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# NEO-DEMOCRACY: ‘USEFUL IDIOT’ OF NEO-LIBERALISM?

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**Abstract:** This article explores a possible link between ‘neo-democratic’ states (the subject of a recent book by the author) and the underlying politico-economic ideology of our post-1989 world, neo-liberalism. Taking the UK and the US as examples, it argues that the shift in our way of looking at the world that neo-liberalism represents involves a forsaking of many of the assumptions of the social democratic polity of the 20<sup>th</sup> century. However this is not a leap into an unknown future so much as it is a return to a particular past. In the threatened transition to fully-fledged neo-liberalism, ‘neo-democracy’ fulfils a useful role as mask that hides from us the great political, ethical and legal changes entailed in such a move.

Keywords:

Neo-democracy; neo-liberalism; human rights; civil liberties; security

## Introduction

In a recent book I reflected on the layers of meaning that can be given to the terms ‘liberty’ and ‘security’ (Gearty 2013). So far as the second of these is concerned, that book identifies three understandings that attach themselves to the word. First there is ‘national’ security, where the primary interest lies in the protection of a piece of land: a territory, a nation or a state. Then, second, there is the more human-centred way in which we use the term, to connote our safety from attack, our freedom from violent intrusion, our individual (and family) ‘security’ in our person and in our homes, a ‘feeling of peace’ that allows us ‘to move forward with a sense of security’ (Johnson and Clifford 2003: 1). More ambitious – but still human-centred – is a third, broader, approach which sees security as something that we have which gives us protection against circumstances in our lives that damage our potential, a safety-net lying below us (guaranteeing a home, health-care, schools for our children, etc) while we negotiate the tricky tightrope of life that is eventually to lead us to what we hope will be a dignified end (Committee on Economic, Social and Cultural Rights 2008). This last resonates with the work done in the field of human security which has seeks to disentangle ideas of security from the discourse of terrorism, not least in order to explain and perhaps therefore help reduce specific outbursts of political violence (Zwitter 2010).

‘Liberty’ is an even more multi-layered idea than ‘security’ but for present purposes we can also identify three relevant meanings, each of which has the advantage here of being to some degree the partner of one of the meanings of security that I have just identified. First there is liberty as a condition of political being, of

living in a free state, a place where freedom is thought of as something a community enjoys as a collective entity (Gearty 2007). (This corresponds with ‘national security’ above.) Second there is the liberty of the individual from outside interference, liberty in the negative sense, a guarantee of non-interference (going beyond but certainly incorporating individual security from attack etc. – see famously Isaiah Berlin (1979)). Third there is what is often called in contrast to this proposition (with its suggestion of liberty as non-interference), the more prescriptive concept of positive liberty, the freedom of the individual to lead a successful life, one in which he or she flourishes, realising his or her potential to the greatest possible extent (Taylor 1991). Now this last cannot be done all by ourselves. Building on an already stretched metaphor from the last paragraph, such a reading of liberty requires a ladder onto the tightrope so that life can be as daringly accomplished as the walker desires – but that ladder would never be ascended without the walker knowing there was always going to be security against a fall - not many of us are so foolish as to want to be Icarus, whatever the risk. That ladder can be put in place for some by families or by friends, but not everyone is so fortunate. So this kind of liberty does to a great or lesser extent assume an interventionist obligation on the part of a third party, and that in a democracy is invariably assumed not only to be family or some part of civil society but the state as well, through its delivery of pre-school support, education, health services, and so on.

I need at this stage in my preparation for what follows to weave a third term into my argument, namely ‘human rights’. It is clear that the phrase ‘human rights’ can also accommodate all these meanings of security and liberty within its capacious linguistic lodgings.<sup>i</sup> Liberty is an individual right as well as a state of living integral to

a functioning, human-rights-respecting society (the right to vote; freedom of political expression; etc.). It is also something towards which, in its very broadest meaning, our language of social and economic rights aspires, with its guarantee of just those entitlements that I have identified as the essential building blocks for a successful life. And these rights, too, are exactly those that we see as essential to human security, which are designed to prevent our decline (through misfortune or our own foolishness) into abject impoverishment. Just as there is positive and negative liberty, so too are there positive and negative conceptualisations of specific rights, each capturing the difference between a condition natural to us which should not be interfered with (i.e. thinking, believing, walking, talking, assembling, associating) and one which may require the actions of a third party to bring about (such as food on the table; a roof over our heads; a place for our children to learn).<sup>ii</sup> Human rights are our new way of saying these old things in a powerful modern way: they complement rather than subvert traditional understandings of liberty and security, bringing a fresh sense of urgency and of moral obligation to the discussion.

In what follows, I intend to take these readings of liberty and security (and of human rights) for granted, or rather more accurately to set their complexities aside for now. I don't want or feel I need to spend time analysing their hidden intellectual depths. Rather I see them here in a deliberately naïve way as being uncomplicatedly about individuals being able (in human rights terms entitled) to lead good lives in a free society, given the chance to succeed while being protected from extremes of distress. The focus here is, therefore, not on what liberty and security (and human rights) entail. Rather it is on what I suggest is the difficult, less frequently asked question of who actually gets to enjoy these freedoms/securities/rights as a matter of

practice: the really interesting issue is one of reach, not remit. Who enjoys these advantages in life now? Who has done so in the past? What does the future hold? My main focus in this article is on the second of these questions as a route to reflections on the third. My concern will be largely (but not entirely) with just two jurisdictions, the United Kingdom and the United States, though I draw European countries in towards the end and (so far as the history is concerned) what I have to say may well be capable of being rolled out across many of the capitalist, colonising states that engaged in a successful power struggle with socialism in the 20<sup>th</sup> century. So at its most general (and ambitious), this article is about the reach of liberty and security in the 20<sup>th</sup> century and what this tells us about where we might be headed in the 21<sup>st</sup>. As we shall see it has been the deployment of the language of security that has made possible the achievement of what is described here as neo-democracy. It has been the Trojan horse within which the warriors intent on reconfiguring the substance of our political ideas have been hiding, and through receipt of which our polity has put its freedom at risk.

