THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN, 1914-1945 by K.D. Ewing and C.A. Gearty (Oxford: Oxford University Press, 2000)

Historians and lawyers often prove ill-suited to the difficult task of charting the historical development of civil liberties. Treatments of the subject tend to either lack the academic rigour expected of legal histories, or they suffer from an overabundance of it at the expense of clarity of analysis and theme. Judging by its sober curriculum vitae, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945*[1] — written by a pair of King's College London professors and bearing the imprimatur of the Oxford University Press — might be expected to fall with a rather dull thud into this second category of constitutional texts, an example of a meticulous reference guide devoid of immediacy or accessibility.

What a delightful surprise, then, to find a book on this topic of such value to both the serious scholar and the casual student of politics, history, or law. *The Struggle for Civil Liberties* weaves legal actions and movements through the much larger and more important social, political, and philosophical fabric, moving with the confidence and pace of the best histories. Even better, it does so without sacrificing analysis, and it demonstrates a satisfying level of detail and precision in its discussion of the legal arguments and tactics on all sides of the issues.

This sort of success is even more remarkable in view of the book's ambition, which is to follow the fate of English civil rights through that nation's arguably most tempestuous and tenuous period: from the beginning of the hellish European conflict in 1914, through the strife of social discontent between the wars, and on to the end of the devastating renewed war with Germany, which shook popular conceptions of "human rights" and "civil liberties" to their foundations. Obviously, the period treated here is not randomly chosen. Rights protections within any political system are never more imperilled (or, arguably, more necessary) than when the system itself is under serious attack, either physically or, as in the interwar period, ideologically. In England this same period was also a time of deep philosophical and political reflection, an era in which Britons' vaunted liberal ideology was tested and, frankly, found inadequate.

It is natural that this work will be of particular interest to modern constitutional scholars for one further reason: a study of the English experience during this period encourages reflection on the relative degree of protection afforded civil liberties in a common law system in which parliamentary supremacy is a central tenet. Is there, we might ask, additional comfort provided by a written constitution, or are such devices in fact (as Professor Bakan recently suggested with mischievous double entendre) "just words"?[2]

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1 K.D. Ewing & C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford: Oxford University Press, 2000) [hereinafter *The Struggle for Civil Liberties*].

2 J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1999).

Such a question is centrally relevant for Britons today, who are struggling with the awkward legacy of the Diplock Courts, revisiting the Bloody Sunday killings through a new international judicial inquiry, and weighing the unfamiliar yoke of the European Union and its Court of Human Rights. Such reflection may also benefit Canadians and certain of our Commonwealth cousins, trapped as we are in something of a gray netherworld between the English model of parliamentary supremacy and the American recognition of rights enshrined in the earliest amendments to the US Constitution.

It might be a surprise to learn that, during this period, perhaps the most profound failures of the English common law to protect civil liberties arose in peacetime, and it is in these accounts that *The Struggle for Civil Liberties*' central theme is best realized. I use as an example the authors' extraordinarily nuanced treatment of *Duncan* v. *Jones*,[3] the seminal interwar test case of police officers' power to arrest public protesters for "anticipated breach of the peace." It is only one of dozens of such revealing stories addressed in the text but, nonetheless, can be seen as something of a centrepiece, both in a tertiary and philosophical sense.

Duncan forced the Court of King's Bench to confront the principle set out in *Beatty* v. *Gillbanks*,[4] which had apparently established that there is no authority vested in the police to a arrest a person for fear that his or her lawful activity might incite another to breach the peace. In *Beatty* the plaintiff was the leader of a Salvation Army march and was arrested out of concern that the marchers would be attacked by members of a rival group. The *Beatty* Court had held that there was no authority for the proposition that a lawful gathering could be deemed unlawful simply because the police believed that others would react violently towards it.

Beatty appeared, in other words, to offer some common law protection for assembly and expression rights. It had stood, for Professor Dicey at least,[5] as proof of the proposition that the common law provided robust and vigilant protection for the civil liberties of Englishmen and, presumably, Englishwomen at the turn of the century.

The facts in *Duncan* seemed to fall comfortably within the protection afforded by *Beatty*, if indeed *Beatty* could be said to provide positive protection at all. In 1934 Mrs. Duncan, a "well known radical" and leader of the National Unemployed Workers' Movement, addressed a crowd of about thirty who had gathered to "defend the right of free speech and public meeting"[6] in the wake of several recent arrests of other protest leaders. When Mrs. Duncan refused to acquiesce to a police demand that she move her meeting away from a government training centre and hold it on another street some distance away, she was promptly hauled off to prison.

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3 [1936] 1 K.B. 218 [hereinafter *Duncan*], discussed most extensively in *The Struggle for Civil Liberties*, *supra* note 1 at 260-74.

4 (1882), 9 Q.B.D. 308 [hereinafter *Beatty*].

5 As noted in *The Struggle for Civil Liberties*, *supra* note 1 at 264, counsel in *Duncan* cited A.V. Dicey, *Law of the Constitution*, 8th ed. (London: MacMillan and Co., 1915) at 508.

6 *Ibid.* at 261.

Initial attempts to justify the arrest on the grounds of an apprehended riot were abandoned by the time the case had made its way to its final arbiters. Instead, the claim was that the police had some vague fears of unrest;[7] nevertheless, there was no suggestion that Mrs. Duncan would *herself* breach the peace or incite others to do so. Was her right to speak and conduct a public assembly not afforded some positive protection by the common law, as *Beatty* had seemingly held?

