

PART V

THE SPACES OF CIVIL
SOCIETY

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CHAPTER 23

CIVIL SOCIETY AND GOVERNMENT

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CIVIL society and government have their own conceptual and institutional histories, and each of these histories has a foot in both political theory and social and political developments. New institutions, shifting boundaries, and novel interpenetrations of civil society and government are a constant, but sometimes these changes amount to transformative moments. One such moment came when perceptions of civil society shifted from negative to universally positive, and civil society came to be identified as a separate sphere from the economy and from government, cast as the terrain of genuine moral and social life. As a result, civil society often escapes the critical analyses that have been leveled at government. Civil society, not the state, is the bastion of utopianism in political thought today. This chapter surveys the shifting boundaries of civil society-government relations and underscores the potentially transformative move towards partnerships that reach into areas that were previously marked out as separate terrains.

1. BOUNDARIES

Discussions of civil society and government pose difficult questions of boundary definition and boundary crossing. Assigning substantive purposes, designating the characteristics of their institutions, and identifying their shifting

boundaries pose many analytic challenges. Moreover, locating the boundaries between civil society and government inevitably reflects moral norms and political ideology, and has implications for law and public policy. In addressing these questions, we adopt the spatial metaphors that have become indispensable to thinking on this subject.

Viewed from the perspective of government, the state is the encompassing sphere, the higher ground, and the controlling institution. Government is the inclusive, putative authorized voice of citizens, and bears principal responsibility for activities that serve common purposes. By means of law and public policy, government creates the institutional framework, the space in which the groups and associations of civil society take shape and carry out their activities. Government assigns the elements of civil society legal status, rights, and responsibilities; it outlaws certain groups and criminalizes certain activities. Public law sets the terms of cooperation and the permissible terms of conflict within and between these groups and associations. By means of coercion and incentives, government cultivates, constrains, regulates, directs, and supports the entire range of institutions and associations that comprise social life. From this perspective, government is “prior” to civil society, and the elements of civil society are “secondary” or “intermediate” associations. In one formulation, government represents “the social union of social unions” (Rawls 1993, 322). As such, government must insure that the partial social unions of civil society are congruent with, or not dangerously in opposition to, the requirements of stable democracy, and towards that end enforce equal protection of the law and due process over and sometimes against civil society groups. From this perspective, the obligations of citizenship outweigh the obligations of association membership, and one task of government is to cultivate public, democratic norms and a commitment to public purposes. At the same time, in recognition of the fact that individuals and groups find their meaning in associations, and on the understanding that for some people membership has priority over citizenship, government should also attempt to minimize conflicts between the obligations of citizenship and the demands of membership, in particular the demands of religious faith (Rosenblum 2000).

Viewed from the perspective of civil society, associational life encompasses activities and commitments as various as are human needs and imaginations, extending far beyond the business of government and citizenship: “our interests, convictions, cultural, religious and sexual identities, status, salvation, exhibitions of competence, exhilarating rivalries” are played out in these partial associations (Post and Rosenblum 2002, 15; 3). From the perspective of members, these groups bear a resemblance to government insofar as they are “jurisgenerative.” Whether they are conceived as voluntary associations or as ascriptive religious, cultural, or ethnic groups, they impose laws and obligations, assign members rights and benefits, decide on collective purposes, and do so by instituting their own structures of authority and forms of internal governance. Unlike government, however, associations are plural, partial, and particularist, and participation in these groups and

associations contrasts with singular democratic citizenship. They are partial in the sense that their membership is not inclusive, which is one reason why civil society is a terrain not only of myriad social differences but also of myriad inequalities. They are partial too in the sense that groups and associations do not occupy every moment or aspect of members' lives; men and women are also producers and consumers in the economy, family members, political actors, and citizens. Finally, associations are partial in that individuals typically belong to more than one group. They form multiple, diverse attachments over the course of a lifetime. Indeed, the possibility of "shifting involvements" and the "experience of pluralism" is a defining characteristic of life in civil society (Rosenblum 1998; Galston 2002).

This brief conceptual account brings us to the inescapable boundary question: what constraints should government impose on the formation, internal life, and activities of groups and associations, and what limits should it set to the authority that groups exercise over their own members and outsiders? In democratic theory there is general agreement that government cannot permit "greedy institutions" that take over every aspect of their members' lives or seriously inhibit their opportunity to exercise the rights and obligations of citizenship; the structure of exit must be deliberately constructed and enforced by law and made practicable by public provisions to meet the needs of those leaving closed communities (Warren 2009). Groups cannot, in classic Lockean terms, punish members (or outsiders) physically or by confiscating property. They cannot be permitted to act as private despotisms or to organize private armies. Less clear is the extent to which civil society is compatible with forms of pluralism that are closed and segmented such that society is composed of (often hostile) "pillars," or a collection of semisovereign ethnic, cultural, or religious communities, or some version of corporatism with fixed sectors.