The perspective of this article is primarily that of law and of the history of civil liberties in practice. The intention is to complement the growing field of security studies in criminology that examines critically underlying assumptions about what we – as a demos; as a culture – mean by security (Valverde 2011). It aims, too, to connect with scholarship that concerns itself with how salience is achieved for the ‘everyday security’ that is of such enormous concern today (Crawford and Hutchinson 2016). Of course there is already an important range of work that engages directly with this field from the perspective of law and criminology (Hudson and Ugelvik 2012; Bigo and Tsoukala 2008; Goold and Lazarus 2007). There are essays in this special issue that

approach the issues dealt with here from other perspectives, that of the contemporary security/securisation debate for example (Virta and Branders 2016; Crawford and Hutchinson 2016), and also that of the scholar of criminology. The expert on terrorism has a particular perspective too (Cooper and Walker 2016). The interdisciplinary light which this particular contribution seeks to throw on the wider security/liberty connections revealed elsewhere has its primary focus in law but in locating itself in this way the piece emphasises in particular the way that legal power has absorbed a rhetoric of liberty without ever making full concessions to the need to deliver equal security for all. The hope is that this enquiry will assist in locating the law and practice of contemporary civil liberties insofar as it has been affected by issues of security in a way that adds understanding to both writers in the more sociologically-minded arena and to those whose interests lie in the more orthodox 'black-letter' law domain. Each 'side' of the discussion has much to learn from the other.

Crucial here is the distinction between law and practice. The argument is that the capacity of the law to mask truths on the ground behind a veneer of fine principle - long known to critical legal historians - is enjoying a great revival as a camouflage for the inequality that, it is argued, is part and parcel of neo-liberalism. By drawing it to the surface in the way it does, this article intends to give a warning to those in other fields not to reach too unsceptically for ideas rooted in legal principle that are in fact more partisan than they seem. The piece is offered, too, as a counter to any argument about the present that too easily succumbs to the temptation to fortify itself with memories of a supposed golden age, of freedom, or democracy, or whatever it might be. 'Security' has long proved a dangerously open term in the hands of judges, and



‘liberty’ a high-flung phrase that can be too easily subjugated to partisan readings of what security is declared to necessitate by those with the power to dominate discourse.

The central argument is that in the mature democratic societies under examination (primarily the UK and the US but encompassing continental European states and other well-embedded democratic states as well) the reach of liberty and security is narrowing, that the enjoyment of these two prerequisites of a successful life is becoming available to substantially fewer people than the assumptions of equality and universality that lie behind the democratic ideal would seem to suggest. The article argues that this move reflects the lack of the deep entrenchment of a democratic way of thinking even in the countries under scrutiny that appear so inured to it: indeed one of the necessary suggestions in the essay is that it has been the vagaries of international relations (including war and the fear of war) that have done more to embed democracy than any amount of good arguments or collectivist expressions of solidarity. The vulnerability of the democratic sensibility identified by the analysis here as having always being present has been exposed by the post-1989 resurgence of the market as (not for the first time in history) the seemingly invincible arbitrator of right and wrong, not only in the US and the UK but further afield as well. This shift has been at least eased and perhaps even caused by ‘neo-liberalism’ – an ideology that puts market exchange at the heart of human experience and sees governance as ‘rooted in entrepreneurial values such as competitiveness, self-interest, and decentralisation’ (Steger and Roy 2010: 12). Taking things at face value, never questioning the justice or morality of the resource-allocations it finds in the snapshot of the moment upon which it acts, neo-liberalism has inevitably proved itself

attractive to those with power in the market, with resources to augment rather than a living to eke out. I shall have more to say about the rise of this particular brand of late 20<sup>th</sup> century market primacy later – its assault on the democratic assumptions of that century has not been as yet fully frontal; rather it has availed of the inherent weaknesses in the prevailing systems that have been (as I argue) present from their inception to eat away at their core, reducing them too often to mere appearance rather than substantive reality: ‘neo-democracy’. When that appearance is fully rotten to the core, it will be time to dispense with it entirely. The ‘useful idiot’<sup>iii</sup> will have done its job. There are already some signs of this afoot, as we shall see. This might be – but is not inevitably – what the future holds.

### The false assumption of progress

Before we turn to this history as our route to an understanding of our possible futures, a few words are needed by way of answer to the first of the three questions posed a little earlier – concerning the present, about who enjoys liberty and security today. Many might not unreasonably assert that this concern for remit simply no longer arises. By the end of the last century, the achievement of liberty and security (in all three of the shapes mentioned earlier) had certainly widely come to be believed to be, within democratic polities at any rate, universal – liberty and security truly were (or were assumed to be) available to all. This was because of what had gone before: in the 20<sup>th</sup> century, fuelled by the reformist energies that naturally followed the social disaster of not one but two global wars, not only had democracy secured a firm grip on many states but the rule of law had increasingly come to be seen as a protection for all against governmental abuse of power. These breakthroughs matter here because

both ‘democracy’ and ‘rule of law’ are near *sine-qua-nons* for a ‘liberty’ and ‘security’ that is universal (see Bingham (2011) on this inter-connectedness). And after 1945 human rights increasingly became the medium through which the richer versions of security and liberty, identified above, came to be expressed (Simpson 2004: Chapters 13 and 14). The apotheosis of this era of progress was the year 1989, when with the collapse of the Soviet Union and its Communist empire, and (it should be added) turmoil in China, it seemed the people (and peoples) of the whole world were within reach of both liberty and security. Here on full display was the confidence of late 20<sup>th</sup> century liberal democratic culture: if Fukuyama’s (1992) now notorious ‘end of history’ was marked ‘liberty and security for all’, the traveller showing up in on Millennium night, 31 December 1999, could be easily persuaded that he or she had arrived.

