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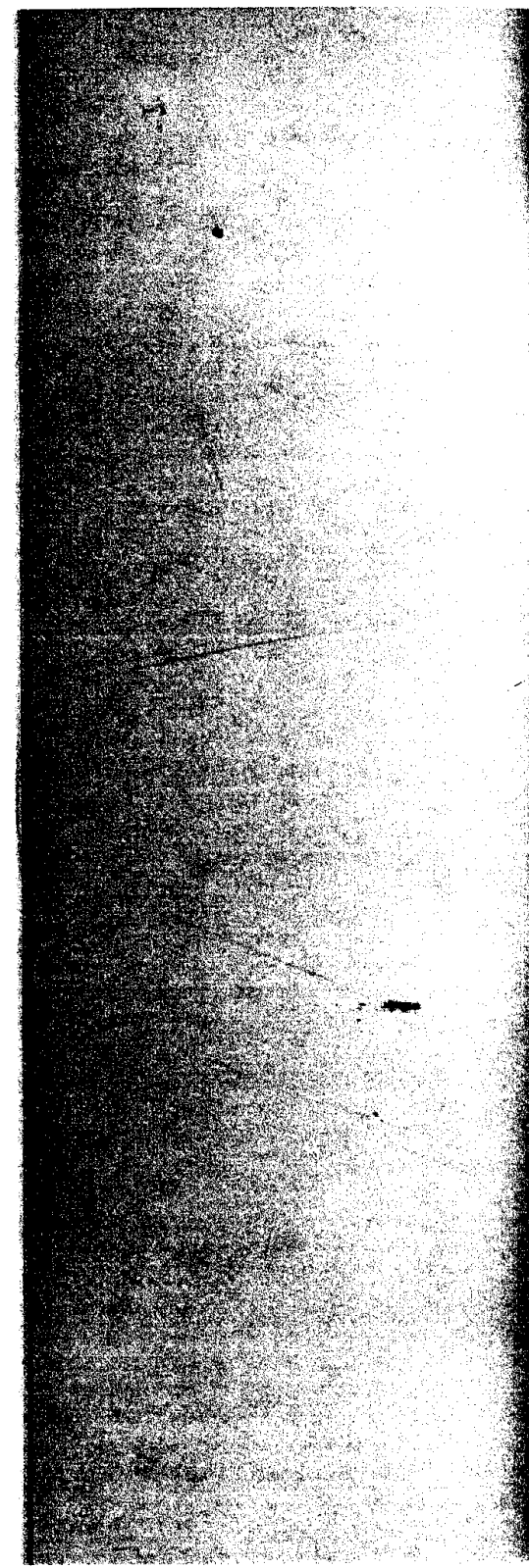
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States of Injury

POWER AND FREEDOM IN
LATE MODERNITY

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CHAPTER FIVE

Rights and Losses

For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being.

—Patricia Williams, *The Alchemy of Race and Rights*

[I]t is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited, because sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society. If one wants to . . . struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty.

—Michel Foucault, "Two Lectures"

Minority people committed themselves to these struggles [for rights], not to attain some hegemonically functioning reification leading to false consciousness, but a seat in the front of the bus, repatriation of treaty-guaranteed sacred lands, or a union card to carry into the grape vineyards.

—Robert A. Williams, Jr., "Taking Rights Aggressively"

WHAT IS the emancipatory force of rights claims on behalf of politicized identities in late-twentieth-century North American political life? If, historically, rights have been claimed to secure formal emancipation for individuals stigmatized, traumatized, and subordinated by particular social identities, to secure a place for such individuals in a humanist discourse of universal personhood, what does it mean to deploy rights on behalf of identities that aim to confound the humanist conceit? What are the consequences of installing politicized identity in the universal discourse of liberal jurisprudence? And what does it mean to use a discourse of generic

personhood—the discourse of rights—against the privileges that such discourse has traditionally secured?

