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INTERNATIONALISM AND THE DILEMMAS OF STRATEGIC PATRIOTISM

John Fabian Witt*

I. INTRODUCTION

It is an honor to talk today about the first woman leader of the most important civil liberties organization in the United States—a person who has combined the pursuit of American civil liberties with a deep interest in international law; who has viewed the civil liberties project as deeply bound up in a project of advancing feminism and women’s freedoms; who has taken up the defense of individual rights in a time of national crisis, forging transatlantic networks to do so; who has resisted the dramatic expansion of the police powers of the federal government in a time of external threats; who has butted heads with an attorney general widely seen as overreaching; and who has defended dissenters even as terrorists caused mayhem and death in her home base in lower Manhattan. I am talking, of course, about Crystal Eastman, a woman with whom some of you are no doubt familiar at least in passing, and who in 1917 co-founded with Roger Baldwin the predecessor organization to the American Civil Liberties Union (“ACLU”).¹

Needless to say, it is also a real pleasure to give this presentation in a symposium honoring Nadine Strossen, president of the ACLU almost a century after Eastman’s and Baldwin’s early moves toward civil liberties. Professor Strossen, no less than Crystal Eastman, has pursued international law ideals alongside American civil liberties, defended civil liberties as aligned with feminist politics, contested expansions of federal police powers, resisted the programs of now two attorneys general, and defended the rights of dissenting voices in our own time of national crisis. From her offices at the ACLU and New York Law School, not too far from Crystal Eastman’s old haunts in Greenwich Village, she has, like Eastman, been a distinctive American voice in defense of the tradition of individual rights that many people from nations and legal systems around the world associate with the U.S.

* Professor of Law and History, Columbia University. Many thanks to Sarah Seo, Columbia Law School class of 2007, for her excellent research assistance. Thanks also to Paul Finkelman, Susan Herman, Burt Neuborne, Nadine Strossen, and the participants in the Fifth Annual Tulsa Legal Scholarship Symposium for their illuminating comments on an earlier version of this article. This article is an edited version of the oral presentation given by John Fabian Witt at the September 19–20, 2005 Legal Scholarship Symposium honoring Nadine Strossen and her work as a scholar and activist.

1. John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 Duke L.J. 705, 709 (2004).

What I would like to try to do here is put Nadine Strossen and Crystal Eastman in dialogue with one another—let us think of this as a kind of early morning séance or spiritualist communion, though perhaps in an unlikely locale for two New Yorkers.

In particular, I want to suggest that reflecting on Strossen and Eastman together may give us a useful perspective on the role of American nationhood in the making of our legal traditions and in the making of our civil liberties tradition especially. Professor Strossen has argued that American national traditions are broadly aligned with international law ideals and in particular with international human rights norms. Here, Strossen is what we might call a Jeffersonian, associating the self-evident universal truths and unalienable rights of the Declaration of Independence with the core of the American national tradition. Here she is with Abraham Lincoln at Gettysburg, whose nation “conceived in liberty” provided a “new birth of freedom” for the world.² Against those who view international human rights norms as threats to American national traditions, Professor Strossen would thus import international human rights norms into U.S. law and be a patriot at the same time. These two projects—international human rights and the American mission of liberty—are coincident, or at least congruent. International human rights norms build on and extend the promises of freedom that the Declaration and the U.S. Bill of Rights first made more than two centuries ago.³

In one sense, this should hardly be surprising. Professor Strossen is a conceptual lumpner rather than a conceptual splitter. In her clear vision of freedom and justice, for example, feminism and civil liberties—properly understood—are aligned with one another.⁴ It should hardly be surprising if her view of the U.S. national tradition should render it similarly aligned with the international human rights tradition.

But is the American national tradition really so seamlessly integrated with international law norms? Much experience in our own times suggests that human rights norms and international law ideals are all too likely to founder on the forbidding shoals of American constitutionalism. For in addition to the universalist Jeffersonian strand of American constitutionalism, there is a second version of the American national tradition, a version hinted at in the Declaration of Independence’s references to “one people,”⁵ separate and distinct from the other peoples of the world. We can also see this second strand of the American national tradition hinted at in Lincoln’s references at Gettysburg to a nation forged in blood and thus marked off by history from the other nations of the earth.

