

DUNCAN KENNEDY

The Critique of Rights in Critical Legal Studies

This piece presents a critique, developed by a faction of the group that called itself critical legal studies, of rights as they figure in legal and general political discourse. This rights critique, like critical legal studies in general, operates at the uneasy juncture of two distinct, sometimes complementary and sometimes conflicting enterprises, which I will call the left and the modernist/postmodernist projects.¹

The goals of the left project are to change the existing system of social hierarchy, including its class, racial and gender dimensions, in the direction of greater equality and greater participation in public and private government. The analytic part of the project includes a critique of the injustice and oppressiveness of current arrangements, a utopian part, and a positive theory of how things got so bad and why they stay that way.

Modernism/postmodernism (mpm) – a no less contested concept – is a project with the goal of achieving transcendent aesthetic/emotional/intellectual experiences at the margins of or in the interstices of a disrupted rational grid. The practical activity of mpm centers on the artifact, something made or performed (could be high art, could be the most mundane object, could be the deconstruction of a text, could be the orchestration of dinner).²

The critique of rights I offer below operates from within both of these projects (I will call it left/mpm). It has three parts: an account of the role of rights in American legal consciousness (and by indirection in American political consciousness more generally); an account of how one might come to lose

179 THE CRITIQUE OF RIGHTS

faith in the coherence of rights discourse; and a brief suggestion as to why one might make such a critique in spite of its unpleasantness.

Rights in American Legal Consciousness

Until World War II, there were two main left reconstructive projects in the United States. One was socialism, meaning public ownership of the means of production, or the more or less complete abolition of the markets for labor and products. The other was the “reform” program of reconstructing the market and also influencing it, by a combination of structural changes (e.g., empowering labor unions), fiscal policy (e.g., progressive taxation), welfare programs, and regulation of just about everything.

Groups favoring either of these approaches might have found ultimate justification in ideas like freedom or human rights, but they were strongly predisposed to understand outcomes for unfortunate people as the consequence of a *failure of planning*. That is, of a failure to properly understand the social totality and intervene to shape it from the center to make outcomes correspond to what *the collective* wanted, whether the collective was “the working class” or “the American people.” (There were exceptions: the rights-of-labor versus the rights-of-capital rhetoric in labor disputes at the turn of the century; women’s rights). The counter-program of the American right was usually cast in terms of the defense of individual rights against the collectivity (exceptions being profascists; the Catholic right).

That is no longer the situation. This part describes the rise of a liberal rights-based version of reconstruction, the role of rights in American legal consciousness now that they are the basis of both liberal and conservative ideological projects, and the left/mpm phenomenon of loss of faith in rights.

THE ROLE OF RIGHTS IN LEFT LEGAL THOUGHT, CIRCA 1975-1985

There are three liberal sub-discourses of rights that get deployed in and around legal reasoning. These are liberal constitutionalism, fancy reconstructive rights projects in legal philosophy, and the popular political language of rights that flow naturally or automatically from the assertion of “identity.” The three discourses are partially autonomous, because each corresponds to a fraction of the liberal intelligentsia.

180 DUNCAN KENNEDY

Liberal constitutionalism is part of the ideology of the milieu of activist liberal law professors, judges, and public interest lawyers mainly oriented to legal reform through the courts. Public interest lawyers include the American Civil Liberties Union, the Legal Defense Fund, and the dozens of newer institutions that have sprung up to litigate on behalf of women, Latinos, the environment, gays, and so on. This group also includes the post-1960s National Lawyers Guild and the Legal Services Corporation of the same era.

Liberal constitutionalists produce legal arguments in briefs and supporting law review articles for the legal recognition, development, or defense of liberal legal positions. The advocates argue that these positions are “required” by the correct legal interpretation of the constitutional law materials, particularly the provisions guaranteeing rights of various kinds. A recent addition to this family is international human rights activism, deploying legal arguments based on international legal materials that recognize rights.

Fancy theory (that, for example, of Ronald Dworkin, Bruce Ackerman, Frank Michelman, Martha Minow, Margaret Radin, Drucilla Cornell, and Patricia Williams) is the project of the milieu of elite legal academic intellectuals self-consciously concerned with universalizing the interests of various oppressed or disadvantaged groups. They support specific liberal positions that have gotten legal recognition, and are therefore already “represented” in legal discourse in (maybe only dissenting) judicial opinions, by linking them to the liberal political philosophy of the day (that of John Rawls, Richard Rorty, Carol Gilligan, Jurgen Habermas, Jacques Derrida, and others). In the 1980s, they were joined by Central European theorists of “limited revolution” under the banner of human rights. All show that philosophy, something at once higher than, more intellectually sophisticated than, and also more determinate than post-realist text-based constitutional argument, supports legalizing liberal rights claims.

Finally, the popular discourse of rights pervades not only the formal political culture but also just about every milieu where people argue about who should do what, including, for example, the family, the school, and the entertainment industry. The identity/rights rhetoric in particular is that of organizers, advocates, and spokespeople of subordinated groups (blacks, women, gays, the handicapped). They argue the existence of an identity, that given the identity there are rights, and that these rights should be recognized by the legal system.

Within legal academia, but virtually nowhere else either in the world of

181 THE CRITIQUE OF RIGHTS

law or beyond it, there is a left/mpm critique, loosely identified with critical legal studies (cls), of the three versions of the liberal project.

The Effacement of Radicalism. The left intelligentsia has not always been organized this way. Although the current liberal project has its “origin” in the fifties, during the 1960s the left intelligentsia grew exponentially and then split sharply and repeatedly over such questions as direct action versus legal strategies, revolutionary communism versus liberalism, black nationalism versus integrationism, separatist feminism versus “sleeping with the enemy.” In each of these splits, one element was different attitudes toward rights and rights rhetoric, associated with different degrees of “radicalism,” as we defined it then, meaning different beliefs about how great and possibly violent the changes would have to be before anything was “really” different.

The political radicals’ critique of rights had little to do with the kind of internal critique of legal reasoning that absorbed first the legal realists and then the crits. Indeed, the 1960s radicals leaned toward external, economy-based, race-based, or gender-based theory (consider Shulamith Firestone and Eldridge Cleaver). The 1960s radicals also failed or were defeated or self-destructed, however you want to look at it. In the 1970s and 1980s, the left intelligentsia was much as it had been in the early 1960s, with a small radical fringe and a giant liberal mainstream always about to be devoured by neoconservatism, yuppieism, and lots of other things.

Perhaps the biggest change from the 1950s and early 1960s was that the white male working class no longer played a significant role in left thinking. White male left liberals and radicals saw themselves as deserted or betrayed by that class, had lost their faith in it, or had never identified with it. For most left political activists, the straight white male working class was, at worst, the core of the enemy camp and, at best, the necessary object of conversion.

From Class Politics to Identity Politics. The hopeful version of the situation of the new New Left is neatly put by Cornel West, who asserts the existence of an “inchoate, scattered yet gathering progressive movement that is emerging across the American landscape. This gathering now lacks both the vital moral vocabulary and the focused leadership that can constitute and sustain it. Yet it will be rooted ultimately in current activities by people of color, by labor and ecological groups, by women, by homosexuals.”³

182 DUNCAN KENNEDY

The different groups within the legal part of the liberal intelligentsia—liberal constitutionalists, fancy legal theorists, identity/rights based organizers—have reorganized around or persisted in rights discourse and successfully *reinterpreted* what happened in the 1960s. They remember it as a triumph, in the civil rights, women's and antiwar movements, of constitutional rights, representing the best instincts and true ideals of the American people, over an earlier regime representing a reactionary or morally torpid version of those instincts and ideals.

What happened, according to them, was the triumph of universalizing intellectuals (Martin Luther King, Gandhi), allied with civil rights lawyers and legal services lawyers, allied with community organizers. Together, they asserted, litigated, and then justified rights guaranteed in the Constitution, against legislative and administrative regimes that denied those rights.

The rights were usually defined in terms of equality, but equality in a special sense. They did not involve the demand for equality in the distribution of income or wealth between social classes, regions, or communities, but rather “equal protection” for individual members of previously subordinated social groups. The rhetorical emphasis on identity and anti-discrimination was a complex new synthesis of the “nationalist” and “integrationist” strands in 1960s black and women's protest movements.⁴

By the 1970s and 1980s, there were no longer “popular movements” aggressively raising rights claims, there were no longer federal courts willing to invalidate legislation and regulations in the interests of oppressed groups, and there was no longer the sense of the undeniable moral/philosophical correctness and ineluctable coherence of left constitutional theory. From different places within the left intelligentsia, the causal links between these three failures looked different.

There were some advantages to the new situation, as well as obvious disadvantages. The remaining left intelligentsia was rid of the radicals who had made their lives miserable throughout the 1960s and freed of the worrisome problem of the white male working class. The left liberals were now *the left*. They could, sometimes, institutionalize themselves and develop all kinds of more or less oppositional or collaborative attitudes toward the mainstream, without worrying about the horrible dialectic of “taking up the gun” or “selling out.” And the left intelligentsia did survive, with a good deal more in the way of numbers and resources and ideas than had been around in the 1950s and early 1960s.

New recruits, post-1960s children, continued to trickle in, particularly

183 THE CRITIQUE OF RIGHTS

women and minority recruits to the law reform and theory intelligentsia fragments. For many of them, the 1960s seemed a Golden Age. They had personal memories of that time, often of formative events in their own lives. But their memories were filtered through childish consciousness, and there was little in them that might conflict with the rights-oriented re-interpretation of what had happened. Its nostalgic emphasis on the importance of popular movements, but suppression of intra-left division, seemed far more plausible than the mainstream story of the 1960s as the Dark Ages.

It is easy in retrospect to see the weakness of this project. But in 1981, say, the year Ronald Reagan took office, or even, just barely, in 1993, when Bill Clinton took office, it was plausible, even if the times were hard for the left. I think a lot of its strength, as an intelligentsia project, derived from the combination of political correctness (struggles of oppressed groups), legal correctness (the Constitution was law and authoritatively demanded massive liberal reform), and philosophical correctness (the fanciest moral philosophy supported left liberal law reform on behalf of oppressed groups). Wow.

The Critical Legal Studies Critique of Rights. Against this background, the cls critique of rights (Mark Tushnet, Peter Gabel, Frances Olsen, me)⁵ was *perverse*. But it was *not* perverse for the reason asserted by the first-stage critics of cls, who saw only one of its originary strands, namely, Marx's critique of rights as individualist rather than communist, and specifically the Marcusean critique of "repressive tolerance." There is an undeniable genealogical connection between this critical strand and the communist practice of denying any legal enforcement of rights against the state, in the name of the revolutionary truth that "bourgeois civil liberties" were a reactionary or counterrevolutionary mystification.

The initial critics of cls on this front were veterans of the wars in the forties and fifties and then again in the late sixties and early seventies between the communists (and other orthodox Marxists and third world Marxist-Leninist revolutionary types) and the liberals. For these anti-Marxists (Louis Schwartz), anti-New Leftists (Phil Johnson, the *New Republic*), and post- or ex-Marxists (Staughton Lynd, Edward Sparer, Michael Tigar), *any* critique of rights automatically smacked of Stalinism.⁶

But the crits were not the radical activists of 1965 to 1972 reemerging as Marxist academics to pursue the old war on a new front. Though they preserved the radicals' animus against mainstream liberalism, their critique was perverse not because it was Stalinist but because it was *modernist*. It

184 DUNCAN KENNEDY

developed, with many hesitations and false steps, the same kind of internal critique, leading to loss of faith, that the critics were then applying to legal reasoning.⁷

Feminists⁸ and critical race theorists,⁹ who took up the critique of the critique after the anti- and post-Marxists, saw this clearly. They objected not on the ground of totalitarian tendency, but on the ground that rights really did or should exist, or on the ground that it was demoralizing to criticize them. This response was plausible because rights played more or less exactly the same role in their post-1960s political thinking that they played in American political thought in general.

RIGHTS IN AMERICAN POLITICAL DISCOURSE

Rights play a central role in the American mode of political discourse. The role is intelligible only as part of the general structure of that particular discourse. It is a presupposition of the discourse that there is a crucial distinction between “value judgments,” which are a matter of preference, subjectivity, the arbitrary, the “philosophical,” and “factual judgments,” or scientific, objective, or empirical judgments.