In our view, some degree of fluidity, some mix of voluntary and ascriptive associations, must be present. "Escape from hereditary and ascriptive attachments (or their willing reaffirmation), the formation of new affiliations for every conceivable purpose, and shifting involvements among groups are essential aspects of liberty," Rosenblum writes (1998, 26). Exit from groups, if not costless, must be a real possibility. Where autonomy is accorded only to groups or subcommunities, and where government does not maintain personal legal rights and afford individual freedom of movement among partial associations, civil society as a conceptual entity hardly exists at all.

The boundary we have outlined, like every analytic approach to the subject, has normative and political implications. Government must be sufficiently strong and independent of civil society groups to maintain the conditions for pluralism and to insure that particularist and partial associations are not private despotisms. At the same time, civil society is inseparable from limited government and a degree of voluntarism and freedom of association. As members of groups and associations, men and women serve as countervailing forces against arbitrary or unlimited government intrusion on the internal lives, purposes, and organizational energy of groups; they must be on guard against even progressive, democratic colonization.

2. CIVIL SOCIETY AND GOVERNMENT

The vision of civil society as an arena existing apart from, or antagonistic to, government propelled the concept's revival during the last years of the Cold War. In this capacity, theorists have frequently assigned to it two primary functions of particular importance to democratic viability. The first is as a sphere for popular resistance. The development of struggles against Soviet imperialism in Central and Eastern Europe led scholars and activists to develop its oppositional role as a "parallel polis" (Benda 1978), a site where some form of negative liberty might be distilled from an otherwise totalizing government hegemony. With open political opposition impossible, civil society came to be identified as an alternative source of struggle and solidarity. This image—the voice of an otherwise repressed mass bubbling up organically from below—became a feature of late-twentieth-century political theory, fueling efforts to make the concept portable to other parts of the world. In its role of empowering the powerless, civil society was also thought to perform a second, related function of organizing citizens for democratic participation. Political parties were only the most conspicuous vehicles for this task. Though a vast array of voluntary associations, groups might pool resources, fight for protection, and advance social policies. Particularly in the past, before they were given the vote, women and other marginalized social groups used associations to give themselves a voice that would not otherwise be possible through formal, political institutions (Kelley 2006). The voices of civil society spur popular discussion, turn the otherwise apathetic towards political participation, create democratic audiences, and demarcate deliberative spheres where policies, issues, and ideals may be affirmed or renegotiated.

As intermediaries between individuals and governments, voluntary associations may offer platforms for political participation, but this is not the limit of their function, nor need political advocacy, resistance, or agenda setting be their primary purpose. The ways in which group life intersects with political activity are neither clear nor predictable (Post and Rosenblum 2002, 18). Recent scholarship shows that in certain institutional, cultural, and historical contexts, civil society may have merely an auxiliary (Encarnación 2003) or even a negative (Berman 2003) role in democratization. Indeed in some circumstances, a once vibrant civil society may encourage an aversion to membership (Howard 2003, 124) or a "politics of anti-politics," with individuals living with their "backs toward the state" (Forment 2003, 438). That said, associations do provide a mechanism for political participation, raising crucial questions about the relationship between group membership and voice, the impact of unequal resources on political expression, and the multiple avenues by which organizations come to engage in political advocacy. Each of these areas reveals the complex and multivalent role that voluntary associations play; in finding their voice they simultaneously empower themselves politically and shape the identities of their members.

To begin, it should be plain that there is a direct relationship between associational membership and the voices that emerge from civil society. Thus, if

association is compelled or otherwise involuntary, its voice may not represent all or even most of its members, and altered membership may change the message and the messenger dramatically. In this way, involuntary or coerced membership in an association may represent a kind of compelled expression. While such a proposition is anathema to classical liberals, it must also be reconciled with the needs of certain groups such as labor unions, whose effectiveness depends on presenting a united front (Rosenblum 1998, 215).