This second strand of American nationhood has been deeply resistant to transnational norms. Indeed, the beginnings of the ACLU and the work of Crystal Eastman—the legacy of which Professor Strossen and her ACLU colleagues carry on

2. Abraham Lincoln, Presidential Speech, *Gettysburg Address* (Gettysburg, Pa., Nov. 19, 1863), in *West’s Encyclopedia of American Law* vol. 12, at 470 (2d ed., Thomson Gale 2005).

3. See Nadine Strossen, *Civil Liberties*, 4 Geo. Mason U. Civ. Rights L.J. 253 (1994) [hereinafter Strossen, *Civil Liberties*]; Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. Toledo L. Rev. 203 (1992); Nadine Strossen, *Americans’ Love-Hate Relationship with the Bill of Rights*, 1991 Det. C. L. Rev. 1181 (1991).

4. See Nadine Strossen, *The American Civil Liberties Union and Women’s Rights*, 66 N.Y.U. L. Rev. 1940 (1991).

5. *Declaration of Independence* [¶ 1] (1776).

today—are the embodiment of precisely such a collision between American constitutionalism and international law norms.

My thesis here—and it is a thesis that I would like to play out by describing the little-known, and in fact self-consciously repressed, history of Crystal Eastman and the ACLU—is that while the American constitutional tradition and its universalist Jeffersonian elements may often provide fertile soil for the advancement of international law norms, that tradition also powerfully resists international law norms and often transforms and even distorts them in their application to U.S. settings. Call it the paradox of strategic patriotism. While civil libertarian organizations in the U.S. have been able to advance rights claims by rooting them in the constitutive legal texts of American nationhood, the tactic of invoking the nation has entrenched a set of national constraints and limits on the available rights moves in our political and legal culture.

II. INTERNATIONALISM'S DILEMMA

In a recent article, I have described at some length the way in which Crystal Eastman's experience offers one solution to a slightly different long-standing puzzle about the civil liberties movement in American law and politics.⁶ The historian Thomas Haskell calls this the problem of rights talk in an age of interpretation: How is it that rights movements experienced some of their greatest successes in national and now international fora in the very same years in which the truth status of natural rights ideas has become hotly contested?⁷ The ACLU was born in precisely the years in which pragmatic philosophers like John Dewey critiqued the idea of rights as an old-fashioned nostrum.⁸ Dewey-influenced critiques of rights have flourished in the century since, even as rights claims such as free speech and privacy found relatively firm footing in the courts for the first time in American history. Organizations such as the ACLU have had remarkable success vindicating what Professor Strossen has called the "inherent, fundamental rights" of "all human beings,"⁹ even as it has become more and more difficult in sophisticated circles to talk about rights as inherent or fundamental.

Crystal Eastman was an early leader in the pragmatic critique of rights in early twentieth-century American public discourse. As a student of political economy at Columbia University, she studied with some of the leading sociological intellectuals of the age, men who were abandoning what they viewed as anachronistic eighteenth- and nineteenth-century individual rights talk in favor of analytic categories at the level of the social.¹⁰ (Her well-known brother, the editor and public intellectual, Max Eastman, was

6. Witt, *supra* n. 1; see also John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* 157–208 (Harv. U. Press 2007).

7. Thomas L. Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation,"* in *The Constitution and American Life* 324, 328–29 (David Thelen ed., Cornell U. Press 1988).

8. See e.g. David M. Kennedy, *Over Here: The First World War and American Society* 50 (Oxford U. Press 1980), David M. Rabban, *Free Speech in Its Forgotten Years* 3 (Cambridge U. Press 1997).

