PROTECTING POLITICAL SPEECH AT A TIME OF PERPETUAL WAR
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I want to argue three propositions this evening. The first is – to put it at its baldest – that freedom of political speech has never existed properly in any liberal democratic society, that its foundational status in our culture is bogus, that its true place is as one of the essential myths with which liberalism has defended itself from socialism in the democratic era. It follows that protecting political speech at a time of perpetual war – the theme of my address this evening – is bound to be more difficult than at first sight appears, at least when this fact of the fragility of the overall presumption in favour of the freedom is taken into account. My second proposition is that the challenge to political speech posed by the entirely phantom 'war on terror' (the perpetual war to which my title refers) is different in kind from what has gone before, representing not only an assault on a far wider range of types of political speech than hitherto but also – altogether more seriously in my view – exposing a fault-line in the very system of government which free speech of this sort is designed to serve, representative democracy itself. My third proposition flowing from these first two is that if we want seriously to protect political speech we need urgently to reconfigure how we think about the subject, focusing on what needs to be done to keep political liberty alive and at the same time being brave enough to let go of old enemies and old wars that we know well and which battles we have so loved to fight, indeed have been fighting since the 18th century – in this context I will at the end of my talk have just one or two remarks about the Government's intentions with regard to a new incitement to religious hatred law.

This then is the menu for my part of the conference: three propositions – on political speech, on the war on terror, and on what needs to be done to preserve political freedom – with each in turn involving a challenge to a particular, commonly held but (I say) bogus belief, rooted in: as regards my first proposition, the sanctity of political speech; as regards my second, the dangers posed by 'terrorism'; and as regards my third, the supposed menace of various old enemies of speech, threats to freedom which are in reality now long past their intellectual sell-by-date. Though the claims I make are general ones, and defensible, I believe, across the board, I will root what I

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have to say in the places I know best, the United Kingdom and the United States, making only passing references to the empirical evidence from elsewhere.

I

Let me turn then to my initial argument, which expressed slightly less aggressively than earlier is that freedom of political speech has never been quite what it has seemed in liberal democratic society: it has always flattered to deceive. The first point to make is of course to acknowledge that the idea of free speech is deeply embedded in every such culture's description of itself. Such entrenchment flows from the fact that the idea of freedom of political speech predates the democratic era, having been part of liberalism in its elite phase, when there was no need for that august ideology to modify its precepts to assuage the crowd. Thus when the English bill of rights of 1688 declared 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament', it was reflecting the importance of the political freedom of those very few men whose representatives were then seeking on their behalf to wrench control of the state from an executive power which had royalty at its apex. The first amendment to the United States constitution, promulgated a couple of generations later, committed itself in grander (because post-Enlightenment) language to the prohibition of any congressional action 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances', but even in this proto-democratic formulation it was clear that the concept of the people was to be understood in a rather more restricted sense than how it now sounds to modern ears.

The success of the democratic movement in the latter half of the 19th century and the first quarter of the 20th can be put down to many things: the energy of trade unionism; the commitment of the electoral reformers; the campaign for votes for women; the impact of world war. But also important was the fact that the idea of representative government, with its essential pre-requisite freedom of political speech, was already in place, that the argument therefore was not for some entirely new notion but was rather – and altogether more modestly – for the expansion of an idea that had already proved its worth: 'more of what works!' is always likely to be a better slogan than 'change everything now!' Viewed in this sense, equal treatment was the pragmatic driving force behind the push for democratic reform.

But how can democracy be conceded without it producing socialism or at the very least disruptive egalitarianism in its wake? This was what preoccupied the British ruling classes of the 19th and early 20th centuries: they knew exactly how unfair the

distribution of resources was as between rich and poor – how could the latter be given political power without using it to destroy the former? Many answers emerged with which we need not be concerned here: strategic concessions by the wealthy; imperialism as a national bonding agent transcending class divide; the patronage of a more sensitive 'one-nation' Tory party; a Dicey-inspired emphasis on law, judges and rules over 'socialist' administrative discretion; and so on. But the reactionary fight to preserve the status quo also had an important civil libertarian dimension. While the fact of 'votes for all' had slowly to be conceded, what was still sought to be denied – in the US no less than in Britain – was equal access to the secondary civil liberties such as expression, assembly and association without which this core right to vote would necessarily be deprived of vital political oxygen. It was not that these civil liberties were prohibited as a matter of law; it was rather that they became impossible to exercise when it was desired to deploy them in an effective manner to promote a radical (which in the context of this period meant a socialist) end. In a neat irony, the way this was achieved was via reliance on the very kind of open-ended executive discretion rooted in vague laws that these self-same reactionary forces affected in other contexts to despise.

