
INTRODUCTION

Love of liberty is supposed to come naturally to Americans. It's supposed to be transmitted through our culture—like love of shopping; it's supposed to be instilled in us in childhood. When I was in grade school, we started our days by singing to our "sweet land of liberty" and pledging allegiance to the flag that stands for liberty, and justice, for all. We learned about the American Revolution, the Declaration of Independence, and the Emancipation Proclamation. A child of the Cold War, I felt lucky to be an American, because, unlike "Red" Chinese or Soviet children, I was free.

I'm still pleased to be an American and still feel relatively free, but I've discovered freedom's fragility; I've learned much of what I wasn't taught in grade school. While I was saluting liberty, African Americans were systematically denied the right to vote (or eat at "white" lunch counters); McCarthyism raged and the House Un-American Activities Committee was persecuting people who held unpopular political views or were associated with unpopular organizations. Our lessons in America's love of liberty were incomplete; we weren't told that Americans sometimes loathed liberty, or feared it, and fell prey to the temptations of political repression. Our lessons in liberty were also self-defeating: When you force children to salute the flag and recite the "Pledge of Allegiance" you don't teach them to exercise freedom so much as you accustom them to the imposition of political orthodoxies.

America's disloyalty to liberty is disheartening but predictable. Liberty leashes power and, right and left, people who find themselves in possession of power tend to resist restraints upon its use. Cynics don't care if they abuse power to advance their own interests; people who take pride in their own virtue generally manage to convince themselves that they exercise power virtuously (even when they exercise it harshly) to serve the public good. Powerful people convinced of their own goodness are as dangerous to individual liberty as powerful people for whom goodness is irrelevant.

So concern for liberty often has a disproportionate relationship to proximity to power. The more protected you feel by your own power or the power of your friends, the less threatened you imagine your own rights. But if you're concerned about the rights of other people, including those you disdain or whose views you abhor, you're apt to be wary of power, even when you or your friends possess it.

You're likely to put less faith in power as a means of forging a just society and more faith in fairness.

Of course, many people claim to value fairness over power, but in practice, few of us do. Few people are willing to extend the same rights to their enemies that they extend to their friends; indeed, you can usually rely on people across the political spectrum to use whatever power they possess to defeat their enemies, partly by denying them rights; most would probably consider it politically naive to do otherwise. Liberals lambaste civil libertarians when they defend the rights of Skinheads or Klansmen. (In 1978, the ACLU lost considerable support for defending the right of a neo-Nazi group to march in a community of Holocaust survivors in Skokie, Illinois.) Conservatives attack the civil libertarian defense of religious minorities who are expected to adopt the majority's religious practices in public schools. (Insisting on their right to pray, proponents of official school prayer also insist upon the power to impose their prayers on others.) Liberals and conservatives alike favor restricting the rights of criminal suspects or members of religious sects denounced as cults. Liberals and conservatives alike will use their power to censor speech they consider dangerous or hateful, although they rarely admit that the restriction of pornography, racist speech, or violent entertainment is censorship; they're more likely to call it common sense.

Civil libertarianism is a nonpartisan virtue, just as repression is a nonpartisan vice. During the 1920s and 1950s, when the government conducted witch-hunts against the left, a commitment to political freedom was associated with liberalism. During the 1990s, when some left-wing college administrators promulgated repressive speech and sexual misconduct codes and, with little due process, prosecuted students for political incorrectness, conservatives laid claim to liberty's torch. Now, their commitment to liberty will be tested, on and off campus, by left-wing protests of the Bush Administration's military campaigns. I suspect that most conservatives will fail freedom's test, as liberals failed when they turned on sexist, racist, or otherwise "offensive" speech. It's worth noting that in the aftermath of September 11, students and professors of various political persuasions were disciplined for making statements for or against the war effort, and for allegedly offending or defending Muslims. Their liberty to speak depended on their conformity to views that prevailed on their campuses. Power trumped fairness, as usual.