In pursuing these kinds of questions about the contemporary deployment of rights, I am not asking whether rights as such are emancipatory. Nor am I concerned with the theoretical question of whether the sovereign subject of rights can be squared with contemporary deconstruction of such subjects.¹ Rather, I want to begin by recognizing rights as protean and irresolute signifiers, varying not only across time and culture, but across the other vectors of power whose crossing indeed they are sometimes deployed to effect—class, race, ethnicity, gender, sexuality, age, wealth, education.² I want to acknowledge the diverse, inconstant, even contradictory ways that rights operate across various histories, cultures, and social strata.³

But an inquiry into the relationship between identity formation and rights claims in late-twentieth-century politics requires more than registering the indeterminacy and contingency of rights. Those concerned with emancipatory political practices in our time confront as well a set of paradoxes about rights, perhaps the central one of which is this: The question of the liberatory or egalitarian force of rights is always historically and culturally circumscribed; rights have no inherent political semiotic, no innate capacity either to advance or impede radical democratic ideals. Yet rights necessarily operate in and as an ahistorical, acultural, acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality. Thus, while the measure of their political efficacy requires a high degree of historical and social specificity, rights operate as a political discourse of the general, the generic, and universal.⁴

This paradox between the universal idiom and the local effect of rights

¹ Drucilla Cornell offers one of the most interesting speculations on this topic in "Dis-membered Selves and Wandering Wombs," chap. 2 of *The Imaginary Domain* (forthcoming from Routledge).

² See, on a related but somewhat different point, Ernesto Laclau and Chantal Mouffe, who argue that "the meaning of liberal discourse on individual rights is not definitively fixed" (*Hegemony and Socialist Strategy* [London: Verso, 1985], p. 176).

³ Consider: rights as boundary, and as access; rights as markers of power, and as masking lack; rights as claims, and as protection; rights as organization of social space, and as defense against incursion; rights as articulation, and as mystification; rights as disciplinary, and as antidisciplinary; rights as a mark of one's humanity, and as a reduction of one's humanity; rights as expression of desire, and as foreclosure of desire.

⁴ To put this matter in an old-fashioned way, rights work within the dissimulating ideology of modernism, and in this regard there will always be something of a chasm between the discourses of rights and their concrete operations.

itself transpires on both a temporal and spatial level. On the temporal level: While rights may operate as an indisputable force of emancipation at one moment in history—the American Civil Rights movement, or the struggle for rights by subjects of colonial domination such as black South Africans or Palestinians—they may become at another time a regulatory discourse, a means of obstructing or coopting more radical political demands, or simply the most hollow of empty promises.⁵ This paradox is captured in part by Nietzsche's insistence that liberal institutions cease to be liberal as soon as they are attained.⁶ It is expressed as well in the irony that rights sought by a politically defined *group* are conferred upon depoliticized *individuals*; at the moment a particular "we" succeeds in obtaining rights, it loses its "we-ness" and dissolves into individuals. On the spatial or social level: Rights that empower those in one social location or strata may disempower those in another. The classic example is property rights, which not only buttress the power of landlords and capital but help to constitute the subjects called tenant and worker. Less obvious examples would be the right to free speech, which some feminists argue fortifies the "speech" of pornographers that in turn "silences" women; or the right to privacy, a highly ambiguous right that differentially serves those differentially situated in the murky sphere demarcated as "the private." The point is that rights converge with powers of social stratification and lines of social demarcation in ways that extend as often as attenuate these powers and lines. And when the temporal and spatial dimensions of the paradox of the universalistic idiom and particularistic force of rights are combined, we can see quite clearly the impossibility of saying anything generic about the political value of rights: it makes little sense to argue for them or against them separately from an analysis of the historical conditions, social powers, and political discourses with which they converge or which they interdict.

The universal-local paradox of rights is itself paradoxical insofar as this "discovery"—that the value of rights is tethered to history, and that the political efficacy of rights shifts according to which social group is wielding them and what social powers situate them—occurs as "history" unravels and social "identity" destabilizes. Thus, we historicize rights in late modernity even as we discredit history as such, and we try to take the measure of the political effectiveness of rights according to an analysis of

⁵ I take this to be the force of Derrick Bell's argument in *Faces at the Bottom of the Well* (New York: Basic Books, 1992): namely, that whatever extraordinary historical and political event the Civil Rights movement was at the time, the emancipatory power of civil rights practices and ideology does not necessarily endure over time. See also Kristin Bumiller's *The Civil Rights Society* (Baltimore: Johns Hopkins University Press, 1992).

