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An Essay on Rights

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I. The Critique of Rights

The liberal theory of rights forms a major part of the cultural capital that capitalism's culture has given us.[1] The radical critique of rights is a Schumpeterian act of creative destruction[2] that may help us build societies that transcend the failures of capitalism. The first section of this Article develops one version of the critique of rights. The second briefly explores the epistemological basis of that critique.[3]

Rights, most people believe, are "Good Things." In this Article I develop four related critiques of rights discussed in contemporary American legal circles. The critiques may be stated briefly as follows: (1) Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable; significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated. (2) The claim that a right is

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1. I take this to be the defensible core of E.P. Thompson's conclusion that "the notion of the rule of law is itself an unqualified good." E.P. THOMPSON, WHIGS AND HUNTERS 267 (1975). Thompson carefully qualifies that conclusion by his emphasis on the rule of law as a "cultural achievement" of a specific time and place. *Id.* He is usually taken to be making a broader claim, one that is independent of the specifics of British culture of the eighteenth century. As I argue below, such a claim is wrong. *See infra* subpart I(D) (discussing the political disutility critique of rights).

2. *See* J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-87 (3d ed. 1950).

3. An early footnote may be the place to identify two themes in what follows. The first, close to the surface, is the repeated interplay between the notion that social life is continuous, a seamless web, and the notion that social life is subject to radical discontinuity as people's attention shifts from their location in a context to their isolation in their individual bodies. The second, perhaps only a more submerged version of the first, is the role of modernist sensibility in constructing the critique of rights.

implicated in some settings produces no determinate consequences.[4] (3) The concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake.[5] (4) The use of rights in contemporary discourse impedes advances by progressive social forces, which I will call the "party of humanity."

Each of these critiques is bound up with a particular rejoinder to the general critique of rights. (1) The argument that rights are unstable responds to the "unions in Poland" or "freedom of choice in abortion matters" rejoinder: "Surely you on the Left have to think that workers in Poland have a right to form unions, and that women have a right to choose whether to bear children." (2) The argument that rights are indeterminate responds to the "rights structure discourse" rejoinder: "Surely the invocation of rights allows us to engage in rational arguments about what ought to be done." (3) The argument about reification responds to the "Stalinism" rejoinder: "Rights are what stand between us and the Gulag." (4) Finally, the argument about the pragmatic disutility of rights responds to the "working class" rejoinder: "The interests of the working class have always been, and will continue to be, advanced by the extension of rights."[6]

A. Instability

It does not advance understanding to speak of rights in the abstract. It matters only that some specific right is or is not recognized in some specific social setting. It is, for example, literally incoherent to claim that women in neolithic societies ought to have had the right to choose not to bear children. Such a claim would have been meaningless to them. Similarly, John Rawls restricts his analysis to societies that meet the circumstances of justice—moderate scarcity in material goods and pervasive differences among people over what constitutes

4. Michael Perry argues that the first two critiques are directed not at the concept of rights per se but at a particular version of rights discourse. Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously,* 62 TEXAS L. REV. 1405, 1411-13 (1984). In one sense that is of course true. I am concerned with the actual use of the concept in contemporary political discussions. I do not deny that a word with the same letters in the same order could be used quite differently. I wonder, however, whether a fully contextualized approach to the relevant problems (a) would lead us to use the word "rights," (b) would involve applications of the generalized definition that Perry offers in the first part of his article, Perry, *supra,* at 1405-10, and (c) would rely on the desiccated abstractions *A, B,* and *X* in Perry's definition.

5. I should note that these three critiques seem to me versions of a broader philosophy of language, rules, and law. But I do not think that their validity depends in any important way on any broader claims than those made here.

6. The critiques, rejoinders, and responses do not really fall into such neat categories. For example, the "Stalinism" rejoinder is met not only by the reification critique but by the pragmatic disutility one as well. Nevertheless, I think the categories are useful as an introduction.

the good for people.[7] In this way, rights become identified with particular cultures and are relativized: to say that some specific right is (or ought to be) recognized in a specific culture is to say that the culture is what it is, ought to recognize what its deepest commitments are, or ought to be transformed into some other culture.

The immediate response to this relativization of rights is obvious. Rawls' "circumstances of justice" and other similar constraints on the coherence of rights-talk are themselves so broad that discussions of rights turn out to be coherent across large numbers of societies, all of which are similar enough to our own to make such discussions sensible. This is the "unions in Poland" rejoinder; given the Left's commitment to emancipation, it has to support the right of Polish workers to organize, because the circumstances of life in Poland are not so different from ours as to make incoherent the claim that Polish workers (ought to) have a right to organize.[8] The "unions in Poland" argument tries to get at something important. It does not, however, undermine the basic claim that the recognition of specific rights is itself what constitutes specific cultures.

1. An Example: The Right to Reproductive Choice.—I will defend this claim by presenting the first step in an inductive argument, leaving it to others to pursue the wearisome chore of answering those who continue to point to some other right as "surely" sufficiently stable. Because leftists have developed the critique of rights in the contemporary United States, a favorite countertactic is to identify a leftish sort of right which, it is said, leftists must recognize as *not* relative lest they lose their political credentials. The usual example is the right to reproductive choice.[9] The inductive argument offered here, however, demonstrates that leftists need not recognize such a right in a society not so different from our own. Both of the societies I will describe possess Rawls' "circumstances of justice." In neither society has scarcity of material goods been eliminated or differences in conceptions of the good eradicated. Neither is a postrevolutionary utopia as we usually

7. J. RAWLS, A THEORY OF JUSTICE 126-28 (1971); Rawls, *Kantian Constructivism in Moral Theory,* 77 J. PHIL. 505, 536, 539 (1980).

8. For a similar observation, see Greenawalt, *Violence—Legal Justification and Moral Appraisal,* 32 EMORY L.J. 437, 446 n.13 (1983) ("The idea, roughly, is that basic forms of social organization, existing technology, religious beliefs, etc., are to be taken as given and the question then becomes what would be the best moral principles for a society with those features."). As Greenawalt concludes, "A deeper analysis would require much more thorough treatment of this problem." *Id.*; *see also infra* Part II(B)(1) (criticizing "blueprintism").

9. *See, e.g.,* Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation,* 130 U. PA. L. REV. 1429, 1437-38 (1982).

think of societies that might develop after feminist or socialist revolutions. In particular, I assume that the changes I describe could occur without disrupting basic structures of male domination. The societies I describe need not be wholly attractive, and indeed may be as unattractive in many respects as our own. But they are societies in which it would be impossible for a woman's situation to implicate the kind of right to reproductive choice that is the focus of current concern.

The contemporary right to reproductive choice has, as a matter of contingent technological fact, two components. A woman who chooses to have an abortion today necessarily chooses two things: to remove the fetus from her body, and to destroy the fetus.[10] All the arguments that support the right to reproductive choice apparently implicate only the first decision. The technology of reproduction, however, has now neared the point where the two choices are independent.[11] If the choices were independent, there would no longer be a right to *reproductive* choice in the sense that interests us today. No one would care about a woman's decision merely to *remove* a fetus from her body, because that act would not have the consequence (*i.e.,* the death of the fetus) that troubles many people today.[12] If the removed fetus had some caretaker available to it, the mere act of removal would be morally inconsequential. The modest technological advance needed to separate the two choices easily could be accompanied by an equally modest social advance that would guarantee caretakers to all fetuses/babies in a manner no different from that in which today's babies are guaranteed caretakers.

At this point the argument about reproductive choice takes a different shape. If a right to choose not only whether a fetus will be removed, but also whether it will be destroyed were to survive the modest technological and social changes I have described, it would have to be supported by what might be called property-based, psychological, and genetic arguments. Additional social changes, however, could undermine those arguments to the point that the right at issue would not be recognizable as the one we discuss today.

The property-based argument is straightforward. Suppose a man decides—on a whim, say—to have his spleen removed. In our society

10. *See* Ross, *Abortion and the Death of the Fetus,* 11 PHIL. & PUB. AFF. 232 (1982).

11. *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,* 69 VA. L. REV. 405, 420-36 (1983).

12. Some people may be bothered by the separation of biological and social parenthood. But even now the growing availability of artificial insemination, adoption, surrogate parenthood, and willed single-parenthood makes it hard to take such concerns seriously—to think, that is, that the child has some right to a particular parent. *See id.* at 406-08.

he has a right to control the disposition of his spleen after its removal. He can donate it to an organ bank, cook it, or throw it away. It is, after all, *his* spleen. Is the fetus removed from the woman any less *hers*? It is not necessary to pursue the line of argument that would distinguish between the spleen and the fetus. Instead consider how queer the man's property right in his spleen is. I take it that the ground for this right is that it would be outrageous for some collective agency to commandeer the spleen in the interests of another person's health. Further, I assume that it would be equally outrageous for the agency to override the man's decision to put his removed spleen to a use that all would agree is less than optimal. He can donate it to his cousin even if the agency would, on balance, decide that a distant stranger would benefit more. I will concede, finally, that these intuitions support a contemporary judgment that people have strong property rights in their spleens, extending even to a right to destroy them. But it would not shake the foundations of the property system to recognize a slightly weaker property right, one that would protect bodily integrity and the freedom to make choices regarding the use of removed organs, but that would *not* encompass the power to *destroy* the tissue. A society that shifted its ideas of property to that extent still would be recognizably capitalist. Indeed, the necessary conceptual change would be rather less significant than the one that led us to see property as a bundle of rights rather than as a tangible object.

The psychological argument holds that a woman has a right to avoid the psychological burdens associated with uncertainty. She may not want to worry for the rest of her life whether a person she saw on the street, who vaguely resembled her grandmother, might be her daughter.[13] But these psychological burdens do not arise necessarily because the fetus was once inside the woman. Putative fathers could, and perhaps do today, bear the same psychological burdens. Even if psychological burdens today are borne differentially by women, the gender differences in the bearing of psychological burdens could be reduced substantially in the future. At that point the right to reproductive choice would become disconnected from the issues of gender to which it is today intimately bound. The claim that the woman had a

13. Even under contemporary law, the right to reproductive choice does not clearly rest on a recognition of this interest in peace of mind. The Supreme Court has upheld far more burdensome restrictions on the exercise of reproductive choice: requirements of pathology reports, second physicians, and parental or judicial consent. *See* Planned Parenthood v. Ashcroft, 103 S. Ct. 2517 (1983). Of course, those decisions may fail to give adequate scope to the "true" right to reproductive choice.

right to choose destruction of the fetus instead of its preservation would sound very different.