9. Strossen, *Civil Liberties*, *supra* n. 3, at 253.

10. Academic Transcr. of Catherine Crystal Eastman (June 8, 1904) (copy on file with Columbia U.); Ltr. from Annis Ford Eastman to Catherine Crystal Eastman (July 16, 1903) (copy on file with Harvard U., Crystal Eastman Papers, Box 5, Folder 132); see also Dorothy Ross, *The Origins of American Social Science* 106–22 (Cambridge U. Press 1991); Franklin H. Giddings & Agnes Mathilde Wergeland, *The Ethics of*

a graduate student under Dewey at Columbia University.¹¹) Unable to attend law school at Columbia because the university's law school did not admit women, Eastman went downtown to New York University School of Law, which had already established itself as the leading American law school for women students.¹² And after law school, Eastman pursued the critique of rights in what was quickly becoming the leading reform of the American progressive period: workmen's compensation statutes, which replaced tort law's tortured inquiry into the relative rights and duties of employers and employees with a straightforward social insurance system that sought to satisfy social needs rather than vindicate individual rights.¹³ For Eastman, the rights tradition was associated with the kind of decisions in which courts invoked rights of contract and property to strike down as unconstitutional progressive reforms such as maximum-hours laws, anti-yellow-dog-contract statutes, and even workmen's compensation statutes.¹⁴ Social insurance systems that allowed the state to deal with individuals in the aggregate, as Eastman herself put it, promised to replace the quixotic aspirations of the "old individualistic legal theory" for "justice between individuals" with "a distribution of the loss" that would minimize the "national deprivation" and "be to the best interests of all concerned."¹⁵

Eastman thus seems to embody Haskell's paradox of rights talk in an age of rights skepticism. How is it that Eastman rediscovered rights between 1911, when she worked on the Nation's first workmen's compensation statute and published the most important book in the period on the social problem of work accidents, and 1917, when she co-founded the organization that would become the ACLU?

The answer, I have suggested, is that as the First World War approached, Eastman discovered that rights were not the only nineteenth-century legal abstraction susceptible to pragmatic critique. With the onset of world war, it became apparent to Eastman and others in American progressive circles that the abstraction about which pragmatic skepticism was most important was not the formal concept of rights, but the formal concept of state sovereignty.¹⁶

During the two years in which the Great War proceeded without American involvement, Eastman and colleagues like Jane Addams, Lillian Wald, and Emily Greene Balch founded organizations such as the American Union Against Militarism and the Woman's Peace Party to resist American intervention. The American Union and the Peace Party helped to bring into American political and legal culture a set of ideas drawn

Socialism, 1 Intl. J. Ethics 239, 240–41 (1891); Clarence H. Northcott, *The Sociological Theories of Franklin H. Giddings*, 24 Am. J. Sociology 1, 12 (1918).

11. Max Eastman, *Enjoyment of Living* 270, 281–86 (Harper & Bros. 1948).

12. Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* 2, 252, app. 1 (Harv. U. Press 1998); Sylvia A. Law, *Crystal Eastman: NYU Law Graduate*, 66 N.Y.U. L. Rev. 1963 (1991).

13. John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* 126–31, 143–44 (Harv. U. Press 2004).

14. Crystal Eastman, *Work-Accidents and Employers' Liability*, in *Crystal Eastman on Women & Revolution* 269, 278–79 (Blanche Wiesen Cook ed., Oxford U. Press 1978); see also Witt, *supra* n. 13, at ch. 6.

15. Crystal Eastman, Address, *The American Way of Distributing Industrial Accident Losses: A Criticism* (Atlantic City, N.J., Dec. 29–30, 1908), in 10 Am. Econ. Assn. Q. 119 (1909).

16. Witt, *supra* n. 1, at 709–10.

from a body of internationalist legal thought that had been percolating in Europe for several decades.¹⁷

We early twenty-first-century globalizers, it seems, are just the latest generation to see the world as suddenly growing smaller. A century ago, another generation of internationalists thought they were witnessing much the same thing. Technology, they announced, had made the world a smaller place. As Franklin Giddings (Eastman's teacher at Columbia) was fond of observing, the extension of "communication throughout the world,"¹⁸ from the steamship and the railroad, to the telegraph, the telephone, and the wireless radio, had brought the nations, races, and civilizations of the world into closer contact than ever before.¹⁹ And like our own era of globalization, the international moment of the late nineteenth century, too, was accompanied by a vast array of new international practices. New international law organizations and publications sprung up across Europe. Tens of thousands of treaties were enacted in the nineteenth century—16,000 by one count²⁰—many of them multilateral law-making treaties among numerous party nation-states, including conventions on telegraph communications, postal services, and international rail transport.²¹