If the years since the momentous events of 1989 seem to have confirmed liberty and security as universals either present or imminent everywhere, then they have also produced something of a mystery. On the one hand, we have continued to have this apparently unparalleled march of democracy, the rule of law and the protection of fundamental human rights; liberty and security for all in other words. Elections are held almost everywhere. Judges are declared to be independent in the written constitutions incorporating democratic values that now dot the globe. The UN’s commitment to human rights, accepted by the vast majority of states, increasingly embraces new rights (persons with disabilities; indigenous peoples), new mechanisms of protection (a UN high commissioner, special rapporteurs) and novel experiments in the legal enforcement of rights with a strongly social dimension (protocols to established treaties) (Tomuschat 2008; de Schutter 2010). On the other

hand, there is still a lot of poverty about in these democratic/human rights environments (Pogge 2008). Many have not been able to get on the tightrope and for those who have fallen off there will often be great hardship with little prospect of return – either for themselves or (increasingly) their children. The evidence tends to show the age of democracy and human rights is also one of deprivation and want (Oxfam 2015; OECD 2015). Moreover, the onset of austerity politics has further exacerbated the tension between poverty and human rights (see O’Connell 2013; Nolan 2014). This dark side to contemporary prosperity – with its widespread inequality (Alston 2015; and more generally Atkinson 2015) - appears to mock the claims of such cultures to have delivered on the universals to which their constitutions, their foundational principles and the speeches of their democratic leaders have committed (and continue to commit) them. As Thomas Piketty (2014) in his recent book shows, the logic of the contemporary organisation of capital points to a relentless increase in inequality, with more and more falling into the hands of fewer and fewer, and that democratic forms of government have by no means prevented this. In the countries under particular focus here, the gulf between ‘the haves’ and ‘the have-nots’ is getting bigger, and the pool of ‘haves’ is shrinking too while the very few grab ever more for themselves.<sup>iv</sup>

How can both these trends exist side by side? This is where the return to the past heralded in our second question shows itself to be relevant, becomes indeed a useful if salutary guide not only to where we are today but where we might be going to tomorrow. This assumption that we should *all* have such protections and opportunities is, after all, very new, and amazingly ambitious (see Tuomisaari and Slotte (2015) for much of the broad historical background). Being both novel and

idealistic, its grip on culture is shallower than many of its optimistic protagonists allow. In their origins, the remit of neither liberty nor security was never seriously believed to be universal. The Greeks talked only of freemen and Romans had their slaves, as did – notoriously – Thomas Jefferson (and even after the abolition of slavery in America of course this land of freedom had its ‘Indians’ to exterminate) (Giltaij and Tuori 2015). For much of the industrial era, the great majority of men and all of the women were disabled from voting in every capitalist country. Poverty was evident and (as exploitation grew) increasingly extensive in its impact and appalling in its consequences. The poor were seen only by a few – their influence on ethical discussion was correspondingly minimal (see the class accounts of Frederick Engels (2009) and Henry Mayhew 2008). The universalist breakthroughs of the 20<sup>th</sup> century were anticipated by the democratisation and labour movements of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries – their campaigns and strikes were bitterly resisted by established power (famously described by E.P. Thompson (1963)); indeed it is not obvious that they would have eventually borne fruit in the way they did without the later impetus of war (Pugh 1978).

If the layer of universalism thrown down over our culture is indeed as shallow today as it is (relatively) fresh, might this explain its lack of grip, the mismatch between what is claimed and the facts to be found on the ground, some of them detailed above? The health of any living surface depends on sustenance from below. In every country where democracy and human rights have become successfully embedded, they have been wrested out of a situation of prior inequality. As a result even in their pomp their victory has never been total. Blank slates do not exist in history. In our two main subject jurisdictions, the UK and the US, power and

affluence – for want of a better expression, the legatees of the ‘gilded age’ – have always fought back hard, resisting the move to universal liberty and security and afterwards to universal human/civil rights, and this has been despite whatever the system of government and constitutional principle have seemed to suggest. This retaliation has not prevented the march of universal liberty and security but the hostile skirmishing involved has weakened both, rendering each vulnerable to the present day debilitations that afflict them.

The hold of the local, of the family, of self-interest, of commitment to our own (or whom we think of as our own) remains deep; indeed some would say these rival particularities – or some of them at least - are getting stronger: the topsoil is affected by a resurgence in (antagonist) activity below. Lip service is still paid to universality in the way that younger generations pretend to obey their elders, following the forms but not the substance of obedience. Battered by an increasingly robust rival perspective on truth, the conditions needed for the success of universal liberty and security become harder to come by, the ethic that they offer humanity less secure than it seems, more liable to pressure from below and unpredictable activity from above, challenging surface assumptions. The job of the constitution, the courts and the rule of law, often honourably resisted by individual judges and benches it must be said, increasingly becomes the doing of lip service to universality. By asserting in this way the equality of all, the market’s allocation of wealth as power desires and accumulators of capital demand is masked in a way that allows such unfairness to thrive unnoticed.

The struggle for civil liberties

In the days up to and including the ‘gilded age’ itself (Twain and Dudley 1873/2002) which is broadly from the late 18<sup>th</sup> century through to the onset of the First World War in the UK while starting after the civil war in the US, no democratic or human rights scruples held power back, and the judges were almost entirely the servants of that power, capital (Jones *et al.* 2013; see also Fink 1990; Buhle and Dawles 1989). The results were predictable and frequently repeated: workers got shot; strikers were starved into submission; the army was mobilised if the going got rough; and reformers were hanged, jailed or transported (Wilson 2009; Dunn 2005). True (universal suffrage) democracy was a despicable plot by socialists to destroy society. Human rights (literally in the eyes of many philosophers – see Macpherson (1962)) belonged to the propertied, that is to those with the resources required to enjoy the privileges of ownership. In the UK, the US and beyond, law was a necessary control on the poor and a useful referee to determine arguments among the powerful (Horowitz 1992). There were two histories, one for the rich full of parliamentary manoeuvres and high politics infused by a tradition of liberty that was as deeply felt as it was (in terms of its reach) emasculated; the other often unwritten, a ‘people’s history’ of protest, suffering and class solidarity (Thompson 1963; Sedley 2011).