Thus was born the preoccupation with practice, or rather the gap between theory and practice, that ought to be the concern of all those interested in civil liberties, and which dogs the subject to this day. Of course allegations of the partisan application of vague laws to clamp down on political radicalism was a part of the furniture of pre-democratic liberal society as well: it had been the supposedly benign Lord Melbourne who had been happy to have obscure unlawful oaths legislation deployed against the Tolpuddle Martyrs in 1834 over their strenuous objection that they had done nothing that was not also being done on a daily basis by members of the Orange Order. During the transition to democracy it was possible to compare ringing endorsements of freedom of assembly in the Salvation Army case of *Beatty v Gillbanks*[1] – in which an effort by local magistrates to prevent the Salvationists from marching in Weston-super-Mare for fear of a reaction from a hostile gang called the Skeleton Army had been overturned by the courts ('No better instance can be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies' was how Dicey put it[2]) – with the way the courts in Ireland allowed a political meeting organised by the Land League to be banned because some Orangemen promised to attack it: *O'Kelly v Harvey*[3] ('I frankly own' that I cannot understand *Beatty v Gillbanks* was how the Irish Lord Chancellor 'distinguished' the case, decided just the year before). And a couple of decades or so later some suffragettes also found out how useless *Beatty* was when they sought to use it to

[1] (1882) 9 QBD 308.
[2] *Introduction to the Study of the Law of the Constitution* 10th edn by E C S Wade, 1959, p 271.
[3] (1883) 15 Cox CC 435.

challenge the way in which the police had dispersed a political assembly organised by the Women's Freedom League that had gathered in Downing Street in an effort to petition the prime minister.[4]

But it has been in the democratic era that the discriminatory application of vague laws to destroy or at very least radically to truncate certain kinds of political speech has come into its own as a vital weapon in the taming of democracy. As regards the United Kingdom part of the story is told in a book written by Professor Keith Ewing and myself a few years ago: *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945.*[5] The Labour Party itself was nearly strangled at birth by a judiciary that saw its very existence as a constitutional affront.[6] No law was too obscure, no provision too antiquated, no piece of common law too vague to be deployed to stop the ventilation of radical political views: defence of the realm regulations; incitement to mutiny laws; the crime of sedition; the ancient concepts of breach of the peace and binding over orders – all these were rigorously enforced against anti-war pacifists, the Communist Party, the National Unemployed Workers' Movement, the anti-imperialists of their day – all those in fact who sought to present radical challenges to the status quo. Naturally the various victims of these repressive actions sought, as had the Tolpuddle Martyrs and countless others before them, to draw attention to the unfairness of it all, how laws could be wheeled effortlessly into action to truncate their freedom of speech while leaving countless others untouched (the Fascists of the early 1930s for example). To which the answer was, in the words of a particularly egregious Home Secretary from the period, William Joynson-Hicks, that the constitution only protected 'the right type of freedom of speech'.[7] This revealing remark was made in the course of a speech in the House of Commons in which Joynson-Hicks was defending himself against charges of partisanship having been reported in *The Times* as having emitted what the paper called a 'a most improper whoop' on hearing of the arrest for sedition of 'notorious communists' at the Hounslow Amateur Dramatic Society which the Home Secretary had happened to be addressing when the news of the police action was brought to him.[8]

In the United States, a pincer movement involving capital, government and the judiciary did indeed destroy the political space that was available for socialist thought, and here there was no parliamentary sovereignty or Labour Party to save the day. The written constitution with its famed bill of rights was, of course, worse than useless. The First Amendment did not stop the Supreme Court in 1919 unanimously

[4] *Despard v Wilcox* (1910) 26 TLR 118.
[5] Oxford, 2000.
[6] *Amalgamated Society of Railway Servants v Osborn* [1910] AC 87.
[7] H C Debs 1 December 1925, col 2093.
[8] Ewing and Gearty n 5 p 139.

upholding legislation which had led to the jailing of the socialist leader Eugene Debs for ten years, for obstructing the recruitment of men to fight in the First World War by declaring that he abhorred war and by asserting that the courts, the press and the entire political system were controlled by the rich.[9] In *Abrams v United* States,[10] the same tribunal upheld the conviction of five defendants under the Sedition Act 1918 for doing no more than distributing leaflets attacking American military intervention in Russia: there is a famous opinion by Oliver Wendell Holmes in that case, about the importance of a free market in ideas as a way of discovering truth, and it is frequently referred to by apologists for the US system – what is less often noticed is that it was a dissent and therefore assisted the men before the court not one jot.

