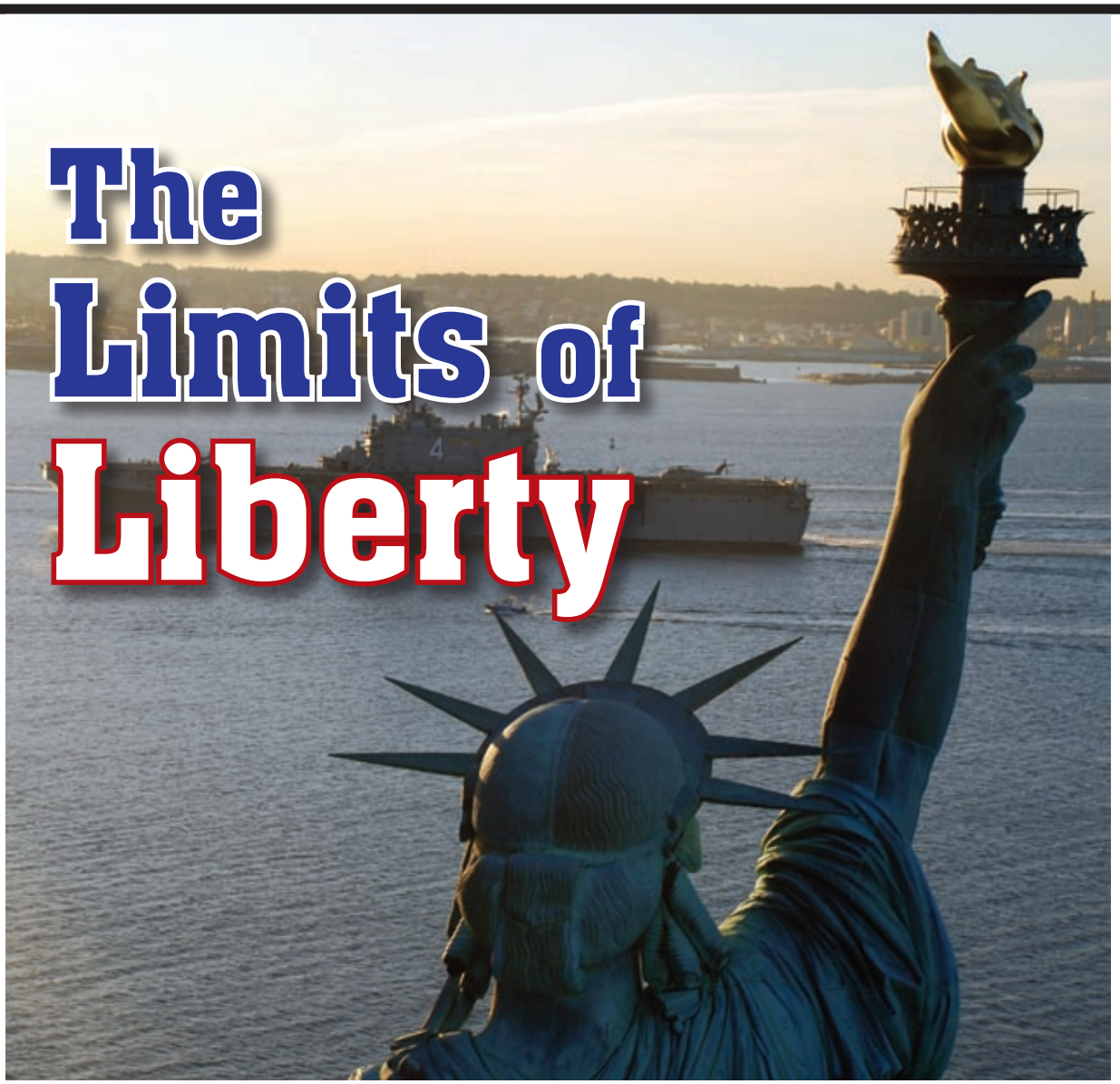
The Limits of Liberty



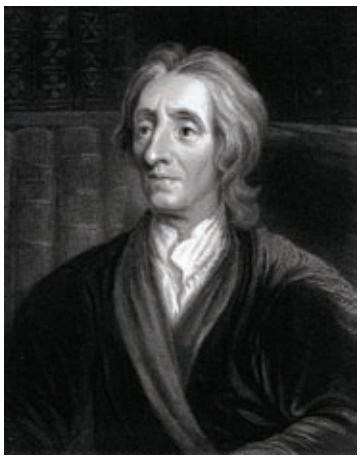
As license now trumps responsibility, the Western world fritters away its most treasured possession.