It was only with the slow embedding of democratic culture that the universal character of the value of liberty and the principle of the rule of law needed to be acknowledged (Pearce 2003) – democratic success (as earlier noted, forged out of the blood sacrifices of global war (Pugh 1978)) demanded at least this. Just when it became impossible to deny the legitimacy of democracy, however, it became possible to tar the proponents of any kind of radical vision of what democratic equality entailed with the brush of foreign subversion. War created such pressure for change as

to make mass suffrage inevitable – while at the same time equipping power to resist its most radical effects: democracy could not be gainsaid but its more terrifying implications could be avoided. It has not been sufficiently acknowledged by those complacent about the successes of today that 20<sup>th</sup> century democracy has never existed in a non-emergency situation (Ewing and Gearty 2000). The aftershocks of the Russian revolution of 1917 translated into a horror of Bolshevik-style ambition that outside the new USSR came to incorporate (on the part of the privileged) a deep fear of the use of emerging democratic institutions to achieve the same end. In the United Kingdom, therefore, we see the defence of the realm legislation morphing into peacetime controls on speech and assembly that were used effectively to control radical political engagement through the 1920s, attacking the Communist and even the Labour parties not as local sources of a rival political vision but as agents of a foreign power (Ewing and Gearty: Chs 2-4). In the United States espionage laws clamped down on the potentially successful political speech of the Socialist Eugene Debs, withstanding first amendment challenge in the process.<sup>v</sup> Before the war Debs had been an important domestic political figure arguing a socialist agenda, sharing much in common with other local movements such as the Populist Party and the Knights of Labour: during and after it he was a traitor seeking to wage war on his own people, not for his class but against his country.

The legacy of the 1914-18 conflict was that in both the US and the UK – the onset of democracy notwithstanding - it became impossible to tackle inequality (in the shape of vast capital accumulators or exorbitantly-scaled property owners) in any kind of radical way without seeming thereby also to be attacking the nation's institutions. Love of country was required to embrace love of privilege (or at least acceptance of



the unfairness it epitomised as part of this commitment to the greater ideal). No true patriot could criticise the inequality that - it now became apparent - the onset of democracy may have ameliorated but had certainly not destroyed. The history of the 'red Scare' of the decade after the First World War is one of a continuing coming-together in one of these two threats to the security of the nation, the first posed to the institutions of the state by forces that sought to overthrow these in the name of communist revolution, and the second aimed at the wealthy whose privileges had survived into the new era of mass suffrage and whose commitment to an unequal status quo was believed by the radical reformers/revolutionaries to require immediate remedial action. The United States saw the Palmer raids (Walker 1990: 43-5), the breaking of the steel strike of 1919 (Brody 1987) and continued persecution of Communist and socialist speech.<sup>vi</sup> The United Kingdom has the emergency legislation that followed the first war (Emergency Powers Act 1920), the successful defeat of the general strike in 1926 (Ewing and Gearty 2000: 155-213) and the hounding of the Communist party through the 1920s (including the prosecution of its leadership for sedition (*ibid.*: 136-44)). In both countries the story of civil liberties in the 1920s and early 1930s becomes largely one of resisting the controls supposedly necessitated by these two interlinked threats, to the institutions of the state and to the privileged within it. 'National' security was successfully elided with the security required by the rich. In London the hunger marches were brutally dispersed by the police (*ibid.*: 214-74; Dyson 1994), while in Washington outgoing president Herbert Hoover ordered the military authorities to disperse the 'bonus army' of veterans who had camped outside the White House in search of justice for their cause (Smith 2007: 282-4).

This interwar period in Britain has interesting parallels with the current position in the US and the UK – and an important difference. As now there were frequent protests: huge marches, demonstrations, petitions, inflammatory meetings in public and private halls, and so on (Ewing and Gearty 2000: Chs 5-6). The UK national government of 1931-35 shared many similarities with the coalition established to deal with the economic emergency in 2010 which (just as in 1935) was replaced in 2015 by a Conservative administration: a multiparty administration coalesced around a set of policies which were rooted in the assumption that household-style balancing of the books was the way to restore prosperity (Skidlesky 1967), and a National Economy Act of 1931 which authorised a range of across the board cuts in welfare and public services (Ewing and Gearty 2000: 216). In contrast to today, however, the opponents of such measures could plausibly be assimilated to external threats to the integrity of the state itself, represented by the Communist Party with its subversives at home and powerful foreign backers abroad. The Party was undeniably involved with the opposition to the cuts, it was supported by and supported the Soviet Union and it made common and effective cause with the many others who were fighting for social justice at the time (Pelling 1958). The links made at the time of the Red Scare directly after the first war had also been similarly not implausible, particularly at a time when the rhetoric of the new Soviet Union was suffused with the expectation of world revolution. This elision between the external and the internal challenges was frustrating for those seeking to deal with domestic injustice in its own terms but it could not be castigated as utterly without foundation. It is as though the public today could be credibly presented with the idea that it is Al-Qaeda/terrorist extremists who are organising today's popular campaigns against

ongoing budget cuts. (As we shall see later, and almost incredibly, an effort has been made to make just this sort of connection.)

We conclude this section by noting another parallel that is worth observing given our interest here in the breath of liberty and security, a point built upon the insights of many of the criminologists already referred to and others who have engaged critically with liberal assumptions about justice (Hudson 2003; Schauer 2015). So far as 1930s Britain was concerned, the equivalent political activities of Oswald Mosley's fascists to those of the left-wing agitators went largely without notice in Britain. They were given the run of the streets and the halls. So far as they were concerned, the British tradition of liberty, free speech and tolerance that had existed prior to democratisation were frequently invoked in defence of police refusals to intervene (Dyson 1994). And what was that tradition upon which the authorities then relied to defend their inaction against fascists? It drew its rhetorical force from a belief that Britain had always been a free country, which it had of course – but only for the few. A ringing and deeply embedded language of liberty and freedom was available for those who wanted to use it – but it had been a language which had at the same time and in the name of the security of the rich (personal and property) also allowed the most brutal attacks on democrats and socialists and trade unionists and others who challenged the system - the state violence of early capitalism and of the 'gilded age' to which I have already referred. This selectivity was surely supposed to have ended with the achievement of democracy - the UK even had a Labour government in 1924 and again from 1929 until 1931. Anticipating the contemporary language of *Prevent* to which we shall presently turn, long serving Home Secretary Sir William Joynson-Hicks defended to Parliament his pre-judgment in a public place

of the trial of leading Communists by asserting that there was no issue of principle to be worried about so far as his remarks were concerned because here were men who had been engaged in the ‘wrong sort of speech’.<sup>vii</sup> The rules of the game did not apply to them. The violence of the fascists in contrast was aimed at defending the unequal status quo, not subverting it.