Another version of the psychological argument objects to the use of a woman's body merely as the field in which fertile seeds can grow to fruition. Once she is allowed to remove the fetus, however, the agricultural image becomes rather less powerful. What remains is an objection not to using her body but to using her genetic heritage, an objection that is equally available to the man. It follows that if the woman had the right to destroy the tissue once it was removed, so would the man, a conclusion that is clearly at odds with our current understanding of the scope of the right to reproductive choice.[14]

The same can be said of the purely genetic argument for a woman's right to control the disposition of the fetus. Under contemporary law a woman typically must consent to an adoption.[15] Yet if she does not, and still refuses to rear the child herself, the state will intervene.[16] Further, the Supreme Court recently held that a genetic father who had not maintained contact with his child (because the genetic mother had successfully concealed the child's location) was not entitled to participate in an adoption proceeding.[17] Thus the purely genetic foundation for a right to control the fetus' disposition is rather weak. It is not obvious that it would be unconstitutional to repeal the adoption consent laws if their only justification were purely genetic. And, once again, the purely genetic argument is entirely independent of the issues of gender that shape our current understanding of the right to reproductive choice.

I have proceeded on the assumption that, after the technological advance described above, the nondestructive removal of a fetus would pose no greater threat to a woman than would a removal that destroyed the fetus. But suppose that the technology required to remove the fetus from a woman's body without killing the fetus were slightly more dan-

14. The problem this argument raises occurs most dramatically when one partner desires destruction of the fetus and the other does not. Some social forum for resolving the dispute seems essential. But even when the partners agree on destruction, it may not violate their relatively weak psychological claims to subject their decision to social control. *See supra* text accompanying note 12. The partners were enabled to come together in the first place because certain social arrangements existed; the interest in maintaining those arrangements may be sufficient to justify some modest degree of social control over the outcome. This is of course a version of the argument for an expansive definition of the state action doctrine. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18, at 1147-74 (1978) (arguing that a liberal state action doctrine has emerged because the Constitution protects individuals only from goverument action).

15. *See, e.g.,* N.Y. DOM. REL. LAW § 111(1)(b)-(c) (Consol. 1977).

16. *See, e.g., id.* § 111(2)(a)-(b). The mother's refusal to consent to adoption or to rear the child would usually render her "unfit" and allow the state to terminate her parental rights. *Id.*

17. Lehr v. Robertson, 103 S. Ct. 2985 (1983).

gerous than the contemporary technology of abortion. The risk of nondestructive removal might be ten percent greater than the risk of abortion. But I wonder whether any but the right's most ardent defenders would hold that a statute requiring women to remove rather than to destroy the fetus would violate the right to reproductive choice. (How would it differ, for example, from compulsory vaccinations imposed on children whose parents have religious objections to vaccinations?) In short, relatively small changes in technology would make it impossible—or at least very difficult—to talk about a right to an abortion.

The Left always has been fascinated by technology as the means by which all social problems will be overcome. But it is not technology alone that can make incoherent the claim to a right to reproductive choice as we now think of it. Suppose that education about contraceptive devices were widespread and that the devices themselves were readily available. Suppose also that no stigma attached to being or bearing an illegitimate child. Suppose finally that people shared a concept of health and illness that made pain and discomfort a natural part of life, something that simply ran its course and that ought not be cured unless the sick person's life were threatened by the illness. These conditions would require no dramatic changes in our present society, and indeed many people today already hold these attitudes. None of them requires elimination of existing structures of male domination. Suppose finally that pregnancy were understood by a large majority of the people as something like an untreatable flu that lasts for nine months but that has no long-term consequences, or as a disfiguring and moderately painful condition that some people choose to have and that others have visited upon them. This description may omit other necessary social conditions,[18] but the point should be clear. The society I have sketched possesses Rawls' circumstances of justice, and it is not, as neolithic society is, wildly discontinuous from our own. One can imagine a path from here to there that includes no violent upheavals, no elimination of all discord. In that society, asking whether a woman has a right to an abortion would be like asking our contemporaries whether we have a right not to get the flu.[19]

18. Science fiction writers have tried to work out the conditions in more detail. *See, e.g.,* S. BUTLER, EREWHON (1900); U. LEGUIN, THE LEFT HAND OF DARKNESS (1969); M. PIERCY, WOMAN AT THE EDGE OF TIME (1976).

19. The preceding argument clearly attempts to structure things so that most people would find that the arrangements have substantially weakened most of the reasons women now have for securing abortions. Some women, however, still might want to have abortions for idiosyncratic reasons. I suggest that in such a society, no one would care enough about the issue to lead a

2. The Generalization.—The inductive program whose first step I have just sketched would show that every specific right is just as contingent on social and technological facts as the right to reproductive choice.[20] There is no reason to believe that the program cannot be executed. If it can, it will show that the set of rights recognized in any particular society is coextensive with that society. The conditions of the society define exactly what kind of rights-talk makes sense, and the sort of rights-talk that makes sense in turn defines what the society is. When someone objects to an act as a violation of a right, the ensuing dialogue either involves a claim that the challenged act is inconsistent with some "deeper" commitments that the actor has—and who is to resolve *that* claim?—or deals with what kind of society we ought to have. If both sides can identify enough openness in the existing structure of rights to make plausible arguments that a right is or is not involved—that the "deeper" commitments "really" mean something—they may talk as if they were debating about what kind of society actually exists. But as the next section shows, the indeterminacy of rights-claims means that the debate is always about what the society is *and* what it ought to be. In some social contexts, the party of humanity may be helped by the mutual illusion that the discussion is only about what is. Perhaps that is how observers in the capitalist heartland would like to construe the "unions in Poland" question. But I doubt that the members of Solidarity see it that way.

In March 1964 five black men tried to use a segregated public library. When they were denied service, one sat down in a chair in the reading room while the others stood quietly nearby. Or, the five men occupied the library.[21] In December 1982 a group of homeless men pitched tents in Lafayette Park across from the White House. At night their lack of any place to sleep other than the tents brought home to the public the terrible consequences of its penny-pinching. Or, at night they fell asleep.[22] Can anyone seriously think that it helps either in

legislature to enact a law prohibiting abortions. One might say that women would have a right to reproductive choice in that society, but it would be akin to the right we now have to pick our noses—moderately discrediting perhaps, but not an object of legislation. It seems to me that if the critique of rights fails only at this point, it will have done its job rather well.

It might be thought that the analogy in the text fails because there is a safe "cure" for the illness of pregnancy, as there is not for the flu. But in the imagined society people do not welcome "cures." They see them instead as artificial and unwarranted interventions in the natural order of things.

20. I pursue the inductive strategy throughout this Article. By doing so I mean to suggest that just as it is futile to talk about a specific right outside its social context, so is it futile to talk about the institution of rights in general without attending to the meaning of specific rights.

21. *See* Brown v. Louisiana, 383 U.S. 131 (1966).

22. *See* Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).

changing society or in understanding how society changes to discuss whether the black men and the homeless men were exercising rights protected by the first amendment? It matters only whether they engaged in politically effective action. If their action was politically effective, we ought to establish the conditions for its effectiveness, not because those conditions are "rights" but because political effective action is important.

B. Indeterminacy

I have argued that rights-talk often conceals a claim that things ought to be different within an argument that things are as the claimant contends. That masquerade is sometimes successful, at least until the claim is rejected by the courts or by the wider audience for the claim. It is successful because the language of rights is so open and indeterminate that opposing parties can use the same language to express their positions. Because rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles.

I distinguish two kinds of indeterminacy, which I will call technical and fundamental. Technical indeterminacy is characteristic of the typical rights-talk of our contemporaries. In our usual ways of talking, we have the techniques readily at hand to undermine the claim that some right must be recognized. Technical indeterminacy might be overcome by rejecting some of these usual ways of talking, although that would be difficult, as will soon be apparent. Fundamental indeterminacy occurs because the general concepts that make any kind of rights-talk seem attractive cannot be connected to particular results without specifying so many details about the social setting of the rights as to transform the rights-claim into a description of an entire society. Thus, fundamental indeterminacy is another aspect of the instability of rights I have already discussed.

1. Technical Indeterminacy.—In our usual ways of talking about rights we use at least three techniques to create or acknowledge the existence of rights and to define them so as to allow us to deny their existence when we want to.

(a) Balancing.—The most familiar technique is to define a right as the result of a balancing process.[23] Balancing can be either an

23. The literature on balancing is large but in the main intellectually thin. The best discussions remain the classics: Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance,* 50 CALIF. L. REV.

ad hoc comparison of the interests at stake in a specific case or a comparison of the interests in a broadly defined category of cases. The argument that both ad hoc and categorical balancing produce no determinate results is so familiar that I will merely catalogue the usual points.

First, to balance interests at all one must reduce them to some common measure of value. In many instances the interests appear to be incommensurable. Consider, for example, the difficulties of balancing the costs of operating railroads against the value of life and limb,[24] or the danger of Communist speech against the threat, such as it was, to national security.[25] The choice of the measure of value must be guided by some substantive theory of rights. But the Supreme Court has not provided us with such a theory. Fundamental indeterminacy argues that there is no such theory. If a substantive theory were available, balancing would be unnecessary.

Second, an accurate balance must take account of all the affected interests.[26] Yet legal interventions have extremely complex consequences that reach far beyond the narrow setting of most cases. Consider, for example, the argument that *Brown v. Board of Education*[27] led to the election of Ronald Reagan by way of an incredibly complicated route consisting of the exacerbation of white perceptions of black threats to social stability, a subsequent general shift of the political spectrum to the right, and so on. Rights become indeterminate as first one side and then the other attaches new long-term consequences to the recognition or denial of particular claims of rights.

Third, courts must define the level of generality on which to balance competing interests. Justice Frankfurter's concurring opinion in *Dennis v. United States*[28] is one of the great scandals of balancing. On one side he placed the details of Communist "subversion" and threats to the national security, and on the other a hymn to the abstract values of free speech. But even if, as defenders of balancing usually require,

821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson,* 51 CALIF. L. REV. 729 (1963).

That balancing is powerfully attractive is evidenced by Douglas Laycock's reliance on it even when it undermines his entire effort. Laycock, Book Review, 59 TEXAS L. REV. 343 (1981); Tushnet, *A Note on the Revival of Textualism in Constitutional Theory,* forthcoming in 58 S. CAL. L. REV. (1985).

24. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

25. *See* Dennis v. United States, 341 U.S. 494 (1951).

26. The balance need not be entirely utilitarian. The consequences that must be assessed could include the effect a decision would have on nonconsequentialist interests. Yet the image and language of balancing do tend in practice to lead people to some form of utilitarianism.

27. 347 U.S. 483 (1954).

28. 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring).

the interests are defined on the same level of generality, selecting that level requires that one have a substantive theory of rights, which by definition is not available to the balancer at that point in the analysis. Further, facts and interests can be decomposed or universalized at will, to trivialize or exaggerate the weight of the facts or interests. If courts decide to balance on a relatively abstract level, they can take relatively trivial facts and generalize their triviality.[29]

Thus, a balancer who wants to "recognize" a right can choose the necessary measure of value, the necessary consequences, and the necessary level of generality. So can a balancer who wants to deny the claim that a right has been violated.

(b) Rights v. rights.—An interesting version of balancing occurs when a court counterposes one right that it ordinarily acknowledges to be protected against another similarly protected right. The Supreme Court's shopping center cases provide a good example.[30] The Court considered claims by demonstrators that they were entitled to access to shopping malls for protest or organizational activity—or, if you prefer, claims that the state could not deprive them of access by enforcing its trespass laws. The Court agreed that first amendment interests were implicated in this situation. But, it held, those interests, even though they were of constitutional dimension, had to be weighed against private property interests that, at least in the absence of contrary legislation,[31] had an almost equivalent status. Again a simple catalogue is enough to make the point. The Constitution recognizes many generally protected interests: national unity, state autonomy, individualism, personal autonomy, private association, private property, and social control of property to guarantee economic growth with liberty. In any particular case a court can draw items from that catalogue and balance them as it chooses.

(c) Rights in legal contexts.—Finally, rights do not exist in isolation. Each one fits into a background of rights that can be used to define the limits of a right drawn into present controversy. But of course what is foreground and what is background is itself indetermi-

29. *Id.* (weighing detailed communist subversion threats against generalized values of free speech).

30. *See, e.g.,* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

31. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

nate, and which parts of the background we choose to rely on to define a foreground right will often determine whether the claimant prevails.

Ruckleshaus v. Sierra Club[32] provides a useful recent example. The Clean Air Act authorizes courts to award reasonable attorneys' fees in some environmental cases.[33] Unlike other statutes, which authorize awards of fees only to prevailing parties, the Clean Air Act authorizes awards whenever the court determines that such an award is appropriate. The Sierra Club argued that the "appropriateness" standard, read against the background of "prevailing party" statutes, meant that courts had discretion to award fees to losing parties. Justice Stevens noted at the outset of his opinion that nondiscretionary awards to losing parties were common in criminal cases, in which the government pays for the defendant's lawyer.[34]

But his was a dissent. Justice Rehnquist for the majority saw a different background. When the Clean Air Act was adopted, some courts had held that the party must have substantially prevailed to receive awards under "prevailing party" statutes, and had adopted a stringent definition of "substantially prevail." According to Justice Rehnquist, Congress reacted to that background by adopting the "appropriateness" standard to avoid a stringent "substantiality" test. Thus, the party must have "some degree of success on the merits" to receive an award.[35] On this view it did not matter that between 1976, when the Clean Air Act was adopted, and 1983, when the case was decided, most courts had relaxed the "substantiality" requirement so that the Court's test under the Clean Air Act's "appropriateness" standard was essentially identical to the test under "prevailing party" statutes, which are worded quite differently.

Another part of the background was perhaps more important. Despite Justice Stevens' invocation of criminal cases, the Court saw a longstanding tradition rooted in "intuitive notions of fairness"[36] against awarding fees even to prevailing parties. "Fairness" means that a winner should not be required to pay someone who wrongly charged him with violating the law. Against this background, the Sierra Club had to make "a clear showing" that nonprevailing parties should be allowed to receive awards, and it did not. Another version of this part of the background, though, would show it to be the result of a judg-

32. 103 S. Ct. 3274 (1983).
33. 42 U.S.C. § 7607(f) (1982).
34. *See* 103 S. Ct. at 3281.
35. *Id.* at 3276.
36. *Id.* at 3277.

ment that litigation brought by losers generally serves no useful social purpose. Against *that* background, it is sensible to see Congress as acting to give judges discretion to make awards in those unusual cases in which the general judgment is inaccurate.

By redescribing the background, then, we can reverse the result. Of course, we always have the option of placing the background—the "intuitive notions of fairness" in *Sierra Club*—itself into question. To block those moves we would need an antecedent substantive theory of rights.

(d) Summary.—In conversation people sometimes acknowledge that rights-talk is indeterminate. But, they say, it is useful because it allows us to carry on coherent discussions about what ought to be done. Technical indeterminacy shows that even this modest claim is wrong. The discussions are coherent only so long as the participants agree not to raise questions about the measure of value, level of generality, or description of the background. But as soon as a rights-claimant sees that her claim is likely to be rejected if the discussion proceeds, the claimant ought to raise those questions. At that point coherence disappears and the shouting begins.

2. Fundamental Indeterminacy.—I find it striking that in discussions about the critique of rights, people who think that there *are* rights take the high ground by identifying a highly abstract right as one whose existence cannot be challenged. And usually I don't challenge it. But fundamental indeterminacy makes it impossible to connect that abstract right—"autonomy" or "equal concern and respect" are the usual candidates—to any particular outcome without fully specifying a wide range of social arrangements that the proponents of the right take for granted but that another person who believes in "autonomy" might reject. Part of the argument for technical indeterminacy is that abstract rights get specified in particular legal contexts. The argument for fundamental indeterminacy is that abstract rights get specified in particular social contexts. Because both the legal and the social surroundings can readily be placed in question, the proponent of the abstract right gains nothing by eliciting agreement on the high ground. As before, I begin with an example and then show that the analysis can be applied more generally.

(a) An example: Richards on the family.—David A.J. Richards, one of the scholars most seriously dedicated to developing a theory of nonabstract constitutional rights, has examined the body of

constitutional law dealing with relations among parents, children, and the state.[37] His premise is that "[w]e must philosophically conceive and explicate the conflicting rights of children, parents, and society, as a matter of general moral and constitutional principle."[38] He makes it clear that the principles he seeks must avoid the problems of technical indeterminacy; they must be "systematic," must avoid "balancing . . . principles . . . in an intuitionistic way," and must "organize[] and explain [our intuitions] as the consequences of deeper premises."[39] Richards finds in the Constitution a theory of human rights involving "the belief that every person has a capacity for autonomy, and . . . the principle that every person has the right to equal concern and respect in pursuit of his autonomy."[40] After presenting his theory in a general way, he applies it to problems of family life. According to Richards, under the Constitution children are beneficiaries of rights to equal opportunity and of liberal paternalism; parents "as such, have rights over their children derived from liberal paternalism."[41]

Equal opportunity requires that children have access to resources for socialization and education sufficient to give them a fair chance in life. This requires in turn that they have a stable relationship with a psychological parent. For my purposes, what is most striking about Richards' presentation is his assumption that biological parents in nuclear families are the "natural" providers of the required material and psychological resources. To Richards, it is "a startling failure of imagination to conclude that . . . communal rearing [is] required," because "although some forms of communal rearing undoubtedly may provide the individualized care that is morally due children, others do not," and "extreme forms . . . violate the rights of children more than any but the most abusive parents might." On the other hand, "the nuclear family accommodates the end of individualized care naturally."[42] The truth value of this passage would arguably be preserved if one substituted "nuclear family" for "communal rearing" and vice versa, which perhaps suggests where the true failure of imagination lies.

Richards pursues this analysis in his discussion of a "right to equal opportunity of schooling," which precludes parents from "indoctrina-

37. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective,* 55 N.Y.U. L. REV. 1 (1980).
38. *Id.* at 5-6.
39. *Id.* at 6 n.37.
40. *Id.* at 8.
41. *Id.* at 20.
42. *Id.* at 21.

tion in rigid sectarian ideology."[43] The secularism of this approach—its denial that autonomy can be achieved, as some theologians believe, through the brotherhood and sisterhood of people in the parentage of God—is striking. Richards here seems to reject one of the Rawlsian circumstances of justice in that he denies the significance of one set of views of the good that exists in our society. He thus derives a conclusion that follows from his premises only if society is arranged one way rather than another.

Richards' discussion of the rights of biological parents presents a more significant illustration of fundamental indeterminacy. Richards writes that parents have a "right . . . to raise *their* children," derived in part from "the presumption that parents have the ability and the willingness that best fulfills each child's right to individualized care," and in part from the fact that "one's children are the test of one's life and aspirations."[44] Richards assumes that biological parents are "most suited to custody and control" because "they often have the strongest motives to provide the . . . environment that is the child's right."[45]

Surely here Richards himself suffers from a failure of imagination. The values he attributes to biological parenthood are actually attributes of *social* arrangements to which we have become accustomed.[46] A useful example is *Lehr v. Robertson,* which involved a biological father who had not married his daughter's mother.[47] The mother married another man and the couple made plans to adopt the child. The biological father had continuously attempted to locate his daughter and even hired a detective agency to find her. Once he found his daughter, her mother refused to permit him to see her. The Supreme Court rejected his claim that he had an absolute right to notice of the pending adoption. It distinguished between "a developed parent-child relation-

43. *Id.* at 22.

44. *Id.* at 28 (emphasis added).

45. *Id.* at 36.

46. A fanatic who misunderstood the teaching of sociobiology might claim that, despite the general pervasive influence of social arrangements, there remains a residue of purely genetic concern for the preservation of the genetic material each parent has provided. *See* E. WILSON, ON HUMAN NATURE (1978). Yet the emphasis on "reciprocal altruism" in sociobiological thought demonstrates that nothing turns on the existence of such a residue. Suppose, for example, that infants were separated from their mothers at birth, were placed in hospital nurseries, and were brought out at random to mothers who wanted to see "their" children. I suppose it is clear that in such a system no one would have any greater sociobiological interest in advancing the cause of the child he or she brought home from the hospital than in advancing the cause of any other child. (The fanatic sociobiologist might claim that how nurses bring infants out from the nursery to mothers is genetically determined. The variability in child-delivering practices of that sort is so great as to make that claim implausible.)