⁶ *Twilight of the Idols*, in *The Portable Nietzsche*, ed. W. Kaufmann (New York: Viking, 1954), p. 541.

social stratification even as we place in question the structures and fixity of the identities that such measurement presumes. And within this paradox lies still another: The late modern effort to critically rework the individualist and universalist legacy of rights for a formulation that offers a potentially more fecund form of political recognition—namely, "group rights," rights of "difference," or rights of "cultural minorities"—is an effort also beset by the contemporary historical, geopolitical, and analytical destabilization of identity upon which such formulations depend. Here we circle back to the first paradox: If contemporary rights claims are deployed to protect historically and contextually contingent identities, might the relationship of the universal idiom of rights to the contingency of the protected identities be such that the former operates inadvertently to resubordinate by renaturalizing that which it was intended to emancipate by articulating? In the context of this paradox, our question acquires an analytic as well as historical form: If, as Robert Meister paraphrases Hegel, "for itself, representation is a means for the people to transform the state [while] in itself, it is a means for the state to control the people,"⁷ when do rights sought by identity "for itself" become "in themselves" a means of administration? When does identity articulated through rights become production and regulation of identity through law and bureaucracy? When does legal recognition become an instrument of regulation, and political recognition become an instrument of subordination?

Here is yet another way of casting this paradox: Historically, rights emerged in modernity both as a vehicle of emancipation from political disenfranchisement or institutionalized servitude and as a means of privileging an emerging bourgeois class within a discourse of formal egalitarianism and universal citizenship. Thus, they emerged both as a means of protection against arbitrary use and abuse by sovereign and social power and as a mode of securing and naturalizing dominant social powers—class, gender, and so forth. Not only did bourgeois rights discourse mask by depoliticizing the social power of institutions such as private property or the family, it organized mass populations for exploitation and regulation, thus functioning as a modality of what Foucault termed "biopower."⁸ But, like the others, this paradox is not merely of anachronistic

⁷ *Political Identity: Thinking Through Marx* (Oxford: Blackwell, 1990), p. 172.

⁸ In this regard, I am distancing myself slightly from Foucault's suggestion that disciplinary discourses historically displace or converge with discourses of rights, suggesting instead that rights are from the beginning a potentially disciplinary practice.

Rosalind Petchesky and Eli Zaretsky have both argued that the juridical recognition of women in the late nineteenth century corresponded with expanded state and medical control over women's reproductive and sexual conduct. See Petchesky, *Abortion and Women's Choice: The State, Sexuality, and Reproductive Freedom* (New York: Longman, 1984), and

interest. How, we might ask, does this historical function of rights as operating both to emancipate and dominate, both to protect and regulate, resurface in contemporary articulations of rights, especially those sought for subjects recently, and patently, produced through regulatory discourses—subjects such as welfare mothers, surrogate mothers, or lesbian mothers?⁹

I begin with this nest of paradoxes not to resolve them—paradox designates a condition in which resolution is the most uninteresting aim—but to avoid misconstrual of my critical engagement with contemporary rights discourse. I do not want to participate in an argument for or against rights as such—for example, the disagreement between Critical Legal Studies thinkers and Critical Race Theorists—precisely because such an argument eschews the significance of historical timing, social power, and political cultural context in adjudicating the emancipatory value of rights discourse. Rather, I want to reflect upon the place of rights in the politics of politicized identities—rights of “inclusion” as well as rights of “difference” currently sought for people of color, homosexuals, and women in the late-twentieth-century United States.

In the service of such reflection, let us reconsider the critique of “political emancipation” embedded in Marx’s essay “On the Jewish Question.” Arguably one of Marx’s most philosophically and politically complex as well as least programmatic pieces of writing, the “Jewish Question” was

Zaretsky, “The Place of the Family in the Origins of the Welfare State,” in *Rethinking the Family: Some Feminist Questions*, ed. Barrie Thorne (New York: Longman, 1982). Through Michael Grossberg’s study of nineteenth-century family law, Martha Minow makes a similar point about the effect of children’s rights in enlarging state power over both children and adults. Minow cites Grossberg’s *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), pp. 287–307, in “Interpreting Rights: An Essay for Robert Cover,” *The Yale Law Review* 96 (1987), p. 1882, n. 82.

