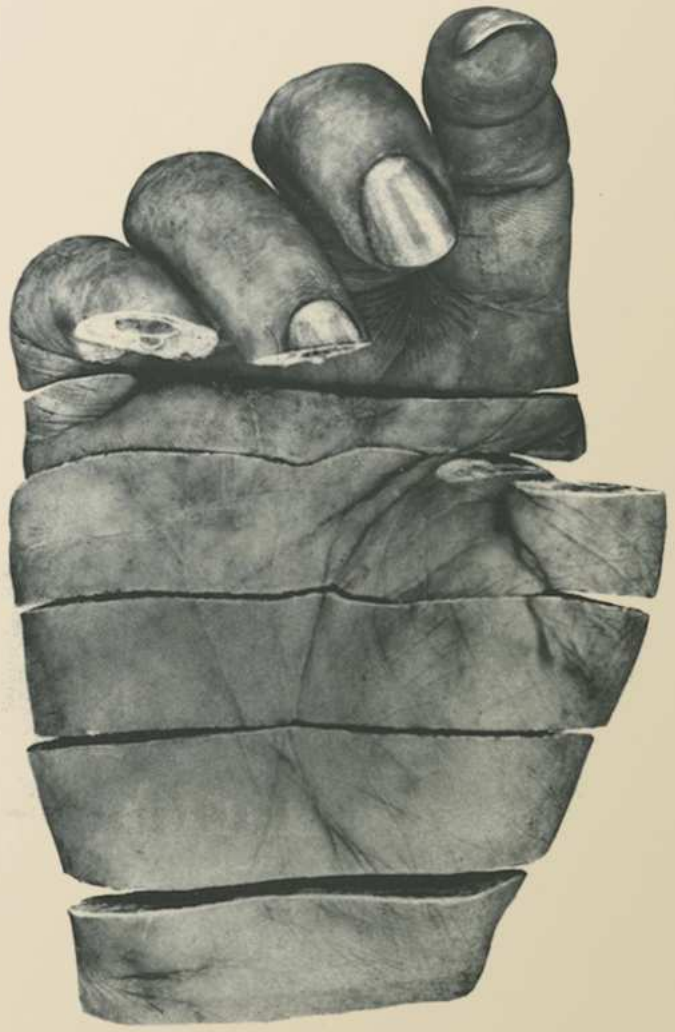
KNOW YOUR RIGHTS

We limit our resistance to fascism by relying on liberal conceptions of human rights.

"Our rights to speak out and assemble are under attack, as the J20 arrests and numerous anti-protest bills make clear. But our defense of these rights always entails engaging on the state's terms and on the presumption of its good faith. Under Trump, this is especially daunting. But under any administration, an appeal to human rights presumes the state's conscience and fealty to the social contract. The use of a rights discourse to defend against repression must be strategic and will always be limited."



This text by Natasha Lennard originally appeared in ***The New Inquiry***, published in the summer of 2017. It is commendable for moving beyond the rhetoric of rights and innocence towards a deeper understanding of resistance and repression.

For more on the ongoing cases stemming from the inauguration and ways to support defendants, visit ***http://defendj20resistance.org***

protester"; the individual rights discourse deployable in court is not designed to save the former.

REACTIONARY state measures that abrogate individual rights produce a particular outrage from liberals, which takes the form of disbelief that the state can fall so far from its alleged foundation as a social contract forged by the will of equal pledgers. As if any state were ever birthed through peaceful agreement and democratic harmony. Needless to say, it takes a certain position of privilege (or brainwashing, or both) to believe such a genealogy of state power. It's almost the liberal version of "Make America Great Again"—an appeal to a state formation that never was.

Friedrich Nietzsche called liberal contractualism a "romantic illusion," presenting instead a far crueler story of state origin in which "a conqueror with the iron hand… suddenly, and violently, and bloodily" imposes order on a previously inchoate population." For Nietzsche, the problem with the "romantic illusion" of the social contract was not only that it was a myth, but that it was a myth, like Christianity, through which we live as if it were legitimized by an unquestionable authority.

