Security and Rights

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SECURITY AND RIGHTS

Trevor C.W. Farrow

This article explores various approaches to the re-constitution of human rights following 11 September 2001. In contrast to the approaches advocated by Sean McMahon and John Edwards, the author proposes a re-commitment to the core values embodied in the rights enshrined in documents such as the Universal Declaration of Human Rights. The article proposes that re-constituting human rights, either by a process of consequentialist trade-offs or choice-based prioritization, opens the door to naturalizing infringements of rights in the name of fear or security. Both detract from the goals set out in human rights declarations. Even in a security-conscious environment, discussions of rights must recognize and take into account the established and fundamental commitments to universal human rights and freedoms.

I. INTRODUCTION

There is no easy way to create a world where men and women can live together... 1

A number of papers in this special issue contemplate the notion that, in light of globalization, the events of 11 September 2001, and resulting government responses, human rights are in need of re-constitution. One version — a utility-based version — of this re-

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constitutions, represented by current post-September 11 Western anti-terrorism legislative initiatives, sees modern rights as increasingly subordinate to security measures. Sean McMahon, in an article entitled “We Are All Potential Terrorists Now: The Reconstitutive Effects of the Anti-terrorism Act and the Patriot Act,” critically discusses two of these initiatives and their resulting impact on power relations in society.

Another version of rights re-constitution — a priority-based version — is that proposed by John Edwards in his article “Security, Asylum, and Rights: Are All Rights Equal?” Edwards argues that we should focus our energies, at least for the time being, on a limited number of higher priority rights in order to make better progress in protecting those key rights in an era in which security, not rights, trumps.

In this article, I argue that both the utility and priority-based approaches — each leading ultimately to a limiting of rights — are misguided. In my view, at a time of increased government security initiatives resulting from heightened sensibilities of individual and collective fear, now, more than ever, we need to stay committed to the aspirational model of human rights that was established post-1945 in, for example, the Charter of the United Nations and the Universal Declaration of Human Rights. Specifically, I make the simple but important point that by re-constituting human rights,

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4 I do not purport fully to summarize or explain the arguments of either McMahon or Edwards in this article. For their full arguments and lines of support, see McMahon, supra note 2 and Edwards, ibid.

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either through a process of consequentialist trade-offs or choice-based prioritization, we open the door to naturalizing infringements on rights, made in the name of fear and security, that push us further back, not further along, the path toward reaching the goals set out in those post-1945 documents designed to “reaffirm faith in fundamental human rights” and promote “social progress and better standards of life in larger freedom … of all peoples.” Ultimately, what is needed is not a re-constitution of rights, but rather a re-commitment to the core values embodied in those rights.

II. RE-CONSTITUTING HUMAN RIGHTS

A. Utility-Based Re-Constution

Two versions of rights re-constitution are discussed in this special issue. One version, under post-September 11 Western anti-terrorism legislative initiatives, provides that the balance between security and freedom must be shifted — away from Mill’s preferred vision of minimal liberty impairment — in order to better protect us from current and future terrorist threats. The calculus made here is based

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8 Charter of the United Nations, supra note 6, preamble.
11 I do not purport here to document the various reports and commentaries — positive and negative — looking at the trade-offs that have occurred in the area of human rights in light of post-September 11 legislative initiatives. For brief discussions, see Edwards, supra note 3 at 84-87, and McMahon, supra note 2 at 55-65. For general commentary on the initiatives themselves, see Yonah Alexander & Edgar H. Brenner, eds., The United Kingdom’s Legal Responses to Terrorism (London: Cavendish Publishing Limited, 2003); Norman Abrams, Anti-Terrorism and Criminal Enforcement (St. Paul, MN: West Group, 2003); and, Donald J. Musch, Balancing Civil Rights and Security: American Judicial Responses Since 9/11 (Dobbs Ferry, NY: Oceana Publications Inc., 2003). For a further discussion of the foreign and domestic

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on a consequentialist determination that puts a higher utility value on protecting the security of the majority from threats of terrorism than on the rights of the minority that are potentially infringed because of that utility calculus.\(^\text{12}\)

Under this version, rights are purportedly re-constituted, not directly, but rather indirectly through their infringement by security initiatives\(^\text{13}\) put in place, ironically, in the name of protecting those rights.\(^\text{14}\) In Canada, this security-based utility approach manifests itself in a willingness to allow increased limits on well-established Charter\(^\text{15}\) rights in the name of security.\(^\text{16}\) For example, during an October 2001 interview, Anne McLellan — Canada’s deputy prime minister and then minister of justice under whom Canada’s Anti-terrorism Act\(^\text{17}\) was drafted — stated that the notion of “reasonable limit” in section 1 of the Charter has shifted since September 11.\(^\text{18}\)

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\(^\text{13}\) See McMahon, supra note 2 at 55-65.