### Controlling social democracy

These trends were confirmed and amplified after the Second World War. They were reflected in the structures put in place in newly democratic states after the end of that conflict. The US and UK had defeated fascism but could not have done so without the support of (and huge sacrifices made by) their Soviet allies. Europe beckoned as a reward for this particular victor, and resisting its advances produced the Cold War. It is now much better understood quite the extent to which the language of human rights was seen by many at this time as a liberal democratic ally in the struggle against Stalinist ambition. The defeated European powers were constructed along lines which reasserted democratic forms for sure but these were now to be explicitly tamed by judicial oversight. Brian Simpson’s (2004) history and afterwards work by scholars like Marco Duranti (2012) has shown how the appeal of the European Convention on Human Rights (agreed in 1950 and coming into force in 1953) lay in the support it promised for liberal democratic values, reflected as civil and political rights and also (in an early protocol) the right to property. Europe was to be allowed social democracy – but only of a fairly timid sort.

The beauty of the human rights approach after the Second World War was that it deepened the universal language of liberty (the ‘rights of mankind’ after all) while at the same time rendering permissible action against dangerous (socialist; egalitarian) liberty in the name of security. The new European constitutions made truly radical politics impossible (Mandel 1998). Special provisions in the European Convention allowed the authorities in signatory states to attack threats to freedom in the name of freedom (e.g. Article 17). The Communist party could be banned in West Germany<sup>viii</sup> and deprived of all freedom of radical manoeuvre in Italy (Mandel 1998: 269-70). Appeals to the new politico-judicial framework established in Strasbourg to police the new human rights settlement proved unavailing, hardly surprising in view of the very particular, politicised construction of the rights instrument whose job it was to police.<sup>ix</sup> The guarantee of universal liberty and security paradoxically required continued restrictions on their reach. Exactly the same trend was to be found in the United States where in these post Rooseveltian days it was not the language of human rights but rather (as in the 1918-32 period) the equivalent declarations of freedom in the countries ‘Bill of Rights’ which were mustered to underpin (and therefore legitimise) the Cold War. ‘McCarthyism’ was a guarantor of rather than an affront to freedom.<sup>x</sup> In the United Kingdom, where a new culture of rights was slow in emerging, the inter-war language of liberty was simply repackaged to underpin resistance to radical change (Street 1963; Williams 1965).

There was a hearkening back here to the days of the Red Scare with the opponents of ongoing inequality and injustice being once again elided with those whose activities could still plausibly be represented as a Communist-inspired threat to the state (Jansen 1988; Mahony 1989). Once again the two main parties, of Left and

Right, agreed on this approach. To challenge wealth and power in any kind of dramatic way was to be subversive of the state itself and not only of the privileged within it. The main difference during this phase as compared with the inter-war period was that domestic-based activism against inequality was not a big factor in post-war politics in the decades after 1945. The protests were over foreign policy, militarisation, Vietnam and the deployment of nuclear weapons. Radical change to the liberal capitalist order was not permitted, it was true, but even the watered-down version of social democracy that was allowed to surface proved itself reasonably robust at obviating domestic calls for political transformation, at least in comparison with the conflict-riven administrations that had gone before. In 1945, the United Kingdom elected a Labour government with a mandate to introduce changes which were to lead to what became known as the ‘welfare state’. Circumscribed by their constitutions, the political parties in power in continental Europe were nevertheless able to adopt welfare-oriented policies, and did so whatever their ostensible political complexion. Emerging from a period of destructive war, the economies of all these states entered into a cycle of growth, giving social policies aimed at increased fairness and equality a chance to bed down (Piketty 2014: 96-9). Even the United States saw living standards rise and the gap between rich and poor narrow, especially with the implementation of legislation enacted during the presidency of Lyndon B Johnson in the 1960s (a trend maintained by his successor Richard Nixon). The US and Western Europe still had their Communist enemy in their sights, but the complaints of their fellow-travellers in these states about impoverishment lacked the bite of the inter-war period – social democracy was proving an effective firewall against popular (Communist) revolution, and the societal direction of travel was (albeit modestly) towards greater equality (Carrillo 1977).

There was still an external enemy to be sure and security demanded a control on the liberty of its domestic supporters so as to impede its success. But the link between this threat and those protesting economic and social deprivation at home became an implausible one: social democracy was doing its best and even its severest critics on this score were not as vulnerable to accusations of being an ‘enemy within’ as had been the case during previous generations of greater poverty. With capitalist democracy seemingly entrenched, energy turned to more personal issues; the domestic conflicts of the late 1960s and 1970s were increasingly over race, identity, gender, sexual orientation. As they did so, it became ever more apparent that the Soviet alternative – and it followed, its domestic supporters – had little of any relevance to offer. The moral strength of the Soviet challenge to defensive social democracy had in any event by then already entered into the sharp decline that was eventually to lead to the implosion of 1989 – Hungary in 1956, Prague in 1968 and then the exposure of the human rights abuses of both the Moscow authorities and its satellite administrations in eastern Europe irretrievably hollowed out the socialist vision it purported to offer the west. And with that loss of credibility went the plausibility of any claim that domestic radicals were intent on fomenting Soviet revolution.