Associational voice may be strongly impacted by direct governmental efforts. These efforts may aim at limiting voices that are deemed too powerful—exercising undue electoral influence, for example. It is precisely this question of influence that is at issue in the relationship between expressive participation and large aggregations of money. The discussion is often framed in terms of the corrosive or distorting influence that corporations or large nonprofit groups endowed with substantial resources are thought to have on the integrity of the political process (*Austin v. Michigan Chamber of Commerce* 660, 668). Such concerns had led to the curtailment of certain kinds of speech, particularly around electoral campaigns. Alternatively, government policy may aim at enhancing the resources and opportunities for civil society voices that might not otherwise be heard, with a view to promoting more equal and universal participation or improving public debate (Gutmann and Thompson 2004).

A third point involves the connection between individual and group viewpoints. As deliberative theorists remind us, neither member nor group preferences are prefixed or pregiven. Associations cannot, in short, be reduced to an aggregation of atomized opinions. Group self-understanding is variable, and internal dynamics are often unplanned. Both constitutional law and political theory have, at times, made the mistake of essentializing political voices. Juridical rulings have given priority to freedom for avowedly political associations, but in many cases, groups form without the intent of engaging in political expression, and it is only later that associations enter the political arena, after fluctuations in membership, the influence of outside events, or a confluence of other factors. Women's groups are a prime example. Often formed initially for the purpose of providing fellowship or advancing charitable works, by the 1970s and early 1980s some of these groups had adopted an explicitly feminist and highly politicized message (Evans and Boyte 1992). For many associations, political expression may only be a small component of their larger purpose or mission. A decision to take a public stance on an issue is, with few exceptions, not delineated in a group's constitution or other guiding materials.

But associational speech *is* a function of its composition, and for this reason it is important to clarify further what is meant by "voice." When associations "speak," their ideas do not float freely within an ethereal public sphere (Habermas [1962] 1989). Rather, voices are necessarily linked to particular individuals or groups. As a consequence, voice plays a central role in determining not only what we say in the abstract, but also how we are perceived by others and how we perceive ourselves—that is, how we become who we are. Even if membership regulations do not affect the objective content of a message therefore, they will surely influence its impact.

This conclusion points to a final connection between voice and membership. Associations and the expression they produce do not enter the world stillborn. Together, they create *influence*, serving, with or without intention, to convince, persuade, and otherwise affect persons and policies both inside and outside of themselves (Dworkin 1987, 10). The unpredictability of political voice on the part of associations whose core activities are only tangentially related to politics or advocacy, the close connection between voice and membership, and the vulnerability of both to government regulation or compelled association, lead us to suggest that a wide degree of latitude be afforded to groups to control their membership and affairs.

3. CIVIL SOCIETY AS A SCHOOL OF CITIZENSHIP

Seeing associations as a resource for political participation, advocacy, protest, and resistance does not adequately take into account the citizenship functions of civil society groups. Claims for the positive moral effects of associational life are familiar, and in recent decades attention has turned to the role of civil society in reproducing democratic citizens. The perceived decline of democratic participation, the rise of personal identities defined as consumers as a result of market forces and popular culture, and egoism and atomism, combine to cast civil society as a democratizing antidote. For critical theorists, associations comprise a comparatively egalitarian public space for deliberation that clarifies and legitimizes public values (Baynes 2002). Others emphasize that when the internal governance of groups is democratic, members develop organizational skills, habits of decision making, and a sense of political efficacy. Those who see civil society groups as so-called schools of citizenship focus on an array of democratic dispositions and practices, shaped directly through education or indirectly through some “intangible hand” (Brennan and Pettit 2004).

Critics have tempered these judgments. First, as an empirical matter they observe the prevalence of uncivil society that challenges an indiscriminate faith in the democratizing potential of associational life. They point to groups and associations that are dedicated to advocating and enacting discrimination and other anti-democratic values; or are organized hierarchically or by charismatic leaders, have internal structures that are rigidly authoritarian, or recruit and exploit anomic members from the disconnected margins of society (Chambers and Kopstein 2001; Berman 2003; Armony 2004). Second, some of the largest and most effective civic associations are national-level organizations, professionally led and managed; they do not cultivate membership and if they do have members they fail to provide them with opportunities for acquiring democratic commitments or skills (Skocpol 2003). Third, instead of creating public identities and platforms for democratic deliberation, civil society pluralism can produce a sense of “impotence in the face of

impenetrable systemic complexity” (Habermas 1992, 453–6). Finally, school of citizenship arguments are vulnerable for often assuming—absent an articulated social dynamic and connecting structures—a “transmission belt” model that posits a spillover of democratic values, skills, and a sense of efficacy from associations into active participation in formal and informal democratic politics.