Roger Scruton

THE AMERICAN SPECTATOR'S ESSAYS on "the future of individual liberty," which have appeared during the course of this past year, reminded us that liberty remains one of the defining issues of modern politics: it is what is at stake in domestic controversies, in foreign relations, and in the broader ideological movements of our time. The writers have considered the conflict between liberalism and conservatism, the disputes over political correctness in schools and colleges, the emerging issue of religious liberty, the battles over the Constitution, the tension between the European Union and the nation states of Europe,

the foreign policy problems created by Russia and China and by the aftermath of Communism, and the broader conflict between the West and radical Islam. And in all these matters liberty is a central political value and one of the things most at risk.

In referring to liberty, however, are we referring to a single good or to a multitude of goods? And are there limits to liberty, beyond which it ceases to be a good? Such questions are not easy to answer, for in all the areas covered by the writers, the controversies and the ambiguities run deep. At the very start of the modern discussions, in his *Essay on Toleration*, John Locke distinguished liberty from license, reminding us that there are freedoms that we abhor, and which it is the duty of government to extinguish. Exactly how to identify those "licentious" freedoms remains highly controversial. Moreover, we know that one person's liberty may conflict with another's. Hence libertarians, who believe that the sole aim of government is to protect and amplify the liberty of the citizen, cannot assume that this statement contains the whole of politics. We must still devise the institutions—the minimum or "nightwatchman" state, as Nozick describes it—that will reconcile the freedom of each citizen with the freedom of his neighbors, while maximizing freedom over all.



But there is a deeper question, which is that of liberty itself. When I unleash my dog, I grant him his liberty to move as he wishes. And we think of this liberty as a good—something that an animal needs and enjoys, and of which he should not be wrongly deprived. We bewail the fate of the pigs raised in narrow cages and unable to turn around for days on end. For we believe that animals too need liberty, even if only the liberty to move as their instincts suggest. And without this liberty they suffer.

Yet that is not what we mean by political liberty, which is the freedom of people to pursue their long-term projects without impediment from their fellow citizens or from the state. And it has been argued on many sides that political liberty, in this sense, has been a distinguishing mark of Western civilization, being implicit to our forms of government long before the Enlightenment spelled it out. Brian C. Anderson, writing in the October issue, follows Michael Novak who, in his book *On Two Wings* of 2002, rehearses the familiar thesis that Western civilization arose from two powerful spiritual forces, one originating in Athens, the other in Jerusalem, one expressed in Greek political philosophy, the other in "Jewish metaphysics." The Greeks defined liberty as a political condition—the condition of the man who is "owner of himself," as opposed to that of the man who is owned by another. And the ideal *polis* is one that would enable this to be the *normal* condition of citizens within a shared public space. Thus was born the *agora*, the meeting place of the community, in which the whole body of citizens participated in making the laws to which each of them would be subject.

The Jews defined liberty in another way, as an inner condition—the condition of the creature capable of free choices, and whose freedom was manifest in his relations with others, in his emotional commitments, and in his sense of accountability before his eternal judge. As Rémi Brague put the point, in his trenchant contribution to the May issue, "outside the Judeo-Christian tradition, it has been rare for thinkers to suppose that God endowed us with a nature of our own, that freedom is a part of that nature, and that it is through the exercise of freedom, and the errors that inevitably stem from it, that we fulfill God's plan." And he added that "the mainstream tradition of Islam has certainly regarded freedom, both personal and political, as valuable—but valuable largely as a means to submission."

From the discussions of Anderson and Brague we can conclude that there are two ideas of freedom at issue—freedom as self-ownership, which is the core political idea, and freedom as the capacity for responsible choice, which is the idea that animates the Judeo-Christian worldview. And, if we follow Brague, the religious tradition that attached us to the second of those ideas supported the political tradition centered on the first. But there is also a tension between the two. The constant attempt to extend the reach of self-ownership raises again the problem that troubled Locke—the problem of distinguishing liberty from license. The point is made in other terms by Judge Robert Bork, in his penetrating discussion of the Constitution (*TAS*, June 2008): the Supreme Court, in its constant invention of the

"rights" necessary to protect the elite lifestyle from legislative control, has also promoted customs and practices that undermine social values, and make it far less likely, in the times in which we live, that genuinely free beings, capable of responsible choices, will emerge.