Gradually, as the real threat from the Soviet empire receded, confidence began to return. The oligarchic rulers of the USSR were drawn into a policy of détente and then an arms race designed to destroy their capacity to compete, the Soviet leadership realising ‘that the country could not compete with the US’ (McCauley 2008: 443). Not only was the link between communist revolution and protest about social and

economic conditions implausible; so too, increasingly - and definitively after 1989 - was the very idea of a Soviet threat. And if the Soviets posed no domestic threat, why bother with the social democracy firewall, with all its suffocating implications for market freedom and capital accumulation? But equally, without the Soviets what alibi could there be for controlling domestic dissent? Of course the Soviet spectre had never been the sole reason for social democracy in Europe – and nor was its sudden departure the explanation without more for the sharp rise in the confidence shown by those hankering after a more purely market-driven world. That said the Soviet Union's sudden departure from the stage was undoubtedly a factor in the increase of social democratic vulnerability, in the change of the weather around it, just as the fear of communist revolution was now also something that could no longer be almost casually offered up as the definitive explanation of the control of all radical speech when the circumstances demanded. A new way of describing the world was required.

### Contriving a Golden Age

Exploring that new description requires us to return to the present so as to be able to end with our third question, about our likely future. It has been argued here that the concessions made by the wealthy and powerful promoters of capital to democracy and equality (expressed through the hegemony of social democratic politics and reflected in the protection of human rights and the neutrality of a fairly applied rule of law which we have just discussed) were always at least partly rooted in fear, not conviction. The spectre of 1917 hung over the opulent status quo in the way that 1789 had over its members' aristocratic predecessors a century before. The horrors predicted by the privileged about what would happen to them in the event of the



embracing of universal suffrage, a commonplace of late 19<sup>th</sup> century elite discourse (Keane 2009: 568-73), had not of course materialised, not least because of the reactionary rear-guard actions described earlier in this article. Much had been lost by the wealthy, it was true, but even at the high point of social democracy great gulfs had persisted between rich and poor.

The knot was unravelled by a reworking of what liberty meant, not a dramatic shift towards universality but rather a return to the partiality of the pre-democratic era, this time disguised – a nod to the continuing power of the universalist past – by the appearance of respect for equality before the law, for human rights for all and for the moral force of democratic choice. The effect has been to reproduce the inequalities of the past (with the present data concerning which this article started) by recreating a society in which liberty has once more become an accessory of affluence but where nowadays the pose of universality has disguised this fact, in the process making other, more genuinely egalitarian approaches to liberty appear old hat, redundant, out-of-date. Emboldened by its victory, capital and the privileged defenders of its partial distribution of resources have forged a new common sense. The fuel driving this set of fresh truths has come to be known as neo-liberalism (Harvey 2005). Starting in south America and given prominence in the 1980s by the administrations of Ronald Reagan in the US and Margaret Thatcher in the United Kingdom (Keegan 1984), neo-liberalism quickly took root; freed of the pressures imposed by social democratic assumptions, and with the market now (thanks to the success of this ideology) seeming to offer a definitive route to universal freedom, the figures quickly moved in the direction of greater inequality. Without the protective spectre of its revolutionary Communist outriders and unequivocally committed to a democratic status quo that

still bared the scars of its origins in profound inequality, social democracy had little ammunition with which to resist the growing hegemony of the market. In asserting itself, neo-liberalism was able also to draw on a new economic order that had been set up to support the liberal peace after the war but which had been quite consciously designed from the outset to sit outside the liberal/social democratic world that was being then erected in that part of Europe not under Soviet control. The various financial institutions created to police the Bretton Woods agreement, and so watch over the activities of the 'sovereign' states within the US sphere of influence, had never been constrained by any of the concessions to anti-market sentiment made at national level, and now these came into their own (see Schifferes 2015).

The decade that brought the 20<sup>th</sup> century to an end can be seen as a pause in history, a moment when proponents of pre-democratic market freedom drew breath and wondered just how far they could possibly go. Taking advantage of an already ravaged working class and a deeply embedded sense of individual autonomy, the Reaganite reconstruction of freedom in the US continued to gather pace through the 1990s in a way that has proved so successful that there is now next to no progressive politics in that country: 'it's called the American dream because you have to be asleep to believe it' (Carlin 2005; see further Brown 2015; Fraser 2015). Immediately following the collapse of the Soviet Union and with the enthusiastic assistance of constitutional and legal experts from the West (the US in particular), Moscow's failed empire was reconstituted as a series of market states, each coalescing around institutions ostensibly rooted in law, democracy and the protection of human rights (Bobbitt 2003). The idea that a new 'gilded age' could be achieved through a neo-liberalism operating under cover of the social democratic language of democracy and

human rights was taking hold (Brown 2015). In the liberal democratic West market reforms were certainly embraced to a degree in the UK but were received more tentatively elsewhere. Unlike in the US, unions (even in the UK) were still effective in the political sphere. Street resistance emerged in the form of the anti-globalisation groups that took as their especial mission the disruption of the meetings of world leaders.<sup>xi</sup> So it was not surprising that the shift of wealth from the poor to the rich could not be entirely masked and as a result encountered deep opposition within the hitherto social democratic polity of western Europe. This was especially the case in a European Union that that not long before recast itself as a social as well as economic community.<sup>xii</sup> And of course we should recall that at this time no external enemy existed to render credible the need to control dissent on the basis of some notional challenge to the integrity of the state. The 1990s saw the playing out of a series of battles between these rival forces fighting for their respective views of the obvious: the UK rejection of the EU's social chapter; police controls on anti-globalisation protestors that were often framed as in accordance with rather than in violation of universal conceptions of liberty;<sup>xiii</sup> the growth of the pressure of marketization seeping into Europe from West, East and across the English channel.