A principal caution against these accounts is that they often lead to a stringent “logic of congruence.” The charge to reproduce citizens supports the idea that the internal lives and purposes of civil society groups should mirror the democratic values of equality and due process that (ideally) order public life. Advocates of a “seedbed of democracy” account of civil society propose that tutelary government should actively propagate and support groups that promote democratic practices and dispositions, and should outlaw or impose costs on those that advocate and enact ethnic, racial, or gender discrimination, deny members due process, or cultivate dispositions antagonistic to public values. The logic of congruence argues for “democracy all the way down,” both as a matter of principle and as an empirical claim. In this view, congruence must be mandated by government, if not always coercively enforced. Principled justifications are given for such compelled association; for example, associations with social and networking objectives like the Boy Scouts should be required to admit gays as scout leaders. The caution here is plain: schools of citizenship thinking raises the prospect of government trespass across the boundary of civil society. In resolving tensions between citizenship and membership in favor of reproducing democratic citizens, the ecology of associational life may be interrupted (Rosenblum 1998). Adding to concern about the logic of congruence is the fact that it can be effected without direct public regulation and coercion, that is, by government acting as patron and enlisting civil society groups as partners, thus erasing the boundary of separate spheres.

4. GOVERNMENT AS PATRON

In accounts of civil society as the site of advocacy, participation, and resistance, and as the moralized terrain of voluntary cooperation and personal development, civil society is often represented as a spontaneous development that is independent of government (Post and Rosenblum 2002, 1). But government frequently provides more than just the infrastructure of public order and public services, the legal structure for forming organizations, and the parameters of civil and criminal law within which voluntary associations operate. Government is also a material patron, purchaser, funder, and partner in the presumptively beneficial activities of civil society groups.

Historians have documented the fact that governments have never been the sole provider of education and social needs, and that voluntary associations have not had the sole responsibility for caring for their members or communities (Novak

2009). In most societies, government recognition and direct and indirect support for associational activities is expanding, and the number of groups that benefit from public patronage continues to proliferate. Of course, the extent and methods of government support vary widely. In the United States, government provides financial support to civil society indirectly by awarding tax-exempt status and eligibility for tax-deductible charitable contributions to associations. Depending on the ideological baseline adopted, this is characterized as leaving civil society in its natural state, independent of government or as a public subsidy. In addition, government provides financial support for association activities directly through grants or vouchers that individuals can use for schooling and other services. Indeed, the most familiar area of government subsidy is education, where in the United States tax credits and vouchers underwrite school choice. Motivated by moral or religious duty and aimed at self-help for their communities, civic associations organize cultural events and create charities and mutual support networks to care for their own. Such groups have always been unequal in the resources their members can contribute and in their organizational capacity and leadership. Social and economic inequalities are replicated in civil society, and there is a class and race bias in associational life as well as in politics. Government subsidy and support for schools, mutual aid societies, and cultural institutions is potentially redistributive. It helps even poor groups provide services to their members, enabling “meat and potatoes multiculturalism” (Walzer 2004, 39). Apart from small, informal associations like private clubs, reading groups, or street corner churches, civil society groups increasingly depend on some form of public support, complementing and correcting both state and market failure in the provision of public goods and in the process encouraging volunteerism, collective responsibility, and cooperative provision. All the reasons for valuing pluralism and particularism generally operate to encourage a degree of government patronage, which benefits the self-chosen, self-directed purposes of associations.

Complicating this picture, however, are tensions between associational activities and public democratic norms of equality, inclusiveness, nondiscrimination, and due process. For strong advocates of the logic of congruence, it is the responsibility of government to democratize groups and liberalize their practices whether or not they receive public subsidy. Public funding lends added force to the argument: by subsidizing an association’s nonprofit activity, government is seen as delivering the public message that it agrees with the association’s broader purposes and practices. In this view, public support has symbolic and pedagogical as well as practical effects. Hence, public patronage of civil society raises the boundary question in acute form. Can religious groups subsidized by public funds be permitted to provide services only to coreligionists? Can they choose their constituency as they do their members? Do they violate laws prohibiting discrimination in hiring when they deny employment to workers of other faiths, or to gays because their doctrine declares homosexuality a violation of divine law? Similar questions arise for secular groups whose practices do not conform to norms of nondiscrimination or due process. Legislation in the United States requires government, and by extension public

accommodations, to afford nondiscrimination protections to workers and due process to all recipients of services. As more and more associations receive government support, they are liable to fall under the public action umbrella. For those solicitous of the pluralism and independence of civil society, the concern is that groups and associations are liable to become artifacts of public policy.

