eternal vigilance. We must be extremely wary of the powers we give the state.

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<sup>20</sup> See Norman Barry, ‘The Rationale of the Minimal State’ in Andrew Gamble and M. Wright, *Restating the State* (Oxford, Clarendon Press, 2004).