\(^\text{14}\) In my view, this argument obtains notwithstanding the following balancing language contained in Canada’s Anti-terrorism Act: “the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the . . . Charter”(Anti-terrorism Act, supra note 9, preamble). See also Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, 2004 SCC 42 at paras. 5-8, Iacobucci & Arbour JJ.


\(^\text{16}\) Discussed also by Edwards, supra note 3 at 84-85.

\(^\text{17}\) Supra note 9.

\(^\text{18}\) Shawn McCarthy, “The War on Terror: Anne McLellan’s New Ideals” The Globe and Mail (22 October 2001) A7. Shifting the balance under s. 1 of the Charter allows for McLellan’s companion view that Canada’s anti-terror legislation “fully complies with the Charter of Rights and Freedoms” (“Anti
This limit — seen practically as the “inroads that security measures make on rights” — is likely to result in an overriding of some rights as a result of “a new balance between individual liberties and the security concerns of society.”

This first view of rights is discussed, critically, by Sean McMahon. He takes the view that post-September 11 security initiatives — specifically the Anti-terrorism Act and the Patriot Act — negatively re-create societal power relations. McMahon develops this argument in several steps. First, using Bentham’s idea of a panopticon (the “perfect prison”), as re-conceived by Foucault, McMahon argues that post-September 11 security initiatives re-make us as self-disciplining members of society. Second, through this self-disciplining process, control by these initiatives “is continuous and automatic.” Third, the process is preventative. According to McMahon, prevention “strives to stop an act or omission before it is committed”; it “strives to pre-empt,” and the “most effective and efficient form of pre-emption is self-discipline on the part of the objects of surveillance.” Fourth, because of the “prevalence of power” in this panopticon-view of modern society, the exercise of actual power is made “obsolete.” Finally, again using a Foucauldian argument, the result of this panopticonism spreads “throughout the social body, thereby
constituting the disciplinary society.” 27 What we are left with, according to McMahon, is a re-made citizen-subject living in a disciplinary society that is individualized and totalized — i.e., under legislation that “encompasses the whole of the social body and applies to every individual member constituting the body.” 28

McMahon identifies four concerns with this post-September 11 utility-based rights discussion. First, the “particular subjectivity” characterizing this “newly reconstituted self-disciplining” society is one that sees us all as “potential terrorists.” 29 Second, it is a subjectivity that “subordinates considerations of justice to the maintenance of extant power relations.” 30 Third, related to the second point, this subjectivity allows for a “rejection of normative concerns” in the context of human rights protections. 31 Fourth, it also “highly circumscribe[s]” our range of possible options for political dissent. 32 A fifth concern, raised by Edwards, is that the damage caused by this erosion of rights is “largely unquantifiable.” 33

The implications of this utility-based rights discussion, viewed through McMahon’s lens of citizen rights-holders as re-made subjects, are “ominous.” 34 For McMahon, only when citizens “recognize that they are all the potentially guilty objects of these acts of governing,” and not simply “the Other,” will “this new subjectivity . . . be challenged.” 35 And for McMahon, “challenged it must be.” 36

27 Ibid.
28 Ibid. at 65.
29 Ibid. at 69.
30 Ibid.
31 Ibid. at 72.
32 Ibid.
33 Edwards, supra note 3 at 85.
34 McMahon, supra note 2 at 72.
35 Ibid.
36 Ibid. McMahon’s article sparks a further point about this utility-based version of rights re-constitution that should also be mentioned. Legislation in place prior to the passing of these initiatives was likely adequate to deal with the potential security threats at issue (ibid. at 55-58). The initiatives should therefore “not be read as legislative discontinuities” or “original . . . attempts to address the issue of terrorism.” Rather, they should be “recognized as continuations of the persistent state practice of penetrating the body politic deeper and more completely with surveillance” (ibid. at 55). As such, it may

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I have discussed elsewhere a number of related concerns about the negative impact that post-September 11 legislative initiatives potentially have on rights. I do not develop those arguments further here. For purposes of this article, I echo McMahon’s concerns.