A 1925 case widely hailed as a breakthrough for civil liberties because in it the Supreme Court suggested that the First Amendment applied to states' as well as federal law – and celebrated to this day on this exact point – in fact left unaffected the defendant's conviction merely for publishing a pamphlet called *The Left-Wing Manifesto*.[11] To similar non-effect is another famous flight of rhetoric on free speech, this time by Justice Brandeis in a case from 1927[12] – it reads marvellously well today, all about 'freedom…being indispensable to the discovery and spread of political truth', with powerful assertions such as 'without free speech and assembly discussion would be futile' and much else in this vein. But this was a concurring opinion (albeit on a technical ground) in the Supreme Court's upholding of Charlotte Whitney's conviction for nothing more subversive than daring to organise a left-wing political organisation. This refusal to notice outcomes is a characteristic of liberal legal analysis – words are celebrated even while the intended beneficiaries of such brave judicial interventions are bundled of to jail. Such duplicity enables a system to preserve a theoretical commitment to free speech while ensuring that its effect in practice is largely nugatory: to have the cake of freedom whilst also consuming it to preserve privilege.

Nor is this story of the suffocation of free speech merely a sad story from the past. The United States I will come back to in the context of the so-called war on terror. In the United Kingdom it is still the case that the law allows the executive a largely free rein in determining whether or not to permit political speech. Official secrets legislation (the Clive Ponting prosecution), contempt of court rules (the ABC trial), the action for breach of confidence (Spycatcher): all these have been among the legal devices that have been deployed to hinder radical speech in the post-World-War-Two

[9] *Debs v United* States 249 US 211 (1919).
[10] 250 US 616 (1919).
[11] *Gitlow v New York* 268 US 652 (1925).
[12] *Whitney v California* 274 US 357 (1927).

era.[13] Sometimes cruder mechanisms have been deemed necessary, such as with the media ban imposed by the Thatcher government on Sinn Féin and other proponents of Irish republicanism in the late 1980s. Two generalisations can be made about these more contemporary attacks on political speech. First they have invariably produced a chilling effect on speech which has extended far beyond the precise limits of the law, covering all those who have 'signed the Official Secrets Act' for example (whatever that might mean) and (in the case of the media ban) reaching not just violent speech but also harmless Irish songs and elected representatives seeking to do their normal democratic duties. Second it is invariably the case that when the hostile deployment of these laws has been challenged in court they have emerged unscathed, indeed legitimised, by the judicial attention they receive. This is despite our society's alleged commitment to free speech, the central importance of which in these cases is never denied. Thus the *Spycatcher* litigation went consistently the government's way in the British courts, and even the Irish media ban was unanimously upheld by a five man House of Lords in 1991, the judges seeming to feel – bizarrely – that the restrictions on political speech entailed in it did not go far enough.[14]

Nor should we naively belief that the language of human rights has made or will make any difference to this; as the early American first amendment cases show us, all that happens when this terminology becomes available is that the restrictions which are being challenged are declared *compatible* with free speech guarantees, either because of the exceptions implicit in the freedom or (in the European Convention of Human Rights context) on account of their being (to use the jargon) 'necessary in a democratic society' for one or other of the many grounds of legitimate restriction laid out in that document. The media ban mentioned above, for example, easily survived challenge when it was taken to the Strasbourg authorities[15] as did an even more radical Irish version of the same kind of ban[16] – a restriction that had itself been earlier found compatible with Ireland's supposed constitutional commitment to freedom of expression.[17]

Viewed in historical context, therefore, it should come as no surprise that the much praised UK Human Rights Act, enacted in 1998 and coming into force in October 2000, should have done so little to protect speech at the outer margins of what is in reality our very narrow band of acceptable political speech. It is true there have been one or two victories that could probably not have been achieved without the Act: the