Social thinkers like Charles Murray and James Q. Wilson have documented the domestic and sexual anarchy that surrounds so many children from birth and the damage that it inflicts on their development into responsible adults. It is surely evident that this anarchy could be limited only by a legislature determined to reinforce family values with whatever sanctions and incentives are available to it—for instance by restricting the availability of pornography, by offering incentives to traditional marriage and withholding endorsement from other kinds of sexual union, by ceasing to reward feckless behavior through the welfare system, and by penalizing fathers who abandon their children. But all such policies involve taking sides in what should be, according to the liberal orthodoxy, matters of individual moral choice. As the Supreme Court expressed the point in the celebrated case of *Planned Parenthood v. Casey*, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life." Any attempt by the legislature to forbid activities that this or that liberal conscience might seize upon as essential to the goal of self-fulfillment, or as justified by "the mystery of human life," can be struck down as unconstitutional. And the effect of this over the last 40 years has been to erode the distinction between liberty and license to the point where the legislative privileges once offered to marriage and the family have now entirely disappeared.

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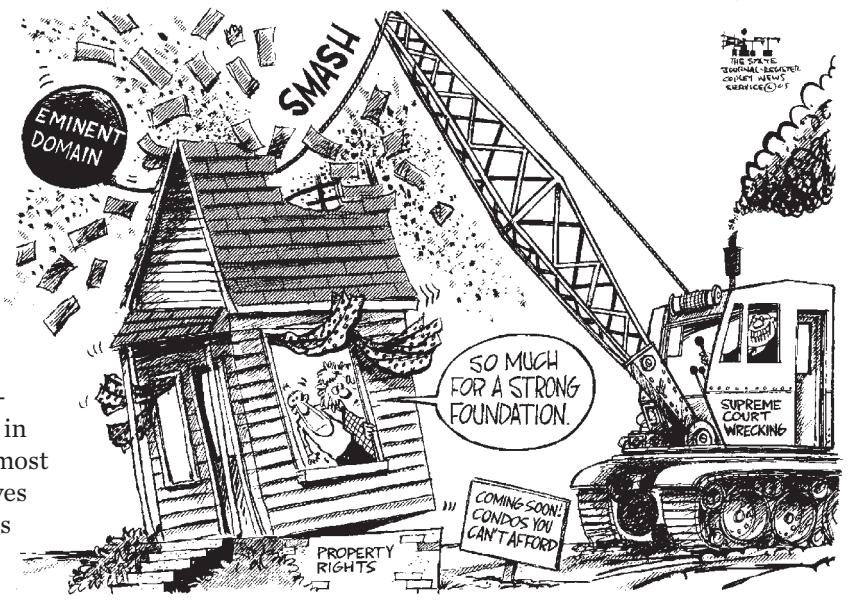
Locke believed that license involves extending liberties beyond the point at which one person's liberties can be reconciled with the liberties of others. And this can be witnessed today, as Judge Bork's examples show. The rights protected by the Supreme Court grant freedoms to parents while removing them from their children. Children in the womb don't have the right to life, and if they are born nevertheless, they certainly have no right to parental protection or to the normal comforts of family life. And this suggests a deep point at issue between liberals and conservatives in the constitutional battles of our time, the one claiming space for adults to enjoy their brief time in the sun, the other hoping to constrain adult behavior in the interests of future generations. Freedom that can be enjoyed by one generation only by condemning the next to dependency surely deserves the name of license.

An interesting twist is added to this argument by Robert P. George (*TAS*, September 2008), who shows the extent to which liberals on the American campus are prepared to intimidate students who fail to endorse their orthodoxies regarding sex. An interesting paradox has begun to emerge. Conservative defenders of liberty against license are being deprived of their liberties—and in particular liberty of speech and opinion—by the defenders of license. In the new campus censorship we begin to see the depth of the conflict here. The old idea of a liberal education emphasized the value of education in freeing the mind, and in inducing habits of informed and responsible choice. Education was seen as a means to liberty in its inward meaning, the meaning that Anderson and Brague associate with the original Jewish revelation. Now, however, the goal of education is often seen as a more outward liberty, associated with an ever-expanding sphere of individual rights, and a breaking free from the constraints of traditional morality in the interests of self-expression. To conservative opinion this involves the pursuit of license. To liberal opinion it involves the pursuit of liberty in its only objective form.