47. 103 S. Ct. 2985 (1983).

ship,"[48] in which the parents' "emotional attachments . . . derive from the intimacy of daily association,"[49] and what it termed an "inchoate relationship."[50] *Lehr v. Robertson* establishes as a matter of contemporary constitutional law that the relevant parent-child relationship is affectional and emotional, not biological. Thus, this relationship is largely dependent on social arrangements independent of the law, such as the mother's ability to conceal the location of her child. If "the family" is defined by ties of affection rather than blood, it is hard to see a distinction between rights pertaining to "the family" and those pertaining to "the family of man," that is, to people generally. The exercise attempted to specify some subset of human rights derived from notions of autonomy and equal concern. The derived subset, however, is the same as the original set.

Richards, of course, might respond by claiming that *Lehr v. Robertson* was wrongly decided. But the broader point, the contingency of the relationship between biological parenthood and the values from which Richards attempts to derive parental rights, can be seen in another way by imagining a society only slightly different from our own. We can think of our system of family law as assigning to older people responsibility for the care of younger ones. It is a system of usually implicit licensing, which becomes explicit only when evidence of abuse or neglect raises questions of parental fitness. Imagine instead a system in which the initial assignment of younger people to older ones was routinely reconsidered after two years.[51] I doubt that the older people who received the initial assignment would find in the younger ones "the test of [their] li[ves] and aspirations."[52] In the alternative, imagine a society in which everyone was conscious that family law included a licensing system. There, perhaps, people would begin to think about putting the assignments up for grabs at birth or before. Some older people would be licensed as physically and mentally fit to "produce" children, others as fit to rear them. But one license need not accom-

48. *Id.* at 2993.

49. *Id.* at 2987.

50. *Id.* at 2993.

51. Again there may be some psychological objections raised here, on the ground that infants develop attachments to psychological parents and that it alters their development in a troubling direction to sunder those attachments by reassignments. But I wonder whether those attachments would develop to the same extent in a society in which the norm was reassignment rather than retention in the original family and whether sundering the attachments in such a society necessarily would alter development in a troubling rather than an encouraging direction.

52. *See* Richards, *supra* note 37, at 28. As with the property-based argument for the right to reproductive choice, *see supra* text accompanying note 13, the argument I criticize depends in large measure on the metaphoric force of calling children "ours."

pany the other.[53] In that society biological parenthood would not give rise to rights at all. Yet no feature of that society appears to violate the principles of autonomy and equal concern with which Richards began. In addition, although this is less clear, the concept of "parenthood" in that society would be so different from ours that its members might not think of "parents" as having rights at all.

James Fishkin has recently argued that efforts like Richards' are inevitably beset by contradiction.[54] Fishkin argues that attempting to specify the meanings of autonomy and equal concern and respect produces a conflict between parental autonomy and equal opportunity for children.[55] This conflict arises because parental choices substantially influence the life chances of children, and because what Richards calls "social policies" to "accommodate[] the end of individualized care . . . more justly"[56] in fact intrude substantially on the sphere of parental autonomy. If Fishkin is correct, the effort to move from the grand abstractions of "a theory of human rights" to a specification of determinate, particularized rights cannot succeed.[57]

(b) The generalization.—Fundamental indeterminacy occurs because rights have a social context. When we try to specify a particularized right in some localized area, we discover that we have committed ourselves to a description of an entire social order.[58] This point, at least, has not escaped the Justices. *San Antonio Independent School District v. Rodriguez*[59] is pervaded by the Court's concern that recognizing a right to attend a school financed by a relatively equalized system would produce consequences for the tax system, the system of property rights, the balance between central and local direction of education, and so on. When the Court in *Washington v. Davis* rejected a claim that policies could be invalidated solely because of their disproportionate adverse impact on blacks, it said:

53. *See* Lafollette, *Licensing Parents,* 9 PHIL. & PUB. AFF. 182 (1980).

54. J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

55. *Id.* at 51-55. Nothing in Fishkin's argument turns on assigning power to make decisions to biological parents. The contradictions he identifies arise solely because decisions are committed to parents. *Id.* at 36-37.

56. Richards, *supra* note 37, at 21-22.

57. For another example of the discontinuity between endorsement of rights in the abstract and unsupported claims that particular rights follow therefrom, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

58. For an especially dramatic example from the anthropological literature illustrating how the meaning of following rules is determined by the social context in which the rules are articulated, see T. COMAROFF & S. ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (1981).

59. 411 U.S. 1 (1973).

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[60]

Even more generally, because rights have a social context, their realization as a fact of social life rather than their mere recognition in political and legal rhetoric requires that right-holders have the material and psychological resources that will allow them to exercise their rights. Yet liberal rights rhetoric ordinarily fails to consider that fundamental social changes are necessary to allow people to exercise their rights. As Fishkin puts it, liberalism "accept[s] background inequalities provided that certain process-related equalities are maintained."[61] *Rodriguez* demonstrates this point also. Advocates of school finance equalization argued that it was required by the first amendment, because children disadvantaged in the educational system—left functionally illiterate or ill-informed about public matters—would be disadvantaged in the political system as a result. The Court responded that it had "long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to . . . guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[62] Similarly, a "volunteer" army in a class-divided society, which structures options so that some find it easier to choose to be soldiers than do others, illustrates the relation between one right and all the others.

Specifying a particular right is thus either an act of political rhetoric or a commitment to social transformation. In this way the indeterminacy critique recapitulates the instability argument.

3. The Scope of the Indeterminacy Critique.—I have argued that particular rights exist in and therefore define a dense network of other legal rights and social arrangements. But the critiques developed so far undoubtedly seem at least a little askew. In the past, after all, the party of humanity has effectively appealed for political support on the ground that those in power were betraying their own stated commitments to legality. We know, moreover, that the Helsinki Watch

60. 426 U.S. 229, 248 (1976).

61. J. FISHKIN, *supra* note 54, at 6. Fishkin here describes Ely's position, J. ELY, DEMOCRACY AND DISTRUST (1980), in constitutional law. In contract law, Hale, *Bargaining, Duress, and Economic Liberty,* 43 COLUM. L. REV. 603 (1943), provides the parallel critique.

62. 411 U.S. at 36 (emphasis in original).

groups, monitoring the failures of "actually existing" socialist states in Eastern Europe and the Soviet Union to honor human rights, are speaking to audiences that would be more than happy to have their governments honor human rights. In the face of these facts of political life, how can the instability and indeterminacy critiques be sustained?

The answer is built into the critiques themselves, which insist that talk about rights is always tied to particular social contexts. One important element in the context is the degree to which the arguments from instability and indeterminacy seem cogent to people in the relevant audiences. That degree differs from one culture to another. In a society whose legal culture remains relatively formalist, the arguments will not seem cogent, and the concept of rights will have real significance. That is why Helsinki Watch groups are important. But it is also why the Left in Great Britain is properly opposed to the adoption of a Bill of Rights; in that culture a Bill of Rights would enhance the political power of the privileged without bolstering the position of the Left.

Although I am open to argument the other way, the instability and indeterminacy critiques seem to have substantial cultural power in the United States.[63] In addition, the critiques themselves rest on assumptions about language and social life that seem simply to be true.[64] Yet the realist influence is not so dominant as to have swamped all opposition. The American Civil Liberties Union remains an important force, and its members have been active in Helsinki Watch. This conflict within the legal culture, and the enduring commitment to rights in the culture generally, raise important questions of political strategy. If in fact the instability and indeterminacy critiques rest on views of language and social life that *are* simply true, can the party of humanity temporarily abandon the critiques in order to appeal to those who have not yet recognized their force? If the critiques are persuasive within that part of the society with which the party of humanity is affiliated, what sort of political action is appropriate with respect to other parts of the society? These are both versions of the "unions in Poland" argument: how can the Left simultaneously make the critical argument against rights and approve of Solidarity and Helsinki Watch? Or at least, how can it do both in good faith? I will argue later that it can do so on pragmatic grounds. For now it is enough to say that if the critiques rest on true views of language and social life, they cannot be made to go away by invoking the "unions in Poland" argument. Thus, we

63. *See* Tushnet, *Post-Realist Legal Scholarship,* 1980 WIS. L. REV. 1383 (arguing that efforts to revitalize formalism have failed).

64. *See* Kennedy, *Critical Labor Law Theory: A Comment,* 4 INDUS. REL. L.J. 503 (1981).

must defend our judgments on some other ground. If the critiques are culturally bound, however, there is nothing odd about saying that rights in Poland are a good thing, while rights in the United States are not. They are, after all, different cultures.[65]

C. Reification

The language of rights is attractive in part because it seems to describe important aspects of human experience. We all fear, but also desire and need, the influence that other people have on our lives. Some rights, like the right to reproductive choice, protect us against the intrusions that others may seek to visit upon us. Other rights, like the rights to nutrition or education, secure from others some of the things we need to flourish.[66] Thus, the language of rights captures the contradictory predicament of people as at once alone and together, independent and yet necessarily in solidarity with others, individuals whose lives have meaning only in society. The language of rights attempts to describe how people can defend the interests they have by virtue of their humanity against efforts by others to suppress those interests or to live indifferent to the suffering caused by failing to recognize the interests of others.

I could not sensibly deny the importance of experiences of independence and solidarity. They are central parts of our humanity. But the reification critique claims that treating those experiences as instances of abstract rights mischaracterizes them. The experiences themselves are concrete confrontations in real circumstances, rich in detail and radiating in innumerable directions. When I march to oppose United States intervention in Central America, I am "exercising a right" to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of "exercising my rights." The experiences become desiccated when described in that way. We must insist on preserving real experiences rather than abstracting general rights from those experiences. The language of rights should be abandoned to the very great extent that it takes as a goal the realization of the reified abstraction "rights"

65. This position does not claim that cultures which do not appreciate the force of the critique of rights are backward in any interesting sense. Moreover, if the critique is entirely culturally bound and is not determined by anything inherent in language or human society, we need give no priority to our culture; it just is the way it is, and other cultures just are the way they are.