**B. Priority-Based Re-Constitution**

A second version of rights reconstitution is that proposed by John Edwards. For Edwards, what is needed is a re-conception of “the standing of rights, their moral content, their authority, indivisibility, and their tradeability.” This would amount to a “less didactic, more morally foundational approach to an understanding of rights.” As such, we should “identify some rights as more important than others,” a process that would be facilitated by a “foundational view of rights” that explains “why we have the rights we do.” By concentrating “our efforts” on those rights, we “might make more progress in fulfilling and protecting them.”

Edwards’ argument is motivated by his underlying view that international human rights, discussed primarily using the example of asylum seekers, are not being adequately protected under current rights regimes. This lack of protection is, for Edwards, based on four factors. First, we now live in a very different world than the post-1945 world in which current international human rights regimes were primarily promulgated. Unlike that world, today’s world is a far less “static place” in which “the obscenities of state actions” are “no longer the main kind[s] of threat to human dignity and autonomy …

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38 Edwards, supra note 3 at 75.
39 Ibid.
40 Ibid. at89-90. Edwards spends only a short time on this exercise; see ibid. at 89-92.
41 Ibid. at 89.
42 Ibid. at 80.

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The pattern of human rights abuses today is of a different kind to those of the post-Second World War era."\(^{43}\)

Second, because of this modern shift in the locus of threat and abuse, different kinds of security measures are now being instituted. As Edwards comments, "[t]here has been an explosion in the security industry over the past ten years and this has been nowhere more noticeable than in the West."\(^{44}\) Further, "[l]imitations on police activity are frequently suspended in the interests of security; security can override most other considerations."\(^{45}\) The result of these new initiatives: "[i]t is security, not rights that now trump[s]."\(^{46}\)

Third, current international human rights regimes operate as all-or-nothing protections. There is little flexibility in their creation or application. Therefore, for Edwards, treating rights as "imperative," "indivisible," "unmovable" and "non-derogable" — as a "Rock of Rights" — has proven "to be one of its main limitations."\(^{47}\)

Fourth, confusion and omissions result from distinctions currently made between both human and citizen rights and international and state action. As Edwards explains, states "are . . . better at righting wrongs within their boundaries"; "can be more flexible in their correlative action"; within their boundaries "citizen rights are less generous or just do not apply to non-citizens"; and "are much less likely than international courts and councils to take a considered view of the rights they are damaging or to consider their impact."\(^{48}\) As a result, "the possibility of rights existing as 'global' declaratory rights and simultaneously as citizen rights with closely overlapping content but different duty-holders, can be a recipe for confusion and an opportunity for dissimulation and inaction."\(^{49}\)

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\(^{43}\) Ibid. at 74-75.
\(^{44}\) Ibid. at 84.
\(^{45}\) Ibid.
\(^{46}\) Ibid.
\(^{47}\) Ibid. at 74. See also ibid. at 83-84, where Edwards similarly argues that "the 'Rock of Rights' — the universality, indivisibility, and equality of all rights is an orthodoxy that may well not best serve the interests of those whose rights are threatened."
\(^{48}\) Ibid. at 88-90.
\(^{49}\) Ibid.

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These four concerns raised by Edwards are important to our understanding of current rights protection and reform. The potential for progress to which he also points, under his version of rights reconstitution, is appealing. It is also, however, misguided, ultimately resulting in a disservice to his stated project of “serv[ing] the interests of those whose rights are threatened.”