As I suggested, the conflicts and ambiguities here run deep. We all of us value the liberties associated with the Greek ideal of self-ownership; and we are all aware that liberty must be restricted, if only to ensure that the liberty of each person is compatible with the liberty of everyone else. The question is, where to draw the line, and on what principle? There is a schematic answer to that question which holds that individuals should be granted those liberties necessary to ensure that they have effective *sovereignty* over their own lives. And this is an answer on which liberals and conservatives may in principle agree. If there is any feature of Western political sys-



tems that distinguishes them from their rivals in the modern world it is this: that they are designed not just to govern people, but also to guarantee their sovereignty. Individuals in Western states are sovereign over their own households; they enjoy consumer sovereignty through the market and political sovereignty through elections. They are sovereign in their projects and careers, in that neither the state nor their fellow citizens can compel them in a favored direction. They have a right to life, limb, and property, and these rights are secure against the state, subject to principles of good behavior enshrined in the criminal law, and recognized by all, or almost all, as valid. Of course liberals and conservatives will differ as to how far these individual rights should extend, and the ways in which sovereignty can be properly exercised. But they differ only because they are both pursuing the same idea—the idea of a society of self-owning individuals, each of whose sovereignty is compatible with an equal sovereignty granted to everyone else.

Seeing things that way, we will surely agree with Paul Johnson (*TAS,* March 2008), in recognizing private property as a cornerstone of liberty. A property right is a fragment of individual sovereignty: it says that the use, exploitation, or consumption of a certain thing can take place only with the consent of the individual owner, whose interest will be protected by the law. As Johnson points out, private ownership of land was one of the factors that forced the Kings of England to grant liberties to their subjects. And it is the lack of private ownership that left the victims of Communism unprotected against the Communist Party and its members. Likewise the invasion of property rights by the unscrupulous use of "eminent domain" is a growing threat to liberty in America. Private property enables us to close a door on our oppressors and to open it to our friends. It enables us to deal freely in goods and strike bargains for our needs. The free market is a natural extension of private property, and as we have seen in the dire history of 20th-century Europe, the abolition of the market economy went everywhere hand-in-hand with the oppression of the individual, and his subjection to the state.

As Anne Applebaum argued, however (*TAS,* April 2008), the free market is only one part of social liberty. Her telling comparison of Poland and Russia since the Communist collapse shows that private property and the market are not enough to establish the kind of freedom that we in the West take for granted. Equally important, and perhaps more important when it comes to human ideals and social fulfillment, is the liberty of association. For this is what permits civil society to grow outside the control of the state. Under Communism people were permitted to form families. But any other form of association was regarded with suspicion, and almost all private societies were outlawed. It was not only schools, universities, and medical facilities that were monopolized by the state. Every little platoon, from the symphony orchestra to the local brass band, from the scout movement to the philately club, was either controlled by the party or outlawed. Even the churches came under Communist Party supervision—except in Poland where, as Applebaum shows, they created a unique space in which civil society endured through the years of darkness. Hence it was in Poland that the overthrow of Communism began.

Freedom of association is so evidently a part of individual sovereignty that you would assume that both conservatives and liberals endorse it. But this is not so, and for a very interesting reason. Associations make distinctions; they breed hierarchies; they foster competition; they are sources of local pride and individual aspiration. In other words, they are, potentially at least, the enemies of equality. Hence they are apt to fall under liberal suspicion. Private schools, for example, have been heavily penalized in Europe, by those who believe them (rightly) to be the

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source of social inequalities. Private clubs that exclude women have been outlawed in America, and associations like the Boy Scouts, which (for understandable reasons) refuse to employ homosexuals, have been subjected to discriminatory treatment—most notably by the city council of Philadelphia, which has forced the Scouts to leave the property that the Scouts once gave to the city. The Communist move to control all associations, to outlaw charitable associations and to make every social institution into a "transmission belt" was simply the extreme example of a motive that remains widespread in modern societies—the desire to neutralize those exercises of human freedom that offend against some code of equality, "inclusion," or political correctness. As a result, freedoms that our grandparents took for granted—the freedom, for example, to employ whom you want in your business, to admit whom you want to your school or university, to fire someone who is in breach of his contract, even to offer your services as your conscience dictates—have now been limited or even confiscated by the state. In a recent case a Californian couple who ran a photography business were found guilty under anti-discrimination laws, when they declined the request to photograph (for a fee) a lesbian "wedding," on the grounds that it was not consonant with their Christian principles to be present at such an event, still less to endorse it with their services. Here is another telling example of liberty confiscated by the advocates of what many would regard as license.