⁹ While the traditional left critique of rights focuses on the law’s decontextualization of persons from social power, the critique of contemporary legal efforts to achieve such contextualization, to recognize subjects as “effects” of social power, might be precisely that it reifies these effects, marking with a reactionary permanence the production of social subjects through, for example, “race,” “gender,” or “sexuality.” A critique of contemporary efforts to install difference in the law would worry as well about the analytical slide from social construction and constructions of subjectivity to social position and constructions of identity. It would worry about the conversion of articulations of modes of power complexly and temporally constitutive of subjectivity into static analyses of social position that are then installed in the ahistorical discourse of the law.

and remains an occasion to inquire into the formulations of identity, state, and law configured by modernity, by liberal constitutional polities, and by capitalist economies. The quest for Jewish citizenship in a Prussian, Christian, or even ostensibly secular state raised for Marx and for his left-Hegelian protagonist Bruno Bauer an ensemble of questions about the nature of religious identity, the state, citizenship, political consciousness, and political freedom. Do Jews want political recognition and rights as Jews or as persons? How does the demand for recognition construct Jewishness, personhood, and citizenship? How does this demand figure the state and political life—what is the state being asked to see or recognize, to disregard in its seeing, and to disavow in itself? Do Jews seeking emancipation want to be free from Judaism, free of Judaism, or free to be Jewish? What does it mean to turn to the state for such emancipation? What is the relationship between political representation, political identity, social identity, and religious identity? How does the nature of the political state transform one’s social identity when one turns to the state for political resolution of one’s subordination, exclusion, or suffering? What kind of subject is being held out to the state for what kind of redress or redemption?

While there are substantial riches to be mined from an essay concerned with such questions, there are also stumbling blocks in using the “Jewish Question” to reconsider the formulations of identity, rights, and the state it poses. These include the anti-Semitism evinced in the essay, an anti-Semitism that has led some to dismiss it (and Marx) altogether. Others have ignored the extent to which the essay is concerned with Jews and Judaism, treating it either as an immanent critique of Hegelian philosophy or as a critique of liberal constitutional precepts—in either case, for them the Jewish question is only an heuristic device.¹⁰ I will try to steer a

¹⁰ Two provisional notes about the putative anti-Semitism of the “Jewish Question.” Since there is good evidence that Marx was as racist as he was anti-Semitic, and it is a certainty that he took Jewish men more seriously than he took any woman, we need to ask ourselves: What precisely vexes us here? Is his anti-Semitism at issue because he was writing about the “Jewish Question”? Or is it the possible specter of self-hatred and dissimulation within the quest for assimilation that produces anxiety? Why isn’t J. S. Mill’s sexism as bothersome to us? Is the problem anti-Semitism, Marx as a Jew, or Marx as a Jewish anti-Semite writing on the Jewish question? Insofar as Marx criticized religion as such and criticized Christianity with vehemence, what specifically constitutes his critique of Judaism as anti-Semitism? These questions are not intended to defend Marx but rather to suggest that in objecting to his anti-Semitism, we may not know the real nature of our objections, what unique place the charge of anti-Semitism occupies in our psyches, what psychic place is held by the self-hating Jew, and why it is this and not Marx’s terrible remarks about Africans or silences about women that is at issue.

The second point responds to the impossibility of the answering the first in anything short of a separate study of the problem. If there is something of potential value in Marx’s essay, but it is not easily extricable from the deprecations of Judaism and Jews, then we need

third course, dismissing neither the essay nor its engagement with Judaism. Particularly in light of twentieth century formations of European anti-Semitism, including those of the present, Marx's rough distillation of Judaism into "practical need, egoism,"¹¹ is certainly disturbing, as is his consequent resolution of the "Jewish Question" into the "general question of the age"—the domination of civil society by capital. But this is not the whole story of his treatment of Judaism in the essay, nor can his critique of Judaism be isolated from his more general critique of religion; his caricature of Christianity is at least as savage.