Rights Mediate between Factual and Value Judgments. Values are supposedly subjective, facts objective. It follows that the status of all kinds of normative assertion, including moral or utilitarian assertion, is uneasy. Claims that something is “right” or “wrong,” or that a rule will “promote the general welfare” are *conventionally* understood to be on the subjective side of the divide, so much a matter of value judgment that they have to be arbitrary and are best settled by majority vote.

Although there are many ways to account for or to understand the nature of rights, it seems to me that in American political discourse they all presuppose a basic distinction between rights argument and other kinds of normative argument. The point of an appeal to a right, the reason for making it, is that it *can't be reduced* to a mere “value judgment” that one outcome is better than another. Yet it is possible to make rights arguments about matters that fall outside the domain commonly understood as factual, that is, about political or policy questions of how the government ought to act. In other words, rights are mediators between the domain of pure value judgments and the domain of factual judgments.

The word “mediation” here means that reasoning from the right is understood to have properties from both sides of the divide: “value” as in

185 THE CRITIQUE OF RIGHTS

value judgment, but “reasoning” as in “logic,” with the possibility of correctness. Rights reasoning, in short, allows you to be right about your value judgments, rather than just stating “preferences,” as in “I prefer chocolate to vanilla ice cream.” The mediation is possible because rights are understood to have two crucial properties.

First, they are “universal” in the sense that they derive from needs or values or preferences that every person shares or ought to share. For this reason, everyone does or ought to agree that they are desirable. This is the first aspect of rights as mediators: they follow from values but are neither arbitrary nor subjective because they are universal.

Second, they are “factoid,” in the sense that “once you acknowledge the existence of the right, then you have to agree that its observance *requires* *x*, *y*, and *z*. Everyone recognizes that the statement “be good” is too vague to help resolve concrete conflicts, even though it is universal. But once we have derived a *right* from universal needs or values, it is understood to be possible to have a relatively objective, rational, determinate discussion of how it ought to be instantiated in social or legal rules.

The two parts are equally important. It is no good to be a believer in universal human rights if you have to acknowledge that their application or definition in practice is no more a matter of “reason” as opposed to “values” than, say, the belief in Motherhood and Apple Pie. They have to be both universal and factoid, or they leave you in the domain of subjectivity.

The project of identifying and then working out the implications of rights is thus a part of the general project of social rationality. As such, the rights project is part of the same family as the project of identifying and working out in practice a judicial method based on interpretative fidelity, rather than mere legislative preference. Moreover, since rights are conventionally understood to be entities in law and legal reasoning, as well as in popular discourse and political philosophy, the two projects are intermingled. But they are not the *same* project. We might think that extant theories of legal reasoning fail to avoid the pitfall of mere preference, but that rights theories succeed, and vice versa. This possibility is real because American political discourse presupposes that rights exist outside as well as inside the legal system.

Inside and Outside Rights. Rights occupy an ambiguous status in legal discourse, because they can be either rules or reasons for rules.¹⁰ “Congress shall make no law abridging the freedom of speech” is an enacted rule of

186 DUNCAN KENNEDY

the legal system, but “protecting freedom of speech” is a reason for adopting a rule, or for choosing one interpretation of a rule over another. In this second usage, the right is understood to be something that is outside and preexists legal reasoning.

The outside thing is something that a person has even if the legal order doesn't recognize it or even if “exercising” it is illegal. “I have the right to engage in homosexual intercourse, even if it is forbidden by the sodomy statutes of every government in the universe.” Or “slavery denies the right to personal freedom, which exists in spite of and above the law of slave states.”

The Constitution, and state and federal statutes, legalize some highly abstract outside rights, such as the right of free speech in the First Amendment or of property in the Fourteenth. Positive law also legalizes less abstract rights that are understood to derive from more abstract, but not enacted, outside rights. For example, in the nineteenth century, the Supreme Court interpreted the constitutional prohibition of state impairment of the obligation of contracts as legal protection of one species of the more general, but unenacted, category of vested rights.

American courts have also, on occasion, argued that the Constitution protects rights even when it does not explicitly enact them as law. At various points in the nineteenth century, courts did this quite boldly, claiming that the protection of unenumerated outside rights was to be inferred from the “nature of free governments.” In the twentieth century, the Supreme Court has seen itself as protecting an unenumerated outside right of privacy whose constitutional (legal) status the Court infers from a variety of more specific provisions (for example, the Fourth Amendment protection against unreasonable searches and seizures).

In classic Liberal political theory, there was an easy way to understand all of this: there were “natural rights,” and We the People enacted them into law. After they were enacted, they had two existences: they were still natural, existing independently of any legal regime, but they were also legal. The job of the judiciary could be understood as the job of translation: translating the preexisting natural entity or concept into particular legal rules by examining its implications in practice.

Though the language of natural rights is out of fashion, it is still true that Liberal theory understands *some part* of the system of legal rules as performing the function of protecting outside rights, rights whose “existence”

187 THE CRITIQUE OF RIGHTS

does not depend on legal enactment, against invasion by private and public violence. We don't need, for the moment, to go into the various ways in which lay people or specialists understand the mode of existence of these extra-legal or outside rights. The important point is that judicial (or, for that matter, legislative or administrative) translation of the outside into the legal materials is still a crucial element in the Liberal understanding of a good political order.

Thus we can distinguish three kinds of rights argument: the strictly outside argument about what the existence of some right or rights requires the government (or a private person) to do or not do; the strictly inside argument about what the duty of interpretive fidelity requires judges to do with a body of materials that includes rights understood as positively enacted rules of the legal system; and the form characteristic of constitutional law (and of some private law argument as well), in which the arguer is engaged at the boundary between inside and outside, interpreting an existing outside right that has already been translated into positive law.

Constitutional rights *straddle*. They are both legal rights embedded and formed by legal argumentative practice (legal rules) and entities that "exist" prior to and outside the constitution. For this reason, an argument from constitutional rights mediates not just between factual judgments and value judgments, but also between legal argument (under a duty of interpretive fidelity) and legislative argument (appealing to the political values of the community). Once again, the word "mediation" means that this form of argument participates in the characteristics of both sides of the dichotomy.

On one side, the argument from constitutional rights is legal, because it is based on one of the enacted rules of the legal system (the First Amendment, say); on the other, it is normative or political, because it is in the form of an assertion about how an outside right should be translated into law. The advocates and judges doing constitutional rights argument exploit *both* the notion that adjudication proceeds according to a highly determinate, specifically legal method of interpretive fidelity, and the notion that the outside right is a universal, factoid entity from whose existence we can make powerful inferences. Their goal is to make the apparent objectivity of rights theory dovetail perfectly with the apparent objectivity of judicial method.¹¹ The opponents of a "strictly positivist" position argue the flip side: that appeal to outside rights can and should resolve gaps, conflicts, and ambiguities that arise when the judge tries to ignore the normative sources of law,

188 DUNCAN KENNEDY

and so forth. In other words, the positivists celebrate judicial method and denigrate rights theory, while the interpretivists do the opposite. This discussion remains marginal. Most of the time, the ideological intelligentsias that deploy constitutional argument confront each other in the intermediate zone. In the intermediate zone, both sides claim enacted constitutional rights *and* the objectivity of judicial method.

RIGHTS IN THE UNIVERSALIZATION PROJECTS OF IDEOLOGICAL INTELLIGENTSIAS

Rights are a key element in the universalization projects of ideological intelligentsias of all stripes. A universalization project takes an interpretation of the interests of some group, less than the whole polity, and argues that it corresponds to the interests or to the ideals of the whole. Rights arguments do this: they restate the interests of the group as characteristics of all people. A gay person's interest in the legalization of homosexual intercourse is restated as the right to sexual autonomy, say. The right here mediates between the interests of the group and the interests of the whole.

When groups are in the process of formation, coming to see themselves as having something in common that is a positive rather than a negative identity, the language of rights provides a flexible vehicle for formulating interests and demands. There is an available paradigm: a group based on an identity, from which we infer a right to do identity-defining things, a right to government support on the same basis as other identity groups, and protection against various kinds of adverse public and private action (a right against discrimination). New groups can enter the discourse of American politics with the expectation that they will at least be understood, if they can fit themselves to this template.¹²

Once the interests of the group have been assimilated to the interests of the whole polity by recasting them as rights, the factoid character of rights allows the group to make its claims as claims of reason, rather than of mere preference. Since you do or at least ought to agree that everyone has this universal right, and that reasoning from it leads ineluctably to these particular rules, it follows that you are a knave or a fool if you don't go along. To deny the validity of these particular rules makes you *wrong*, rather than just selfish and powerful.

This general Liberal idea is available to all. In other words, both liberal and conservative intelligentsias argue that the group interests they repre-

189 THE CRITIQUE OF RIGHTS

sent should be recognized in law by asserting that the recognition would be an instantiation of some set of outside rights. The proposed legal rules are not “partisan” but rather represent political beliefs and commitments that transcend the left/right divide. For many conservatives, rent control is unconstitutional. Likewise, the liberal intelligentsia argues that its program is just the vindication of outside rights, enacted in the Constitution, against their mistranslation in wrong legislative, administrative, and judicial decisions.

I argued above that only since the 1970s has the left in general come to rely on rights as the principal basis for universalizing its positions. Before the 1970s, there had always been a live controversy between Marxists hostile to the whole rights formulation, social democratic progressive planners with a universalization project based on savings from eliminating wasteful and chaotic markets, and civil libertarians.

For the conservative ideological intelligentsia, the alternative to rights is efficiency. An efficiency claim has many of the same mediating properties as a rights claim: it is a value judgment that is universal (who can be opposed to making everyone better off according to their own understanding of better-offness?) and factoid (efficiency arguments are nothing if not technical and they are supposedly empirically based). But while this alternative still exists for conservatives, rights now bear the main burden of universalization for both camps.

The Parallel Investments of Ideological Intelligentsias in Legal Reasoning and Rights Discourse. The notion of an “empowerment effect”¹³ is helpful in understanding the investment of liberal and conservative intelligentsias in the general idea of a judicial method that will produce “legally correct” results, and also in understanding their more specific investment in judicial review of the constitutionality of legislation. It seems plausible (at least to me) that American political intelligentsias of left and right experience empowerment vis-à-vis legislative majorities through constitutional wishful thinking: the belief that correct judicial interpretations of the Constitution make illegal their opponents’ programs, permit the moderate version of their own programs, and check the dangerous tendencies of the masses. People really like to believe that whatever they believe in is validated by the mana of the Judge. Moreover, legal correctness is a weapon equally of the left and the right, so that neither side should see it as “in its favor.” Finally,

190 DUNCAN KENNEDY

the privileges of the intelligentsias do not seem to depend in any profound way on belief in the nonpolitical character of judicial method.

There is a clear parallel between the role of judicial method and the role of rights. The double mediating effect of rights, between fact and value and between law and politics, allows both camps to feel that they are correct in their rights arguments, just as they are correct in their technical legal arguments. Both claim a whole history of triumph over the other side under the banner of rights. Each recognizes that the other holds some territory, but interprets this as manipulation of legal reasoning, or wrong legal reasoning, to conclusions that violate outside rights.

For both sides, rights are crucial to counter-majoritarian security as well as to counter-majoritarian reform. The general societal belief in rights, like the parallel belief in legal reasoning, empowers intelligentsias that no longer believe (or never believed) that they represent the “will of the people.” For the left in particular, the move to rights rhetoric meant abandoning any claim to represent an overwhelming (white male) working-class majority against a “bourgeoisie” that was by definition a tiny minority and getting smaller all the time.

A final parallel is that rights talk, like legal reasoning, is a discourse—a way of talking about what to do that includes a vocabulary and a whole set of presuppositions about reality. Both presuppose about themselves that they are discourses of necessity, of reason as against mere preference. And it is therefore possible to participate in each cynically or in bad faith.

Cynicism means using rights talk (or legal reasoning) as no more than a way to formulate demands. They may be “righteous” demands, in the sense that one believes strongly that they “ought” to be granted, but the cynic has no belief that the specific language of rights adds something to the language of morality or utility. When one attributes the success of an argument couched in rights language to the other person’s good-faith belief in the presuppositions of the discourse, one sees the other as mistaken, as having agreed for a bad reason, however much one rejoices in the success of a good claim.

Bad faith, here and in the case of legal reasoning, means simultaneously affirming and denying *to oneself* the presupposed rationality of the discourse, and of the particular demand cast in its terms. It means being conscious of the critique of the whole enterprise, sensing the shiftiness of the sand beneath one’s feet, but plowing on “as if” everything were fine. Bad faith can be a stable condition, as I have argued at length elsewhere for the

191 THE CRITIQUE OF RIGHTS

case of legal reasoning.¹⁴ Or it can turn out to be unstable, resolving into loss of faith or into renewed good faith.