In America, the hostility to free association on behalf of "inclusion" has been most vividly apparent in the feminist movement. But, as Christina Hoff Sommers pointed out, in an influential article (*TAS,* August 2008), feminists have airbrushed from the history of their movement the true advocates of liberty, in order to idolize the radicals who were more interested in conscripting women than in granting them their freedom. The conservative feminists, whom Sommers credits with the *real* work of emancipating women in the 19th century, were far more influential than the radical feminists who are currently identified as the movement's founders. But they were traditionalist and family-centered. As Sommers puts it, they "embraced rather than rejected women's established roles as homemakers, caregivers, and providers of domestic tran-

quility—and [they] promoted women's rights by redefining, strengthening, and expanding those roles. Conservative feminists argued that a practical, responsible femininity could be a force for good in the world beyond the family, through charitable works and more enlightened politics and government." In short the conservative feminists, such as Frances Willard, adhered to the traditional image of woman, as "the angel in the house." They did not wish to destroy the family or the man's place within it, but to grant self-ownership to the wife and mother on whom the peace of the household depends. Such feminists were liberals, not in the modern sense of demanding state-enforced equality, but in the classical sense, of demanding rights of self-ownership that would give women the same sovereignty over their lives as that which had been enjoyed by men.

As Sommers points out, the home of radical feminism is not the family or the workplace; it is the campus. Radical feminism is an opinionated movement, dependent upon the massive rents on middle-class incomes that are available to those who can control the university curriculum. The campus feminists show all the intolerance documented by George in his review of academic freedom: they are notorious for devising courses that impose ideological tests for entrance and successful exit, that ignore all countervailing arguments and alternative visions, and that have the closing of the student mind as their implicit goal. And they have more or less wrecked the traditional curriculum in the humanities, by inventing the specious subject of "women's studies," and by promoting "feminist readings" of classical texts—in other words, readings that undermine the authority of those texts, and show that we should not in fact be reading them. Moreover, by advocating suspicion and hostility to men, the campus feminists have begun to recruit young women to a way of life that condemns as an institutionalized path to oppression the most important liberty that a woman can enjoy—which is the liberty to be a wife and mother, in a home of her own. For Simone de Beauvoir, indeed, that is a liberty that no woman should be granted.

Nevertheless, liberty of opinion still exists in Western societies, and although I have done my academic career no good by writing the above paragraph, *The American Spectator* will not suffer from publishing it. To what do we owe this great achievement? The test case, as Seamus Hasson showed in the first essay in the series (*TAS*, February 2008), is religion. Religious opinions are unlike scientific opinions or even political opinions, in that they are expressions of existential commitment. Religious believers identify their deepest interests, their community, their sense of life's purpose, through their faith, and react to those who question it with suspicion and distrust, if not downright hostility. How then can a society be constituted, so as to permit the peaceful coexistence of rival religions, and to protect people who live by one faith from the intolerance of those who live by another? As Hasson argued, the American Founders took the bold step of addressing this problem in the Constitution, introducing the "no establishment" clause in order to ensure that the state would remain neutral in religious disputes, standing above them and maintaining in the face of them the equal right of every citizen to the opinions that are his.

As Hasson reminds us, the purpose was not to repress religion or to exclude it from the affairs of state. On the contrary, the purpose was to *permit* religion, and to allow people of faith the right to practice and express their beliefs without hindrance from those who do not share them and without hindrance from the state. Once again, however, the

defender of liberty comes up against the advocate of license. Religion is one of the most important vehicles for the passing on of social order, moral values, and spiritual capital. Religious people are by nature hostile to license, strive to control their sexual lives, and are usually first in the exercise of those conservative virtues that get up the liberal nose. They are eager to teach children the norms of restraint and decency; they are in favor of discipline and respect and on the whole support the adult against the adolescent in all matters where the two conflict. Hence the advocates of self-expression and moral anarchy would like to marginalize religious people, and to remove their influence from the public space of our culture. To this end they have reinterpreted the "no establishment" clause not as *permitting* religion but as *forbidding* it. Religion, they argue, is excluded from every office, activity, or social arena governed (however indirectly) by the state—so there cannot be prayers or Bible classes in public schools, there cannot be any acknowledgement of God, the Ten Commandments, or the ascendancy of the Christian religion in any legal or political institution, and those who receive state support for their charitable work among the poor and the broken-hearted cannot use the Bible as their guide. Never has a more effective means been discovered, of cutting off a whole people from its inheritance of moral and spiritual capital than this one, whereby the constitution devised to permit religious beliefs is used as an instrument for suppressing them.