Rather than inquiring into the anti-Semitic elements of the Jewish assimilationist formulations of which Marx's essay is a particular expression, I want to consider the essay's characterizations of Judaism along different lines. The variations on the "Jewish question" across European states spurred Marx to attempt to diagnose politically, and resolve theoretically, the historically specific making and meaning of the Jewish quest for political membership in a variety of states, some of which were tacitly rather than explicitly invested in Christianity.¹² And it is this formulation of the problem that may be of use in thinking about contemporary campaigns by feminists, gay activists, indigenous peoples, and people of color for emancipation through and for rather than in spite of their "difference," for recognition from a state whose masculinism, heterosexism, and whiteness is also frequently tacit rather than explicit. In other words, precisely because Jews sought political rights as secular Jews in Christian as well as "secular" states, precisely because the Jewish question does not issue from a wholly liberal claim to generic personhood on the part of the historically disenfranchised, Marx's essay has potentially rich contemporary resonances. Insofar as the analysis concerns the complex political claims and aspirations of a marked identity not constituted *solely* through subjugation and exclusion, not reducible to a socioeconomic category, and not figurable as a "difference" entirely attributable to a form of social power as class is attributable to property relations, the quest for Jewish

to proceed with the double consciousness such a paradox demands. In this kind of consciousness, one attends both to the exoteric argument or narrative of a novel or philosophical work and, simultaneously, to the effect of the anti-Semitism on the shape and turns of this argument. This reading strategy offers not simply a mode of "correcting" Marx's prejudice but, even more importantly, of learning, rather than preconceiving, how this prejudice operates both as philosophy and politics.

¹¹ "On the Jewish Question," *The Marx-Engels Reader*, 2d ed., ed. R. C. Tucker (New York: Norton, 1978), p. 50.

¹² See Carlebach's *Karl Marx and the Radical Critique of Judaism* (London: Routledge, 1978), for a discussion of the ways in which assimilation in general, and conversion and baptism in particular, figured in both the background and foreground of the "Jewish question" in Marx's time.

civil and political rights in European nation states in the nineteenth century bears some (incomplete) parallels to antiassimilationist juridical claims generated by contemporary identity politics.¹³

Marx begins with a notoriously ungenerous engagement with Bruno Bauer's own attempt to "resolve" the Jewish question. But Marx is ultimately less interested in the left Hegelianism Bauer espouses than in the historical condition of which Marx takes Bauer (as well as Hegelianism, right and left) to be a political and philosophical symptom. For Bauer, the Jewish question arises as a consequence of the unemancipated *consciousness* of Jews on the one hand and the state on the other: as long as the Jew privileges his Judaism (his partial nature) above his universal personhood, and as long as the state privileges its Christianity above its universal (secular) nature, this partiality (in both senses of the word) prevents the recognition and realization of "the universal humanity of man."¹⁴

Marx's objection to Bauer's formulation is that within its terms, both the state and the Jew could give up their religious "prejudice" and in so doing be "politically emancipated" without being emancipated from religion. What, Marx asks, is the nature of the emancipation Bauer advocates such that it addresses only the way the state and the Jew respectively *represent* themselves, the way each thinks of itself in a political way, such that the formal secularism demanded from each in no way affects the "actual religiosity" of either? What does it mean to render "prejudice" a matter of attitude and freedom, a matter of words and representation, a matter of pose? And why does Bauer's (idealist) formulation of freedom so closely resemble that represented by the state itself? Is it significant that the left-Hegelian formulation of freedom as a problem of consciousness, representation, and state proclamations is precisely the formulation of freedom animating and legitimating the liberal constitutional state?