[13] See generally Ewing and Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, Oxford, 1990).
[14] *R (Brind) v Secretary of State for the Home Department* [1991] 1 AC 696.
[15] *Brind v United Kingdom* (1994) 18 EHRR CD 76.
[16] *Purcell v Ireland* (1991) 70 DR 262.
[17] *The State (Lynch) v Cooney* [1982] IR 337.

protester whose conviction under public order legislation for burning of the American flag was set aside;[18] the anti-war demonstrator who has been able (at least for now) to continue his protest on Parliament Square in the teeth of Westminster City Council's effort to remove him.[19] But on big issues the Act has been found wanting. Not even the well-resourced and litigation-aware *ProLife Alliance* could ultimately prevent the broadcasting authorities from controlling the content of their party political broadcasts on grounds of taste and decency.[20] True radicals have fared even worse. Thus the May Day protestors and many others who were detained in Oxford Street for several hours by the police in 2001 have just lost their legal actions, the actions of the authorities having been found to be compatible with the Human Rights Act.[21] A second indicator of what my colleague Professor Ewing has called 'the futility of the Human Rights Act'[22] is *R (Gillen) v Metropolitan Police Commissioner*[23] in which a police operation which involved stopping and searching protestors on their way to demonstrate outside an arms fair – and confiscating papers – was held not to infringe their rights to liberty, expression or assembly. The aspirant protestors who found themselves prevented by the police from even reaching their protest goal – their coaches being turned away well before they arrived at RAF Fairford – were likewise, no doubt, surprised to learn that this police action was perfectly compatible with their alleged freedom of peaceful assembly.[24] The court was able to rely on an authority from the miners' strike which had legitimised the then prevalent police practice of turning back pickets at motorway exits miles from where they intended to go.[25] All that had changed in the intervening years was the nature of the language that was used to produce the desired – and restrictive – outcome: 'human rights' made not the slightest difference, made things worse in fact, by adding a new layer of legitimacy to state repression. We see exactly the same process of rights'-erosion underway – with police exclusion zones, strict controls on meetings and processions and the like – as we move closer to the G8 global summit to be held next month in Edinburgh.

[18] *Percy v Director of Public Prosecutions* [2001] EWHC 1125 (Admin).
[19] *Westminster City Council v Haw* [2002] All ER (D) 59). But see now recent legislation which has imposed widespread new controls on protest in an extensive area around Parliament and which threatens to expel Mr Haw: 'Liberty backs exclusion zone protest' *Guardian* 17 June 2005.
[20] *R (ProLife Alliance) v BBC* [2003] UKHL 23.
[21] *Austin v Metropolitan Police Commissioner* [2003] EWHC 480 (QB).
[22] [2004] *Public Law* 829.
[23] [2004] EWCA Civ 1067.
[24] *R (Laporte) v Gloucestershire Chief Constable, Thames Valley Chief Constable and the Metropolitan Police Commissioner* [2004] EWCA Civ 1639.
[25] *Moss v McLachlan* [1985] IRLR 76.

II

If this is how things have been and indeed still are in peacetime, in Britain and in other liberal democratic societies as well, then it will come as no surprise that controls on political speech have been far worse in times of war. 'War' is the potently destructive term that, once effectively deployed, redefines the nature of the relationship between an individual and state power in a democracy. It is possible for present purposes to describe the history of the twentieth century as the working through of two emotions or instincts about the future, each in radical opposition to the other. The first is essentially hopeful and optimistic: it is democratic and progressive, aiming at happiness in the neo-utilitarian sense of a universal human flourishing, and seeing representative government and freedom of political discourse as vital means to this end. The second is much more negative and pessimistic: it sees enemies at every block and fifth columnists at home queuing up to support them. Its byword is fear rather than hope; its creed national security rather than human happiness. Those who fear hope are drawn to fear as a way of destroying democratic optimism and using up vital political capital in the search for enemies without and within. The reactionary elements in liberal democratic society – those with an undue share of national resources, whose forefathers probably opposed democracy in the first place – are drawn to fear as a neat way of getting democracy to change the topic of conversation, from wealth to war, from selfishness to security, from a search for equality to a horror of national extinction. When a democracy's mind wanders like this, little can be done to push the progressive agenda: the wagons have stopped on the road to a better future, and circled for a shoot-out: shouts of 'gee-up' are simply besides the point.