The trap is that true believers in the social contract ought to, according to their own political philosophy, withdraw their submission to a government they believe has abrogated the contract's terms. But faith in the ultimate legitimacy of the state, based in liberal contractualism, is inherently un-revolutionary: such belief relies on appeals to a government's better nature. There is currently no consistency of what constitutes an abrogation of the social contract, or of what upholding the general will looks like. Are we talking Lockean or Rawlsian? A President without the popular vote? A racist prison industrial complex, which disenfranchises and cages millions? Is everything legitimate except collusion with Russia?

Our rights to speak out and assemble are under attack, as the J20 arrests and numerous anti-protest bills make clear. But our defense of these rights always entails engaging on the state's terms and on the presumption of its good faith. Under Trump, this is especially daunting. But under any administration, an appeal to human rights presumes the state's conscience and fealty to the social contract. The use of a rights discourse to defend against repression must be strategic and will always be limited.

AFTER the DC police formed a kettle on January 20 to capture over 200 protesters at the intersection of L and 12th Street, I presumed they wouldn't hold them in the streets for long. "Catch and release," we'd been assured by local protest mainstays in advance of Inauguration Day. Catch and release—the police tactic of briefly detaining protesters in order to disperse crowds—was understood to be the DC Metropolitan Police Department modus operandi since an infirm mass arrest in 2002 had the city paying out its nose: $8.25 million in settlements. But the afternoon wore on, and the police line didn't move.

Four hours later, when the arrestees were taken into booking, I presumed the charges would be minor, perhaps disorderly conduct or obstructing government administration. When the charge of felony riot was handed down—rare in and of itself, let alone for over 200 people—I presumed it couldn't stick. Then, in April, a superseding indictment added several more felony charges to each defendant: inciting to riot, rioting, conspiracy to riot, and destruction of property. Now over 200 protesters each face up to 75 years in prison.

No one expected a prosecutorial response quite so extreme, nor charges so unprecedented. "In my over thirty years of practicing law, I've never seen anything like this," said veteran DC Attorney Mark Goldstone.

The case against the vast majority of the J20 defendants should be paper-thin. They were swept up in a dragnet arrest; the evidence against some arrestees (as shown in the prosecution's discovery) is no more than: they were present throughout the short march, they wore black clothes and masks, they chanted. To suggest that the police had individualized probable cause to arrest each and every defendant (even though the original dragnet swept up journalists and legal observers, too) should be laughable. So too should the idea that over 200 people were involved in the breaking of one bank window, as the indictment proposes.

Civil and human rights groups like the Partnership for Civil Justice Fund have, unsurprisingly, responded in terms of civil and human rights. The arrests, they point out, deploy collective punishment and abrogate First Amendment protections. Fifty years of case laws bears out that the presence of violence or illegal activity within the context of First Amendment protected activity is no grounds for the arrest of everyone present.

Strategically, an appeal to human and constitutional rights is appropriate and necessary in the J20 cases. But as reactionary anti-protest repression heightens across the country, we do well to understand the risks and limits of a response framed by a rights discourse, which would only honor the rights of an individual to assemble in a manner deemed "peaceful" by the state.

While we may want to rely on a rights defense in court, where First Amendment activity is threatened, our defense of dissent outside the courts should not be limited by what the state deems defensible by metrics of human or civil rights. A rights discourse, for example, would not defend the deliverer of that glorious punch to neo-Nazi Richard Spencer—it would, in fact, defend Spencer.

A leftist over-reliance on a rights discourse to defend against repression of our protest would treat the state—the Trumpian, corporate, white supremacist state—as an interlocutor, instead of an enemy. In 1968, John Berger highlighted a conflict inherent to the sort of public demonstrations "rights" aim to defend: "If the State authority is open to democratic influence, the demonstration will hardly be necessary; if it is not, it is unlikely to be influenced by an empty show of force containing no real threat." It's safe to say we live in a moment when it is clear and correct to distrust the state's openness to democratic influence.