66. For a discussion of the significance of the infirmity in our society of the latter kinds of rights, see *infra* Part I(D)(2)(b).

rather than the experiences of solidarity and individuality.[67]

Moreover, the social theory according to which rights advance human interests is at best only tenuously established. In one of its incarnations, that social theory calls the critique of rights Stalinist because rights are an important part of what stands between us and the Gulag. In this version at least, the theory is just wildly implausible. In the language of classical rhetoric one might analogize this incarnation of the theory to a synecdoche, which takes the denial of rights, a part of Stalinism, for the whole. The Gulag was, of course, a denial of rights, but surely no one would defend a theory of society or history which held that it was caused by the denial of rights rather than by the personalities of Lenin and Stalin, the social, political, and economic situation of the Soviet Union in the 1920s, and so on.

It is not easy to spell out how the refusal to recognize rights impairs human interests. That would require a theory of interests according to which some people—the oppressors or the indifferent—could advance their interests by suppressing or ignoring the interests of others. The theory would have to distinguish between human interests, those we all have by virtue of our humanity, and specific interests, those each of us has depending on our social position. The theory would then have to explain how the oppressors and the indifferent could advance not only their specific interests but also their human interests by suppressing or being indifferent to the human interests of others. At that point the theory would encounter all the complexities that Jean-Paul Sartre tried to capture in his idea of bad faith. Perhaps it is possible to build up a theory of interests and society that would avoid those complexities, but why bother? It is enough to avoid the reification of rights in the first place and pay attention to the real experiences on which the language of rights rests but from which it improperly generalizes.

Finally I should note a troublesome consequence of the reification of rights. Once my experience in marching to oppose U.S. intervention in Central America is transformed into an example of exercising a right, I may find myself pulled in directions that I would resist were I to confront the issues directly. Having thought of myself as exercising a right to free speech, I will find myself asking whether the Nazis in Sko-

67. Perry argues that in some settings, notably courtrooms, invoking rights is an "appropriate" way to characterize activities. *See* Perry, *supra* note 4, at 1414. Perry does not identify why it would be appropriate, but I gather that he believes it would be pragmatically useful, given the kinds of things audiences in courtrooms expect to hear. If my understanding of Perry's sense of what is appropriate is accurate, then his criticism of this argument reduces to his criticism of the fourth one.

kie or pornographers also have rights to free speech. Of course one can resist this pressure by defining the right to free speech in one way rather than another. Or one can concede the need to protect the "rights" of Nazis and pornographers as a prophylactic in a society not in general devoted to advancing the cause of the party of humanity. But the problem arises because of the reification of rights in the first instance. If we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues on the appropriate level.

D. Political Disutility

Conversations with people skeptical about the critique of rights lead me to suspect that much of what I have already said may be overkill. They usually agree with the indeterminacy critique rather quickly, and are willing to accept the instability critique for purposes of argument. But they say that the critique of rights ought to be rejected because the idea of rights is useful to the party of humanity. This section first will suggest some reasons to be skeptical of the claim that the idea of rights is politically useful and then will develop an argument that the idea of rights is affirmatively harmful to the party of humanity. I do not mean that the idea of rights is on balance actually harmful. Rather, my point is that the pragmatic argument to which defenders of rights retreat when pressed is much less powerful than they normally think.[68]

1. Rights as Not Useful.—Initially, it seems difficult to reconcile the indeterminacy critique with the claim that rights are pragmatically useful. To say that rights are politically useful is to say that they *do* something, yet to say that rights are indeterminate is to say that one cannot know whether a claim of right will do anything. Perhaps on this level utility means that, although the indeterminacy critique is in some

68. Perry properly discusses this critique on the level of political-strategic choice, asserting that invoking rights—at least outside the courtroom—is an effective technique of justification, as against invoking needs. *See id.* at 1415. I am perfectly willing to engage in a strategic discussion with Perry. Indeed, I had thought that my discussion of the first amendment had opened the dialogue. But Perry appears to concede the strategic disutility of appealing to (first amendment) rights before the Supreme Court. I would have thought it incumbent on him to show rather than assert how invoking rights "will make a difference" before some other politically significant audience.

In this connection I merely note Perry's polemical language, traditional in sectarian political arguments, in the penultimate paragraph of his article. *Id.* For a nice illustration of the tradition, see THE SIXTIES WITHOUT APOLOGY 384 (S. Sayres, A. Stephanson, S. Aronowitz & F. Jameson eds. 1984).

sense correct, enough relevant decisionmakers do not accept it that political advances can be achieved by making claims of right.

But there is another sense in which rights might be thought pragmatically useful. In order to establish social control over investment (X), we have to engage in various protest activities (Y). Claiming that we have a right to do Y might be pragmatically useful to the achievement of X in two ways. First, Y might be useful as a means to X. This claim, however, reduces to the prior argument, and I defer its discussion to the next subsection. Second, and more interesting, people who see that our "right" to Y is under attack—"civil libertarians"—might be attracted to our cause and eventually enhance our ability to achieve X.

There is reason to be skeptical about this version of the argument. Something like it motivated the tactics of the Communist Party in its support of the Scottsboro defendants.[69] The defendants, blacks charged with raping two white women, were railroaded through Alabama's court system. Several were sentenced to death. The Communist Party, acting through a front organization called the International Labor Defense, effectively mobilized civil libertarian sentiment in support of claims that the defendants' rights to a fair trial had been denied.[70] Of course civil liberty was not the Communists' ultimate goal. But they believed that by demonstrating that the Communist Party stood for some things civil libertarians valued, they could persuade civil libertarians that other parts of the Communist program were worthy of support. During the Scottsboro period the NAACP was the ILD's primary competitor for civil libertarian support in connection with civil rights struggles. The ILD's position infuriated the leaders of the NAACP, who saw it as a cynical effort to manipulate blacks and civil libertarians. And in some sense the NAACP leaders were correct. If rights are only pragmatically useful, their defenders in foul times will abandon them when the weather changes. If a right to Y is only pragmatically useful as a means to X, Y will be abandoned as soon as some other means to X appears more promising. This consideration undermines at least this version of the argument that rights are pragmatically useful. Many civil libertarians who were attracted to the movement by its stand in favor of rights will feel betrayed when the defense of rights is relinquished. Some, perhaps, will stay on, having

69. *See generally* D. CARTER, SCOTTSBORO 49 *passim* (1969) (discussing role of the Communist Party in the Scottsboro cases).

70. The case produced a major Supreme Court decision on the right to counsel, Powell v. Alabama, 287 U.S. 45 (1932).

been persuaded that their civil libertarianism was false consciousness. But I suggest that the historical record does not stand strongly in favor of this version of the argument.

Finally there is the version of the pragmatic defense of rights that I call the *shanda fur de Goyim* argument.[71] *We* know that the critique of rights is correct, but it would be dangerous to let others know that. Happily for the party of humanity, its opponents are mired in ignorance, which gives the party of humanity a political edge. It is hard to accept this argument and conduct political discussions in good faith; one invokes rights to scare one's opponents, knowing that the stratagem succeeds only because they have not yet caught on to the critique of rights. Further, the factual predicate of the argument seems erroneous. The opponents are not—all of them—stupid. Some of them will come to understand the critique of rights for themselves. They will hire themselves out to those who do not understand, and the truth will be let loose. Rights-talk can be useful only until people discover the critique of rights. And no matter how hard the party of humanity tries to hide the truth, its market value will lead our opponents to discover it. Under the circumstances, it would be better to get the critique of rights out on the floor and out of our way.

2. Rights as Harmful.—It is not just that rights-talk does not do much good. In the contemporary United States, it is positively harmful.

(a) An example: the first amendment.—In 1924, Felix Frankfurter wrote an article for the *New Republic* arguing that the due process clause of the fourteenth amendment should be repealed.[72] On the negative side, he argued, the courts were using the clause to thwart the enforcement of socially beneficial programs adopted through the regular processes of democratic government. On the positive side, the American polity had reached the point at which regular democratic processes could be counted on to protect the interests in fairness with which the due process clause was properly concerned. The balance between harm and necessity tilted in favor of repealing the clause; the occasions for its proper use were rare enough to be outweighed by the

71. I do not vouch for the transliteration. The phrase describes a scandalous situation within the Jewish community about which it would be a shame for the non-Jewish community to learn. Roughly, although it loses something in this version, it means "Don't wash dirty linen in public."

72. *The Red Terror of Judicial Reform,* 40 NEW REPUBLIC 110-13 (1924) (unsigned editorial), *reprinted in* F. FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME COURT 158-67 (P. Kurland ed. 1970) (attributing editorial to Frankfurter).

opportunities for its abuse. I sketch here a parallel argument regarding the first amendment. Although I will concentrate on the negative side of the argument, its positive component, such as it is, should not be forgotten.

The first amendment has replaced the due process clause as the primary guarantor of the privileged. Indeed, it protects the privileged more perniciously than the due process clause ever did. Even in its heyday the due process clause stood in the way only of specific legislation designed to reduce the benefits of privilege. Today, in contrast, the first amendment stands as a general obstruction to all progressive legislative efforts. To protect their positions of privilege, the wealthy can make prudent investments either in political action or, more conventionally, in factories or stocks. But since the demise of substantive due process, their investments in factories and stocks can be regulated by legislatures.[73] Under *Buckley v. Valeo*[74] and *First National Bank v. Bellotti,*[75] however, their investments in politics—or politicians—cannot be regulated significantly.[76] Needless to say, careful investment in politics may prevent effective regulation of traditional investments.

The commercial speech cases similarly protect the privileged in the name of the less privileged. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[77] the origin of contemporary doctrine, considered a state law prohibiting advertising of drug prices. The Court held that the law deprived consumers of information that was central to their informed participation in a market economy.[78] Of course the law at issue was a "bad, old-fashioned" regulation designed to protect an industry against competition.[79] But once let loose, commercial speech doctrine ravaged "new" regulation as well. In *Central*

73. *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

74. 424 U.S. 1, 180 (1976) (ceilings placed on independent expenditures by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1268, held unconstitutional).

75. 435 U.S. 765, 785 (1978) (holding unconstitutional a state law prohibiting certain expenditures by corporations for the purpose of influencing the vote on referendum proposals).

76. There is a substantial critical literature on these cases. On *Buckley,* the best are Wright, *Politics and the Constitutions: Is Money Speech?,* 85 YALE L.J. 1001 (1976), and Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Equality?,* 82 COLUM. L. REV. 609 (1982). On *Bellotti,* the best are Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology,* 1981 WIS. L. REV. 494, and the hysterically funny Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment,* 91 YALE L.J. 235 (1981).

77. 425 U.S. 748 (1976).