What distinguishes a civil libertarian is a focus on preserving fair processes rather than obtaining particular results. A commitment to

civil liberty simply requires fealty to the golden rule: extend the same rights to both your friends and foes—the rights you hope to enjoy yourself. This is, in part, a political strategy: Power shifts between your allies and opponents, often unpredictably. Your rights are most secure if they derive from established constitutional principles, not patronage. But the equal allocation of rights is also a moral imperative. I oppose censorship not simply because I fear that the power to censor might be turned against the speech I like but in the belief that people have a moral right to indulge in speech I hate. The right to view Nazi porn or tune in to Jerry Springer or Bill O'Reilly may seem ignoble compared to the right to read Montaigne, but it includes the individual's essential right to entertain moral preferences. Restrict it and you substitute the authority of the state for the individual conscience.

That, of course, is precisely the aim of censors who don't trust individuals to make moral choices or withstand the corrupting effect of "bad" speech to which they may be exposed inadvertently. This assumption that government knows best suggests that we're a nation of children (while the government is staffed by adults), and it's no coincidence that censorship campaigns often begin with the stated intent of protecting minors. Censorship in the name of child welfare usually garners popular support, although it treats child rearing as the collective responsibility of government officials and not individual parents. In any case, if individuals can't be trusted to choose "good" speech over bad (or "good" religions over "cults"), then neither can their government, which is, after all, composed of individuals, with all their vices; it's not as if being elected or appointed to office magically cleanses them of sin.

Civil libertarianism doesn't rely on assumptions about our moral character. The belief that we should all enjoy the same rights doesn't reflect faith in everyone's ability or inclination to exercise rights virtuously. Instead, it's based on a conviction that we don't have to earn inalienable rights or win them in a national popularity contest: Stupid, nasty people have the same right to vote as their intelligent, compassionate neighbors.

This belief in equality of rights is hardly controversial; at least it evokes rhetorical acclaim. But, for most of our history, equality has been greatly qualified by the usual forms of discrimination. Sex, race, ethnicity, religion, and sexual orientation (if not intelligence or kindness) have all been used as criteria for distributing rights. Historically, Americans have had a "yes, but" belief in equality: We be-

lieve in equal rights, but only for people considered deserving, or capable, of exercising them. For over a century, women were denied the vote because they weren't trusted with it; for nearly two centuries they were legally excluded from male professions, because they were presumed incompetent to engage in them, or because female doctors or firefighters were considered unnatural, like female soldiers today. Sometimes, rights are denied in God's name. In the nineteenth century, the women's rights movement was apt to be considered ungodly. Today, some consider homosexuality a sin, and gay people are denied the right to marry because same-sex marriages are deemed unnatural, or a violation of God's plan. Interracial marriages were barred for similar reasons only thirty-five years ago.

Is the right to marry fundamental, like the right to pray or speak freely? What are the boundaries of our right to privacy? What rights should people enjoy when they're arrested? What rights should survive imprisonment? (The right to live freely in society may be forfeited when you commit a crime, but what about the right not to be raped in state custody?) Are we endowed with a fundamental right to end our lives? Does democracy depend upon the right to own a gun?

Civil libertarianism begins with a roster of inalienable human rights—like rights of speech, religion, privacy, and due process—which are often contested. Does the right to privacy include the right to obtain an abortion, use contraception, or marry the person or persons of your choice? Are violent video games protected forms of speech? Does the right to be free of "cruel and unusual punishment" preclude the death penalty or the torture of suspected terrorists? But reaching general consensus on a list of fundamental rights is only the prelude to battles that occur when rights conflict. Does the First Amendment right to conduct an aggressive protest outside an abortion clinic unduly interfere with women's privacy rights to obtain abortions?

Civil liberties often conflict with civil rights, as liberty inevitably conflicts with equality, dividing liberal and conservative libertarians. The 1964 Civil Rights Act that prohibited discrimination in public accommodation and transit systems (as well as in the workplace) subordinated the associational freedom of white supremacists to the equality rights of African Americans. The conflict between the freedom to discriminate and the right to equal treatment in public places was properly resolved about one hundred years too late, most Americans would probably agree. But it's worth noting that the conflict existed. Bigots have civil liberties, too. Today, while laws against official

segregation are no longer controversial, workplace regulations aimed at benefiting women, racial minorities, or other historically disadvantaged groups, like disabled people, raise similar questions about balancing employers' liberties with employees' rights. Conservative libertarians generally value economic liberties, like the liberty to hire, fire, and promote without government intervention, over civil rights against discrimination.