There is plenty of evidence in both Britain and the US of a quite extreme degree of political censorship and control during both the first and second world wars.[26] But the same is also true of the much longer Cold War, when radical socialist speech was firmly restricted by governments across the liberal democratic and social democratic world. The well-known American example is *Dennis v United States*[27] in which the Supreme Court upheld the legislation which was underpinning McCarthyism. 'Liberty of thought soon shrivels without freedom of expression' wrote Mr Justice Frankfurter in his *concurring* opinion in that case, described by the then Director of the ACLU as 'the worst single blow to civil liberties in all our history'.[28] Once again we see a theoretical commitment to free speech sitting without apparent embarrassment alongside its practical destruction: more evidence of Joynson-Hickory in action.

[26] See generally *Ewing and Gearty* n 5 above, chs 2 and 8; S Walker, *In Defence of American Liberties: A History of the ACLU* (Oxford University Press, Oxford, 1990).
[27] 341 US 494 (1951).
[28] Walker n 26 above, p 187.

The politico-legal settlement of post-War Europe followed the same pattern. Liberal democratic nations were constructed or rebuilt under the umbrella of American hegemony, with various kinds of commitments to freedom of political speech but with an equal determination that, though they might be allowed vote, communists and other radicals must never be allowed to succeed. In a replay of the way in which an earlier generation of socialists were squeezed off the democratic playing field, radical opponents of the fast emerging and soon well entrenched, market-oriented status quo found little public space for the articulation of their point of view. Optimism that constitutional guarantees of free speech, such as those to be found loudly trumpeted in the European Convention on Human Rights, could be relied upon proved ill-founded. Either organisations committed to this kind of speech were explicitly banned, as with the German communist party[29] or the expression of these opinions was sharply controlled, for example by deportation on grounds of national security[30] or by restricting the access of such 'extremists' to the civil service. All of this was upheld by the Strasbourg rights bodies as compatible with free speech. A particularly hard case was *Glasenapp v Germany*,[31] in which the applicant was removed from her teaching job for writing a letter to the newspapers in which she had indicated that she shared some of the aims of the German Communist Party, particularly in relation to the establishment of an international people's kindergarten in Dortmund. Her attempt to assert her freedom of speech failed both in the German Constitutional Court and afterwards before the European Court of Human Rights.

Serious though the assault on political speech during the Cold War was, it had what in retrospect we can see were some redeeming features. First, its purpose, the protection of the social democratic/liberal democratic system of government in Europe, was not merely ostensible: the restrictions on free speech were intended to bolster rather than to subvert civil and political rights. It was the 'victims' of these crackdowns on free speech who were the true enemies of bourgeois freedom, and it is hardly surprising that the democratic institutions they so despised should not have allowed them the space to grow to the point where they might become a real threat. Second, in the Cold War there was a real enemy, with goals and a programme, on which it was possible to have a view: the war may have been bogus in many ways – exaggeration of the Soviet threat; spurious attacks on denounced fellow travellers at home; and so on – but that there actually was a threat could hardly be denied. Thirdly, because the 'enemy' was real, it was possible for someone to surrender, and for the war to end. This happened in the late 1980s with President Gorbachev's switch to *perestroika* and also – more materially for present purposes – to *glasnost.*

[29] *German Communist Party v Federal Republic of Germany* app 250/57 (1957).
[30] *Agee v United Kingdom*
[31] (1986) 9 EHRR 25.

The political atmosphere lightened significantly in the 1990s. Cold war cases were overturned[32] and quite ambitious assertions of a real freedom of speech began to seep into the case law.[33] Fear was on the defensive; the democratic wagons looked as though they were back on the move.

This was to underestimate the power of capital, and the extent to which it saw social democracy as a tactical concession to socialism which could now, in the aftermath of Communist defeat, be clawed back. There were many dimensions to this reactionary counter-revolution: privatisation, deunionisation; a renewal of Diceyean demonisation of the regulatory state among them. These are not germane to my discussion this evening: nor are the various ideological superstructures – choice, third way, Hayekian liberalism and so on – within which the crudity of this reallocation of wealth from the poor to the rich was camouflaged. What is relevant is that the 1990s saw a variety of attempts to reintroduce fear into the discourse, to fabricate the levels of anxiety that had stymied progress through the hot and cold wars of the past, and which were necessary once again if the obviousness, the breathtaking selfishness, of the reactionary project was not to be exposed: the war on drugs, the war on crime, and so on. The war on terror was already well embedded as a potential runner when the events of 11 September 2001 occurred, and gave it its chance.