78. *See id.* at 763-65. *Compare id. with* Kleindienst v. Mandel, 408 U.S. 753 (1972) (sustaining a provision of the Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006-10, making foreign Communists ineligible to receive visas, despite the claim that the provision infringed the interests of those willing to listen).

79. It is worth noting that the regulation protected small businesses against the competitive

Hudson Gas & Electric Corp. v. Public Service Commission, the Court invalidated an effort to regulate advertising promoting the use of energy.[80] *Central Hudson* can be seen more broadly as obstructing legislative attempts to regulate the way in which advertising and other kinds of messages shape public consciousness about what our problems are, what solutions would be reasonable, and why some things are reasonable and others are not.[81] Thus, for example, when proposals for social control of investment can be dismissed as utopian, the commercial speech cases converge with the campaign finance cases.

These cases are unequivocally pernicious uses of the first amendment. I take it that most liberals agree. Often they want to treat the decisions as aberrations, simply wrong decisions that depart from the true meaning of the first amendment. To the extent that they have conceded the validity of the indeterminacy critique, however, that response ought to embarrass them. But even more important, wrong or right the decisions exist as part of the contemporary use of the first amendment, which we are trying to evaluate pragmatically in light of the political interests of the party of humanity. Score several points for the disutility critique.

Other parts of first amendment law are more problematic. I have yet to run across a decent argument that access to sexually explicit material of the sort protected by the Court's obscenity decisions[82] is itself a positive good. In the free press/fair trial controversy, the present balance between the interests of defendants and victims, on the one side, and the morbid curiosity of the press, on the other, is not obviously correct.[83] Perhaps a case can be made that these doctrines serve a useful prophylactic purpose; it is not that sexually explicit material is itself a positive good, but it must be protected so that censors do not regulate material, with sexual overtones, that *is* a positive good.[84] Now, however, it is appropriate to invoke the positive component of Frank-

pressures exerted by larger ones, such as Hyatt Legal Services and the new Emergency Care Centers. There are of course political consequences to such a course.

80. 447 U.S. 557 (1980).

81. For a more thorough discussion, see Tushnet, Book Review, 1984 WIS. L. REV. 129, 140-45.

82. *See, e.g.,* Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974) (holding that no jury constitutionally could find the film *Carnal Knowledge* obscene); Miller v. California, 413 U.S. 15, 23-24 (1973) (holding that a work can be found as obscene only if it has no serious literary, artistic, political, or scientific value when considered as a whole); Redrup v. New York, 386 U.S. 767 (1967) (reversing conviction on ground that material was not obscene).

83. *See, e.g.,* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (names of youthful offenders); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (names of victims).

84. The facts of Jenkins v. Georgia, 418 U.S. 153 (1974), in which a state court held that the film *Carnal Knowledge* was obscene and the Supreme Court reversed, suggest that a strong prophylactic rule is necessary.

furter's argument. If a case for the prophylactic value of first amendment doctrine can be made, so too, and perhaps more powerfully, can the case be made that in contemporary political circumstances the dangers against which the doctrine guards are largely hypothetical.[85] If first amendment doctrine protects material for which the positive grounds for protection are weak, and if the dangers would rarely be realized because of the level of maturity in our political institutions, the pragmatic balance would seem to be against the doctrine. Score one or two for the disutility critique.

I realize that I have inverted the usual approach to first amendment doctrine. In effect, I have used The *Additional Problems* chapter of Professor Gunther's casebook[86] to introduce the first amendment. (Perhaps there is a message in *his* way of organizing things.) What can be said about his *Basic Themes*?[87] In the tenth edition, sedition and public forum materials occupy 200 of the chapter's 220 pages,[88] so I concentrate on them.

The contemporary law of the public forum gives some comfort to the party of humanity, but not much. In current doctrine, areas for speech activities are divided into three categories: traditional public forums and those deliberately opened to speech activity, limited-purpose public forums, and nonpublic forums.[89] Access to forums in the first category, which includes streets and parks, must be guaranteed subject only to reasonable time and manner restrictions. Access to places in the second category must be guaranteed so long as the speech activity does not substantially interfere with the normal activities in the forum. Access to places in the third category may be denied entirely or granted selectively. Several things are noteworthy about this scheme. First, the line between limited-purpose forums and nonpublic forums is not well defined. Indeed, the Court has never explained why, for example, a school is a limited-purpose public forum[90] while a teacher's mailbox is not a public forum of any sort.[91] It is striking that *Brown v.*

85. The indeterminacy critique ought to make us skeptical about the power of first amendment doctrine in circumstances where the political barriers are overcome and the dangers are realized.

86. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1326-1545 (10th ed. 1980).

87. *Id.* at 1105-1325.

88. *Id.*

89. This summary is drawn from Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 954-55 (1983).

90. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

91. It is possible to treat the teacher's mailbox case, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 955-56 (1983), as a case involving the special characteristics of public sector labor relations, in which the designated bargaining agent is guaranteed special access to the

Louisiana,[92] which applied limited-purpose forum analysis to a library, appears to have disappeared from the doctrine; it was cited in neither of the Court's most recent decisions. This suggests that the third category might have some expansionist tendencies.

Second, the test of "substantial interference" is plainly subject to substantial manipulation. In its most recent uses, it has restricted access. More important, *Greer v. Spock*[93] applied the test in a way that guts it of any significant use to the party of humanity. In that case, the Court denied access to a military base in part on the ground that access would interfere with the symbolic separation of the military and politics. Once interference with symbols becomes a sufficient reason to restrict access, the game is over. Schools are symbolic temples of disinterested learning, and so on.

What we are left with, finally, is a public forum doctrine that unequivocally protects access only to the streets and parks.[94] I do not deny the political significance of this part of the doctrine; demonstrations in the streets provide important opportunities for people to come together, see how many they really are, and begin to overcome their political alienation. But recent experience has shown that street demonstrations are not enough. Drama is required to attract public attention.[95] Given the structural demands of press coverage, drama means either engaging in or being the victim of discrediting violence, or developing some novel form of protest like sleeping in tents across from the White House. Yet precisely because effective types of protest must be novel, they are not protected by public forum doctrine. Score one against the disutility critique.

As for sedition, again I must emphasize the positive component of the argument: More sophisticated conservatives understand that they no longer need antisedition laws. The status quo is so entrenched that efforts to displace it are likely to involve activities that can constitutionally be made illegal without regard to speech: factory occupations (trespass), fragging (murder), and the like. Even during the height of the repression during the Vietnam War, legal attacks on dissent took

workers. But that explanation cannot account for United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 128-29 (1981), in which the Court adopted essentially the same analysis in the context of purely political activity by a civic association.

92. 383 U.S. 131 (1966).

93. 424 U.S. 828 (1976).

94. I am skeptical about the analytic stability of the category of areas "deliberately opened" to speech activity. It is always possible to narrow that category by redefining the activities to which the area was deliberately opened.

95. *See, e.g.,* D. GARROW, PROTEST AT SELMA (1978); T. GITLIN, THE WHOLE WORLD IS WATCHING (1980).

the form of prosecutions for conspiracy to cause unquestionably illegal activity. In classic sedition prosecutions, speech was either the offense itself[96] or was said to be causally related to illegal activity.[97] In the Vietnam era prosecutions, speech played a different role. It was merely evidence of conspiracy. Because conspiracy involves agreement that can be manifested in words, civil libertarians struggled hard to come up with first amendment defenses. They achieved some incredibly fragile victories,[98] whose analytic contortions make it clear that the next time around they need not impede those who would suppress dissent. Thus, it seems unlikely that the achievements of first amendment sedition doctrine amount to much in contemporary circumstances.

In this connection I find it significant that the facts underlying the crowning achievement of sedition doctrine, *Brandenburg v. Ohio,*[99] involved a Nazi speaker, although of course the case was decided by a Court acutely conscious of the ongoing antiwar protests. If the political situation should heat up again, I am not at all confident that *Brandenburg* would remain untouched by more recent cases deferring to national security interests.[100] *Brandenburg* purported to apply the doctrine of *Dennis v. United States,*[101] and though the citation is plainly disingenuous, *Dennis* remains available for use against the party of humanity. Score a smidgen against the disutility critique.

In its 1982 term, the Supreme Court upheld free speech claims made by newspapers seeking reduced taxes,[102] by contraceptive manufacturers seeking access to the mails for advertising,[103] by supporters of John Anderson seeking access to Ohio's ballot in the face of restrictive statutory regulations,[104] by people who wished to carry political banners on the grounds of the Supreme Court,[105] and by the Socialist Workers' Party seeking to conceal the names of contributors to its campaign fund.[106] These add up to something, to be sure, but one can wonder whether the benefits the cases provide to the party of humanity

96. *See* Gitlow v. New York, 268 U.S. 652 (1925).

97. *See* Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919).

98. *See* Greenawalt, *Speech and Crime,* 1980 AM. B. FOUND. RESEARCH J. 645 (discussing the problems raised by Vietnam era prosecutions).

99. 395 U.S. 444 (1969) (per curiam).

100. *See, e.g.,* Haig v. Agee, 453 U.S. 280 (1981); Snepp v. United States, 444 U.S. 507 (1980).

101. 341 U.S. 494 (1951) (holding constitutional a law prohibiting willful advocacy of the forceful overthrow of government).

102. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983).

103. *See* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983).

104. *See* Anderson v. Celebrezze, 103 S. Ct. 1564 (1983).

105. *See* United States v. Grace, 103 S. Ct. 1702 (1983).

106. *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87 (1982).

outweigh the costs of the rest of first amendment doctrine. Pragmatic arguments of course should be more comprehensive than this. Although I suspect that they cannot be made conclusively in print, perhaps the argument made here has shown that the pragmatic defense of the first amendment is open to serious question. If *it* is, what remains of the pragmatic defense of rights?

(b) The generalization.—Part of the conventional wisdom about rights distinguishes between negative rights—to be free from interference—and positive rights to have various things.[107] People sympathetic to the party of humanity usually agree that the present balance between negative and positive rights is askew and that we should strengthen or create positive rights while preserving most of our negative rights. Yet, viewed pragmatically, it may be impossible to carry out that program. In our culture, the image of negative rights overshadows that of positive ones and may obstruct the expansion of positive rights.