The conflict over rights and freedoms in the workplace reflects the conflict for left-of-center libertarians between their attachment to liberty and their notions of justice. In the liberal view, an unregulated marketplace inevitably exploits the most powerless members of society and produces gross inequalities of wealth that effectively prevent many people from enjoying the rights to which they're entitled. In our society, your ability to exercise rights usually depends on your income: You have no practical right to obtain an abortion if you can't afford to pay for one and there are no free clinics within your reach. The extent of your due process rights is often determined by your ability to hire a lawyer. Conservative libertarians disagree about the effect of free markets, arguing that they would benefit everyone; but the history of maximum hour, minimum wage, child labor, and occupational safety laws shows that many businesses and industries treat workers decently only when they're legally required to do so.

I share liberal faith in a regulated marketplace (despite my opposition to particular regulations, like workplace speech codes intended to prevent harassment), but I regard the state as an occasional ally, never a friend. I'm wary of liberalism's anti-libertarian tendencies. Because liberals often depend upon government to fulfill their vision of social justice through welfare programs and antidiscrimination laws, they risk losing the mistrust of government that is essential to maintaining liberty. They risk becoming statists.

Of course, liberals are not alone in embracing statism. Virtually all of us rely on the state and want to dedicate it to our vision of the public good. Sometimes only the government can protect individuals from excesses of corporate power. Only the government can administer penal laws to protect individuals from each other. Only the government can conduct foreign policy and provide for the national defense, virtually everyone agrees. Liberals and conservatives have different visions of a just and virtuous state, but they all want to harness its power. Even practically pure libertarians might agree on a short list of essential governmental functions, although they always regard government suspiciously. (In their view, it's always a necessary

evil, never an ally.) Only libertarians resist efforts to direct government power to moral reforms. Social conservatives want government to rid us of promiscuity, among other disputed vices; liberals expect the government to rid us of prejudice.

The temptation to restrict freedoms that are popularly linked with injustice or vice has always been strong. Often people fear the freedom of others as much as they desire their own. In fact, mistrust of liberty may be as hardy an American tradition as mistrust of big government. Left and right, people expect government to keep them safe, and to make their neighbors more virtuous.

State power has become particularly seductive after September II; it promises more protection than liberty. Ask people to choose between freedom and security and almost all will choose security. Freedom depends on peace and some measure of order, after all. People in high-crime neighborhoods are not at liberty to walk the streets, civil libertarians are often reminded when they fight for the rights of criminal suspects. (Not all criminal suspects are criminals, they respond.) People in the Middle East, Israelis and Palestinians, are prisoners of violence, like Protestants and Catholics in Northern Ireland before their truce. So I don't champion liberty in the belief that it matters more than safety. But I believe it matters almost as much, and I'm skeptical when government officials tell me that sacrificing freedom will make me more secure. Left and right, most of them always want me to have less freedom just so they can have more power, regardless of security.

I shiver a little when I hear the familiar post-September II debate about balancing liberty and security. "Are freedom and security a zero-sum game?" people ask, and the answer is predetermined by the question. If politicians and law enforcement agents want us to surrender liberty reflexively, they have only to suggest that it lessens our security. They don't have to demonstrate precisely how the destruction of particular liberties will lessen particular threats—unless we ask a different question. Since September II, it has been clear that freedom is apt to be protected best by a pragmatic focus on security. Thus, the first question to ask of a counter-terrorism proposal is "How will this make us safe?" It turns out, not coincidentally, that the laws and policies that are most effective in eroding our freedoms are often among the least effective in maintaining security, as the history of political repression in America points out. (Consider the internment of Japanese Americans during World War II.)