Enthusiasm for internationalism on both sides of the Atlantic persuaded many that a new era of global peace and brotherhood was at hand.²² International fora such as the Permanent Court of Arbitration set up by the two Hague Conferences in 1899 and 1907 seemed to promise a new global rule of law in place of the rule of force that had dominated international relations for centuries.²³

For almost three years, between the summer of 1914 and April 1917, Eastman and her colleagues took up the radical wing of American internationalism.²⁴ For Eastman, the new internationalism promised to provide a forum for peaceful resolution of nation-state conflicts. Indeed, internationalism seemed to hold out the promise of eclipsing nation-state sovereignty altogether. "[N]ationalistic words" and "patriotic phrases" were "abstractions"²⁵ based in what Eastman's brother Max called "artificial

17. Charles Chatfield, *For Peace and Justice: Pacifism in America, 1914–1941* (U. Tenn. Press 1971); Charles DeBenedetti, *Origins of the Modern American Peace Movement, 1915–1929* (KTO Press 1978); C. Roland Marchand, *The American Peace Movement and Social Reform, 1898–1918*, at 182–84 (Princeton U. Press 1972); see also Witt, *supra* n. 1, at 724–25.

18. Franklin H. Giddings, *The Heart of Mr. Spencer's Ethics*, 14 *Intl. J. Ethics* 496, 499 (1904).

19. Franklin H. Giddings, *Imperialism?* 13 *Political Sci. Q.* 585, 596 (1898).

20. Arthur Nussbaum, *A Concise History of the Law of Nations* 196 (rev. ed., Macmillan 1954).

21. Gerard J. Mangone, *A Short History of International Organization* app. 3 (Greenwood Press 1954); see also Geoffrey Best, *Humanity in Warfare* 131–34 (Columbia U. Press 1980); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge U. Press 2002).

22. Witt, *supra* n. 1, at 728–30; see also Pres. Address, *The Function of Private Codification in International Law* (Am. Socy. of Intl. L., D.C., Apr. 27, 1911), in Elihu Root, *Addresses on International Subjects* 57, 69 (Robert Bacon & James Brown Scott eds., Harv. U. Press 1916) [hereinafter Root, *Addresses on International Subjects*]; Address, *The Hague Peace Conferences* (Natl. Arb. & Peace Cong., N.Y., Apr. 15, 1907), in Root, *Addresses on International Subjects*, *supra*, at 129, 134; Louis P. Lochner, *Internationalism Among Universities* vol. 3, at 12 (World Peace Found., Pamphlet Ser. No. 7, 1913); Elihu Root, *Speech, Obligations of the United States as to Panama Canal Tolls* 3, 27 (U.S. Sen., Jan. 21, 1913) (World Peace Found., Pamphlet Ser. Vol. 3, No. 3).

23. See Marchand, *supra* n. 17, at 23.

24. Witt, *supra* n. 1, at 732–33.

25. Jane Addams, *The Revolt Against War*, in *Women at the Hague: The International Peace Congress of 1915*, at 69, 72 (Humanity Bks. 2003).

unit[s] of loyalty.”²⁶

Eastman became perhaps the leading organizer of the radical internationalist movement in the U.S.²⁷ As she conceived it, the movement’s aim was to “keep the ideal of internationalism alive and growing in the minds and hearts of the American people.”²⁸ Indeed, the American Union’s international program—for which Eastman was primarily responsible—drew heavily on ideas that had been circulating among American and European internationalists for decades.²⁹ The internationalist agenda, as Eastman and the *Four Lights* editors of the Women’s Peace Party of New York City conceived it, was no less than “to destroy geography” by “welding the nations of the world into the United States of the World.”³⁰

With U.S. entry into the war in April 1917, however, the internationalists of the Peace Party and the American Union were suddenly presented with a dilemma. For with U.S. involvement in the war, opposition to nation-states and dissent against war became, in the view of many, tantamount to treason.³¹ If, in our own time, Attorney General John Ashcroft has indicated that domestic opposition to the executive branch is equivalent to support for our enemies, during World War I, the equation of dissent and treason was widespread among government officials and private patriotic organizations alike.³² Antiwar speakers were arrested, kidnapped, brutalized, and sometimes even murdered.³³ Postmaster General Albert Burleson systematically removed antiwar material from the mails.³⁴ Prosecutions under the Espionage Act of 1917 and the Sedition Act of 1918 cracked down on dissent.³⁵

26. Max Eastman, *What is Patriotism and What Shall We Do with It?* in *Toward the Great Change: Crystal and Max Eastman on Feminism, Antimilitarism, and Revolution* 239, 246–47 (Blanche Wiesen Cook ed., Garland Publ. 1976).