I suggest that Edwards’ argument is misguided for three reasons. The first deals with his allowance for prioritizing between “more important” and “lower priority” rights. To help facilitate this choice, Edwards makes several distinctions between types of rights: citizen and human; declaratory and foundational; and more and less “essential” (for our “existence as morally autonomous agents”). He also distinguishes between the objects of rights as “means to ends” (such as “education, social security, the right to work, the right to leisure and so on”) and “ends in themselves” (“liberty, freedom of movement, worship, [and] thought”). Notwithstanding these distinctions, it is unclear exactly what Edwards is ultimately contemplating in this prioritization as rights re-constitution. Given his discussion of globalization, modern security regimes and security trumping rights, he appears to be considering some kind of balancing of rights. If this is correct — if he is considering some kind of balance, similar to what Canadian courts already do under section 1 of the Charter — then we have really advanced no further than the version of rights re-constitution contemplated by the utility-based version discussed by McMahon.

If what he means involves the more fundamental issue of

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Supplementary notes:

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50 Ibid. at 84.
51 I am grateful to Annalise E. Acorn for comments on the development of these arguments.
52 Edwards, supra note 3 at 89.
53 Ibid. at 91-92.
54 Ibid. at 75.
55 Ibid. at 84.
56 Ibid.
57 In the context of security initiatives, see e.g. Application under s. 83.28 of the Criminal Code (Re), supra note 14. In the U.S., see e.g. Hamdi et al. v. Rumsfeld, Secretary of Defense et al., 542 U.S. 507 (2004), No. 03-6696 (28 June 2004), online: Supreme Court of the United States <http://a257.g.akamai.net/7/257/2422/28june20041215/www.supremecourts.gov/opinions/03pdf/03-6696.pdf>.

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identifying what rights are necessary for moral autonomy, then it seems to me that he runs into two further problems. The first is that this calculus is really beside the point in the context of how to balance security and rights. Even if we were able to identify a core set of fundamental human rights, and further, if we were willing to say that those rights were more important than (and would trump) a competing right – for example, to be protected from imminent death resulting from a terrorist attack – then we are still going to be left with a balancing of rights and security contemplated under the utility-based version.

The related problem is one of realizability. If we were able to agree fairly on what rights — or what principles of fundamental justice, for that matter — are necessary for moral autonomy, then Edwards’ argument might be quite useful. However, such choices are, quite frankly, not easy to make.\textsuperscript{58} This problem is not fatal in itself. However, while Edwards gives us some ideas,\textsuperscript{59} he does not ultimately provide us with any real assistance in this calculus. He acknowledges that “[u]ntil we have a clearer view of exactly what is and is not required for moral autonomy, however, we can make little progress with prioritizing rights.”\textsuperscript{60} Thus, even with his means/ends distinction — under which he argues “there is more reason to be optimistic”\textsuperscript{61} — Edwards recognizes that we still will “need a principled set of criteria to judge relevance to moral autonomy and what constitute means/ends rights.”\textsuperscript{62} He concludes that the combination of the moral autonomy and means/ends sets of ideas


\textsuperscript{59} See Edwards, \textit{supra} note 3 at 87-93.

\textsuperscript{60} \textit{Ibid.} at 93.

\textsuperscript{61} \textit{Ibid.}

\textsuperscript{62} \textit{Ibid.}

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“ought to provide the means for prioritizing rights.”\textsuperscript{63} He may well be right. However, again, he does not provide us with anything further on how, as a practical matter, prioritization takes place. So we are left with the direction to prioritize, without any real guidance as to how to do so.

My second criticism of Edwards’ project is quite simple. By choosing some rights over others in what appears to be, for Edwards, a zero sum environment, some rights will always be left behind. Edwards himself acknowledges that the “price” for this choice is that “some ‘lower priority’ rights would remain unfulfilled for the time being.”\textsuperscript{64} This goes back to the first problem of having to choose which rights will be left behind. It also creates the further problem of sanctioning a system that is necessarily designed to fail in some cases without really telling us what those cases are or how the choices will be made. Again, we seem to be no further ahead than we are under the utility-based version.