LOSS OF FAITH IN LEGAL REASONING

To lose your faith in judicial reason means to experience legal argument as “mere rhetoric” (but neither “wrong” nor “meaningless”). The experience of manipulability is pervasive, and it seems obvious that whatever it is that decides the outcome, it is not the correct application of legal reasoning under a duty of interpretive fidelity to the materials. This doesn’t mean that legal reasoning never produces closure. It may, but when it does, that experienced fact doesn’t establish, for a person who has lost faith, that closure was based on something “out there” to which the reasoning corresponded. It was just an experience and might have been otherwise (had one followed another work path, for example).

As for attempts to demonstrate abstractly that legal reasoning does or could produce closure, the extant examples within law look open either to internal critique or to the critique of partiality by ignoring equally good arguments on the other side. The post-faith minimalist critic finds not that “it can’t be done,” but only that “it doesn’t seem to have been done yet, and I’m not holding my breath.”

Loss of faith is a loss, an absence: “Once I believed that the materials and the procedure produced the outcome, but now I experience the procedure as something I *do to* the materials to produce the outcome I want. Sometimes it works and sometimes it doesn’t, meaning that sometimes I get the outcome I want and sometimes I don’t.” Loss of faith is one possible resolution of the tension or cognitive dissonance represented by bad faith. One abandons the strategy of denial of the ideological, or subjective, or political, or just random element in legal reasoning. One lets go of the convention that outcomes are the consequences of “mere” observance of the duty of interpretive fidelity.

The loss of faith in legal reasoning is the across-the-board generalization of a process that has gone on continuously with respect to elements within legal thought at least since Jeremy Bentham’s critique of Blackstone. Two examples are the gradual loss of faith in the forms of action and in the characteristic eighteenth- and nineteenth-century legal operation of “implication.” When faith is gone, people say things like Holmes’s remark: “You can always imply a condition. The question is why do you do it?”¹⁵ Or they write, “Much labor and ingenuity have been expended in the attempt to

192 DUNCAN KENNEDY

find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none.”¹⁶

Loss of faith in legal reasoning bears a close analogy to one of the many kinds of experience of loss of faith in God. The atheist who believes that he or she, or “science,” has disproved the existence of God is analogous to the maximalist who believes that postmodern critical theory has proved the indeterminacy of legal reasoning. The other kind of maximalist is like the Catholic who becomes a Protestant, rejecting authority while continuing to hold a theology. Loss of faith, by contrast, is not a theory and is not the consequence of a theory.

I think of my own initial faith in legal reasoning as like the religion of eighteenth-century intellectuals who believed that there were good rational reasons to think there was a God, that the existence of a God justified all kinds of hopeful views about the world, and that popular belief in God had greatly beneficial social consequences. But they also had confirmatory religious experiences that were phenomenologically distinct from the experience of rational demonstration.

They engaged in the work of critiquing extant rational demonstrations and in that of constructing new ones, without any sense that their faith was in jeopardy. And they had occasional experiences of doubt without any loss of interest in and commitment to the enterprise of rational demonstration (this is me in the first year of law school). Loss of faith meant they woke up one morning in the nineteenth century and realized that they had “stopped believing.”

It wasn't that someone had proved to them that God did not exist. They didn't find any extant rational demonstration of this proposition convincing. Nor had they decided that it was impossible to prove that God exists. It was just that they didn't find any extant proof convincing. They might even continue to have experiences like those they had once interpreted as intimations of the divine. But somehow the combination—the processes of critique and reconstruction of rational demonstrations, along with the process of doubt and reaffirmation—had “ended badly.”

It no longer mattered that more work might settle the question rationally, that the idea of a world without God was profoundly depressing, that they might lose their jobs in the clergy if anyone found out what they really felt, or that a generalized loss of belief in God threatened all kinds of terrible social consequences. It didn't even matter that people much smarter

193 THE CRITIQUE OF RIGHTS

than they were pushing rational demonstrations that they hadn't refuted and perhaps wouldn't be able to refute when they tried.

They were in a new position. It was neither a position of certainty nor one of uncertainty. It wasn't certainty because no certainty-inducing rational demonstrations had worked. It wasn't uncertainty because the only possibility left was a surprise: someone might come along and prove that God did or did not exist, and everyone would have to come to grips with that development. In the meantime, there was no subjective state of wondering, no interrogation of the world. The question was "over," or "parked." They were post-God.

I said earlier that loss of faith is neither a theory nor the outcome of a theory. It is an event that may or may not follow critique. For example, in the Spring of my first year in law school, I was working on a law review case note. At lunch with a second-year student editor, I waxed eloquent on the doctrinal implications of a paragraph in Chief Justice Warren's majority opinion that indicated, I thought, an important change in the Court's First Amendment theory.

The editor looked at me with concern and said, "I think you may be taking the language a little too seriously." I blushed. It was (unexpectedly, suddenly) obvious to me that the language I had been interrogating was more casual, more a rhetorical turn, less "for real," than I had been thinking. No judicial opinion since has looked the way some opinions looked before this experience.

Working for a law firm during the summer of my second year, I prepared a brief arguing that a threatened hostile takeover of our client would violate the antitrust laws. I was a fervent trust buster and "believed" my argument. The lawyers on the case let me tag along when they visited the Justice Department to urge the Antitrust Division to intervene. Back in New York, in the elevator going up to the office, we ran into another lawyer who told us that a new offer had persuaded our client to go along with the takeover. The lead lawyer said to me: "You know the argument so well, it should be easy to turn it around." Something in my face shifted him from jocular to pensive. "On second thought, we'll get someone else to do it," he said, and patted my arm. Ah, youth!

Nothing was "proved" in either incident, and in each case the person who jolted me was trying, nicely, to induct me into bad faith, not no faith. It would have happened some other time if it hadn't happened then.

194 DUNCAN KENNEDY

Though it is arational, a “leap” in reverse, rather than a “consequence” of critique, loss of faith is nothing like a fully random event. It is a familiar notion that critique may “undermine” or “weaken” faith, preparing without determining the moment at which it is lost. And loss sometimes precedes by a process like metaphor (or is it metonymy?) in poetry. Loss of faith can seem to “spread” like a disease, or “jump” like a forest fire.

In the next part, I describe the structural relationship between the critique of legal reasoning and the critique of rights. The idea is not to explain but rather to describe the context within which occurred the migration of loss of faith from one domain to the other.

The Critique of Rights

This part describes a series of contexts for the loss of faith in rights, arranged as a kind of route for the progression of the virus. I begin with the role of rights “inside” legal reasoning, that is, with the way judges argue about the definition and elaboration of rights that are clearly established by positive law. Doubts about this process suggest doubts about the constitutional rights that “straddle” the inside and the outside. And these lead in turn to doubts about popular rights discourse and fancy rights reconstruction projects in political philosophy. I close with an attempt to dispel some common misunderstandings of the nature and implications of rights critique.

FROM THE CRITIQUE OF LEGAL REASONING TO THE CRITIQUE OF CONSTITUTIONAL RIGHTS

The point of closest contact between legal reasoning and rights talk occurs when lawyers reason about inside rights. This practice is important for rights talk because through it outside rights are “translated” into the legal order. As we saw in the last part, this translation is a crucial part of the Liberal program for a good society. Failure in the process of translation—say, a loss of faith in the possibility of doing it while maintaining the double mediation between factual and value judgments, and between legal and political discourse—would be a failure for Liberal theory.

But it would pose (has already posed) another danger as well: doubt about the coherence of legal rights reasoning at the business end, so to speak, of the rights continuum threatens to spread “back” to constitutional

195 THE CRITIQUE OF RIGHTS

rights, which “straddle,” and thence to fully outside rights. It is just such a progression that I will suggest here.

Legal Rights in Legal Reasoning. The critique of legal reasoning operates on inside rights argument in the same way it operates in general. It does not deny that it is “meaningful” to speak of legal rights. For the judge under a duty of interpretive fidelity, legal rules stated in the language of rights are part of the body of materials that “bind” him, or that he transforms through legal work. Appeals to legal rights, whether constitutional or just mundane common law rights, influence the course of decision, as do appeals to legal rules that are not stated as rights (such as rules about interstate relations), and to precedents or policies (for example, security of transaction). The appeal to a rule cast in the form of a right, or to a value understood to be represented by a right, may produce the experience of closure: given this legalized right, you can’t think of a good reason why the plaintiff shouldn’t lose the case.

Participants in ideologized group conflict formulate their demands in rights language and then try to get particular rights legalized (enacted by a legislature, promulgated by an administrative agency, incorporated into judge-made law), both at the particular level (*Miranda* rights) and at the more abstract level (the Equal Rights Amendment). If they succeed, “there is a right to a lawyer during police interrogation,” meaning that there is a legal rule requiring a lawyer, one that influences real world practices as do other rules in the system. In drafting a charter for a limited equity co-op, it makes sense to provide for the “rights” of the cooperators, of the community land trust, and so on.

Although rights arguments have meaning and effect in legal discourse, it is clear that they are open to the same analysis of open texture or indeterminacy as legal argument in general. The crucial point about the critique of legal rights is that in the process of pursuing the general left-wing project of showing the manipulability of legal reasoning, critique flattened the distinction between rights argument and policy argument in general. It did this in two distinct ways. First, when the asserted right deployed in argument is seen as a legal rule, a positive prescription to be interpreted (right to counsel during police interrogation), then we interpret it using the whole range of policy argument. Whatever the right “is,” is a function of the open-ended general procedure of legal argument.

Second, when the arguer appeals to a right as a reason for adopting a rule (protect free speech, secure the owner's property rights), minimalist internal critique reduces legal rights reasoning to policy reasoning by showing that it is necessary to balance one side's asserted right against the other side's (protect the right to a non-abusive workplace, tenants' rights). According to the critique, what determines the balance is not a chain of reasoning from a right or even from two rights, but a *third* procedure, one that in fact involves considering open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability. None of this precludes the phenomenon of closure or apparent objectivity of the rule interpretation. It merely undermines its rational basis.

Legal Argument about Rights that are Legal Rules Reduces to Policy Argument. Judges making legal arguments about interpretive fidelity in common law adjudication and statutory interpretation typically convey that they are dealing with a dense network of rules that have to be followed regardless of their sources and regardless of what the judges think about their rightness or wrongness. The correct interpretation of the materials is a very different question from the question what would be the best thing to do under the circumstances (the "legislative" question), and from the "philosophical" question of what political morality, or protection of natural rights, say, requires under the circumstances.

In the context of common law or statutory interpretation, rights and rights reasoning are submerged in the argumentative mass that includes precedent, canons of statutory interpretation, institutional competence and administrability arguments, general moral arguments for or against the conduct of parties, utilitarian arguments about how different rule choices will affect the conduct of parties, utilitarian arguments about how different rule choices will affect the conduct of private parties beyond the parties to the case, and arguments about the welfare consequences of those changes. Since the word "right" is generally used synonymously with "a rule legally protecting an interest of a party," there is nothing even slightly odd about casting a judicial opinion in the form: "We hold that the plaintiff has a right to x , and the reason is that this will honor precedent, correspond to legislative intent, keep us within our institutional competence, reward morality and punish vice, be easy to administer, and maximize consumer welfare."

The critique of this kind of legal rights reasoning is aimed at the abil-

197 THE CRITIQUE OF RIGHTS

ity of judges to produce convincing, closure-inducing, doubt-eliminating chains of reasoning about particular legal outcomes in the context of interpretive fidelity. The rights are just legal rules, more or less abstract, more or less easy to administer, that we are trying to interpret along with all the other legal materials to justify our outcomes.

Loss of faith in this discourse is loss of faith in the judge/legislator distinction, or in the idea of the objectivity of adjudication. It is the development and extension of the now one hundred year old project of critiquing legal reasoning in general. Of course, it might mean loss of faith in *law*, or in legal authority, as well. But the rights—that is, the legal rules that don't produce closure—might come from anywhere. They might be morally admirable or monstrous; they might be grounded in majority rule, or natural law, or custom, or whatever. In other words, no matter how threatening to *legality*, the critique and loss of faith in legal rights reasoning does not necessarily imply a loss of faith in *normativity* in general, or in the use of rights and rights reasoning to decide what we leftists think the law should be.

Nonetheless, it is one part of the context of loss of faith.