27. For a brief description of Eastman’s activities, see Witt, *supra* n. 1, at 733–34.

28. Am. Union Against Militarism, *Statement to the Press* (n.d.) (microformed on Swarthmore College Peace Collection, Am. Union Against Militarism Papers, Reel 1, Scholarly Resources, Inc. [hereinafter AUAM Papers]).

29. See Witt, *supra* n. 1, 734–35.

30. Edna Kenton, *Bounded on the North, South, East, and West*, *Four Lights* (Jan. 27, 1917); *To George Washington and Patrick Henry: Greetings!* *Four Lights* (Mar. 10, 1917).

31. See e.g. Chatfield, *supra* n. 17, at 4; Kennedy, *supra* n. 8, at 61–66; H.C. Peterson & Gilbert C. Fite, *Opponents of War, 1917–1918*, at 148–49 (U. Wis. Press 1957); *They Who Play with Fire*, Grand Rapids Press (May 31, 1917) (microformed on ACLU Archives: The Roger Baldwin Years, 1917–1950, Reel 4, vol. 20, Scholarly Resources, Inc. [hereinafter ACLU Archives]).

32. On private and quasi-private patriotic organizations, see Peterson & Fite, *supra* n. 31, at 18; Geo. H. Greenfield, *Democracy’s Battle 6* (n.d.) (microformed on ACLU Archives, *supra* n. 31, at Reel 4); Natl. Civ. Liberties Bureau, *Press Statement* (July 1917) (microformed on ACLU Archives, *supra* n. 31, at Reel 4). On the work of private associations enforcing political obligations during the war, see Christopher Joseph Capozzola, *Uncle Sam Wants You: Political Obligations in World War I America* 26–81 (unpublished Ph.D. dissertation, Colum. U. 2002) (copy on file with author).

33. See e.g. Telegram from E.F. Alexander to Roger N. Baldwin (Nov. 1 1917) (microformed on ACLU Archives, *supra* n. 31, at Reel 4) (discussing how Herbert Bigelow was kidnapped and brutalized); Natl. Civ. Liberties Bureau, *Press Release* (Nov. 7, 1917) (microformed on ACLU Archives, *supra* n. 31, at Reel 4) (same).

34. See e.g. Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 98 (W.W. Norton & Co. 1979).

35. *Espionage Act of 1917*, 18 U.S.C. §§ 793–799 (2000) (amended by *Sedition Act of 1918*, 40 Stat. 553, ch. 75 (1918)); see also Eldridge Foster Dowell, *A History of Criminal Syndicalism Legislation in the United States* 147 (Da Capo Press 1939); Peterson & Fite, *supra* n. 31, at 18, 213–14; see generally William Henry Thomas, Jr., *The United States Department of Justice and Dissent During the First World War* (unpublished

III. PATRIOTISM'S ANSWER

It was in the cauldron of World War I nationalism that the civil liberties project was born. In 1916, Eastman had married a British man named Walter Fuller who was involved in an English organization called the National Council for Civil Liberties. From Fuller, it appears, Eastman and Baldwin borrowed the phrase "civil liberties" to advance a new wartime internationalist strategy in the form of a new office of the American Union called the Civil Liberties Bureau.³⁶ As Baldwin would later note, this was the first time that the phrase "civil liberties" had been used systematically in American legal and political discourse.³⁷

For the pre-war internationalists, the move to civil liberties aimed to carve out some room for resistance to the claims of nation-state sovereignty in a moment in which such resistance had become dangerously close to treason.³⁸ The great virtue of the civil liberties claims advanced by the new Bureau was that they could be rooted in the founding documents of the American national tradition.³⁹ Never mind that the U.S. Constitution and Bill of Rights had never been construed authoritatively by any court to protect speech rights as against repressive legislation. The claim that resistance to the sovereignty claims of the nation-state was built into American constitutionalism, provided invaluable standing to the embattled internationalists.