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This returns me to Rémi Brague's discussion of the Judeo-Christian inheritance. As Brague points out, the Judeo-Christian tradition has portrayed God as standing in a free relation to his creatures. He has not sought to compel our love—for love is not love when forced. He has sought to reach an agreement, a covenant, that will govern not only our relations with Him but our relations with each other. That seems to imply a contrast with the Islamic vision. Islam means submission, and though this submission should be freely undertaken, it cannot be freely escaped. Hence it is easy to interpret the Quran as forbidding us to question, or even to interpret, the direct commands of God. Those who cite the holy book in justification of oppressive customs such as forced marriage, female circumcision, the stoning of adulterers, and the sequestration of women do so with no sense of blasphemy. They may have mistaken the letter of the text, but they are confident in its spirit. In their eyes the God of the Quran is an angry old man with a beard, a kind of super-mullah, as fierce and humorless as his spokesmen here below.

That this is a travesty of Islam goes without saying. But it is a travesty with a large and popular following, rooted in a long-standing way of reading the Quranic verses. And it contrasts with a central strand of the Christian tradition, to which we owe what is perhaps the most important guarantee of liberty in the modern world, which is the rise of a secular jurisdiction. The privatization of religious law was clearly a part of Jesus's mission, and one of the reasons why he aroused such hostility from the Jewish religious authorities. His striking pronouncement in the story of the tribute money, that we should render unto Caesar what is Caesar's and unto God what is God's, has served as authority down the centuries for the view that, in public matters, it is human and not divine government that should be obeyed. This idea gained credibility through St. Paul's letters, influenced as they were by Roman law and by the knowledge that the early Church enjoyed the protection of a developed system of law. This law did not claim religious authority and was tolerant of all gods who did not openly confront it with intransigent demands. Even if religious edicts crept back into European jurisdictions after the triumph of Christianity, the Roman vision of sovereignty as exercised through secular law survived into modern times. It served as the foundation of national (in other words territorial) jurisdictions, and shaped legal systems in which religious diversity is not merely permitted but openly tolerated, as being no concern of the secular state.

This kind of secular jurisdiction has found its home in the nation-state, and—as Jeremy Rabkin

points out, in the last essay in the series (*TAS*, November 2008)—the nation-state has been the greatest guarantor of freedom in the modern world, precisely because it establishes a territorial, rather than a religious, jurisdiction. It is this that enables the nation-state to treat citizenship, rather than creed, as the criterion of membership, and that enables it to adjudicate conflicts between people of different faiths. Once again, however, we find a growing conflict between conservative and liberal over the role of the nation-state and its claims to allegiance. Conservatives have, on the whole, accepted nationality as a sphere of local duties and loyalties, defining an inheritance and a community that has a right to pass on its values from generation to generation. The nation may indeed be the best that we now have, by way of a society linking the dead to the unborn, in the manner extolled by Burke. And for this very reason it arouses the hostility of liberals, who are constantly searching for a place outside loyalty and obedience, from which all human claims can be judged. Hence, in the conflicts of our times, while conservatives leap to the defense of the nation and its interests, wishing to maintain its integrity and to enforce its law, liberals advocate transnational initiatives, international courts, and doctrines of universal rights, all of which, they believe, should stand in judgment over the nation and hold it to account.

Out of this has arisen yet another conflict between liberty and license. The liberal position tends to found itself on the idea of human rights, and to espouse international jurisdiction, as upholding human rights against the governments of nation-states. Conservatives, witnessing the behavior of the U.S. Supreme Court, have become suspicious of the "rights" idea. When something is a fundamental right under the Constitution, then it becomes an absolute claim in the hands of the individual, and one that cannot be limited or compromised by public interest. It needs only one person successfully to argue that some particular piece of pornography falls under the protected category of free speech, for the entire mass of offensive material to be thenceforth protected absolutely, lifted above the world of legal and political compromise, and given a protection that no normal and worthy human interest could ever hope for. Hence "rights" talk is as useful in the cause of license as it is in the cause of liberty.