III

At the start of my talk I characterised the ‘war on terror’ as entirely phantom. I now expand on the point as concisely as I can by stating three propositions: First, it is clearly impossible to have a war on a state of mind. Second, the notion of a ‘war on terrorism’ is just as misguided: terrorism is a technique of violence available to all participants in a conflict, governments as much as opposition forces – it is a method of violence rather than a category of violent person. If we are going to wage war on terrorism we might just as well wage war on the motives behind various military actions or (even less coherently) on the actions themselves, sieges, aerial bombings, guerrilla attacks – any kind of politically motivated systematic violence of which we disapprove. Third, even if there were such a person as a ‘terrorist’ – a highly dubious notion in my opinion – there is no evidence of any kind of campaign of systematic terrorism without which a war on terrorism is simply impossible to fight. Nor is there evidence of an organisational driving force doing anything to bring such a campaign about. What we do have is sporadic but undoubtedly bloody subversive violence against broadly speaking American and Western targets. This appears to me to be

[32] See *Vogt* v *Germany* (1995) 21 EHRR 205.
[33] *Jones v DPP* [1999] 2 AC 240; *Redmond-Bate v DPP The Times* 28 July 1999.

driven by a combination of deep levels of hatred for the West, a decent level of technical and scientific capabilities, and a brutal kind of opportunism: strike when you can where you can. That there is a serious problem is undoubtedly true, that it crosses national boundaries is also true – but it is a criminal problem, one for the police not the army, for the ethics of law enforcement and international co-operation rather than one demanding military-style interventions and, to quote Michael Ignatieff's latest book, the administering of some 'necessary evil' by counter-terrorism officials.[34]

Above all, terrorism is not a reason for attacking political speech. But if we look at the terrorism laws, we see unprecedented levels of entrenched controls on the freedom. In the United States this takes the form mainly of the surveillance society that is now permitted under the Patriot Act, with its chilling impact on a discourse already emasculated both by the past extirpation of so many non-capitalist political perspectives and by the vast influence of business on news dissemination. As far as the United Kingdom is concerned, anxiety about terrorism was evident even before September 11, in the permanent Terrorism Act enacted in 2000. (All previous such laws had been ostentatiously temporary.) Here we have an extremely wide definition of terrorism,[35] so wide in fact that it on its margins dispenses with the need for violence entirely and focuses on such matters as creating 'a serious risk to the health or safety of the public or a section of the public' and action 'designed seriously to interfere with or seriously to disrupt an electronic system'. Where this conduct or the threat of such conduct is 'designed to influence the government or to intimidate the public or a section of the public' and is engaged in 'for the purpose of advancing a political, religious or ideological cause' then it counts as terrorism.

The result is not prosecution for a criminal offence, nothing so crude as that – with the requirement for fair rules and the possibility of exposure before a sceptical jury (or even a sceptical judge). No, what flow are a range of executive powers: greatly extended police powers of stop and search[36] with suspects now as a result of a recent change being liable to be held for up to fourteen days without charge;[37] organisations 'concerned in terrorism' banned with their assets rendered liable to seizure[38] – already dozens of groups have been designated under the Act.[39] There is also the possibility of prosecution under various very broad offences related to inciting 'terrorism overseas'[40] and 'directing terrorist organisations.'[41] After 11

[34] *The Lesser Evil. Political Ethics in an Age of Terror* (Edinburgh University Press, 2004).
[35] s 1.
[36] Part V.
[37] Criminal Justice Act 2003, s 306 adding a new Para 36 (3A) to schedule 8 of the 2000 Act.
[38] Part II.
[39] schedule 2 and SI 1261/2001 and 2724/2002.
[40] ss 59-61.