In one sense, the civil liberties idea was continuous with the pre-intervention internationalism of Eastman and her colleagues. The aim in moving toward civil liberties was to find a new strategy for advancing internationalism now that internationalism had been ruled out as an openly-espoused political idea.

But the move to root norms drawn from international law and transnational debate was not so straightforward. For the little known story of the beginnings of the ACLU is the way in which the strategic move to root a set of internationalist ideas in the constitutive texts of American nationhood helped to reshape not merely the means, but also the ends, of the first generation of American civil libertarians.

Part of the story here is about the personalities of the founding generation. Eastman became ill after giving birth to her first child in March 1917,⁴⁰ and when her colleague Baldwin took the leadership role in her stead, he brought a significantly more domestic outlook to civil liberties activism than Eastman had.⁴¹ Much of the story,

Ph.D. dissertation, U. Iowa 2002) (copy on file with *Duke Law Journal*) (describing the Justice Department's covert campaign to suppress opposition to the war effort).

36. Murphy, *supra* n. 34, at 9; see also Marvin Swartz, *The Union of Democratic Control in British Politics During the First World War* 51 (Oxford U. Press 1971).

37. Murphy, *supra* n. 34, at 9.

38. John Haynes Holmes, *I Speak for Myself: The Autobiography of John Haynes Holmes* 189 (Harper & Bros. 1959) (noting "there came suddenly to the fore in our nation's life the new issue of civil liberties"); Am. Union Against Militarism, *Development* (typescript circa Sept./Oct. 1917) (microformed on AUAM Papers, *supra* n. 28, at Reel 1); Civ. Liberties Bureau, Am. Union Against Militarism, *Proposed Announcement for the Press* (circa fall 1917) (microformed on AUAM Papers, *supra* n. 28, at Reel 1); see also Witt, *supra* n. 1, at 746-50.

39. See Witt, *supra* n. 1, at 756.

40. Ltr. from Max Eastman to Lillian D. Wald (n.d.) (microformed on Colum. U., Lillian D. Wald Papers, Reel 3, Folder 4.2 [hereinafter Wald Papers]).

41. Robert C. Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* chs. 1-5 (Colum. U. Press 2000).

however, is about the coercive powers and alluring appeal of nationhood. In 1918 and 1919, government repression of dissenting political voices reached new heights. Baldwin himself was jailed for a year for refusing to register for the draft.⁴² Eastman's brother Max was tried twice for his editorial activities with the radical avant-garde journal, *The Masses* (the trials both produced hung juries).⁴³ Deportations of radical aliens and the infamous Palmer Raids followed, establishing that government suppression of radical dissent would not be tolerated after the war any more than during it.⁴⁴

This was nationalism in its coercive form. Persisting in an internationalist agenda increasingly meant that one would be jailed or worse. But nationhood offered carrots as well as sticks. It had a seductive appeal. Men like Baldwin soon found that they could conjure categories that drew on the traditions of the Nation. And so as the war ended, Baldwin and his colleagues abandoned the appeals to do away with the abstraction of the nation-state.⁴⁵ Indeed, they abandoned appeals for civil liberties as a means to the end of international governance institutions. As the leaders of the pre-intervention internationalist associations fled their now scandalous internationalist beginnings, the American civil liberties movement shed its critique of the nation-state as an organizational form. "Let us be patriots in the true sense," exclaimed a Chicago lawyer for the Civil Liberties Bureau,⁴⁶ and Baldwin and others insisted that the "cause of civil liberties"⁴⁷ was "the highest type of loyalty"—not loyalty to global citizenship or a cosmopolitan ideal, but loyalty to the American nation-state.⁴⁸

By 1920, Baldwin began self-consciously to rewrite the history of the organization that he had renamed the "American Civil Liberties Union."⁴⁹ The Civil Liberties Bureau, he insisted, had not been an antiwar organization but an organization dedicated to "[insist] on American constitutional rights."⁵⁰ In the 1920s, the ACLU would heroically defend labor radicals of any number of different types, but it effectively disowned the cosmopolitanism of the pre-war internationalist movement.⁵¹

42. *Id.* at 83–90 (discussing Baldwin's arrest).