Rights Argument within Legal Reasoning Reduces to Balancing and Therefore to Policy. I have been arguing that when by rights we mean legal rights, then rights are legal rules, and, like the other rules of the legal system, turn out to be open to strategic work designed to exploit or to generate gaps, conflicts, and ambiguities in particular cases, with the goal of making legal rules that will favorably dispose ideological stakes. The advocates, in the examples above, use social welfare or administrability arguments, or whatever, in support of their favored interpretation of the legal right. But even when the advocates stick to arguments about the rights of the parties that more or less exactly parallel the rights arguments used in political philosophy, it turns out that they end up with balancing tests that render rights argument indistinguishable from the open-ended policy discourse it was supposed to let us avoid.

The political philosophical discourse of rights uses familiar operations to move from rights generally stated (“everyone has a right to privacy”) to specific outcomes. For example, a right holder can lose because she waived the right asserted (she can argue back, say, that the waiver was obtained under duress) or forfeited it by misconduct (versus, say, a claim of inevitable accident). For the purpose of critique, the most important of

198 DUNCAN KENNEDY

these techniques are those for generating a right that supports what your side wants to do or what your side wants to stop the other side from doing. As Hohfeld showed for property rights, the right your opponent is asserting will often be defined in such a way that you can appeal to the very same right on the other side.¹⁷

You can also work at constructing a new right by recasting what you want to do as an instance of a more general interest, and then as an instance of an already existing legal right that protects that interest. For example, it was not until the 1930s that labor picketing was reconceptualized as free speech.¹⁸ Or the advocate can claim that a set of precedents previously viewed as protecting several rights actually protect a single interest, which should be legally protected as a new right. The classic example is the generation of the right to privacy, first by Louis Brandeis in the private law context, then by W.O. Douglas in constitutional law.¹⁹

Another part of the mundane legal practice of rights argument is the critique of your opponent's rights claims. The most basic technique is the internal undoing of a rights argument by showing that it relied on a false deduction, typically on a conceptualist overstatement of what was entailed in the definition of the right. For example, the right to contractual performance does not entail the right to expectation damages.²⁰

The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's right and the other from the defendant's. Yes, the employer has property rights, but the picketers have free-speech rights. Yes, the harasser has free-speech rights, but the harassed has a right to be free of sex discrimination in the workplace. Yes, the landowner has the right to do whatever he wants on his land, but his neighbor has a right to be free from unreasonable interference. And each chain is open to an internal critique.

Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances. The lesson of practice for the doubter is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. The critique of legal rights reasoning becomes just a special case of the general critique of policy argument: once it is shown that the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the "subjective" or "political" commitments of the judges, that are deciding the outcome.

199 THE CRITIQUE OF RIGHTS

Once again, the prevalent experience, first, of the manipulability of legal rights reasoning and then of its reduction to balancing tests, doesn't preclude instances in which rights reasoning produces the opposite experience of closure. Nor does it show that outside rights don't exist. It is just another context for loss of faith.

Rights Mediate between Law and Policy. The application of the critique to legal reasoning about inside rights suggests that rights do more than mediate, as suggested in the last part, between facts and values and between law and politics. *Within legal discourse*, rights arguments are situated midway between merely "technical" or deductive arguments about rule application, appealing to ideas like the plain meaning of words, legislative intent, stare decisis or the "will of the parties," and "pure" policy arguments that require the judge to balance the conflicting interests of the parties. Remember that policy arguments are understood to be inevitably present within legal argument, but they are disfavored and marginal in status, compared to arguments that appear more consonant with the supposedly objective character of adjudication.

Right arguments involve something more than the logic of the valid, because they explain and justify rules, rather than merely apply them, but they are less "subjective" than pure policy arguments, because of their "factoid," half-fact/half-value character. Loss of faith, or the failure of mediation, occurs when we begin to see the techniques of "manipulative" rights argument as potent enough to reduce "every," or at least any particular, rights argument to a question of balancing.

The Proliferation of Balancing Tests Reduces Constitutional Rights Questions to Policy Questions. The second context for loss of faith in rights (the first being the manipulability of rights when viewed as legal rules, just discussed) is the specific history of balancing, or of conflict between rights, in constitutional law. I think the attitude of political lawyers in the United States toward rights has been profoundly influenced by this nationally specific history. As I see it, it has four parts.

1. The legal realist attack, in the 1920's and 30's, on the rights reasoning by which conservatives had embedded a particular understanding of property rights in constitutional law.²¹ The realists argued that because the conservative constitutional rights case against reform statutes neces-

200 DUNCAN KENNEDY

sarily involved mere policy argument, the courts had no specifically legal basis for overruling legislative judgments.

2. The moderate and conservative attack on the liberal attempt, in the 1950s, to embed a particular understanding of freedom of speech and equal protection in constitutional law. Moderates and conservatives argued that because all the courts could do was balance rights against powers, or rights against rights, they had no specifically legal basis for overruling legislative judgments.

3. The liberal success, in the 1950s, 1960s, and early 1970s, in getting the liberal conception of equal protection and identity rights embedded in constitutional law (the victim perspective), followed by an equally successful conservative counterattack, in the 1970s and 1980s, that embedded a contradictory understanding of rights in constitutional law (the perpetrator perspective).

4. The emergence, in the 1970s and 1980s, of contradictory rights claims within the liberal coalition, based on different conceptions of identity.

Before I briefly describe each of these contexts, I want to reemphasize that none of them compelled loss of faith. Loss of faith is an event that occurs for some people in one context, and for others in another. Some people lost their faith in constitutional rights reasoning in the 1930s. Others lost their faith in the late 1980s. Many lost faith and then regained it, or lost faith in one kind of rights reasoning but not in another, and so on.

One thing the contexts have in common is that they each presented the problem of how to make abstract rights (property rights, free-speech rights, equality rights, reproductive rights, privacy rights) concrete at the level of rule choice within the legal system. The initial question was, "Given that we all agree there is a right of free speech, can a city restrict leafleting on downtown streets?" Or, "Given that we all agree that there is a right of privacy, can a woman decide without the consent of the father to abort her fetus in the first trimester of pregnancy?"

Another thing the contexts have in common is that the inquiry into how to concretize the abstract right occurs in the presence of a countervailing right, or of a power of the legislature presumed to derive from majority will, or from the legislature's duty to protect the rights of parties other than the claimants. This means that there are two opposing concretization proj-

201 THE CRITIQUE OF RIGHTS

ects going on, one from the plaintiff's side and the other from the defendant's. It is always possible that the judge or observer will see these two projects as producing a "draw" or a "stalemate" or a "clash of absolutes."

A final thing the contexts have in common is that the opposing sides in the dispute attacked each other's concretization projects as unsuccessful, on their own terms, in linking the preferred rule to the abstract right. Each side then accused the other of motivated error, that is, of having consciously or unconsciously masked an ideological – a deeply contested – claim about what the law ought to be in a false claim about interpretive fidelity to the body of extant legal materials.

The Liberal Legal Realist Origin of the Critique of Rights. The historiography of balancing in American legal thought is in its infancy.²² But the idea has well-known legal realist origins. Holmes (not, of course, a liberal, just a hero to liberals) is a convenient starting point. In numerous private law and constitutional decisions, he emphasized that the recognition of rights was a matter of degree, of quantity not quality.²³ No one got recognition of his or her right to the full extent that might be justified by consideration of its definition in the abstract. Where the right of one party ended and that of the other began had to be determined by looking at the consequences of drawing the line in one place rather than another. The mere recognition and definitional statement of the right (free speech, property) was inadequate because it would seem to justify more for the claiming party than was consistent with equally well established rights claims of the other side.

This kind of formulation fit the scientific, antimetaphysical, relativist, pragmatist biases of realism. But it was given a kind of bite that survives the biases by Hohfeld's insight that the word "right" sometimes means a privilege to hurt someone without having to pay and sometimes means a claim to be compensated when hurt. When we talk about property, in particular, we are referring to a collection of rules some of which authorize injury and others of which forbid it. Whenever there is a gap, conflict, or ambiguity in property law, one side can invoke all the rules in the "bundle" that suggest protection, and the other the rules in the bundle that suggest freedom of action.²⁴

Learned Hand, who saw himself as a devoted follower of Holmes and Hohfeld, proposed balancing tests in a series of contexts, including the law of unfair competition, antitrust, the definition of negligence, and the defini-

202 DUNCAN KENNEDY

tion of free-speech rights threatening to national security.²⁵ For Hand, as for Holmes and Hohfeld, the move to balancing was initially part of the liberal critical project, because he saw overt judicial balancing as formal acknowledgment that judges decide questions of policy without any methodology that distinguishes them from legislators.

If that is what judges do, there is less basis than there would otherwise be for judges to overrule legislatures. Indeed, if judges can't decide constitutional questions without balancing, one can ask why their balance, their views of policy, should prevail over those of the elected representatives of the people. If balancing means looking in detail at the consequences of drawing the line in one place rather than another, then it would seem that judges are less "institutionally competent" to the task than legislators.²⁶

The realist position was that interpretive fidelity just "runs out" in many (not all) cases, because they involve conflicts for which there is no other resolution than balancing. In other words, the emergence of balancing was an extension of the basic minimalist critical routine: given the internal critique of extant attempts at determinative legal reasoning, many questions of law can be resolved only by looking at them as questions of policy that will evoke differing responses according to one's ideology.

This extension of the critique did not necessarily produce loss of faith in constitutional rights. The emergence of balancing occurred in an odd and complex context. Balancing was initially liberal because, in private law (right against right), it undermined the claim of judicial objectivity and, in public law (right against power), it undermined the legitimacy of the Supreme Court's protection of property rights against progressive legislation. As such, it was not anti-rights but only anti-property rights. At the same time that the liberal Court was drawing most clearly the conclusion that questions of economic regulation were so "legislative" that it was inappropriate to interfere, the self-same liberals were gearing up for the defense of human rights, through the *Carolene Products* footnote, *Powell v. Alabama*, "picketing as free speech," and the flag salute cases.²⁷

Balancing and the Conservative Critique of Liberal Rights Claims. When the Democrats gained control of the Supreme Court in the New Deal, their legal realist appointees developed a new body of constitutional law doctrine that glorified legislative power. The Supreme Court exploited the gaps, conflicts, and ambiguities of legal rights doctrine, plus the power to overrule its own decisions, to make legal reasoning a principal support of

203 THE CRITIQUE OF RIGHTS

legislative supremacy.²⁸ The realist critique of adjudication – that it often involves policy choices, which amount to value judgments that are ideologically contested – was an important element in the argument for this turn.

But once the liberals were in control, and fascism and Stalinism emerged as the threat, the realists abandoned the project of internal critique, in favor of the more pressing task of managing the new liberal, regulatory, interventionist state. As post-1945 legislatures turned conservative, while liberals retained control of the judiciary, the left intelligentsia went for the adjudicatory empowerment effect. That is, it adopted the position that the federal Constitution enacted a wide range of liberal policy preferences and flatly prohibited a wide range of conservative policy preferences.

One part of this project was to develop the kind of reasoning from individual constitutional rights that liberals had allowed a marginal survival during the period of their attack on constitutionalized property rights. Faced with McCarthyism, police brutality, and conservative gerrymandering, and positively committed to racial justice, the left liberals attacked the jurisprudence of legislative supremacy they themselves had constructed, and became civil libertarians with a vengeance.

Another part of the project was to reconstruct the theory of the judicial role, repairing the damage that their parents and grandparents, or they themselves, had done to the mana of the Judge in the process of storming the robing room. Though some, like W.O. Douglas, weren't able to do it with a straight face, the liberal intelligentsia in general followed Herbert Wechsler (neutral principles) or Hugo Black (absolutes), according to taste, in reaffirming the possibility of judicial neutrality and the distinction between law and politics²⁹. Here again, balancing was the key.

The initial battle was over the criminalization of the Communist Party. Moderates and conservatives argued that because it was necessary to balance communist free speech rights against the legislative power to protect national security, and because the balancing process was nothing more than the redoing of the (ideologically charged) policy decision that the legislature had made in passing the statute, the judges should “defer” to the legislature.³⁰ In short, they used the liberal legal realist critique of judicial activism against the left.

The left liberals answered that the First Amendment was an “absolute,” thereby both firmly tying their position to the vindication of individual rights against the state and establishing a basis for non-ideological judicial

204 DUNCAN KENNEDY

enforcement through adjudication.³¹ The conflict played out in a long series of cases. Though the liberals won many of these cases, “absolutism” did not survive the realist critique.³² Balancing became a paradigm for constitutional decision in one area after another.