Rights, as the liberal American jurist Ronald Dworkin puts it, are trumps. If my interest is something I want, while yours is something you have a right to, then, in any conflict, it is you whom the law will protect, not me, even if my interest is more fundamental to my well-being than yours is to your well-being, and even if a compromise solution would be for the common good. Rights are rescued from the political process, and become non-negotiable possessions of those who can claim them. They give the courts precedence over the legislature, and allow unelected judges to undo the most elaborately thought-through and profoundly needed legislation, in order to protect the interests of the individual, however unimportant his interests might be. Rights therefore constitute a serious danger to the political process, as well as an absolute necessity if that process is to be founded in consent. Hence we should be meticulous in defining them, and show a true awareness of what is at stake. This awareness, needless to say, is vanishing from the political culture of our age, as more and more people scramble to define as rights, those interests that they wish to safeguard forever from invasion.

This is particularly so when it comes to international courts, which do not have to bear the cost of their decisions, and don't have to reconcile the rights they grant with the many interests that conflict with them. Hence international courts provide a perfect forum for people who wish to advance their own interests without concern for the conflicting interests of others. Here is a simple example: The careful attempt to reconcile conflicting interests on an overcrowded island has led the English Parliament to pass complex and sensitive planning laws that

control building in the countryside, and forbid people to reside where they choose. But the European Court of Human Rights has determined that ethnic "travelers" (i.e., gypsies) have a right to their "traditional lifestyle," which involves putting their trailers wherever they settle. This right trumps the interests of English residents, even when the travelers are not British citizens. The result has been massive conflict in the English countryside, leading to murder and arson. In a similar way international courts have defended the "rights" of terrorists against the laws designed to suppress them, the "rights" of migrants against the laws that limit their number, the "rights" of Muslims to defy dress codes established by law in order to prevent social fragmentation. And so on.

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Look at the growing list of rights defined and upheld by the UN and the various international bodies, and you will see the way in which agendas have taken over from liberties in defining the rights of the individual. The UN Commission on Human Rights is currently policing the world for signs of "Islamophobia," supposedly an offense against human rights of which the U.S. and its allies are principally guilty. The European Court is policing the legislatures of Europe for signs of "discrimination," forcing all parliaments to close down institutions that discriminate on grounds of "sexual orientation," so that Catholic adoption agencies can no longer function within the law. As the two examples show, the liberal agenda is no more likely to be advanced than the opposite agenda of the Islamists, but in both cases the principal casualty is liberty.

Where does this leave the advocate of liberty in the world today? Looking back over our series of essays, we can perhaps draw a few tentative conclusions. First, we must recognize that liberty is not the same thing as equality, and that those who call themselves liberals are far more interested in equalizing than in liberating their fellows. Secondly, the pursuit of liberty often disguises a hostility to established moral norms. When Adam Smith made freedom central to his vision of the modern economy, he was clear that freedom and morality are two sides of a coin. A free society is a community of free beings, bound by the laws of sympathy and by the obligations of family love. It is not a society of people released from all moral constraint—for that is precisely the opposite of a society. Without moral constraint there can be no cooperation, no family commitment, no long-term prospects, no hope of economic, let alone social, order. And interestingly, as we have seen, the advocates of equality and the advocates of license tend to be one and the same. Morality, they believe, is none of our business: the state is in charge.

Finally, we should recognize that this habit of calling upon the state, to take charge of matters that were once the concern of individual initiative and private charity, is the surest sign that the inner liberty shown in responsible choice is disappearing from our society. Its disappearance is both the cause of liberal policies and the natural effect of them. People are less and less inclined to take responsibility for their lives, to commit themselves to others or to social networks, to engage in charitable work, or to solve by free initiative what they can summon the state to take charge of instead. And by invoking the state in this way, they prepare the way for a loss of political liberty. The state comes with an agenda: it is less interested in freeing people than in equalizing them, less interested in upholding responsible choice than in extending its relief to the irresponsible. In the growth and the operation of the modern state, therefore, we see the way in which the two kinds of freedom—self-ownership and responsible choice—grow and decline together. And we see what the cause of the true conservative must be: liberty, in both senses of the word.

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