September as we all know the executive detention of suspected terrorists was permitted under the Anti-terrorism, Crime and Security Act 2001, and after the House of Lords' adverse ruling on this at the end of last year this has now been replaced by new types of anti-terrorism control orders: Prevention of Terrorism Act 2005. These new orders may be imposed where the Secretary of State '(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from the risk of terrorism, to make a control order imposing obligations on that person'.[42]

Now clearly there are large implications here for various freedoms, not least liberty, privacy and security of the person. What of free speech? This is where we need to remind ourselves of the breadth of the definition, extending way beyond what the layperson popularly considers to be terrorist. It is clear that the law has the potential to reach many forms of effective non-violent direct action, stopping the streets, swamping public offices with protesters, inconveniencing business to make a political point, theatrical gestures of defiance – how many of these cannot be said to threaten the health or safety of a section of the public? And this is before we take into account the 'chill factor', the way in which anti-civil-libertarian laws are invariably construed more broadly by their enforcers than those responsible for them intended, being deployed to reach far wider ranges of dissent than was expected, with the courts standing by wittering ineffectually on the sidelines. We have already seen an example of this in *R (Gillen)* where the anti-arms trade protesters were stopped and searched on their way to their protest. This is also what happened to the May Day protestors in 2001, when the police whipped up by an excited Prime Minister – himself responding to growing press hysteria – acted entirely disproportionately. How many more such cases are we likely to encounter in the future?

Let me sum up my concerns about the way our greatly expanded terrorism law is likely to impact on political speech in the UK. First, the Terrorism Act 2000 has become part of our normal law and unless we fight very hard the 2005 Act is headed in the same direction.[43] Second, the effect of this is that executive control on conduct which is politically motivated and which falls short of violence can be exercised without the need for the deployment of the criminal law and also without any real requirement for proper judicial review, so groups can be banned, people arrested, assets seized, places cordoned off and so on through the raw exercise of executive power. Third this is especially the case with the ASBO style control order scheme under the 2005 Act where the judicial role in the so-called 'non-derogation' orders is

[41] s 56.
[42] s 2(1).
[43] See s 13.

fairly minimal and where swingeing restrictions on political action can be imposed on activists. Fourth, what follows from all this is that while it is clear that freedom of speech will continue in this country, it will do so outside the parliamentary, ie the orthodox, arena only because the executive has not decided that it should not: it is in Joynson-Hicks's terms not 'the wrong kind of speech' (or not wrong enough). But promoters of the truly 'wrong kind of speech' – radical challenges to the status quo; disruptive protest; non-violent demonstrations demanding to be noticed; and so on – will find themselves vulnerable to a mix of new and coercive police powers: they will have stopped being agitators and become terrorists, with all that that implies for freedom of political speech in the public arena. The big change made by the 2005 Act is that it will now be possible not only to tackle the group with pre-emptive public order restrictions on meetings and marches[44] but there will also be a quite new capacity to go after the leadership directly. What was clumsily achieved against Tom Mann and other inter-war radicals – via binding over orders, trumped up charges followed by bail conditions and the like – can now be effortlessly imposed, with the judicial branch trotting along awards to provide the necessary legitimacy to assuage the consciences of those doing the repressing.

IV

I said at that the start of my talk that I would end by arguing that if we want freedom of political speech to survive and thrive, it is essential that we now begin to think about the subject in a fresh way. The problem as I see it lies in our addiction to a mistake made in a famous lecture made years ago, by the late Isaiah Berlin. I am referring, of course, to the so-called distinction between negative and positive freedom, with the former being considered more worthy of support than the latter. On this analysis freedom of speech is something we have and therefore something which government should not try to restrict. It is more fundamental than the various other things – a job, a house, holidays and so on – which we don't have as such and which do require state action if they are to be achieved. But true political freedom cannot be secured by simplistic adherence to this liberal model, one which sees each of us as free and independent individuals as long as we are left to our own devices. We are *never* left to our own devices. Our opinions are forged by the world in which we live, and – more and more since 1989 — that is a world in which the power of the market is uppermost, actively protected and supported by government action. Our views are also, inevitably, only realised through the constitutional structures that exist at any given moment in time to give effect to them, and are therefore hostage to any

[44] The Public Order Act 1986 and the Criminal Justice and Public Order Act 1994 for example: see 'Call to lift ban on Gleneagles March' *Guardian* 16 June 2005.

defects there might be in such a structure. Our political thoughts can never exist in some kind of moral desert island. They are formed by the stimuli of the world around us and turned into actions (or not) through the institutions through which our society expresses itself. Increasingly these structural influences on speech have coalesced around the protection and promotion of market interests.