In a second round, the moderates and conservatives critiqued judicial activism in the civil rights era, producing counter-rights that had to be balanced against left liberal claims. Wechsler, in his famous article, pointed out that white segregationists were asserting their right of free association with just as much subjective sense of entitlement as the blacks demanding integration. Since there was no “neutral principle” by which to decide between the two demands, the judges should have deferred to the legislature.³³ In other words, to assert that the Court should straightforwardly balance in favor of blacks would have been a usurpation of legislative power.

The moderates and conservatives also developed another strand of pre-World War II progressive argumentation, that which had favored federal deference to state government regulatory initiatives. Hart and Wechsler’s famous casebook, *The Federal Courts in the Federal System*, provided a theory not of states’ rights per se but of common interests in the viability of decentralized government. These interests had to be balanced against the rights-based demands of the civil rights movement for intervention against racist Southern government officials and private parties. Once again, the inherently ideological nature of the choice, the necessity of balancing, argued for federal judicial (though not necessarily congressional) deference to state power.

Neither these balancing disputes, nor those in the area of apportionment (right to vote versus states’ rights) or regulation of police conduct (suspect’s rights versus right of the community to protection from crime), *necessarily* led to loss of faith. Indeed, since the left was usually arguing for a recognized individual constitutional right against a proxy (national security, states’ rights, police power) for “rights of the community,” it was possible to see each conflict as “good” rights of the individual against “evil” powers of the majority.

Nonetheless, there was something “weakening” or “undermining” about the fact that the liberals were using exactly the rhetoric they had denounced before World War II, about the failure to come up with any alternative to balancing as a methodology for protecting rights, about the

205 THE CRITIQUE OF RIGHTS

very facility they began to feel at inventing new rights (privacy being the most striking case), and about the parallel facility of their opponents at inventing counter-rights of one kind or another.³⁵

Revalidated Constitutional Rights Reasoning Switches Sides in the 1970s. The violent Southern racist reaction to the civil rights movement, combined with the triumph of the liberals on the Court of the 1960s, had an impact on the critique of rights quite similar to the impact of fascism, Stalinism, and the Roosevelt Court on the realist critique of adjudication. In short, there are no atheists in foxholes.

As I mentioned above, there was a persistent radical 1960s critique of the judiciary as a tool of the Establishment, a critique that fed on every hesitation, compromise, or betrayal by the liberal Supreme Court. It was also grounded in the experiences of local activists, movement lawyers, and legal services lawyers with the arbitrariness or just plain conservatism of local courts of all kinds. But for the liberal ideological intelligentsia, and particularly the legal part of it, these were minor themes compared to the major theme of empowerment through adjudication based on rights claims.

Faith in rights within law fed on the explosion of different popular movements in the 1960s and the 1970s. The “corrosive” effects of the realist critique of conservative property rights, and of the conservative critique of 1950s personal rights, were internal to the legal intelligentsia. Faith flooded in from outside, at just the moment when liberal lawyers found that their rights arguments had an almost magical effect on the liberal judges with whom they shared the agenda of adjudicatory empowerment.

The dramatic reversal brought about, over fifteen years, by the Burger and Rehnquist Courts changed all this. Conservative judges deployed a new version of rights rhetoric and drew on a new version of conservative white, male, straight, working and middle-class popular rights culture. The familiar arguments, which had come to seem “correct” in part just because they worked to mobilize the mana of the Judge, stopped persuading. The rights of “victims” gave way to the rights of “perpetrators,” perhaps most dramatically in *Bakke*, and then across the board. Balancing was everywhere – the left had no alternative – and was everywhere patently an invitation to conservative ideological intervention.

The left in the 1980s was in the position of the right of the 1940s, which had relied for several generations on a rhetoric of property rights that made no careful distinction between natural rights arguments and arguments

206 DUNCAN KENNEDY

based on the Fourteenth Amendment. The right had achieved massive victories in getting the Supreme Court to strike down all kinds of social legislation. In the process, it had woven the natural right to property more and more tightly together with the constitutional right to property, until the legal part of the position was much more developed, more coherent, and more convincing than the “external” part. The left of the 1960s had performed a similar operation with the equal protection clause.

The right in the late 1970s and the 1980s exploited the gaps, conflicts, and ambiguities in the system of rules, the open texture of the doctrine of stare decisis, and the semiotic, formulaic, pro/con character of policy argument to cut back and dismantle the liberal victories much as the liberals had done with the conservative victories of forty years earlier. Of course, it was possible to interpret this trend, yet again, as no more than the triumph of vice over virtue. But the demonstration, yet again, of the manipulability of rights arguments back and forth across the political spectrum provided yet another context for the loss of faith.

The Internal Disintegration of Left Rights Rhetoric. In the late 1970s and the 1980s, at the same time that the left legal intelligentsia was constructing its version of the sixties as a constitutional rights revolution, organizers, activist lawyers, and theorists all began to come up against a kind of rights-overkill problem. Rights for gays, old people, mentally retarded, Native Americans, children, mental patients, animals, prison inmates, endangered species, the handicapped, prostitutes, crime victims, people with AIDS, all made sense, if what one meant by each of them was the specific program of law reform in favor of the group in question. But remember that the whole point of adopting rights rhetoric was to get beyond or outside the posture of the mere ideological or interest group demanding something on policy grounds. The more rights there were, and the more particularly defined their various classes of bearers, the harder it became to conceptualize them as universal.

Left thinking evolved in reaction to internal debates about the content of these “proliferating” rights claims, whether phrased in terms of equality within the legal order or in terms of substantive rights to freedom of action. The most striking of the equality debates addressed “equal treatment versus special treatment” within the feminist legal community. A series of efforts to use the notion of a right to equal treatment as the basis for a program of law reform ran up against the classic problem of deciding between formal

207 THE CRITIQUE OF RIGHTS

and substantive equality as the content of the right. In so much as the debate had an outcome, it seemed to be that rights definition should proceed ad hoc, through something very like balancing.³⁷

The equivalent within the black community was the dispute about whether equal protection meant affirmative action in the form of integration or in the form of development of black institutions. In such contexts as schools and housing projects, it seemed that the price of integration would be subjection to unending white racial hostility, acceptance of white social norms, and the loss of black power and opportunity within the integrated settings.³⁸ At the same time, a black conservative movement began to challenge affirmative action in general, arguing for a definition of the right to equal protection as formal equality.³⁹

The substantive branch of identity/rights doctrine has to do with a newly formed identity-based group demanding its rights. The group typically demands lifting of restrictions on its characteristic, identity-defining activities, affirmative governmental support for the group's interests, and the imposition of restrictions on other individuals or groups that are attempting to suppress the newly asserted identity. Thus the left supports the pregnant woman's right to abortion over the right to life of the fetus, and the right to engage in consensual adult homosexual intercourse over the community's right to prohibit what it views as evil conduct.

But then there are splits about whether the woman's right to abort excludes any rights at all for the father, about whether the state should suppress Nazi or Klan neighborhood marches, pornography, and racist and sexist speech on campus. Leftists who combine anti-state libertarian commitments with cultural pluralist commitments find themselves constantly balancing freedom-of-action rights against security rights.⁴⁰

Finally, there is the problem of "intersectionality": rights that supposedly flow from a particular group identity may be oppression for subgroups that have a crosscutting allegiance. For example, black feminists face the nationalist assertion of a black male right to "discipline" black women and of a black community right to freedom from majority or state interference with this practice.⁴¹

In white feminism, first came the argument that Equal Rights Amendment advocates were denying or attempting to suppress more "traditional" forms of female identity, then that white feminists had defined female identity in essentially white terms, and then that cultural feminists in the anti-

208 DUNCAN KENNEDY

pornography movement were abridging the rights of pro-sex or sex-radical women to read and write erotica. These quarrels were totalized by postmodern feminists under the banner of anti-essentialism and given added bite when gay men began to challenge the monolithic cultural feminist construction of male identity.⁴²

For some, the project of identifying identities and then defining rights to protect them, in their freedom to engage in defining practices, in claims on public resources, and in protection against discrimination, began to seem a pipe dream. One might lose faith in it as a project, without losing enthusiasm for cultural pluralism or for one's particular list of law reform proposals, just because the process of deciding what the rights were was no different from general policy analysis. The project of identity rights looks uncomfortably like the nineteenth-century project of guaranteeing "everyone's right of freedom of action as long as they don't interfere with the security rights of others," or *sic utere tuo ut alienum non laedas*.

But, once again, there was nothing inevitable about this interpretation of intra-left conflict, any more than there was in the unwinding of nineteenth century rights faith.



Although I have no theory of loss of faith, I would hazard the hypothesis that in the legal context "erosion," "undermining," "unraveling," and "contagion" are likely to be precipitated by the spectacle of reversal: the anti-rights arguments of the old left used by the new right, the left occupying the exact position of the earlier right. This kind of flip by the two opposing camps undermines belief in the technique in question in a way that criticizing something that is simply analytically incoherent and politically incorrect doesn't. I wonder how abolitionist litigators dealt with their own dramatic shift, from nationalists to states' rights advocates, after the Fugitive Slave Law put the federal government on the side of the South against resisting Northern state governments.

Another hypothesis is that it is undermining to experience the unexpected disintegration of an apparently robust rights discourse within one's own camp. In both the 1950s and the 1980s, a discourse understood unproblematically as a righteous weapon against the wrong thought of enemies suddenly foundered on the inability to convince one's supposed allies that a particular right was good rather than bad.

209 THE CRITIQUE OF RIGHTS

FROM THE CRITIQUE OF CONSTITUTIONAL RIGHTS TO THE CRITIQUE OF OUTSIDE RIGHTS

Does the flattening of constitutional rights argument into policy argument have any relevance to the outside rights that are supposedly “behind” or translated by legal enactment? Yes, because the loss of faith in reasoning about legal rights raises the question of whether one can still have faith in the normative rights project carried on outside legal discourse. If the inside discourse, the translation, is “mere rhetoric,” under constant suspicion of ideological partisanship, then isn’t that likely to be the case for the “outside,” “original” text as well?

The critique shows only that there is often no difference between an argument that you have a constitutional right to *x*, *y*, or *z*, and an argument that on general moral, political, utilitarian, or institutional competence grounds it would be better overall for the legal system to intervene on your side. It does not show that there is no valid procedure for reasoning from rights as pre-legal entities to conclusions about what law should be. This was the mode of reasoning of those abolitionists who saw the Constitution as a pro-slavery, hence immoral, document. They were antilegalists but in no sense critical of rights.

Moreover, it is still possible to believe that one chooses one’s intra-legal rhetorical posture by reference to the extra- or pre-legal element in constitutional rights discourse. Advocates making constitutional rights arguments can go on believing that the part that is outside, existing prior to the legalization of the right in the Constitution, has a kind of reality quite different from the reality of the right understood as incorporated into positive law, and subject to all the mechanisms of legal interpretation.

If you can be correct about the outside right, it isn’t so bad to have to give up the objectivity of legal rights reasoning. You can be extremely “legal realist,” or even “nihilistic,” about law but still believe that correct reasoning from rights solves ethical problems. The point, then, is just to get judges who will manipulate the plastic substance of legal reason to achieve the results that are correct in terms of outside rights.

Or you can believe in the correctness of the outside rights judgments but believe that these judgments are “in the abstract.” They may have to be modified “in practice” by the kinds of non-rights considerations typically raised in legal reasoning – utilitarian or institutional competence constraints, for example.⁴³

But if the inside/outside divide is breached, and the critical spirit gets

210 DUNCAN KENNEDY

applied to the outside rights, there may be trouble. Given the content of the critique of constitutional rights, there is little reason to hope that either fancy theory or lay rights discourse will be able to sustain their extralegal normative claims.

CRITIQUE OF THE LAY DISCOURSE OF RIGHTS

In lay discourse, the word “right” is used in all the ways it is used in constitutional discourse. There is, to begin, a strictly legal positive usage: “women have no rights in Iran,” “there was no right of free speech in Stalin’s Russia.” Rights just mean rules in force to protect particular interests. But the word is also used in lay legal argument about what the U.S. courts should do about particular statutes or executive actions. The speaker assumes the existence of a “straddling” constitutional right, and reasons from it to a conclusion, deploying some version of the standard legal interpretive techniques, including precedent (consistency) and moral, utilitarian, institutional competence and administrability arguments.