Berger did not reject the significance of protests, which manage to show, in their peaceful numbers, the potential for revolutionary action (very rare), but he saw their limitations as empty shows of force unlikely to influence the state. A rights discourse which can only be used to defend this sort of protest will thus echo its limitations: defending that which is no real threat to the powers that be. When we call upon the government to recognize our right to peaceful assembly, we perform the very sort of act we are seeking to see defended: appeal to the democratic conscience of the state. "A conscience which is very unlikely to exist," as Berger noted.

THE J20 cases don't stand alone. In April, two U.N. human rights investigators issued a statement in response to a wave of bills introduced in over 19 states since Trump's election, which can generously be deemed "anti-protest." The experts noted an "alarming and undemocratic" trend. In Indiana, for example, Republicans proposed legislation to allow police to use "any means necessary" to remove protesters from a roadway; in Virginia, lawmakers are considering a bill that would make "unlawful assembly" after the police have ordered a crowd to disperse punishable with a year's jail time; in North Dakota, Republicans proposed legislation to legalize running over protesters if they are blocking roadways (it happily failed).

The investigators were particularly alarmed by an apparent failure in legal understanding running through the language of many of the proposed bills. Again and again, lawmakers referred to "violent protest" to which the police and the law must respond. The U.N. experts disagreed. "There can be no such thing in law as a violent protest," the investigators stated. "There are violent protesters who should be dealt with individually and appropriately by law enforcement. One person's decision to resort to violence does not strip other protesters of their right to freedom of peaceful assembly. This right is not a collective right; it is held by each of us individually."

In the unlikely event that any legislators listened or cared, a corrective course was made clear to prima facie appease these human rights concerns while maintaining a conspiratorial agenda to stifle dissent: edit the bill by finding and replacing "violent protest" with "violent protester(s)." As the DC prosecutors' deployment of felony riot charges in the J20 makes clear, while "violent protest" may be absent from the letter of the law, the idea is operative in police tactics and court proceedings. A riot charge inherently carries the risk of collective punishment, and the "violent protest" is de facto posited as the grounds to name "violent protesters" as members.

Defendants and lawyers in cases like those from J20 have every reason to call upon the logic of the U.N. statement to highlight the unconstitutionality of their mass arrest. But as a broader response to the crackdowns against dissent, the U.N. line is not only a blunt weapon, but one with unintended consequences. In response to heightened dissent, the state further criminalizes protest; liberals then call upon a discourse of individual rights, which can only defend the very mode of protest least suited to challenging the sort of repressive government keen to criminalize protest: this is the conflict highlighted by Berger. The fight becomes atomized over the fact of assembly, not the reason for protest.

In their formulation, liberals uphold the "good protester/bad protester" dichotomy that says the state can do whatever it wants to a protester if that protester has violated some mythical social contract with "bad" or "violent" behavior. In the reality forged by these conspiracy-mongering lawmakers, however, we're all bad protesters now. When we're playing the state's game, i.e. in court, there's no avoiding state logic. A court doesn't care that we don't see property damage as violence. A strategy committed to convincing the state of the rights of "good protesters" might win some crucial battles in state houses and courts. An ideology committed to the existence and necessity of good protesters (to be contrasted with bad protesters) presumes a status quo in which we do not need to fight.

The collapse of strategy into ideology when it comes to rights discourse recalls Arundhati Roy's concern that we've swapped a grand pursuit of justice for the far smaller demand of human rights. "Too often," Roy writes in *Things that Can and Cannot Be Said*, these rights "become the goal itself… Human rights takes history out of justice." The entire J20 black bloc was part of a struggle for justice—an explicitly anti-capitalist and anti-racist march, aesthetically unified to show symbolic and rageful opposition to everything Trump represents on the day of his inauguration. A window breaker is no less invested in justice than a "good