5. FROM PATRON TO PARTNER

Recent developments in the United States and elsewhere pose a more radical challenge to the boundaries we have been tracing: “third party government” (Salamon 1995). The range of activities described as government-civil society partnerships is exhaustive, from drug rehabilitation centers and housing to social welfare. The scale and scope of direct grants and contracts is remarkable, made more so by the fact that these collaborations extend to the core activities of government. In addition to subsidizing the independent social and charitable activities of civil society groups, government increasingly contracts with these groups for everything from corrections, welfare provision, education, and job training to basic public services and inherently governmental functions such as emergency relief and military training and logistics (Minow 2009).

Policies about partnerships vary across countries, of course. Some countries have competitive bidding among nonprofit groups for block grants to deliver services (Goodin 2003, 43), while others have historically organized their welfare states around religious “pillars,” so that segmented pluralism is built into the provision of important services. Some governments reserve more activities for the public sector, though there is a general trend towards functional privatization (Verkuil 2009, 330–31). In the United States, the menu of arrangements by which associations supplement or substitute for direct government services is fluid. Indeed, “partnerships” is an inadequate description of this terrain, since the mix includes voluntary associations, contracts with for-profit enterprises, and private foundations (Minow 2003, 8). An example of this fluid mix is “charitable choice,” instituted by the 1996 Welfare Reform Act, by which federal dollars go to an array of groups including religious associations that mix services with worship.

Influential rationales for such partnerships do not always propose that there are specific advantages to social provision by civil society groups. Rather, conservative ideologies of small government, a general loss of trust in government, and the perennial challenges of social provisioning, combine to argue for more devolution. From this standpoint, the services provided by civil society groups are the equivalent of those provided by government, but with the added advantages of cost-cutting, less government, and the presumed efficiency of a competitive market in services. Other advocates of government-civil society partnerships claim that the provision of services by civil society groups is better and more humane, not just less

costly or more efficient. For one thing, voluntary associations are seen as answers to political corruption. For another, these groups are said to be more creative, flexible, and responsive. Supporters have faith in the fine-grained knowledge and sensitivity that such groups exhibit when defining needs and serving their clients. Whereas recipients of public services are often demeaned and disrespected, voluntary associations are said to be more attentive to human dignity. Moreover, precisely because of their partial, particularist nature, pervasively religious groups and secular groups with strong moral or ideological commitments are said to do a better job at education or drug rehabilitation, for example, though the evidence for this proposition is contested (Glenn 2000; Wuthnow 2004).

Critics alert us to the potential moral and democratic tradeoffs of these developments. They raise questions from both directions: about the potentially deleterious consequences of partnerships for the values of pluralism and partial association on the one side, and for democratic responsibility on the other. The overarching concern is a lack of democratic deliberation about the appropriate division of labor between government and civil society. It is one thing for voluntary arrangements to supplement the public definition and provision of basic needs and services, and another for government to step back from these democratic responsibilities. Accountability is one concern, famously difficult to achieve even when activities are performed by public agencies, much less when they are the work of a wide array of dispersed associations. The reasons are plain. Legal assurances of public access to information do not always apply to private actors. Moreover, to the extent that government delegates public purposes to civil society groups, these activities may be buffered from due process and other constraints that govern direct state action (Metzger 2009, 292). In broad terms, the standard means of accountability do not apply to civil society groups. Associations are not subject to elections or the constraints of business enterprises, and are not responsible to voters or shareholders. Scholars have argued that civil society associations have developed their own, distinctive accountability regimes: they are constrained by their unique motivation and altruistic mission, and by reputational concerns. Nonprofit groups tend to develop networks with other associations that share their purposes and monitor their conduct (Goodin 2003). Government partnerships can weaken this accountability framework without effectively replacing it with another.

Oversight and accountability for outcomes is only one difficulty with partnerships from the standpoint of democracy. Diffusion frustrates deliberate democratic decision making when it comes to public provision, if only because innumerable subsidies, grants, and contracts obscure the character and dimensions of publicly mandated activities and services. Also from the government standpoint, there is concern that provision by particularist associations dilutes citizens' rights and benefits. Public funding of health care delivered through Catholic hospitals, for example, "affects the availability of reproductive services and assisted technology, abortion, counseling for persons who are HIV positive... and end-of-life choices" (Minow 2003, 13). Without alternative public providers or a plurality of civil society groups, individuals are necessarily directed to

particular religious or secular institutions for services. Pluralism and voluntarism—the promises of civil society—do not hold when government contracts with particular groups to address social needs.