By destroying our sense of security, the September II attack

greatly weakened our commitment to liberty. Among its secondary tragedies was the death of a nascent movement to reform the criminal justice system and curb law enforcement abuses; by the beginning of 2001, the public had begun paying attention to racial profiling, police brutality, and the likelihood of wrongful convictions (revealed partly by DNA testing). Support for capital punishment; long, mandatory minimum sentences; and the harsh, ineffective war on drugs was slowly beginning to decline. But if people were beginning to question the government's exercise of its prosecutorial powers on September 10, they stopped abruptly on September 11. Their abandonment of reform was inevitable. The more we fear overwhelming external threats, the more likely we will blindly trust the government. A few survivalists may retreat off-grid to wilderness cabins or fallout shelters stocked with gas masks, antibiotics, and a year's supply of Spam, but most of us prefer to continue our pre-9/11 lives and vest our survival in the wisdom and wiliness of government officials, notably the president. What else but the government, who else but the president, could protect us from terrorists?

George Bush's high approval ratings probably measure public fear of terrorism more than reasoned faith in his abilities. The irony in the post-9/11 embrace of big government, often dangerously overlooked, is that public trust in government rose just when government failed us most dramatically. The September 11 attack and our lack of preparedness for future attacks reflect colossal failures of intelligence, airport security, and attention to public health. Why are we so ill prepared for an anthrax attack or other acts of bioterrorism? Why are some nuclear power plants in abysmal condition? In mid-2002, why is it still relatively easy to smuggle weapons aboard an airplane? The first response of the administration and the public to September 11 was a law enforcement crackdown and a demand for new restrictions on liberty, although there was no evidence that the attacks resulted from too much liberty or too little law enforcement power. There was reason to believe that it was facilitated by law enforcement and intelligence blunders.

But for months criticism of government incompetence or negligence in protecting us was rare. At first, Congress made noises about investigating intelligence failures, but most of the noise and willingness to criticize the intelligence apparatus quickly dissipated. Even the appalling blunders of the Immigration and Naturalization Service—notably the issuance of visa approvals for two dead hijackers after the attack—did not evoke much second-guessing of the administra-

tion's capabilities. It was not until May 2002, when leaked CIA and FBI documents revealed that federal agents had some forewarning of the attack, that the administration was forced to defend its actions and inactions before September 11. Still, the initial round of questioning was quelled by predictable assaults on the patriotism of the questioners and by a series of terrifying predictions of what Vice President Cheney called "near-certain" future attacks, probably involving weapons of mass destruction. (In June 2002 the administration changed tack; having been forced to acknowledge FBI and CIA blunders, the president proposed a bureaucratic reorganization and the establishment of a cabinet department for homeland defense. Congressional investigations into U.S. counter-terrorism efforts in the months and years preceding the attack have commenced, but who knows how vigorously they will be pursued or where they will lead?)

It's not surprising that doomsday warnings by the vice-president and other high-ranking officials initially succeeded in deflecting the critics who surfaced in the spring of 2002. Fear is a powerful distraction. But it is instructive that while general faith in government and federal workers was declining, people seemed willing to continue supporting the president and his appointees, even as they advertised their impotence. With its warnings, the administration implicitly acknowledged that the assault on Afghanistan had accomplished little: Al Qaeda operatives were still chattering away, and future devastation was inevitable. The officials in charge of waging America's war on terrorism seemed resigned to losing it. But the public seemed too frightened to notice, and soon the administration was asserting its competence once again, publicizing the arrest of an American citizen allegedly associated with Al Qaeda and suspected of having an interest in detonating a dirty bomb in Washington, D.C. Americans will not readily lose trust in the Bush Administration's ability to protect them; it's difficult for people to admit that their leaders are failing when failure is too terrifying to contemplate.

But blind faith in government, or the executive branch, at least, is nearly as dangerous as terrorism: It facilitates domestic repression and a disinclination to question the administration's diplomatic and military strategies. This public passivity poses foreign as well as domestic dangers. The problem presented by a decades-old worldwide network of anonymous terrorists isn't simple. The administration isn't infallible and would likely benefit from the challenge of opposing views. So, while John Ashcroft and others denounce criticism of the government as dangerous and treasonous, I suspect that a com-

pliant public poses greater dangers than public engagement and dissent. Patriotism requires speech, not silence (or mere applause). I wouldn't call the failure to scrutinize the actions of government officials treason—a hanging offense—but it could someday prove fatal. Follow the government blindly and it will lead you into the sea.