Lay discourse also uses rights in self-consciously legislative argument, with the issue no longer interpretive fidelity but rather what people with law-“making” (as opposed to law-interpreting) authority ought to do. Here is an example:

Civil libertarians shriek about the right to privacy of those infected with AIDS. To me, Kimberly Bergalis had more a right to live than her dentist had to privacy. In the balancing act, there is no contest. But it is important to protect those who test positive with strong antidiscrimination laws.

Those opposed to mandatory testing argue that the risk of patients contracting AIDS from workers is very low, that workers are more likely to contract AIDS from patients. So why not test all patients who are to undergo “invasive” procedures, while at the same time testing health care workers who perform such procedures? Protect everyone, rather than no one.⁴⁴

In this passage, the writer treats rights argument very much as would a lawyer disabused of the sense that “rights are trumps.” Rights conflict; they are quantitatively rather than qualitatively powerful; they have to be balanced; how we do the balance depends on the practical context and on non-rights arguments about things like the degree of harm that will flow from different resolutions of the conflict.

211 THE CRITIQUE OF RIGHTS

The same presuppositions may underlie statements like “there is a conflict between privacy rights and free-speech rights,” “the statute gives inadequate recognition to the right of free speech,” “the statute should have recognized a free speech right,” “we should recognize a right of privacy,” “our society has a consensus in favor of a right of privacy,” “this is an attempt to cut back the right of privacy,” “we have to find a way to reconcile landlord’s rights with tenant’s rights.”

The justifying role of rights here is ambiguous. The speaker might go on to explain that the reason the statute gave inadequate recognition to free speech was that free speech is an interest more important than the interest in, say, national security, that there were other ways to achieve the national security objective, that the resolution gives courts too much power, and so on. Rights then function as no more than interests (perhaps with an exclamation point). Because the discourse treats rights arguments as no more than policy arguments, they perform no mediating function, produce no transcendence of the fact/value or law/politics divides, as those are commonly presupposed in the discourse.

The same is true of explanations like “we should establish a right of privacy in order to safeguard people from unreasonable searches...” or “to assure a woman control over her reproductive life.” Here, the idea is to change a legal rule by inserting a right-concept, but the reason given is to change a state of affairs defined otherwise than in terms of violation of the right. If you have lost your faith in the mediating power of legal rights discourse, having come to experience it as no more than a form of ideologically permeable policy talk, then you are not likely to see these forms of lay discourse as any different.

Sometimes lay people appeal to fully outside rights without employing either positivist legal reasoning or legislative policy argument. The rights claim is intended to be something more than just a claim about what is politically and morally best. The speaker seems to presuppose that it is more “objective” or “absolute” or “conclusive,” that it is possible to “be right” about it, to make a “correct” argument, in a way that differentiates it from other kinds of claims: “Banning abortion is wrong because it denies a woman’s right to control over her own body,” “rent control is wrong because it denies the landlord’s right to private property.”⁴⁵

When challenged, the speaker may quickly turn to defense of the right in the normal legislative way, offering all kinds of arguments as to why a legal decision maker should agree. (Institutional competence – it should be up to

212 DUNCAN KENNEDY

the woman rather than the court to decide; social welfare – back-alley abortions will increase and are an unacceptable cost.) When this happens, it reemerges that the right is a “value judgment,” supported by a rhetoric, perhaps a rhetoric one finds utterly convincing, but without the mediating power promised in the initial formulation.

When the speaker sticks to unadulterated rights talk, the problem is that the assertion is conclusory. The speaker seems unaware that *there is a counter-right* that can be asserted in the same tone of voice and that cancels out the first right. I may be missing the existence of a lay rights discourse that avoids this pitfall without slipping into mere balancing. But my own experience has been that the critique of constitutional rights reasoning has spread corrosively from legal to lay discourse.

It is not, not at all, that someone has proved that rights “do not exist,” or that they are “nonsense on stilts.” It is not a question of proof. It is a question of mediation – of whether one gets any more from rights talk than from social welfare or morality or administrability talk.

FROM THE CRITIQUE OF CONSTITUTIONAL RIGHTS TO RECONSTRUCTIVE PROJECTS IN POLITICAL THEORY

That we don’t find convincing rights talk in popular discourse doesn’t mean it can’t be done convincingly somewhere else. The whole function of fancy theory is to show that it is possible to construct rights arguments, using the most sophisticated philosophical apparatus, that will validate left-wing popular assertions of rights. Here the problem is not that the discourse is conclusory, but that it has the same sophisticated indeterminate quality as legal reasoning, at a less complex and interesting level.

There are an infinite variety of possible non-legal, purely rights-oriented defenses of statements like “a woman has a right to reproductive freedom and therefore a right to abort her fetus.” Without ever straying into obviously contestable utilitarian or institutional competence or “mere value judgment” arguments for the asserted right, fancy theorists can try an indefinite number of strategies to achieve closure or, if not closure, something a lot better than mere political rhetoric.

I would say about this enterprise what I have said elsewhere about the closely analogous, indeed overlapping enterprise of showing how judges can decide cases according to a method of legal reasoning method that is not mere policy.⁴⁶ On the one hand, as a minimalist, I don’t believe it has been shown

213 THE CRITIQUE OF RIGHTS

that it is impossible to do a successful argument from outside rights or even to reconstruct the discourse. On the other hand, the last time I looked into it, it seemed as though critics of each particular rights argument from fancy theory are still managing to show, for one contender after another, that it doesn't quite work on its own terms.⁴⁷

At some point, one just loses the energy to do another internal critique. *You can't prove it can't be done.* Conceded. Therefore it is possible that the most recent contender is successful. But you don't believe anyone has done it in the past, and don't believe anyone is likely to do it in the future, and it seems like a waste of time to take up each new challenge in turn. In short, the project of reconstructing outside rights through political philosophy is another context for loss of faith.

THINGS THE CRITIQUE OF RIGHTS IS NOT

People sometimes say, "A critique of rights? But if you got rid of rights, then the state could do anything it wanted to you! What about the right of privacy? We wouldn't have any way to object to state intrusion!" They are just missing the point!

In the Western democracies, rights "exist" in the sense that there are legal rules limiting what people can do to one another and limiting the executive and the legislature. The critique of rights recognizes the reality of rule-making, rule-following, and rule-enforcing behavior. It is about faith in the rational procedures through which legislators, adjudicators, or enforcers elaborate gaps, conflicts, and ambiguities in the "text" of inside or outside rights.

There is nothing in the critique that might suggest a reduction in the rights of citizens vis-à-vis their governments. Having lost one's faith in rights discourse is perfectly consistent with, indeed often associated with, a passionate belief in radical expansion of citizen rights against the state. Moreover, loss of faith is consistent with advocacy of greatly increased tenant rights in dealings with landlords, as well as with the reverse, just as it is consistent with favoring more or less government control over abortion decisions. It is not about the question of what legal rules we should enact to define the limits of conflicting rights claims, but rather about how we should feel about the discourse through which we argue those limits back and forth.

When people want to claim things from the legal system, they put their

214 DUNCAN KENNEDY

demands into rights language, as they once put them in religious language.⁴⁸ But rights are more than just a language – or we might say that, like any language, rights talk does more and less than translate a clear and constant meaning from one medium to another. Rights talk was the language of the group – the white male bourgeoisie – that cracked open and reconstituted the feudal and then mercantilist orders of Western Europe, and did it in the name of Reason. The mediating power of the language, based on the presupposition of fact/value and law/politics distinctions, and on the universal and factoid character of rights, was a part of the armory of this group, along with the street barricade, the newspaper, and the new model family.

Since the bourgeois revolutions, one group after another has defined its struggle for inclusion in the social, economic, and political order as a rational demand for enjoyment of the same rights of freedom and equality that belong to a postulated “normal,” “abstract” citizen in a bourgeois democracy. An important part of the struggle between liberals and conservatives within these societies has been over how far to go in incorporating those not included in the initial Liberal formulation of the Rights of Man into the order the revolutions established for a select few.

There has been a connection between rights language and the acquisition by these oppressed groups of an identity in the subjective sense. Rights talk has been connected to daring to claim things on a basis that might previously have been disqualifying, to claiming things “for” blacks, women, gays, or Hispanics, when the feeling before might have been that “because” one was one of these things one was disentitled to make claims. (I think it is as easy to exaggerate as to underplay the role of rights talk – as opposed to religious or moral or just rebellious or even acquisitive discourse – in popular rebellions against oppressive circumstances. And it is not at all clear to me that oppressed groups needed rights talk to know that they were oppressed.)

The critique is not an assertion that these demands for inclusion, for acceptance as equals by the dominant groups in these societies, are wrong or misguided. It is certainly not an assertion that they should chasten their rights rhetoric, when it operates effectively, to suit the evolution of belief within a fraction of the white left intelligentsia. But, in its minimalist form, it “applies” to excluded groups, as they have defined themselves on the left since the 1960s, as much as it applied to the white male working class of the nineteenth century, to which Marx originally addressed it.

215 THE CRITIQUE OF RIGHTS

MARX'S CRITIQUE OF RIGHTS

The Marxist origin of the critique of rights lies in the project of showing that the inclusion of the proletariat in the regime of the Liberal Rights of Man did not end illegitimate domination of that class. Its first point was that if you had, under capitalism, all the revolutionary freedoms, and strictly equal civil and political rights, you would also have, through the very economic mechanism defined and protected by those rights – the “free market” – exploitation even to the point of death.⁴⁹

Its second point was that rights were by their very structure, their definition as “trumps” against the claims of others, immoral, because they were based on the idea that the invoker of the right can disregard the wishes, over some subject-matter domain, of the people under the duty corresponding to the right. This was Marx's utopian communist critique of Lasallean “equal rights” socialism, quite distinct from the positive analysis of how the property and contract system necessarily worked under capitalist conditions. It was an argument about how to conceptualize a good society. Specifically, it was an antiformalist assertion of the priority of consensus, sharing, and sacrifice over *any* assertion (group or individual) of the legitimacy of ignoring a person affected by one's actions.⁵⁰

Though they are important origins, neither the first nor the second point is implicit in the minimalist internal critique of rights. Marx's necessitarian model of the evolution of capitalism proves vulnerable to the same kind of internal critique that subverts faith in legal reasoning or rights reasoning.⁵¹ As to the second point, the minimalist internal critique and the posture of loss of faith do not suggest an alternative faith that, because human nature is intrinsically “good,” we can do without coercion. If the critique suggests anything, it is the constant possibility of undermining or “corroding” *any* faith in the derivation of a utopian scheme from a theory of human nature.

It is an expression of loss of faith in the possibility of conclusively formulating or even of initially deciding on substantive demands through a “logic” or an “analytic” or a “reasoned elaboration” of rights. It is an attack on the claim that rights mediate between fact and value, the rational and the subjective, the political and the legal, law and policy. It is a posture of distance from a particular attitude of some people, some of the time, when they are demanding things from within the liberal order, *and* when they are demanding inclusion from a position of exclusion and oppression. The distance comes from loss of faith in the presupposed rational character of the project of rights definition.

216 DUNCAN KENNEDY

There was a third element in Marx's critique. The Liberal constitutional regimes that emerged from the bourgeois revolutions fostered, he argued, a particular kind of false consciousness. He saw Liberalism as based on the fantasy that, by the exercise of universally valid political rights (voting, speech), we participated in a benign collective process of guaranteeing our universally valid private rights (property and contract). It is these rights that define the capitalist mode of production, and their enforcement, their entrenchment in the Liberal constitutions, guarantees that real life in "civil society" will operate according to principles of selfishness and exploitation that are the exact opposite of those proclaimed in political theory.⁵²

But there is no more a legal logic to Liberal rights than there is an economic logic to capitalism. For this reason, Marx's presentation of the selfishness and exploitation of civil society as necessary consequences of abstract property and contract rights seems seriously wrong. But his psychological analysis, of the public/private distinction and of rights consciousness retains its power, at least for me. His notion was that the belief in universal political rights functioned, together with the belief in universal private rights, as a fantasy resolution of our contradictory experience of being, at once, altruistic collective and selfish individual selves. At the same time, the fantasy performed, for the beneficiaries of capitalism, the apologetic function of explaining why they were entitled to the profits they derived from exploiting the propertyless.

I don't think it plausible that rights consciousness, in and of itself, plays either an intrinsically progressive or an intrinsically conservative role in our current politics. But, from my post-rights perspective, and with deference to believers, I do think the view of rights as universal and factoid, and so outside or above politics, involves denial of the kind Marx analyzed. As with the denial of the ideological in adjudication, there are many ways to theorize the conflicts that give rise to this particular form of (what seems to me) wishful thinking.⁵³ And, as with adjudication, psychologizing denial involves suspending dialogue with those for whom the reality of rights is close to tangible.