Finally, there is the question of diminished government capacity as public activities and the definition of public objectives are transferred to civil society and for-profit groups. Partnerships can drain public agencies of expertise, management skills, and the ability to provide regular oversight. They reduce government's ability to undertake energetic action, mobilize resources, and define and address collective problems. And partnerships may be hard to reclaim, leading one scholar to propose an "antidevolution principle" (Verkuil 2009, 316).

A different set of considerations arises from the perspective of civil society. The chief concern is whether public purposes are displacing the plural, self-directed purposes of associations as these groups initiate or alter their activities in order to receive government grants and contracts. Originally designed to underwrite the charitable activities of churches and other voluntary associations, government contracts now provide not only incentives for certain activities but impose requirements for management, record-keeping, audits, and transparency. Associations, at least in theory, are required to meet public measures of performance and outcomes. They are moved directly or indirectly to adopt professional norms and to replace the work of members and donors with professional staff. These developments pose many challenges to associations that value privacy, hold themselves to different measures of success, and seek to fulfill nonstandard needs. Forces push in the direction of convergence towards bureaucracy or towards modeling activities after businesses or establishing their own for-profit enterprises. The growing popularity of social entrepreneurship captures this trend. The overriding concern is that large swaths of civil society will be colonized by government.

6. CONCLUSION

Insofar as public values follow public dollars, the latitude to opt out of government support is vital to avoid compromising the independent life of associations (Minow 2003, 142). That explains why some religious leaders in the United States have refused to participate in government-civil society partnerships. Associations may lose the will and capacity to engage in activities and provide goods that neither markets nor government take on, or can even imagine. At stake is the self-direction that is characteristic of civil society: expressing and enacting plural visions of value, articulating their own missions, agitating for their independent ideas about public democratic purposes, and acting as vocal critics of government. If one of the imperatives of separating civil society and government is the preservation of countervailing authority and power, do partnerships weaken that capacity? If one reason for the mix of partnerships is to divide and distribute power, are these increasingly complex

arrangements weakening this purpose? (Novak 2009, 33). Social scientists have the obligation to describe and explain, and political theorists to conceptualize and justify, the new contours of plural and partial civil society on the one hand and democratic capacity and control on the other. Is their increasing interpenetration irreversible, and if so why and with what effects? What boundaries remain, or should remain, and why? If we think that “the value of association is as encompassing as the value of liberty,” we must continue to analyze, justify, and monitor the changing boundaries between civil society and government (Post and Rosenblum 2002, 3).

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CHAPTER 24

CIVIL SOCIETY AND CIVIL LIBERTIES

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THE spaces of civil society provide the arenas in which “citizens engage with each other in the public sphere, argue and deliberate about the issues of the day, build consensus around the future direction of their societies, and participate in democracy, governance and dialogic politics” (Edwards 2009, 64). But the state governs those spaces, expanding and restricting them over time according to the interests, systems, parties, and individuals in power. In some countries, the mechanisms for such control rely solely on the raw exercise of state or party authority, but in most nations, the law is a key mechanism for regulating the spaces in which civil society functions. This chapter outlines some of the recent problems that civil societies have faced, both in dealing with their own liberties to operate and in representing and advocating for the broader liberties of citizens.

Democratic states, broadly defined, impose some constraints on the spaces, rights, and liberties of civil society and civil society organizations, but those constraints tend to be functional in nature. Democratic states may regulate widely on civil society, including such topics as the extent of advocacy activities by some kinds of civil society groups as a condition for providing them with tax incentives, or the extent to which organizations may engage in business activities without paying tax. Direct and highly controlling restraints on social and political advocacy by civil society organizations are less common in democratic states, and they tend to be couched in terms of restrictions applicable to individuals and groups throughout society rather than focused on a defined set of civil society, nonprofit, charitable or other groups. But there are times when the spaces, rights, and liberties of civil society groups are directly threatened in democratic societies, and such episodes can be serious. The destruction of nonprofit organizations in the United States and the

silencing of nonviolent advocacy under McCarthyism during the 1950s was one such moment, a time of exceptional challenge both for the organizations that came under attack and because of the chilling effect it exercised on a wide range of non-profit, charitable, academic, advocacy and other groups throughout American society (Cole 2003). Some developments in the United States and the United Kingdom since September 11, 2001 also raise these concerns, particularly the overbroad regulation of terrorist financing, overseas grant making, and statutes that criminalize providing some kinds of support to or on behalf of groups that a government has defined as a “terrorist” organization.