The distinction between negative and positive rights reflects and perhaps is based on a fundamental aspect of our social life. We fear that others with whom we live will act so as to crush our individuality, and thus we demand negative rights. But we also know that we need other people to create the conditions under which we can flourish as social beings, and thus we need positive rights. In our culture, the fear of being crushed by others so dominates the desire for sociality that our body of rights consists largely of negative ones. The language of negative rights supports a sharp distinction between the threatening public sphere and the comforting private one.[108] The very idea of negative rights compels us to draw that distinction. But it is possible to see the public sphere as comforting and the private one as threatening. Indeed, the idea of positive rights compels us to blur the distinction. That means, however, that it will be difficult to develop a rhetoric of rights that both creates and denies the distinction between public and private, that justifies both negative and positive rights. The contemporary rhetoric of rights speaks primarily to negative ones. By abstracting from real experiences and reifying the idea of rights, it creates a sphere of

107. The most influential exposition of this distinction is I. BERLIN, *Two Concepts of Liberty,* in FOUR ESSAYS ON LIBERTY 118 (1969). A useful critique, developing and expanding some criticisms made by C.B. Macpherson, is A. LEVINE, LIBERAL DEMOCRACY: A CRITIQUE OF ITS THEORY 181-93 (1981).

108. *See generally A Symposium: The Public/Private Distinction,* 130 U. PA. L. REV. 1289 (1982) (discussing public/private distinction in constitutional, labor, corporate, and real estate law).

autonomy stripped of any social context and counterposes to it a sphere of social life stripped of any content. Only by pretending that the abstract sphere of social life has content can we talk about positive rights.

Moreover, the predominance of negative rights creates an ideological barrier to the extension of positive rights in our culture. I find it striking that the rights actually recognized in contemporary constitutional law are almost all negative ones. To the extent that our society recognizes positive rights, it does so through statutory entitlement programs, which are subject to substantial political pressure and which receive almost no constitutional protection.[109] Judge Posner has summarized the constitutional scheme:

> [It] is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do to much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. . . .
>
> The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others. The Supreme Court has refused to go so far . . . . Whether the Court has refused because a guarantee of basic service cannot easily be squared with the text or intellectual ambience of the Fourteenth Amendment or because judges lack objective criteria for specifying minimum levels of public services or are reluctant to interfere with the public finance of the states need not trouble us. It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise.[110]

We could of course have a different Constitution. Or, as some prefer, we need not accept this as a description of the "true" Constitution. Its sense of history, for example, is woefully deficient. But the persuasive power of the description cannot be denied. And because it

109. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970).

110. Jackson v. City of Joliet, 715 F.2d 1200, 1203-04 (7th Cir. 1983) (Posner, J.) (citations omitted).

is persuasive, it obstructs the development of a more complete set of positive rights. One can argue that the party of humanity ought to struggle to reformulate the rhetoric of rights so that Judge Posner's description would no longer seem natural and perhaps would even seem strained. I cannot pretend to have an argument against that course and would not want to weaken my comrades' efforts to build a society that guarantees positive as well as negative rights. But there do seem to be substantial pragmatic reasons to think that abandoning the rhetoric of rights would be the better course to pursue for now. People need food and shelter right now, and demanding that those needs be satisfied—whether or not satisfying them can today persuasively be characterized as enforcing a right—strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.

Once again there are no dispositive pragmatic arguments. But once again the case for the pragmatic disutility of rights is stronger than defenders of its utility like to think.

II. Grounding the Critique

The anomaly in what has gone before should have escaped no one's attention. The critique of rights takes a strong relativist position; it insists that rights-talk is meaningful only when it is placed within a full social and legal context. The critique culminates in a pragmatic assessment of rights in contemporary legal discourse. But pragmatic assessments are impossible in a completely relativized system, in which there are no criteria by which to evaluate whether something is pragmatically useful or not.

This Part briefly explores whether this apparent anomaly is in fact genuine. I will present two fundamentally incompatible arguments in support of the position that it is not. Both arguments attempt to ground the critique of rights, to overcome this paradox of relativism. I believe one of them on Mondays, Wednesdays, and Fridays; I believe the other on Tuesdays, Thursdays, and Saturdays. (On Sundays I think about modern literature and art.)[111]

A. Habermas and Human Interests

One method of grounding the critique of rights would be to have at hand a fully developed theory of human interests. We could then examine any social practice and evaluate whether it promotes or impedes human interests. Jurgen Habermas' work is the most extended

111. Or is it the other way around?

effort along these lines in recent social theory.[112] Habermas identifies three distinct human cognitive interests. The technical interest guides instrumental action designed to accomplish something in the world by obtaining control over external nature.[113] The technical interest lies, for example, behind efforts to develop a working automobile. For Habermas, the physical sciences exemplify the sphere in which the technical interest prevails. One scientific principle is better than another if invoking it rather than the alternative allows us better to achieve the goals we have set for ourselves.

The second human interest is the practical interest. It guides action in the social world, allowing us to coordinate our actions to accomplish our goals.[114] Actions that advance the practical interest help us gain understanding of our social lives. The test of knowledge is also pragmatic: a principle serves the practical interest if it in fact allows better coordination than the alternatives.

Finally, Habermas identifies an emancipatory interest, for which his model is the process of psychoanalysis, in which intensive reflection on our own lives, carried on by offering to another our own interpretations of our experiences in order to test our understanding of them, leads us to a position in which we can fully realize our humanity.[115]

Part of the time I believe Habermas is right. His universal pragmatics, once it is linked to an emancipatory interest, provides the basis for evaluating actions and principles in terms of the interests of the party of humanity. Further, although here I venture far beyond my competence, what Habermas says about human interests seems to form part of a developing body of thought attempting to provide some basis for rational political judgment in the face of the attractions of complete relativism.[116] If only I could sustain the sense that Habermas was right, all would be well. I could apply pragmatic tests to all sorts of discourse; I could explain why one might say some things to one audience and other things to another while believing that both were in the relevant sense true. Finally, I could continue to make relativized judgments while insisting that I was not in principle an ethical relativist.

It also seems likely that one could begin to develop a blueprint for

112. The body of work is usefully summarized in T. McCarthy, The Critical Theory of Jurgen Habermas (1978).

113. *See id.* at 60-68.

114. *See id.* at 68-75.

115. *See id.* at 75-91.

116. *See, e.g.,* P. Feyerabend, Science in a Free Society (1978); A. MacIntyre, After Virtue (1981); H. Putnam, Reason, Truth and History (1981); R. Rorty, Consequences of Pragmatism (1982). These authors disagree among themselves on a number of issues, but insofar as I understand them they appear to disagree within a single camp.

change on the basis of Habermas' ideas. It might include things like guarantees of rough material equality in access to basic resources, guarantees of participation in political action ("rights"), worker control of production, social control of investment, rotation in offices charged with administering the distribution of resources and jobs, and rotation in job assignments within enterprises and from one activity to another.[117] All in all, this blueprint seems like a realistic utopia, something that is obviously attractive.

Two difficulties with this framework are worth mentioning here. First, Habermas distinguishes between the technical, practical, and emancipatory interests so that he can preserve what seems intuitively indisputable, that the physical sciences yield nonrelativized knowledge. But there is a strong and, to me, persuasive pragmatic attack on that apparently indisputable truth.[118] If the interest whose identification seemed at first intuitively obvious turns out to be completely relativized, one is certainly entitled to worry about the more problematic emancipatory interest.

Second, and more significant, it seems impossible to divide up the world of human life in the way that Habermas desires. The coherence of the notion of a technical interest depends on identifying some action as instrumental. But making that identification is itself engaging in practical and potentially emancipatory action. How do we know that we want automobiles in order to get us from one place to another at an acceptable level of expenditure? Maybe we want automobiles because they express something about our images of ourselves, our relation to the natural environment, and our disconnectedness from other people. When the categories of interest collapse into one, it becomes impossible to apply a pragmatic test to decide whether human interests are being served or not. If you think that the action is unlikely to advance the technical interest, you just have to throw in some practical or emancipatory interest to make the balance come out right.

In later work Habermas has reformulated his position. Instead of relying on a theory of human interests, he has attempted to derive the equivalent of the emancipatory interest by identifying social arrangements that are implicit in the enterprise of living in a social world. Drawing on the work of some philosophers of language, Habermas argues that lurking in all speech is the notion of an ideal speech situation

117. Ursula K. LeGuin presents a brilliant account of how such a blueprint might be filled in and what its consequences might be. U. LEGUIN, THE DISPOSSESSED (1974).

118. *See* P. FEYERABEND, *supra* note 116; T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

in which communication is not distorted by the coercive power structures of the social arrangements in which we now find ourselves. Such a view compares favorably with psychoanalysis, in which a successful analysis of the transference eliminates the artificial barriers that real differences in power place between the analyst and the client. Similarly, Habermas argues, all speech implicitly claims validity because the participants have equal power. In this version of the argument, the emancipatory interest lies in realizing in society the social arrangements already implicit in speech: relatively equal power, relatively equal access to material resources, and so on.[119]

Again I find myself both attracted to and puzzled by the notion of the ideal speech situation. Habermas nicely overcomes the classic separation of "is" and "ought" by finding the "ought" implicit in the "is."[120] Yet I remain unpersuaded that the very idea of speech entails the social arrangements that Habermas wishes to bring into existence. The move that transforms emancipation into the realization of something already here strikes me as too slick.

There is another way of articulating my discomfort with reliance on a theory of human interests to ground a political decision to support the party of humanity. I cannot identify a set of interests that qualify as transcendent "human" interests rather than as interests that arise in particular social settings. There is a human interest, for example, in having enough food to eat. But then I think about the IRA leaders in the Maze prison, who found that they flourished by starving themselves to death.[121] Of course, it is possible to work around the example by arguing that the prisoners in the Maze were not actually advancing their true human interests but were advancing interests that seemed true to them only because their social situation severely constrained their ability to advance their true interests. But that gives the game away, because it means that we can identify true human interests only by spelling out in all their details the social arrangements within which the interests will be located.

The discomfort that the example of the Maze produces is perhaps a natural result of the view of the social world that underlies the critique of rights. The point of the instability, indeterminacy, and reification critiques is that the social world is entirely constructed by choices

119. For similar efforts, see Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development,* in THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 101 (1981).

120. *See* T. MCCARTHY, *supra* note 112, at 306-10.

121. This is just a specific version of the difficulty that theories of human interests experience in dealing with the problem of evil.

that people make, that there is nothing beyond what we choose to find there. Yet if the world is already what we choose it to be, why choose to make it one thing rather than another?