WHY DO IT?

In part for these reasons, leftists engaged in the rights debate, myself included, often feel that it is dangerous. I don't mean now to critique an argument but to describe an emotion. The discussants may be willing to confront the critique and take in good faith the risk of loss of faith. But isn't

217 THE CRITIQUE OF RIGHTS

it an experience we should all wish to avoid if that were only possible? To begin with, if “we” lose our belief in rights, we may be disarmed in dealing with our opponents. The notion is that rights rhetoric is or at least once was effective, and we would be giving that up by losing faith in rights.

Of course, it is not an argument in favor of rights that rights rhetoric “works.” The critique is not about effectiveness, though possibly useful in understanding effectiveness.⁵⁴ One can lose one’s faith in an utterly effective rhetoric and keep it in a rhetoric that practically no one seems to find plausible. And it is not a response to the critique of rights rhetoric that everyone uses it, or that our heroes or our parents used it, any more than it is a critique of rights that conservatives used or use them to great effect.

But to explain the sense of danger, one might respond that if “we” lose our faith in rights rhetoric but “they” don’t, then they will gain an advantage over us. This is plausible to the extent that the “we” in question derives some measure of power, in confrontation with “them,” from the sense of righteousness, of mediation, that rights have historically provided. “Giving up” rights would be like a professional athlete giving up steroids when all her competitors were still wedded to them.

If you have *already* lost your faith in rights, the argument has the sound of that in favor of religious faith for the masses, no matter how delusive, on the ground of its beneficial consequences. Yet if we are really talking about effectiveness, it seems merely conjectural.

My own experience has been that some people who lose faith in rights become more politically committed, some become less, and some stay the same. Some switch sides, and some gain rhetorical astuteness in dealing with the good faith, bad faith, or cynical rights arguments of opponents, becoming more powerful rather than less. Many committed leftists, including most of those in the anarcho-Marxist, or Western Marxist, or neo-Marxist anti-Stalinist tradition, today and yesterday, never had faith in rights to begin with. If we are speaking of actual, empirical effects, I think it’s hard to make the case one way or another.

Rights are not the “core” or “centerpiece” or “heart” of Liberal legalism, either as an ideology or as a social formation generating a complex mix of happiness and unhappiness, legitimacy and oppression. The prevailing consciousness doesn’t have, to my mind, a heart or a core. It is an enormously plastic, loose congeries of ideas, each of which appears from moment to moment to have the force of many army divisions and then no force at all – from Gramscian hegemony to Emily Litela’s “Never mind.” The

218 DUNCAN KENNEDY

critique of rights, even when totally convincing, is a good deal less “effective” than it seems from the position of threatened faith.

But there is an aspect of the sense of danger that I want to acknowledge as rationally grounded. Undermining faith in rights threatens to undermine the unity of the left and its sense of inclusion in “American citizenship.” If some on the left have lost faith in rights, and others have not, then those who have will face a constant dilemma, forced to choose between arguing with those who haven’t, keeping silent, or engaging in cynical or bad-faith manipulation of the discourse within the movement.

Given that the critique is not a solution to any problem of the left, not a panacea or a program, given that the consequences for militancy and commitment are at best uncertain and at worst disastrous, then why do it?

Why Do It?

Leftism aims to transform existing social structures on the basis of a critique of their injustice, and, specifically at the injustices of racist, capitalist patriarchy. The goal is to replace the system, piece by piece or in medium or large-sized blocs, with a better system. Mpm is a critique of the characteristic forms of rightness of this same culture and aims at liberation from inner and outer experiences of constraint by reason, in the name, not of justice and a new system, but of the dialectic of system and anti-system, mediated by transgressive artifacts that paradoxically reaffirm the “higher” forms of the values they seem to traduce.

Critique is always motivated. The practitioners of the critique of rights have often had mixed motives of the kind I am describing here. One motive is leftist and the other is mpm. Suppose for the moment that one didn’t have to worry about the leftist implications, what would be mpm motives for a critique of rights? The answer is that belief in rights and in the determinacy of rights reasoning are important parts of the overall project of bourgeois rightness, or reason, or the production of texts that will compel impersonally.

For the mpm project, the demand for agreement and commitment on the basis of representation with the pretension to objectivity is an enemy. The specific enemies have been the central ethical/theoretical concepts of bourgeois culture, including God, the autonomous individual choosing self, convention morality, the family, manhood and womanhood, the nation-state, humanity. But the central ethical/theoretical concepts of the left have

219 THE CRITIQUE OF RIGHTS

also been targets, including the proletariat, class solidarity, party discipline and socialist realism, and, more recently, sexual and racial identity.

The mpm impulse is to counter or oppose the producers of these artifacts with other artifacts. The transgressive artifacts are supposed to put in question the claims of rightness and, at the same time, induce a set of emotions—irony, despair, ecstasy, and so on—that are crushed or blocked when we are experiencing the text or representation as “right.”

If we define the left project as the struggle for a more egalitarian and communitarian society, it is not intrinsically connected to rightness in any particular form. But within the left project it has always been true that rightness has played a central role. Leftism has been a bourgeois cultural project within which many leaders and many followers have believed that they were not just left but also right, in the strong sense of possessing coherent and complete (“totalizing”) descriptive and prescriptive analyses of the social order.

Of course, critique has been crucial to the dominant “rightness” faction of leftism—that is, critique as ground clearing for the erection of new edifices of rightness. In the Marxist tradition, the slogan of the “scientificity” of Marxism was the repository of the impulse to be right. For the non-Marxist left, the slogans of “planning,” “rational social policy,” and “the public interest” played the same role. But in the United States, by the end of the 1970's, with the rise of identity politics, left discourse merged with liberal discourse, and the two ideas of the rights of the oppressed and the constitutional validity of their legal claims superseded all earlier versions of rightness.

Moreover, in the diffuse general culture of the bourgeoisie, the rule of law and rights seem to function as crucial paradigms of rightness for everyone. There has been a kind of concentration of experiences of rightness into the two contrasts of law versus politics and rights versus mere preferences. Finally, in the specialized legal academic culture of the United States, legal discourse in general and rights discourse in particular, underwent an aborted or perhaps just compromised, modernist revolution in the 1930's, but after World War II, legal culture as a whole seemed to slide backward into a combination of resurgent formalism with a reified version of policy analysis.

Remember that we are assuming, just for the moment, that it is possible to pursue the mpm project without hurting the left project of change in an egalitarian and communitarian direction. A person with mpm aspirations

220 DUNCAN KENNEDY

would “naturally” choose rights and rights reasoning as targets, and try to counter or oppose the demand of leftists for agreement and commitment based on correct legal reasoning from the existence of rights. And such a project would have a larger mpm appeal to the extent that the rule of law and rights have become prime vehicles of rightness for the whole society.

The mpm counter to rights and the rule of law looks, at first, like the more traditional mode of left theory, based, say, on the model of alienated powers. It deploys internal critique to loosen the sense of closure or necessity that legal and rights analyses try to generate. But rather than putting a new theory in place, it looks to induce, through the artifactual construction of the critique, the modernist emotions associated with the death of reason—ecstasy, irony, depression, and so forth. It is aimed at the pleasure of shedding Reason’s dead skin. All the same, it can be leftist in two senses: (a) when it is carried out by people who see themselves as doing to leftism what mpm artists see themselves as doing to “art,” that is, moving it along by attacking its presuppositions and opening it up to what it wants to deny; (b) when it proposes that the left should confront those with whom it is ideologically engaged through transgressive artifacts as well as (or instead of) rational analysis.

THE PROJECT OF RECONSTRUCTION

It was once the case that the answer to left/mpm was a theory, whether Marxism or Liberalism. That is no longer the case, at least in the academic left. The answer to left/mpm is rather a charge, the charge of “nihilism,” a critique of the bad consequences of nihilism, and a project—reconstruction.

Sometimes the author has a specific reconstruction in mind and presents it full blown as the next step after critique, as something to replace what has been critiqued. When this is the case, the only fair response is to critique it in its turn, subscribe to it, or just ignore it. More often, the author proposes *the project of reconstruction*, rather than any particular reconstruction. One favors the project not because one has a proposal but because one believes that we ought to have one, or at least be trying to have one, that bad consequences will follow if we fail to develop one, and that there are at least some interesting possibilities, some hopeful avenues, some useful bits and pieces available for the task.

A striking aspect of calls for reconstruction is that the author not uncommonly treats critiques as decisive refutations of previous theories. An important trope is the suggestion that critique is easy, while reconstruc-

221 THE CRITIQUE OF RIGHTS

tion is hard, that it is self-indulgently pleasant to go on trashing one thing after another, since we all know how to do it, but morally bracing to roll up our sleeves and get down to the less fashionable but in the long run more constructive task of reconstructing.

A second striking aspect is that the same reconstructionist who asserts the validity of prior critiques, and claims that they are easy to do, is likely to explicitly or implicitly call for reconstructions that will perform just the same function that was performed by the critiqued entities. This is the function of representing social order in a way that would allow us to have assurance that we are right to be left, and right to pursue particular strategies in favor of equality and community.

This form of endorsement of critique doesn't problematize the category of theory. Quite the contrary, critique is in the service of ultimate rightness, and the call for reconstruction is an affirmation of faith in theory as a way to rightness. The project of reconstruction (as opposed to any particular proposal) looks, from a left/mpm point of view, like the reification or fetishism of theory, in a mode parallel to the fetishism of God, the market class, law, and rights. Left/mpm, by contrast, is caught up for better or worse in the "viral" progress of critique, and in so much as there is a lesson from the progress of the virus it would seem to be to anticipate loss of faith in theory in general and general theory in particular. But I hasten to add once again that losing faith in theory doesn't mean giving up doing theory—it just means giving up the expectation of rightness in the doing.

It will come as no surprise that I don't think I can demonstrate that reconstruction is impossible. But, as usual, I do think something can be said about the rational side of faith. Here, as elsewhere, as in the case of God, legal correctness and rights, reconstructionists urge us to believe in and strive for reconstruction because there would be many bad consequences of its failure or impossibility, such as that we wouldn't have assurance either in our leftism or in our particular leftist strategies, that we would become totalitarians, and so forth. Although I don't think these are the real issues, I'll address them as best I can.

NIHILISM

Mpm critique, the induction of loss of faith, and characteristic associated emotions, seen as a project, negates a particular experience, that of rightness, in favor of another experience. When it comes to "deciding" whether

222 DUNCAN KENNEDY

or not to be a leftist, this project has nothing to offer. Because of these commitments, to critique and loss of faith, without commitment to providing other forms of rightness in the place of what it dissolves, it is common to describe it as nihilist. And it is well known that nihilism is both wrong and of evil tendency.

There is something odd about this argument. It seems to presuppose that we prefer error to enlightenment when enlightenment is at the cost of beliefs that seemed useful when we still believed in them. Why wouldn't we welcome the critique, no matter how left/mpm its ulterior motive, as long as after hearing it we were no longer convinced of the truth of our previous view?

Critique doesn't leave us with "nothing," in the sense of making it impossible to decide what to do, say whether or not to be a leftist, or of making it impossible to figure out enough about how the social order works to choose a strategy of left action within it. Those of us who are not moral realists (believers in the objective truth of moral propositions) are used to committing ourselves to projects, and deciding on strategies, on the basis of a balancing of conflicting ethical and practical considerations. In the end, we make the leap into commitment or action. That we don't believe we can demonstrate the correctness of our choices doesn't make us nihilists, at least not in our own eyes.

We misunderstand internal critique if we imagine that it might lead to a situation in which we had lost faith in "everything," so that we just wouldn't know what to believe in or do. Critique changes our attitude toward a particular theory (whichever we successfully critique) that generated a particular sentiment of rightness. It leave us, in the way of tools for working out our commitments and our concrete plans for the future, whatever we had before that theory and its critique. It seems odd to me to suppose that we could ever, conceivably, be without resources of this kind, even if each of us was a veritable Hercules of critical destruction.

Of course, a person might be committed to egalitarianism only because of belief in rights, and in particular rights. The loss of faith in rights in general might lead such a person to abandon egalitarianism, in favor of another attitude, say, belief in natural inequality, that seemed more plausible when not countered by a particular belief in rights now undermined by critique. But the causal chain might move in the other direction as well: loss of faith in property rights might permit previously thwarted egalitarian sentiments to flower.