If all this represented a hollowing out of liberty, what of security? In the first decade of the 21<sup>st</sup> century two great events shook the political systems of the world out of their post-World War Two shape and pushed them further in the direction of neo-liberalism and its constitutional sister neo-democracy than had been possible in the immediate aftermath of Communist collapse. The first were the attacks of 11 September 2001, generative as these were of a reframing of what we now believe a democracy (or a regional or international organisation) to be able to do to resist an

external threat while still remaining committed to democratic values, the rule of law and respect for human rights. After 11 September 2001, in other words, we have learnt to understand in a new way the values of liberty and security to which we nevertheless still believe we are committed, one that allows many things that a generation before we would not have contemplated (Gearty 2013). The mode of achieving this has been to foreground once again the situation of emergency - something that is not at all new but has been, as this paper argues, a feature of democratic politics since these first arrived at the start of the last century.

Of course the terrorism threat has hardly been connected to opposition to neo-liberal reforms: as earlier noted the link between contemporary global terrorism and resistance to neo-liberal agendas is not easily (or plausibly) made: Al-Qaida outriders are not organising opposition to the bedroom tax. The self-evident disjunction between the two has however not prevented the occasional connection being made in a way which has allowed deployment of wide-ranging terrorism laws to control the political expression of dissent, both from government policy generally and market-oriented preferences in particular. Thus to focus again on the UK, an infamous example of the first of these arenas of control was the ejection of Walter Wolfgang from the then governing Labour Party annual conference in 2005 for heckling the foreign secretary, the supposed legal basis for preventing his return being asserted by the police on the spot to be s 44 of the Terrorism Act 2000.<sup>xiv</sup> So far as the second is concerned a notorious example, subsequently ruled a breach of the European Convention on Human Rights, was the use of the same police power to hinder effective protest at and around an arms fair.<sup>xv</sup> The move is easier than might be thought on account of the breadth of the definition of terrorism in the parent law

(Terrorism Act 2000 s. 1). Even if this were not the case, a recent broadening of government attack in the UK from terrorism to violent extremism to extremism, the last of these terms defined in loose terms as an affront to British values, has already led to police linkages between threats from terrorism proper and from other anti-austerity 'extremists' such as the Occupy movement (Quinn 2015). In a similar way a plethora of law enforcement agencies constituted under the title the Domestic Security Alliance Council have been instrumental in coordinating the severe crackdown on Occupy in the US that took place in Autumn 2012, the FBI frequently describing the movement as posing a 'terrorist threat' in the documents procured under freedom of information legislation that have detailed the Bureau's actions (Wolf 2012).

Mention of Occupy and austerity takes us to the second great defining moment of the first decade of the 21<sup>st</sup> century, as much a breakthrough for neo-liberalism as the attacks of 11 September 2001 had been for neo-democracy. The consequences of the economic collapse of 2008 have been enormous and are still being felt. Great levels of impoverishment have resulted, across the world. The international and regional institutions created after the Second World War, outside (as already noted) the social democratic framework of sovereign states, have imposed financial measures on debtor countries that have been devastating in their effect. Neo-liberalism has been so dominant that it has contrived to embed itself as the solution to the problems that it itself had largely created (Nolan 2015). All the while the gap between rich and poor - already growing fast after 1989 - has continued to rise. There is no end in sight; resistance politics persists but remains as protest not as a source of alternative ideas for aspirants to power (Schäfer and Streeck 2013; della Porta 2015). There has been no appetite to ditch the values of the 20<sup>th</sup> century, the assumptions about the pivotal

importance of democratic government, the rule of law and respect for human rights: controls on the protests provoked by the policies of austerity (themselves entailing an ‘economic policy akin to neoliberalism’ (Salomon 2015)) have operated within not outside conventional rules. Perhaps the beneficiaries of the new economic order believed they value these ideals themselves; perhaps those who make their opinions for them judge that their explicit jettisoning would be too dangerous, given the anger of the present moment.

Whichever it was, the terms democracy, the rule of law and human rights have however been increasingly hollowed out to reflect the new reality (Brunn *et al.* 2014; Kochenov *et al.* 2015). And so these values find themselves being used to mask policies designed to impoverish, persuading those who are victims of deliberate acts against them that their human rights are in fact being complied with, that the law is indeed being applied equally, that the decisions that hurt them so terribly are in truth reflections of a thought-out and fairly arrived at majority view (O’Connell 2013). At times the values of the past have even begun simply to be set aside where neo-liberalism cannot any longer operate under camouflage: a parliament is ignored, a people told to think again, a court ruling appealed to a more politically sensitised tribunal (Nolan 2015). When the governor of the Bank of England warns that growing inequality ‘risks undermining the basic social contract of fairness’ as Mark Carney did in late May 2014,<sup>xvi</sup> it is time to take note. With its insistence on ‘British values’ in a way that expands the zone of control for non-violent protest, the UK government’s recent *Prevent* guidance threatens a further sharp move in this direction (*Prevent*, 2015). Will neo-democracy continue to act as a cover for neo-liberalism but in the process becoming ever emptier until finally it is jettisoned completely, or do the

tools offered by social democracy still have some legal/democratic/human rights bite against market power in both its social (Nichols 2014) and political manifestations (Amnesty International 2014)? The hollowing out may leave nothing of substance in the values that we think we believe in. What then?

### Conclusion

The late Richard Ericson has used the term 'counter-law' to describe what Boukalas has described as 'the advance in the context of counter-terrorism of extra-legalism and generalized surveillance of trends that reverse the logic and principles of (criminal) law, without disrupting its formal shape' (Ericson 2009; Boukalas, 2014). Certainly there are connections between what is argued for here, building on *Liberty and Security* (Gearty 2013), not only with Ericson but also with the permanent state of exception envisaged by Giorgio Agamben (Agamben 2005). As Boukalas's thoughtful review of *Liberty and Security* makes clear, the work of Colin Crouch (Crouch 2004), Jean C Paye (Paye 2007) and, more recently, Wendy Brown (Brown 2015) also has obvious resonances (Boukalas 2014). Michael Wilkinson is on not dissimilar ground talking about the 'authoritarian liberalism' of Europe (Wilkinson 2015). The author has himself recently expanded this reading into the arena of the European Union, drawn heavily from the critical perspective of Wolfgang Streeck (Gearty 2015; Streeck 2014).