The United States stands as a warning of the direction in which our own society might go. There are no big free speech cases in the US arising out of that country's lurch into military imperialism. Its culture is not rocked by a public debate involving ideas the public do not want to hear. The controversy is over surveillance not speech. This is because the public discourse – First Amendment or no First Amendment – is so poisoned by power and capital, that there are simply few if any chances to express dissenting views in the mainstream media.[45] So as small clusters of like-minded progressives gather together to share their version of the truth, they worry not about how to communicate their point of view in order to persuade the majority (impossible) but rather about being spied on by the state while they speak. That this is the nature of what opposition there is to the Patriot Act speaks volumes for how unfree US society has become – just as with the Vietnam period, it will take a Tet offensive or two and the prospect of defeat for the Americans to rediscover their zeal for free speech. There is no prospect of anything like this anytime soon.

The problem is not as I have indicated one any longer unique to America. Earlier in this talk I gave various examples of the clawing back of power by capitalist forces in the aftermath of the Cold War. One way that this has been undertaken in Britain which I did not mention was the success of the capitalist tendency in Labour. This is not necessarily to criticise New Labour. Socialism was not exactly in good ideological shape in the 1990s, globalisation was not something that could be tamed by Party conference, and if capital entered Labour at all it did by the front door and to the acclaim of the Party and afterwards the British people themselves (in 1997, 2001 and 2005).

But the effect of the removal of socialist language from the orthodox political arena has been greatly to narrow the range of opinion to be found there and consequently greatly to expand the need for non-parliamentary speech in order to give vent to ideas, sentiments, goals, visions and so on that can no longer be credibly articulated on the floor of the house. As the malign effects of the capitalist fight-back are becoming more apparent, so the need for a new set of political metaphors to focus and inspire opposition is becoming more and more urgent. Maybe the new politics

[45] A book like A Meiklejohn *Political Freedom: The Constitutional Protection of the People* (Harper and Bros Publishing, New York, 1960) could not now be written.

needs to be environmental or human-rights-based or something else entirely. What we know for sure, though, is that, whatever it is, it has no way of expressing itself in today's political system. Indeed it is at exactly this time that the laws mentioned above are making possible the criminalisation of a wider and wider range of 'unacceptable' political speech, i.e. talk exactly like this, outside the ever-narrowing mainstream.

And so finally to my agenda for action. First, we should not fall for the false Berlin dichotomy which drives us to be fanatical about any kind of government restriction on speech – no matter how well meaning – and makes us entirely indifferent to what we can do to improve the quality of our political discourse. We should not fetishise our hostility to government regulation of speech. The proposed incitement to religious hatred law may or may not be the right response to the mischief at which its sponsors say it is addressed: there is the possibility of a malign chill factor on the one hand; on the other there is the excellent precedent of the incitement to racial hatred laws that perhaps show us that this kind of law can work. But for advocates of free speech there are surely bigger contemporary issues than fighting hard for the right of people to express hatred for, and to seek to get others to hate, the views and beliefs of congregations of faithful. I can understand why Voltaire felt like this, but would this be what he would be concentrating on were he alive today? I doubt it.

Proponents of the freedom of political speech in this country should strive for larger goals. They should be devoted advocates of electoral reform in order to broaden the range of persons capable of securing a platform for their views in the House of Commons. They should be outraged by the House of Lords, yet aware that here is an opportunity by creative reform to introduce the healthier parts of civil society into our legislative process. If the place is good enough for crooks like Lord Jeffrey Archer and Lord Black, cannot space also be found for the heads of Amnesty, of Liberty, of Child Poverty Action, and the like? And perhaps most challenging of all, far from being fanatically opposed to it, campaigners for political speech should be keen advocates of government regulation: we need much stronger controls on the financing of political campaigns by large donors; we need much more intrusive government to control media monopolies and to create the conditions for the development of a more diverse public discussion on issues of concern; and we need a legislative right of reply for those without resources who are maligned by the press for the sake of circulation.

This is a tough set of proposals and I am sure many of us can think of other changes that should be made. The point is to protect political speech by creating the space for different views to be heard, to break the growing connection between government and business by persuading the former to make the kind of institutional changes that

will lead it out of a sense of survival to be more responsive to the people than to market power. The instincts of the Labour Party are in this direction, as evidenced by the fact that there has been movement on almost all of the points I have identified above. Those instincts need to be fostered and allowed to flourish: there is no reason for pessimism here, look at how Gordon Brown has publicly called on protestors and others to put pressure on government to achieve change for social justice. I think we could be entering a most interesting phase of British politics, as the system fights back against the growing Americanisation of the political process.