B. Oppositionism

There is unnecessary suffering in the world we have chosen to create. That fact alone is enough to ground the critique of rights, to justify opposition to the way things are. One does not side with the party of humanity because its program will lead to human emancipation; there is no such thing as a transcendent humanity lying around waiting to be emancipated, or even to emancipate itself. One sides with the party of humanity because it is defined as the party in opposition to what exists.

1. Against Blueprintism.—Initially it seems only reasonable to require that the party of humanity provide a blueprint, even a crude one, of a transformed society. But blueprints invariably lead to a number of rhetorical traps, which I will label utopianism, lack of program, and Stalinism. Oppositionism's refusal to accede to such requests, although initially annoying, proves in fact to be an essential component of the process of social transformation.

(a) The utopianism trap.—The request for a blueprint begins modestly enough, with opponents asking for some idea of how things will be in a transformed society, so that they may evaluate its attractions and risks as compared with the status quo. But suppose one responds that there will be lots of bicycles and computers, and that judges will wear wigs. Opponents of the party of humanity invariably treat that as a flippant answer; they want a blueprint that deals with "fundamentals" like the organization of work (how are the bicycles to be produced), distribution (who gets the computers), and politics (who decides on the mix between computers and bicycles).

This request for a blueprint dealing with fundamentals is a trap for several reasons. First, one quickly discovers that the opponents really want not a blueprint but an incredibly detailed program that deals with everything our current system does: pollution, idiosyncratic preferences, perversion, and so on. One cannot possibly satisfy the impulses that generate the request for a blueprint. Even more, as soon as the details begin to be sketched in, the "blueprint" can be dismissed either as hopelessly utopian—impossible to implement without major changes in personality structures—or mindlessly sectarian—produced by someone who thinks it important to take a position on the Albanian question. The principle of job rotation, for example, is challenged as

inevitably leading to economic inefficiency as those whose natural talents give them comparative advantages in some specialty are forced out of that job. (I wouldn't want to drive a car I had helped make. But perhaps my mechanical clumsiness is as much a trained incapacity as my facility at legal argument is a trained capacity.) As it happens, there are many responses to the objection of inefficiency. Comparative advantages are in fact relatively small; people need not leave their jobs unless there is a demand for the jobs from others; and demands are unlikely to occur if nothing special like added income or prestige attaches to the job. But the more detailed the responses become, the more utopian the scheme seems. How, for example, are we going to guarantee that nothing special attaches to jobs whose incumbents wish to remain there?[122]

But the fundamental trap in the request for a blueprint dealing with fundamentals is its premise that there are in fact fundamentals of social organization. The premise is that one can start with positions on things like the organization of work and distribution and spell out their implications for social structure, but that one cannot start with things like bicycles, computers, and wigs and spell out *their* implications. I agree with the latter proposition, but wonder about the plausibility of the theory of society that underlies the former. Or, alternatively, I believe that to the extent that one can spell out the implications of positions on the organization of work, to that very same extent one can spell out the implications of bicycles, computers, and wigs. I suspect that there is an analogue to the critique of rights in the critique of social theory. At the very least, the party of humanity ought to place the burden on its opponents to spell out the social theory that leads them to identify fundamentals before accepting the terms of the request for blueprints.

(b) The lack of program trap.—Suppose one does provide a blueprint of the sort requested, and suppose it includes job rotation as a fundamental principle. Not very much in the present program of the party of humanity speaks to job rotation. Indeed, to the extent that corporations sponsor "Quality of Work Life" programs that include job rotation, the party of humanity ought to *oppose* them. Opponents will then charge the party of humanity with inconsistency and opportunism for failing to support programs aimed directly at implementing ele-

122. *See generally* J. CARENS, EQUALITY, MORAL INCENTIVES, AND THE MARKET: AN ESSAY IN UTOPIAN POLITICAL-ECONOMIC THEORY (1981) (outlining utopian scheme in which moral rather than material incentives are used to encourage production).

ments of the blueprint and jumping on the bandwagon of opposition even if the issue has nothing to do with the blueprint.

Once again the trap is sprung because the opponents rely on an unstated and strongly held theory of social transformation. Failing to support some forms of job rotation, or even refusing to adopt an ideal form of job rotation as part of today's political program, is inconsistent only if one gets from here to there by equating today's program with the immediate realization of "there." Yet that is by no means true. The immediate implementation of one part of the blueprint such as job sharing within a social setting in which nothing else changed might impede rather than advance social transformation.[123] In addition, because social structures are complex, even if an ideal system of job rotation were established it might not lead to general transformation as directly or as quickly as other actions. Complexity means that the best one can do is assess the existing circumstances and make a tentative political judgment about what seems most likely to do a little good. There are no grand strategies for general transformation, only careful analysis of existing and usually quite localized circumstances. Thus, there need be no obvious connection between today's program and the blueprint. But once having acceded to the request for a blueprint, one is at a rhetorical disadvantage when there appears to be no connection at all between today's program and the blueprint.

(c) The Stalinism trap.—The Stalinism trap is laid so often that I suspect that it is the real motivation for the request for a blueprint.[124] The trap is sprung when an opponent looks at the blueprint, identifies what seem to him to be tensions, and demands to know how the tensions—between job rotation and relatively equal access to material well-being, for example—can be resolved without a permanent, centralized, and highly coercive bureaucracy.

The Stalinism trap comes in a common unsophisticated version and in an unusual sophisticated one. The unsophisticated version simply counterposes things as they are, or the ideal form of liberal capitalism, to the worst possible transformed world. Of course it would be senseless to deny that the best liberal capitalist order could be better than the worst socialist one, unless one built criteria of good and bad into the definitions of socialism and liberal capitalism. But the unso-

123. For a critique of a position akin to mine, see Levinson, Book Review, 96 HARV. L. REV. 1466 (1983) (criticizing, for continuing to record grades, those who condemn arbitrary grading systems). The observations in the text seem to me adequate to deal with this critique.

124. For a delicate version of the Stalinism trap, see M. YUDOF, WHEN GOVERNMENT SPEAKS 87-88 (1983).

phisticated Stalinism trap can be taken seriously only if we make three additional assumptions: (1) that things as they in fact are, are basically all right (although marginal tinkering may be needed); (2) that liberal capitalism has no dynamic that drives it toward disaster; and (3) that the blueprint has such a dynamic. The party of humanity need accept none of those assumptions.

The sophisticated version of the Stalinism trap makes these assumptions. In support of the third, it argues that people have devised only two fundamental ways of coordinating large-scale societies: markets and politics.[125] Invoking Michels' "iron law of bureaucracy" and Weber's concept of the routinization of charisma,[126] it argues further that coordination through politics must degenerate into bureaucratic domination of the citizenry. The determinism of this social theory is striking, especially considering its thin empirical foundation. Michels relied on the experience of European Social Democratic parties at the turn of the century; his vision remains powerful because of the experience of Stalinism. But close examination of the relevant history would surely show that the commitment to a particular type of politics made nothing inevitable; personalities and the world situation,[127] for example, had more to do with the Social Democrats' nationalism in 1914 than did their political commitments. Without romanticizing limited experiments, we can nonetheless find experiences since 1945 which suggest that Michels' law is not made of quite as much iron as those who set the sophisticated Stalinism trap think.[128]

The other assumptions that give the Stalinism trap force—that things are all right and that liberal capitalism has no tendency to degenerate—are questionable, and both for basically the same reason. Contemporary discussions in the United States of liberal rights are incredibly parochial. They discuss the good society only as it is found in the United States (and, sometimes, Western Europe). That approach is parochial in two ways. First, among advanced societies the United States is probably the most retrograde in its recognition of positive rights, which makes taking it as the ideal form of liberal capitalism a

125. *See* C. LINDBLOM, POLITICS AND MARKETS (1975).

126. For discussion of Michels, see A. MITZMAN, SOCIOLOGY AND ESTRANGEMENT 267-338 (1973). For discussion of Weber, see FROM MAX WEBER 51-54 (H. Gerth & C. Mills eds. 1958).

127. This aspect of the analysis was captured in the debates between Stalin and Trotsky over the proposition that socialism could be created in one country and then spread throughout the world.

128. Because the usual examples are Scandinavia, Yugoslavia, Cuba, and Maoist China, one should resist the temptation to romanticize. *Cf.* Salas, *The Emergence and Decline of the Cuban Popular Tribunals,* 17 LAW & SOC'Y REV. 587 (1983) (analyzing the factors that led to the development and demise of Cuban popular courts).

little odd. Second, and more important, the United States is one of the great empires in world history. As with all empires, life in the metropolis goes on as well as it does only because the metropolis exploits the provinces.[129] Once our attention is drawn to conditions in the rest of the world, oppositionism seems the only rational course. Things are on the whole terrible, and their overall terribleness may be systematically linked to conditions in the United States.[130]

In its strongest version, the Stalinism trap asks why a moderately risk-averse person (selected at random from the entire population of the world) should try to alter the way things are. The answer is clear: conditions of life overall are so near the floor that the cost of falling to the bottom discounted by the likelihood of such a disaster is more than offset by the benefits of alternative forms of social life discounted by the likelihood of their realization. When I said at the start of this section that there was unnecessary suffering in the world, I meant every word.

2. Conclusion.—And what if things change? If there is no transcendent humanity, when things change all that will be left is to remain in opposition.

III. Conclusion

It is of course difficult to live one's life believing that the social world is entirely constructed. Every time one thinks about it, the social world dissolves into a set of choices that one has made. (What is the meaning of writing this article?) Every decision becomes political. One asks oneself, do I think that this rather than that is, as far as I can tell now, more likely to advance the cause of the party of humanity?

But that question is itself tremendously liberating. It rests on an understanding of the social world that tells me that nothing is necessary, that everything is contingent, that I need not resign myself to how things are or to supporting those modest changes that are possible given the constraints placed on social life by a relatively unchanging human nature or by the demands of some technical apparatus. That view of the social world does not ground the choice to join the party of human-

129. I take no position on the condition of the underclass in the metropolis. It may be as bad as the condition of groups elsewhere in the world, or it may be better because of the imperial exploitation of the provinces. I doubt that anything significant in my argument turns on the underclass' condition.

130. The Soviet Union is the contemporary world's other great empire. Perhaps each empire exists in part as a parasite on the other, which provides it with the image of the horrors associated with abandoning the quest for true realization of negative or positive rights.

ity. What does ground the choice is the sure and certain knowledge that things can be better than they are.