In the background of any kind of discussion of the sort pursued here is the challenge laid down by Loader and Sparks to think seriously about 'the

place that crime, punishment and – increasingly – security have come to occupy within the social relations and political cultures of contemporary western societies over the last several decades – notably, but by no means only, in the United Kingdom and the USA’ (Loader and Sparks 2011: 2). If impact is to be achieved by a scholar – and an underlying assumption here is that it should be strived for – it will be primarily through the credible claim for authority made by the academic intervener, not just ‘listen to me I am a prof’ but ‘listen to me because I know well that segment of the world that you are seeking to understand and deal with.’ Knowledge of this sort is most effective when it is multi-faceted; though originating in a deep knowledge of one perspective it draws others in and connects with them in an open and free-flowing way. The specialist silo is necessary to establishing authority. Leaving that silo is essential if impact outside academe is to be achieved. This article is offered as a sideways route into the ideas that frame so much current thinking in the ‘self-consciously “applied” undertaking’ that Loader and Sparks believe criminology to have been from its inception (Loader and Sparks: 3).

Security studies have been valuable in deconstructing assumptions about what security entails, assumptions that have served all too often to buttress neo-democratic efforts to protect us all from the realisation that gross and rising levels of inequality is a price that a neo-liberal society chooses to pay for the market freedoms that benefit only those with the resources to access them. The link with liberty is an important one because too often – that inextricability again - are we led to assume that the reduction of liberty is an (inevitable) price paid by the exigencies of the ‘security situation’, or



the demands of ‘national security’. The language of liberty and security needs to be won back from the libertarians and the counterterrorist practitioners, a struggle for meaning in which scholars are necessarily among those on the front line. Both terms need to be reinvigorated with the radical edges that once gave each of them such prominent roles in shaping the progressive agenda. Learning from the past equips us to fight old battles on new terrain. Even if it comes, the success of neo-democracy should be via battle not surrender. If this entails a politically-engaged academy, then we should cheerfully recognise that there are worse fates than to be condemned for being partisan. After all, ‘balance’ and ‘neutrality’ are not so much routes to reason as instruments for the preservation of the status quo.

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<sup>i</sup> Lodgings that, it should be said, go well beyond the legal to incorporate ways of looking at the world. For recent valuable treatments of a subject that has attracted its fair share of literature, academic and popular see Klug (2015) and Hogan (2015).

<sup>ii</sup> The negative/positive divide is crudely represented in the distinction between civil and political rights on the one hand and social and economic rights on the other: see the international covenants on civil and political rights and on economic, social and cultural rights, both 1966 (see Burchill (2007). For a take on the transcending of the distinction see Gewirth (1996).

<sup>iii</sup> As Lenin is reputed to have called those in the West who supported his cause without fully understanding the means he judged necessary to realize it.

<sup>iv</sup> In the UK ‘Britain’s richest 1% have accumulated as much wealth as the poorest 55% of the population put together’ (Office of National Statistics, reported in the *Guardian* 15 May 2014: <http://www.theguardian.com/uk-news/2014/may/15/britains-richest-1-percent-own-same-as-bottom-55-population> [last visited 21 July 2015]). For the United States see Krugman (2009) and, more recently, the *New York Times*’s *Great Divide* series overseen by Joseph Stiglitz: [http://opinionator.blogs.nytimes.com/category/the-great-divide/?\\_r=0](http://opinionator.blogs.nytimes.com/category/the-great-divide/?_r=0) [last visited 21 July 2015]).

<sup>v</sup> *Debs v United States* 249 US 211 (1919). See further *Schenck v United States* 249 US 47 (1919) and *Frohwerk v United States* 249 US 204 (1919).

<sup>vi</sup> In relation to which the Supreme Court remained happily complicit: *Whitney v California* 274 US 357 (1927).

<sup>vii</sup> HC Debs 1 December 1925 col 2093 (William Joynson Hicks).

<sup>viii</sup> The Constitutional Court order of 17 August 1956 to this effect can be found at [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=3097](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3097) [accessed 24 July 2015].

<sup>ix</sup> *German Communist Party v Federal Republic of Germany* app 250/57 (20 July 1957): see [hudoc.echr.coe.int/webservices/content/pdf/001-110191](http://hudoc.echr.coe.int/webservices/content/pdf/001-110191) [last visited 30 July 2015].

<sup>x</sup> *Dennis v US* 341 US 494 (1951). Walker 1990 is a gripping if depressing study.

<sup>xi</sup> The views of these protestors were effectively captured as well as deepened by Klein (2001). Key cases include *Appleby v United Kingdom* European Court of Human Rights 6 May 2003 and *Austin v United Kingdom* European Court of Human Rights 15 March 2012 (relating to controversial kettling by the Metropolitan police which had taken place as long before as 1 May 2001).

<sup>xii</sup> This move towards the social reached its high point under the presidency of the European Commission of Jacques Delors (see Ross 1995).

<sup>xiii</sup> *Austin v United Kingdom* n xi above (relating to controversial kettling by the Metropolitan Police which had taken place as long before as 1 May 2001).

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<sup>xiv</sup> See <http://www.telegraph.co.uk/news/uknews/1499466/Heckler-82-who-dared-called-Straw-a-liar-is-held-under-terrorist-law.html> [last visited 27 July 2015]. Note however that the Labour Party did issue an apology and the incident led to a strong political engagement with the risks posed by the relevant section leading to change: Walker 2014: ch 5.

<sup>xv</sup> *Gillan and Quinton v United Kingdom* European Court of Human Rights 12 January 2010.

<sup>xvi</sup> <http://www.ft.com/cms/s/0/acecac0c-e5ba-11e3-a7f5-00144feabdc0.html#axzz34JDMKdzZ> And the head of the IMF has also recently lamented that ‘inequality hampers growth’ *Business Davos 2015*: <http://www.independent.ie/business/davos-world-economic-forum/davos-2015-inequality-hampers-growth-imfs-christine-lagarde-30930866.html> [last visited 3 August 2015].

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