Constraints on the space for civil society in democratic states have followed a pattern of broad restrictions on a wide range of organizations and direct restrictions on a small number of groups, with widening ripples of chilling effects on a broader range of associations and their activities. But in democratic states, civil society can fight back through the legal and policy process. In undemocratic states, the situation can be far more serious, because such states can raise and lower restrictions on civil society at their discretion, carefully calibrating the space accorded to different types of organization, the work they do, and the needs of the state or ruling party. China and Vietnam illustrate this pattern of strong, direct, highly discretionary, and widely encompassing restrictions in undemocratic states on the space and freedom accorded to civil society groups.

1. THE DANGERS OF PROSECUTION AND OVERREGULATION: RESTRICTING CIVIL SOCIETY IN THE UNITED STATES

These themes have emerged with particular force since the September 11, 2001 terrorist attacks on the United States. Direct restrictions have been placed on the rights and freedom of action available to a relatively small group of civil society organizations through a highly contested process that, in one important case, has reached the U.S. Supreme Court, focused on the question of how laws can criminalize the provision of certain forms of support such as humanitarian assistance, political advocacy, or distributing literature to or on behalf of groups that a government has defined as a “terrorist” organization.¹ These restrictions and other steps taken by the U.S. government have, at times, had a chilling effect on some activities carried out by the nonprofit sector (Sidel 2008, 2009a).

For the vast majority of American nonprofits and foundations, the primary impact of counterterrorism law and policy since September 11 has been the need for enhanced information gathering on partner organizations, including checks against government watch lists and the collection of “nonterror certifications”; and the shifting of risks for compliance downwards to the recipients of funds or to local

affiliates of federated groups. For a minority of American organizations, however, counterterrorism law and policy has had an even greater effect. Some of the largest Muslim charities in the United States have been closed since 2001, their assets frozen, and in some cases the organizations and their leaders charged with material support for terrorism because of suspicion of their links with partner organizations in conflict areas overseas. The impact has also been felt directly by American public charities and foundations that work or make grants overseas, perhaps most acutely by organizations working in conflict areas where extremist groups and militant organizations operate. In a broad sense, the American nonprofit sector has sought to maintain its autonomy and vibrancy while agreeing and acceding to the government's interest in preventing nonprofit organizations from being conduits for terrorist finance or otherwise supporting terrorist organizations or their goals (Sidel 2009a; Guinane and Sazawal 2009).

The proscription and freezing of assets of several Muslim foundations on grounds of material support for terrorist organizations, and the attempt to promulgate new "voluntary" regulations governing the work of American organizations abroad, have been the most important regulatory actions in this area (Chesney 2005; Cole 2003; Crimm 2004). But the chilling effects of these measures went further than the letter of the law, as was their intent. These effects included the addition of unindicted "co-conspirator" organizations onto a government list that included many well-known and well-respected Muslim groups; civil actions against Muslim foundations; concerns in the American Muslim community about the impact of donating funds to organizations that might come under U.S. government scrutiny; and the impact of the Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities that were issued by the U.S. Treasury in 2002.²

These guidelines provided a detailed range of new provisions for charitable and philanthropic organizations to use in their overseas giving that were intended to prevent the channeling or diversion of American funds to terrorist organizations or purposes. They included the collection of considerably more information about recipient organizations than is often available, the vetting of grantees, and the extensive review of their financial operations way beyond accepted voluntary sector norms. These guidelines were significant to the U.S. nonprofit sector because, although they were voluntary, nonprofit organizations faced considerable risks of being investigated and prosecuted for failing to carry out the required due diligence. In the words of Barnett Baron, Executive Vice President of the Asia Foundation, the 2002 treasury guidelines carried the danger of "setting potentially unachievable due diligence requirements for international grant-making, [and] subjecting international grant-makers to high but largely undefined levels of legal risk, [which] could have the effect of reducing the already low level of legitimate international grant making" (Baron 2004). Legitimate charities struggled to comply with the standards, while less professional or less well-intentioned groups could just ignore them.

However, measures with a narrow direct impact and a broad chilling effect can also spur opposition, and the guidelines did precisely that, provoking a widespread response by charities and foundations that were engaged in overseas giving who

demanded their withdrawal or substantial improvement, while also proposing their own Principles of International Charity, a new self-regulatory approach to ensuring that charitable funds did not find their way to terrorists.³ Partly in response to that opposition, the U.S. Treasury revised its guidelines in 2005 and 2006, but these changes did not satisfy the nonprofit sector. In 2007 the Treasury Department added a “risk matrix” for charitable institutions to use in connection with their overseas giving, also without consulting civil society groups themselves.⁴ By 2009, civil society and the Treasury Department were at an impasse, with nonprofits refusing to recognize the legitimacy of the Anti-Terrorist Financing Guidelines, and the Treasury refusing to allow the Principles of International Charity to supplant them. In 2010, the new administration of President Barack Obama quietly opened discussions with representatives of the American nonprofit sector in an attempt to begin bridging some of these policy differences.