It was not. In fact, in the deliberately blithe language characteristic of judges engaged in "legal reform," the *Duncan* Court professed to be somewhat mystified at the plaintiff's invocation of the earlier case, rather inexplicably asserting that "no such question as that which arose there is even mooted here."[8] The Court clearly held that the police had been within their rights to arrest Mrs. Duncan.

The authors of *The Struggle for Civil Liberties* note the difficulty that subsequent scholars have had in reconciling the decisions in *Beatty* and *Duncan*. The latter decision is indeed, as they suggest, "the common law at its least persuasive";[9] they note that the Court seized upon principles from *Beatty* that were, at best, *obiter*, referred to authorities that had doubted the correctness of *Beatty* (without citing any), and seemingly ignored the fundamental *ratio* of the earlier case.[10]

Certainly, without the remarkably detailed context provided here by the authors, the two decisions, at least from the point of view of *rights*, appear irreconcilable, even bizarre. What emerges from the entire story of *Duncan*, however, is that the English courts, staring down an ideological threat to the traditional order — blinked. The sheer weight of evidence provided by the authors shows that, in fact, the English judiciary had its eyes more often contentedly closed than could be consistent with the traditional image of a wary, alert body of men doggedly defending citizens' rights against a mischievous state.

The failure of the common law can be found in the very words with which the Court in *Duncan* chose to characterize the nature of the "right of assembly," which it claimed "is nothing more than a view taken by the Court of the individual liberty of the subject."[11] The common law, evidently, may be given to striking, even violent mood swings. Or as Forrest Gump might say, "justice is as justice does."

Nowhere do the authors suggest that the existence of a constitutionally entrenched set of rights is a panacea, and rightly so. Certainly, inconsistent decisions are possible under a Bill of Rights, and opposing judicial decisions frequently claim to be founded upon the same textual description of a right. Additionally, we should not seek to compare 1936 England with 2001 Canada.

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7 *Ibid.* at 262-63.
8 *Duncan*, *supra* note 3 at 221.
9 *Supra* note 1 at 267.
10 *Ibid.*
11 *Duncan*, *supra* note 3 at 221.

But the episode of *Duncan* v. *Jones*, as it is related so thoroughly by the authors of the present text, illustrates quite nicely the value that might have been provided by a concise, positive, normative rhetoric of rights, even one subject to exceptions such as those found in sections 1 and 33 of the Canadian *Charter*.[12] As the authors note in their introductory chapter, to the extent that the late-nineteenth century decision in *Beatty* seemed to suggest some common law embodiment of an assembly right, it was an "aberration,"[13] seized upon by Dicey in a failed attempt to set out "a coherent vision for the protection of civil liberties through the medium of the common law."[14] The authors state their belief that "[t]o the extent that there was any substance in Dicey's Rule of Law (which we doubt), this had all but evaporated even within his own lifetime."[15]

At the very least, a direct and unambiguous rhetoric of rights in a constitutional document stands as a statement of intent, a challenge to the executive and legislature to justify their actions according to a visible, if still not an entirely tangible, standard.[16] Further, explicit constitutional "rights" rhetoric ensures that even legislatures cannot escape the risk of having their decisions found wanting in the comparison. In the end, this may be of significant psychological, philosophical, and political, if not legal, value.

Is there any criticism to be levelled at this book? There is, perhaps, one. In the introductory chapter the authors seek to define "civil liberties" as the freedoms necessary to promote political participation, as opposed to "human rights," which the authors conceive as protective devices against encroachment by the state.[17] As they put it, civil liberties define a "freedom *to*," and human rights cover "freedom *from*."[18] Some might not be comfortable with so stark a demarcation.[19] Indeed, if I had to articulate a disappointment with this book, it would be that this stage-setting first part ought to have been either more thoroughly fleshed out or largely omitted. The space dedicated to the important matters in the introductory chapter was insufficient for the authors to convince the reader of their positions, or even to sufficiently explain them, particularly so because, as they themselves acknowledge,[20] the definitions they prefer are far from universally

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12 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

13 *The Struggle for Civil Liberties*, *supra* note 1 at 31.

14 *Ibid.* at 34.

15 *Ibid.*

16 It is instructive to compare the language of the *Duncan* decision with that of the US Supreme Court in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 at 515 (1939) (a case argued by the ACLU). In this case Roberts J., invoking the First and Fourteenth Amendments, said:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

17 *Supra* note 1 at 4-5.

18 *Ibid.* at 33 [emphasis in original].

19 Would it have been an infringement of civil liberties or human rights to, for instance, forbid members of a particular religion to hold public meetings or to prevent women from voting? I would argue that the two concepts are often inseparable; moreover, there does not appear to be any real analytical advantage to the narrower definition of civil liberties preferred by the authors.

20 See *e.g.*, *supra* note 1 at 5.

endorsed. This is perhaps a quibble with which those better-schooled in turn-of-the-century English law might disagree, and I rush to emphasize that this criticism in no way detracts from the quality of the narrative that follows.

In the end, the lesson to be gleaned from the era portrayed here is perhaps that political rights are fragile before both demagogues and democrats, and are enshrined, to the extent they are at all, principally within the social consciousness and protected mainly by the will of the "social mind." To their credit, the authors provide concise and thoughtful analysis without pretending to offer simplistic answers to the troublesome questions of rights and social struggle. Readers are left to form their own conclusions, but they are immeasurably better off for the inquiry.

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