223 THE CRITIQUE OF RIGHTS

It might be possible to make convincing generalizations about the causal tendency of the left/mpm project of critique, loss of faith, and attendant emotions. After the proposal that the tendency is demoralization, the most popular may be that left/mpm leads to Hitler and Stalin. As I understand this argument, it goes something like this. Stalinism and Nazism represent the powerful, irreducible force of evil in human nature. But they inflicted previously unimaginable suffering, degradation and destruction, far beyond the normal. They were able to do this because they were nihilist, meaning that they denied the validity of fundamental human rights. Nietzsche's cult of the Superman and the moral relativism of Weimar are responsible.

The mirror image: Stalinism and Nazism represent the powerful, irreducible force of evil in human nature. But they inflicted previously unimaginable suffering, degradation and destruction, far beyond the normal. They were able to do this because they were totalitarian, meaning that they proclaimed the absolute truth of their theories. Therefore, skepticism is the true antidote to the repetition of the holocaust and the Gulag. Hegel's cult of Absolute Reason and blind obedience to authority are responsible.

It may be possible to combine the theory that the evil of the twentieth century was caused by the denial of reason (nihilism) with the theory that it was caused by excessive commitment to reason (totalitarianism). Perhaps on a higher lever true believers are nihilists and vice versa. Or perhaps one should be a true believer in fundamental human rights and a nihilist about racist and Marxist theories.

But from the point of view of loss of faith in reason (which is not an impossibility theory about reason), it seems unlikely that either believing or disbelieving in reason in general or in any particular rational construction, has this kind of causal power. It seems more likely that belief and denial of reason can each have many different meanings and combine in an infinite number of ways with idiosyncratic or socially constructed attitudes, sentiments, and dispositions. Belief and denial more likely were constitutive but not controlling elements in many forms of collaboration with and opposition to Nazism and Stalinism, rather than elements with a single intrinsic or inherent tendency.

LEFT/MPM AS AN INTERSECTIONAL PROJECT

Left/mpm artifacts are at the intersection of two projects, one leftist and the other mpm. These are designed to play two dramas on this single stage. One idea is to modernize or post-modernize the leftist project, and the other is to

224 DUNCAN KENNEDY

move the world leftward by doing in right wing forms of rightness. What this means is that there is strategic behavior within the intersection. The mpm part of left/mpm aims to move the left project along rather than to destroy it—allegiance to mpm is no more “absolute” than allegiance to leftism. In ideological struggle/dialogue with the right, we choose our themes/targets with an eye to converting waverers, and avoid themes/targets than can be predicted to demoralize other leftists (would that we were so powerful) when the mpm payoff is small or nonexistent.

In other words, the left, as I am using term, is a “site” for particular, outward- and inward-looking ideological encounters and coalitions, rather than a set of principles or a program. It is, for me, a “position” as well, by which I mean that I much prefer to hang with liberals, identity politicians, and post-Marxist radicals—however hostile to mpm—rather than with the varieties of right-wing or centrist/mpm types. But it is no more conceivable, to me, to be left through and through than to be mpm through and through.

Notes

- 1 .** I use the word “project” here as a term of art, a term of art that is also a fudge. I mean by it a continuous goal-oriented practical activity based on an analysis of some kind (with a textual and oral tradition), but the goals and the analysis are not necessarily internally coherent or consistent over time. It is a collective effort, but all the players can change over time, and people at any given moment can be part of it without subscribing to or even being interested in anything like all its precepts and practical activities. The situated practice part has as much influence on the theory part as vice versa, but the two never fully conform to one another. It isn’t a project unless people see it as such, but the way they see it doesn’t exactly exhaust what outsiders can say about it.
- 2 .** Making and appreciating artifacts are two paths toward transcendent experience, but they regularly upset the theory of the experience. The analytics, which in modernism are always ex post, are incorporated into the performance by postmodernists who emphasize the omnipresence of repressed or denied “primal forces” or “dangerous supplements” and the plasticity of formal media that presuppose that they are not plastic.
- 3 .** Cornel West, *The Struggle for America’s Soul*, New York Times Book Review, 15 Sept. 1991, 13.
- 4 .** See Gary Peller, *Race Consciousness*, DUKE L. J. 758 (1990).
- 5 .** Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984); Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUSTRIAL RELATIONS L. J. 503 (1981); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205 (1979).

225 THE CRITIQUE OF RIGHTS

- 6** . Louis Schwartz, *With Gun and Camera through Darkest CLS Land*, 36 STAN. L. REV. 247 (1984); Phillip Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247 (1984); Staughton Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417 (1984); Edward Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Michael Tigar, *The Right of Property and the Law of Theft*, 62 TEXAS L. REV. 1443 (1984).
- 7** . See Duncan Kennedy, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] (Harv. Univ. Press 1997), pt. 3.
- 8** . Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860 (1987); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 NEW YORK UNIV. L. REV. 589 (1986).
- 9** . Patricia Williams, THE ALCHEMY OF RACE AND RIGHTS (Harv. Univ. Press 1991); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. CIV. RIGHTS. - CIV. LIB. REV. 301 (1987); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).
- 10** . Kennedy, A CRITIQUE OF ADJUDICATION, 135-40.
- 11** . Since the late eighteenth century, there has been a metadiscussion in constitutional law about the proper role of unenacted outside rights. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and *Loan Assoc. v. Topeka*, 87 U.S. (20 Wall.) 655 (1875). Opponents of judicial reasoning from unenacted outside rights have insisted that there is a clear difference between being outside and being inside, and that judges should concern themselves only with the inside. Outside rights don't "really" exist; even if they exist, they are too much open to ideological controversy; even if they exist and are clear, they are not "law".
- 12** . Minow, *Interpreting Rights*; Schneider, *The Dialectic of Rights and Politics*; Gabel, *Phenomenology*.
- 13** . Kennedy, A CRITIQUE OF ADJUDICATION, 224-35.
- 14** . *Ibid.*, 191-212.
- 15** . Oliver Wendell Holmes, "The Path of the Law" in COLLECTED LEGAL PAPERS (William S. Hein, 1985), 181.
- 16** . Henry Terry, *Legal Duties and Rights*, 12 Yale L. J. 185 (1903).
- 17** . Wesley N. Hohfeld, *Fundamental Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710 (1917).
- 18** . *Compare* *Vegehan v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896), with *Hague v. C.I.O.*, 307 U.S. 496 (1939).
- 19** . Louis Brandeis and Charles Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); *Griswold v. Conn.*, 381 U.S. 479 (1965).
- 20** . Lon Fuller and William Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 373 (1936-37). Hohfeld is again the most important originator; see his *Fundamental Conceptions*.

- 21** . See William W. Fisher III, Morton J. Horwitz and Thomas Reed, eds., *AMERICAN LEGAL REALISM* (Oxford Univ. Press 1993) for a collection of classic texts.
- 22** . But see Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L. J.* 943 (1987).
- 23** . Pa. Coal v. Mahon, 260 U.S. 393 (1922); Hadacheck v. Sebastian, 233 U.S. 394 (1915). See Thomas Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 819-20 (1989).
- 24** . Hohfeld, *Fundamental Conceptions*.
- 25** . Cheney v. Doris Silk Co., 35 F.2d 279 (2d Cir. 1929); U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Dennis v. U.S. 182 F.2d 201 (2d Cir. 1950).
- 26** . Learned Hand, *THE BILL OF RIGHTS* (Harv. Univ. Press 1958).
- 27** . U.S. v. Carolene Products, 304 U.S. 144, 152-153, n. 4 (1938); Powell v. Alabama, 287 U.S. 45 (1932); Hague v. C.I.O., 307 U.S. 496 (1939); W.Va. v. Barnette, 319 U.S. 624 (1943).
- 28** . William O. Douglas, *Stare Decisis*, 49 *COLUM. L. REV.* 735 (1949).
- 29** . Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* (1959); Hugo Black, *The Bill of Rights*, 35 *NEW YORK UNIV. L. REV.* 865 (1960).
- 30** . Dennis v. U.S., 341 U.S. 494, 543 (1951) (Frankfurter, J., concurring).
- 31** . See for example, Alexander Meiklejohn, *The First Amendment is an Absolute*, *SUPREME COURT REV.* 245 (1961).
- 32** . See for example, Erwin Griswold, *Absolute is in the Dark*, 8 *UTAH L. REV.* 167 (1963); Paul Freund, *THE SUPREME COURT OF THE UNITED STATES* (World Publishers 1961).
- 33** . Wechsler, *Neutral Principles*.
- 34** . Henry Hart and Herbert Wechsler, *THE FEDERAL COURTS IN THE FEDERAL SYSTEM* (Foundation Press 1953).
- 35** . Three quite different reactions to this general kind are Robert McCloskey, *Economic Due Process and the Supreme Court: and Exhumation and Reburial*, *SUPREME COURT REV.* 34 (1962); Jan Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections between Law and Political Theory*, 20 *STAN. L. REV.* 169 (1968); and John Griffiths, *Ideology in Criminal Procedure, or, A Third 'Model' of the Criminal Process*, 79 *YALE L. J.* 359 (1970).
- 36** . Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265 (1978).
- 37** . Ann Freedman, *Sex Equality, Sex Difference, and the Supreme Court*, 92 *YALE L. J.* 913 (1983).
- 38** . Derrick Bell, *Serving Two Masters*, 85 *YALE L. J.* 470 (1976).

227 THE CRITIQUE OF RIGHTS

- 39** . See the discussion of Thomas Sowell in Crenshaw, *Race, Reform and Retrenchment*, 1339-46.
- 40** . Thomas Grey, *Discriminatory Harassment and Free Speech*, 14 HARVARD JOURNAL OF LAW AND PUBLIC POLICY, 157 (1991).
- 41** . Kimberlé Crenshaw, *Mapping the Margins: Identity Politics, Intersectionality, and Violence against Women*, 43 STAN. L. REV. 1241 (1991).
- 42** . Martha Minow, *The Supreme Court, October 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Mary Joe Frug, *POST-MODERN LEGAL FEMINISM* (Routledge 1992).
- 43** . Even if, for one of these reasons, the realist critique of legal rights reasoning isn't very threatening to the belief that there are universal human rights, it should still be plenty threatening to the idea that identifying them in the abstract will get you away from the kind of "value judgment" that you invented them to avoid. This doesn't seem to have occurred to political philosophers outside law, but it is close to an obsession, in the form of the "countermajoritarian difficulty" of American jurisprudence.
- 44** . Bella English, *Keeping Rights in Perspective*, Boston Globe 22 July 1991, sect. 2. p. 13.
- 45** . "I can engage in homosexual intercourse because I have a right to sexual freedom"; "I can organize a PAC with corporate contributions because I have a right to free speech"; "Slavery is wrong because it denies the inalienable rights of life, liberty and property"; "Nondisclaimable strict products liability is wrong because it denies the right of freedom of contract"; "Compulsory membership in a labor union is wrong because it denies the right of free association; the banning of strikes is wrong because it denies the right to strike"; "The banning of the sale of contraceptives is wrong because it violates the right to privacy."
- 46** . Kennedy, *A CRITIQUE OF ADJUDICATION*, chaps. 4, 5.
- 47** . An exemplary critique of this kind is Jeremy Paul, *Book Review*, 88 MICH. L. REV. 1622 (1990) (review of Jeremy Waldron, *THE RIGHT TO PRIVATE PROPERTY*).
- 48** . Minow, *Interpreting Rights*; Schneider, *The Dialectic of Rights and Politics*.
- 49** . Karl Marx, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY*, vol. I, trans. Ben Fowkes (New York, Vintage Books 1977).
- 50** . Karl Marx, *CRITIQUE OF THE GOTHA PROGRAM* (Moscow: Progress Publishers 1971).
- 51** . Kennedy, *A CRITIQUE OF ADJUDICATION*, chap. 11.
- 52** . Karl Marx, *On the Jewish Question* in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 216, ed. and trans. Lloyd Easton and Kurt Guddat (Anchor 1967). This essay is full of neo-Hegelian anti-Semitic ideas. I think this is one of those cases where the dross doesn't corrupt the gold. It is also typically "early Marx".
- 53** . See for example Gabel, *Phenomenology*; Alan Freeman and Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987); Duncan Kennedy and Peter Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).
- 54** . There are a number of critical analyses of the role of rights rhetoric at different stages of social movements and at different stages in American political history. See Gabel, *Phenomenology*; and Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. OF LAW IN SOC. 309 (1990). They aren't examples of the rights critique, although they sometimes presuppose it.