43. Max Eastman, *Love and Revolution: My Journal through an Epoch 92–99, 118–24* (Random House 1964).

44. Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* 155–71 (Viking 1987).

45. Witt, *supra* n. 1, at 756.

46. Ltr. from John L. Metzger to Civ. Liberties Bureau (Aug. 9, 1917) (microformed on ACLU Archives, *supra* n. 31, at Reel 4, vol. 32).

47. Ltr. from Norman Thomas to Lillian D. Wald (Aug. 27, 1917) (copy on file with the N.Y. Pub. Lib., Norman Thomas Papers).

48. Ltr. from Natl. Civ. Liberties Bureau to Friends (Jan. 5, 1918) (microformed on ACLU Archives, *supra* n. 31, at Reel 1, vol. 3); *see also* Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 53 (2d ed., S. Ill. U. Press 1999) (describing ways in which Baldwin and other early ACLU advocates worked to "capture the symbols of Americanism for the cause of civil liberties").

49. Ltr. from Norman Thomas et al. to Lillian D. Wald (Jan. 19, 1920) (microformed on Wald Papers, *supra* n. 40, at Reel 10, Folder 12.4); Conference of the Anglo-American Tradition of Liberty (New York, N.Y., Oct. 1919) (microformed on ACLU Archives, *supra* n. 31, at Reel 9, vol. 73, at 522).

50. Ltr., *supra* n. 49.

51. *Id.*; *see also* Witt, *supra* n. 1, at 760–61.

IV. PATRIOTISM'S POWER

What I am suggesting here is that the ACLU was born in a kind of Elizabeth Gurley Flynn moment. I am referring, of course, to the still-controversial expulsion of communists such as Flynn from membership in the ACLU in 1940.⁵² Some twenty years earlier, at the outset of the modern civil liberties movement, the founding of the ACLU had been accomplished through a similar move, expelling the internationalist beginnings of an organization that over the course of the next half-century would have remarkable success redescribing the American national tradition as organized around legal protections for individual rights. Internationalism functioned in 1920 much like communism did in 1940, as a political tenet that threatened to destroy the patriotic credentials of any organization or advocate. And so at the end of the First World War, the ACLU did what it would do again in the expulsion of the communists—compromise with the imperatives of American nationhood in order to maintain the power of persuasion that a national footing provided.

I am put in mind here of the story of the Quakers in the historian David Brion Davis's great, Pulitzer Prize-winning accounts of slavery and antislavery.⁵³ The Quakers—who would go on to provide much of the energy for early antislavery efforts in England and the U.S.—emerged as one of many Protestant sects in the diverse and eclectic world of seventeenth-century radical Christian sectarianism. Unlike other such sects, however, the Quakers survived because they compromised with the existing categories of the world around them, in particular with the world of the marketplace. And so, Davis contends, the Quaker experience was one of the earliest pieces of evidence that the rise of antislavery ideals might subtly legitimate forms of labor exploitation that either fell short of slavery or were difficult to describe in the moral terms of the antislavery movement.⁵⁴

Like the Quakers in the world of seventeenth-century sectarianism, we might think of the ACLU as emerging from a rich stew of early twentieth-century radical organizations, ranging from the Socialist Labor Party and the Industrial Workers of the World, to Theodore Schroeder's absolutist First Amendment organization, the Free Speech League. But like the Quakers, the founders of what became the ACLU compromised. Their compromise was with American nationhood.

If the analogy is apt, it means that the compromises of the ACLU—like the compromises of the Quakers—have had consequences. And here we come back to the paradox, the dilemmas of strategic nationalism. The decision to root the claims of civil liberties in the traditions of American nationhood (savvy as it no doubt was) has entrenched American national traditions to the exclusion of international norms and influences. American nationhood may provide an irresistible set of resources for contesting the coercive capacity of the state, but turning to American nationhood

52. Walker, *supra* n. 48, at 130–33 (describing the 1940 purging of prominent radicals from the ACLU); see generally Burt Neuborne, *Of Pragmatism and Principle: A Second Look at the Expulsion of Elizabeth Gurley Flynn from the ACLU's Board of Directors*, 41 *Tulsa L. Rev.* 799 (2006).