In practice, however, nonprofit fundraising and program activities had already begun to narrow, in part in response to concerns over U.S. government policies. Increasingly, overseas giving institutions were moving to a risk-shifting and risk analysis perspective in their activities, in line with the approach of the treasury’s guidelines. The impact of government regulation was felt by prominent American foundations that were already concerned about potential investigations of their grant making by the U.S. government. For them, the stakes were high. Several of these organizations, most prominently the Ford and Rockefeller Foundations, responded by shifting responsibility to their grantees for terrorism-related risks through new language in their grant contracts. Ford introduced new language in 2003 that required grantees to promise not to “promote or engage in violence, terrorism, bigotry or the destruction of any State, nor . . . make subgrants to any entity that engages in these activities.” This new language prompted initial opposition from a group of elite universities and, for a time, from the American Civil Liberties Union who decided not to accept new funds from Ford (Sherman 2006; Sidel 2007). In 2007, a prominent Indian nongovernmental organization (NGO) also raised this issue with the Ford Foundation, requesting modification of the foundation’s grant letter to restrict the very broad limitations to which it would have bound grantees.

In other cases, the American nonprofit sector has beaten back legal changes that would have restricted civil society advocacy and other activities. One example was an attempt in 2004 by the U.S. government agency that operates the Combined Federal Campaign (CFC), through which hundreds of thousands of federal employees donate to nonprofit organizations, requiring each nonprofit that receives CFC funds to investigate its own employees in order to certify that it “does not knowingly employ individuals or contribute funds to organizations found on the . . . terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union” (Combined Federal Campaign 2003). This new requirement ignited a firestorm of opposition from the wide range of groups that received CFC funding. Eventually the American Civil Liberties Union and a number of other organizations filed suit against the federal government to overturn the new

certification requirements (*New York Times* 2004; *Washington Post* 2004), and in November 2005 the federal government withdrew them (*New York Times* 2005).

The shifting of risk to recipient organizations goes even further than these examples suggest. In recent years, a number of local branches of the United Way in the United States have required that each nonprofit organization that receives funds—down to the smallest and most local charitable group—certifies that it complies with all anti-terrorist financing laws and regulations; that individuals or organizations that the organization works with are not on any government terrorism watch lists; and that no material support or resources are being provided to support or fund terrorism in any shape or form. In another example, it became clear in 2005 and 2006 that government surveillance of nonprofit organizations in the United States went far beyond the small number of Muslim charities and other groups that were suspected of direct terrorist ties. The American media revealed that the U.S. government had targeted a much broader swath of the nonprofit sector for observation. Hundreds of nonprofits have had their events monitored, their telephone calls logged, and their financial transactions examined by government agencies (*Washington Post* 2006).

In 2007, press reports indicated that the U.S. government was using software to search, track, and correlate donors to an undefined range of nonprofit organizations (*Los Angeles Times* 2007), and new reports emerged in 2007 and 2008 around government surveillance of nonprofits, particularly advocacy organizations, in several U.S. states. The *New York Times* and the New York Civil Liberties Union revealed in 2007 that the New York City Police Department had conducted surveillance on advocacy groups in at least thirteen states, as well as in Canada and Europe, before the 2004 Republican National Convention (*New York Times* 2007). In Maryland, the police and other security forces at the state and city level conducted surveillance on, and infiltrated, anti-war, anti-capital punishment and other nonprofit organizations in 2005 and 2006, with reports sent to “at least seven federal, state, and local law enforcement agencies” (ACLU of Maryland, 2008; Guinane and Sazawal 2009).

2. THE ADVANTAGES OF QUASI-INDEPENDENT REGULATION AND MONITORING: REGULATING CIVIL SOCIETY IN THE UNITED KINGDOM

British law also allows for the proscription of terrorist organizations and support for their meetings and other activities, bans fundraising and funding arrangements for “purposes of terrorism,” and prohibits retention or control of “terrorist property,” among other provisions (NCVO 2007). However, there are differences in the American and British approaches that offer useful lessons for the future in reducing the potential chilling effect of these restrictions on civil society. In particular,