My third objection is more fundamental. By allowing for the possibility of prioritizing rights (prior to any discussion of balancing under competing notions of security), even if only “for the time being,”\textsuperscript{65} we open the door to consequentialist arguments of utility that will ultimately, it is feared, lead to majority-dominated priority calculations. And it is against unfair determinations and prioritizations by majorities under these calculations that fundamental rights regimes — like the \textit{Universal Declaration of Human Rights} and Canada’s \textit{Charter} — are designed to protect.\textsuperscript{66} As Ronald Dworkin states,

\begin{quote}
[t]he bulk of the law — that part which defines and implements social, economic, and foreign policy — cannot be neutral. It must state, in its greatest part, the majority’s view of the common good. The institution of rights is therefore crucial, because it represents the majority’s promise to the minorities that their dignity and equality will be respected. When the
\end{quote}

\textsuperscript{63} \textit{Ibid.}

\textsuperscript{64} \textit{Ibid.} at 89. I do not argue that a zero-sum environment must (or in fact should) obtain. However, given Edwards’ acknowledgment, it is clear that his present argument contemplates such an environment.

\textsuperscript{65} \textit{Ibid.}

\textsuperscript{66} In \textit{Taking Rights Seriously} (London: Duckworth, 1977), Ronald Dworkin provides a modern view of this concern in his statement that “utilitarian arguments . . . are ruled out by the concept of rights” (at 203).
divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere. 67

Under Edwards’ prioritization argument, we are left with little guidance as to how to choose between competing rights when making determinations about which rights should be left behind. And without a principled priority-based theory, we are left vulnerable to the will of the majority, even before we get to any balancing calculations under utility-based security regimes.

III. RE-COMMITTING TO HUMAN RIGHTS

It seems to me that neither the utility-based nor the priority-based rights discussion provides any kind of meaningful change to our current understanding of the nature of rights. As such, what we are really talking about here is not a re-constitution of rights, but rather a need to re-commit to the core values of existing and future human rights regimes.

By arguing for either a utility-based or a priority-based understanding of rights (the latter, as Edwards acknowledges, amounts to “heresy in many human rights circles”), 68 we are resigning ourselves, in either case, to less effective regimes than the aspirations to which we agreed in our post-1945 rights-based documents. Yet, the aspirational nature of those documents is their strength, particularly at a time when rights are under severe strain as a result of modern security concerns. As early as Socrates’ defence in his trial in the Apology (of himself and the just life)— “O men of Athens, I say to you . . . either acquit me or not; but whichever you do, understand that I shall never alter my ways, not even if I have to die many times,” 69 — aspirational approaches to justice have been advocated. More recently, John Rawls identified that, as one of the “roles that political philosophy may have as part of a society’s public political culture,” political philosophy holds out a “realistically utopian” ideal, thus “probing the limits of practicable political possibility.” 70

67 Ibid. at 205. See also Ronald Dworkin, “Rights as Trumps” in Waldron, ed., supra note 12, 153.
68 Edwards, supra note 3 at 89.
70 Rawls, Justice as Fairness, supra note 58 at 1, 4.

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Setting high goals pushes us in a direction designed to better the human condition for all, not to settle for a middle ground that necessarily pays the heavy price of leaving some behind (particularly without a principled basis for doing so). While Edwards is looking to make some positive inroads into bettering “the overall welfare and security of rights-holders,” particularly in the context of asylum seekers who he sees as falling through the cracks of our current all-or-nothing system, his priority-based argument, in my view, threatens the goal of universal human rights regimes, a goal that takes all rights and their universality seriously. As the Vienna Declaration and Programme of Action on Human Rights 1993, adopted by the Vienna World Conference, provides:

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all . . . The universal nature of these rights and freedoms is beyond question . . .

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Edwards is right that we are clearly not there yet. And he, supported by McMahon’s discussion, is also right that currently, under modern security regimes, “[i]t is security, not rights, that now trump[s].” But that cannot be our endgame; it is certainly not the endgame of our post-1945 human rights regimes. We can and must do better than that. It is for this reason that I am so concerned about

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71 See Edwards, supra note 3 at 87.
73 Edwards, supra note 3 at 84.
any discussion of rights that allows, as part of its purpose, for the necessary erosion or neglecting of some rights.