53. David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (Cornell U. Press 1975).

54. *Id.*

entrenches the national categories on which those strategic moves depend. Those categories, in turn, sustain foundational elements of modern human political and legal organization. As democratic and constitutional theorists are quick to point out, nation-states have sustained the robust democratic systems and principles of justice characteristic of the best modern states.⁵⁵ But as the cosmopolitans reply (with Eastman and her internationalist colleagues), those nationalist categories also raise legal and moral barriers among peoples that are extremely hard to defend.⁵⁶ For good or for ill, the work of American civil liberties organizations for almost a century now has built on these national categories, but in doing so it should hardly be surprising if they have thereby made it more difficult to reach outside of the Nation to borrow rights norms from international human rights or comparative law.

To be sure, American civil libertarians now adopt a kind of modernist or postmodernist bricoleur strategy, drawing on patriotic principles with one breath but looking to international norms with the next, working with nationhood when it works and then turning to the transnational in moments in which the national tradition seems unlikely to support claims of autonomy from the state.⁵⁷ In this sense, the legacy of the American civil liberties movement's beginnings in a now-obscured World War I internationalism is still with us. Though obscured, the internationalism of a century ago has powerfully shaped our ostensibly national tradition, providing the energies and even the terminology for the remarkably successful civil liberties movement of the twentieth and now twenty-first centuries. When domestic civil liberties advocates look abroad, they are thus returning to the roots of the tradition in which they work. Think, for example, of the ACLU's "I am NOT an American" publicity campaign in the couple of years after the 9/11 terrorist attacks.⁵⁸ The campaign seemed to play on the cosmopolitan/transnational divide, raising the possibility of disowning the national tradition—"I am NOT an American . . ."—before closing up that startling prospect by concluding on a reassuringly loyal note: "who believes in" torture, or suppression of free speech, or detention without trial.

But is it really possible for American civil libertarians to move back and forth so easily across national boundaries, to pick and choose between national and cosmopolitan postures, or (as Professor Strossen would have it) borrow international human rights norms in those areas in which our own rights traditions seem to fall short? For one thing, as the early experience of the founding period of the civil liberties movement suggests, strategies powerfully shape and reshape ends. What is a tactic today may well become a talisman tomorrow. More powerfully still, tactics today reshape the ground underneath

55. Jeremy A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton U. Press 2005); Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Affairs* 113 (2005); Jed Rubenfeld, *The Two World Orders*, 27 *Wilson Q.* 22, 22–36 (2003).

56. Martha C. Nussbaum, *For Love of Country? Debating the Limits of Patriotism* (Joshua Cohen ed., Beacon Press 1996); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?* 34 *Phil. & Pub. Affairs* 147 (2006); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 *U. Mich. J.L. Reform* 751 (1992).

57. For one well-elaborated version, see Bruce Ackerman, *Rooted Cosmopolitan*, 104 *Ethics* 516 (1994).

58. See generally ACLU, *Celebrities Speak Out for Civil Liberties in New ACLU Advertising Campaign*, <http://www.aclu.org/safefree/general/16776prs20030915.html> (Sept. 15, 2003).

our feet, transforming the contexts in which advocates work. The institutional edifice and national traditions of the American legal system have exerted a kind of gravitational force on international law norms, distorting and transforming them in the course of their introduction to the U.S.

If this is right, then it is not so clear to me that Professor Strossen is correct when she suggests that American nationhood and international human rights norms are part and parcel of the same historical project. Crystal Eastman certainly did not think so. By the end of her tragically shortened life in 1928—a life ended by the same disease that struck her upon Jeffrey Fuller’s birth—Eastman had become a critic of the national constitutional tradition on which her former colleague Baldwin had begun to build.⁵⁹ Indeed, Eastman had left the U.S. altogether for her husband Walter’s United Kingdom. She came to chafe at the constraints placed by the power of nationhood on the work she had begun. And those constraints explain much about the resistance to international norms for which American law is becoming notorious a century later.

59. See e.g. Crystal Eastman, *The Socialist Party Convention*, in *Toward the Great Change: Crystal and Max Eastman on Feminism, Antimilitarism, and Revolution*, *supra* n. 26, at 436, 439; Holmes, *supra* n. 38, at 189.