Some argue that globalization is, at least in part, responsible for increased pressures on human rights. As I have argued elsewhere, globalization means many things to many people. Of its varied potential aspects, Edwards correctly identifies several central components that may be relevant to human rights considerations, including: “increases in intra- and inter-national movements of population for purposes of work, tourism, [and] flight from oppression or war”; the “spread of ideas, cultural artifacts and ideologies with a heightened potential for conflict”; and, “increased contact between ideological and other interest groups such as independence, religious, and political groups, not all of whom will use pacifist ways of promoting their cause.” Fundamental to each of these elements is the movement of humans and ideas. With this increase in movement comes an increase in potential conflict. And with this increase in potential conflict comes a need for increased human rights protections. Utility-based arguments make no apology for overriding some rights in favour of others. Edwards’ priority-based solution favours some rights over others, necessarily leaving the latter unprotected.

In my view, any discussion of rights needs to take seriously, as a starting point, all rights of all people. This is what we have agreed to in documents like the Vienna Declaration and Programme of Action on Human Rights 1993. The price of leaving some rights

74 Edwards, for example, discusses this argument; see ibid. at 75-77.
76 Edwards, supra note 3 at 76.
77 Supra note 72.

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behind, by design, may simply be too high, particularly without a more principled basis for how to make that calculation.

From this starting point, a discussion of the re-constitution of rights would begin with the acknowledgment that the problem lies not in our understanding of rights, but rather in our ability to, or choice not to, protect those rights. Elements of that discussion would include a commitment, or re-commitment, to the aspirational nature of the post-1945 rights project already in place. However, notwithstanding this commitment, there are clearly going to be challenges and difficult choices to be made between competing rights and interests.

It is for this reason that any discussion of rights needs to emphasize the fundamental need for meaningful civil societies and adequate room for robust political discussion and debate. Equally important is a strong judiciary, empowered to protect the rule of law (that contemplates both domestic and international human rights commitments), particularly when majority rule in times of insecurity threatens the rights of minority groups in society. Further, while globalization puts pressure on rights, it also opens new avenues for awareness, learning and monitoring — through advances in technology and broad, cross-border discussion and international scrutiny — that need to be harnessed for the further advancement and protection of rights. Finally, to the extent that current security concerns place strains on the goals of universal human rights regimes, we need to realize, as Michael Ignatieff has argued, that

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81 For a useful discussion on the necessary role of “cross-boundary scrutiny” of local rights and ethical practices, making use of Adam Smith’s demand that ethical scrutiny requires that moral beliefs should be examined from a distance, see Amartya Sen, “Elements of a Theory of Human Rights” (2004) 32 Philosophy & Public Affairs 315 at 355, and generally at 348-355.
human rights are “the best guarantor of national security.” In the specific context of world insecurity as a result of inequality and terrorism, we need to look behind the anger in order to start to understand and address its sources. Here, again, respect for universal human rights and needs is fundamental.

IV. CONCLUSION

King’s comment quoted at the outset of this article about the difficulty of creating racial harmony in the 1960s is equally apposite to the difficulty of establishing international civil and political harmony today. Current terrorism is real and in need of prevention and response. One only need look at the recent bombings in London, occurring during the start of the July 2005 G8 Summit in Scotland, to bring home this harsh reality. As such, as a majority of the Supreme Court of Canada recently stated: “The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so.”

I agree. However, whatever measures are put in place to protect us from current threats must be crafted in such a way that they do not destroy the very rights and freedoms they are designed to protect. And in this security-conscious environment, any discussion of rights — utility-based, priority-based, or other — must accord with our well-established fundamental commitments to universal human rights and freedoms.

84 Application under s. 83.28 of the Criminal Code (Re), supra note 14 at para. 5, Iacobucci & Arbour JJ.
85 For a recent discussion of this balance by the Supreme Court of Canada, see ibid. For a recent collection of essays looking at creating a “culture of respect” for human rights through their effective practical implementation, see Colin Harvey, ed., Human Rights in the Community: Rights as Agents for Change (Oxford: Hart Publishing, 2005).
Canadian Ronald St. John MacDonald, the first non-European judge on the European Court of Human Rights at Strasbourg, recently stated that “[w]e need to promote the idea that law is liberating instead of constraining”; that it “makes possible the kind of society we want to live in.”\textsuperscript{86} Human rights regimes — international and domestic — need to be directed at the kind of society we want to live in, not at the kind of society that only some people can live in. Regardless of current security threats, discussions of rights need to take this view seriously. Otherwise, in the fight to protect democracies in the war against terror, we could become our own worst enemy.