In contending that the "actual religiosity" of the state and its citizens is undiminished by the declared irrelevance of religion to politics, Marx is concerned not simply with the religious *belief* harbored by Jews or the state, but, more importantly, with the conditions that give rise to reli-

¹³ This, notwithstanding Marx's own effort to reduce Judaism to an "empirical essence of . . . huckstering and its conditions," and thus to render Judaism as a "historically produced need" and "the Jewish question" as a *symptom* of an age materially dominated by relations of capital and spiritually dominated by Christianity. At the extreme, Marx casts Judaism as the avatar of "material egoism" and civil society, dialectically opposed to Christianity as the avatar of "spiritual egoism," imaginary transcendence, and the state ("Jewish Question," p. 52).

¹⁴ *Ibid.*, p. 28.

gious consciousness, the conditions that produce and require religion. While Marx and Bauer share a view of religious consciousness as "a defect," Marx regards this consciousness, and the state's participation in it (expressed in the very declaration that it is *free* of religion when it ceases to determine political membership on the basis of religion), as historically necessary rather than contingent. To the extent that religious consciousness is historically produced rather than freely adopted, it cannot, as Bauer would have it, be "cast off like snake skins." Rather, for Marx,

The question is: what is the relation between *complete* political emancipation and religion? If we find in the country which has attained full political emancipation [the United States], that religion not only continues to *exist* but is *fresh* and *vigorous*, this is proof that the existence of religion is not at all opposed to the perfection of the state. But since the existence of religion is the existence of a defect, the source of this defect must be sought in the *nature* of the state itself. Religion no longer appears as the basis, but as the *manifestation* of secular narrowness. That is why we explain the religious constraints upon the free citizens by the secular constraints upon them. We do not claim that they must transcend their religious narrowness in order to get rid of their secular limitations. We claim that they will transcend their religious narrowness once they have overcome their secular limitations. We do not turn secular questions into theological questions; we turn theological questions into secular ones.¹⁵

Critical here is Marx's effort to reveal the metalepsis in Hegelian thinking about the relation between religious and secular life, consciousness and institutions. This effort is most apparent in his insistence that religious consciousness is a *manifestation* of rather than the *basis* of what he calls "secular narrowness"—the social and political constraints upon substantive freedom, equality, and community. This, in a vernacular foreign to the one we now speak, is Marx's method of de-essentializing in order to deconstruct political expressions of cultural, ethnic, or religious identity. Reading religious consciousness as a political symptom, even a site of injury and despair about freedom in *this* world, Marx seeks to avoid responding to it as a political demand issuing from fixed political identities or interests.

What Marx calls religious narrowness, what we might term investments in particular identities, is not blamed by him as it is by Bauer upon those who have such investments and fail to understand their place in the

¹⁵ *Ibid.*, p. 31. Marx's point about the fresh, vigorous character of religion in the nineteenth-century United States was repeated on September 16, 1992, almost verbatim, by Clinton during his presidential campaign as he argued for the continuation of religious tolerance and separation of church and state. "In no other advanced nation," Clinton remarked, "is religion so widely practiced, do so many people go to church, synagogues, temples, and mosques."

world of universal humanity, nor upon the state's failure to look beyond such investments to the universal humanity of its subjects. Marx's critique of Bauer's Hegelian emphasis upon the independence of consciousness—either in individuals or in the state—turns on his derivation of "religious narrowness" from the specific political conditions that require this "narrowness," conditions that, importantly, are obscured rather than redressed through formal emancipation, through acquiring the right to be free of the political stigma of this narrowness. In fact, Marx argues, the limits of political emancipation "appear at once in the fact that the state can liberate itself from a constraint without man himself really being liberated."¹⁶

The political "constraint" to which Marx refers is the state's vulnerability to reproach for a religious bearing, for its appearance of failed or incomplete secularism. Yet the state is no more liberated from religion by declaring itself religiously tolerant than it is liberated from private property through the "abolition of the property qualification" for suffrage.¹⁷ Insofar as Marx *deliteralizes* both religion and secularism, he is able to establish the state's religiosity as inhering not in express religious statements but in its transcendent ideology, its representation of universal humanity above the mortal particulars of civil society. The constitutional state he is analyzing is homologically Christian in its reduction of freedom to pronouncements of freedom, in its equation of equality with the declaration that it regards us as equal, in its creation of equality through its ideology of popular sovereignty; in short, in its *idealist* resolution of our relative lack of freedom, equality, and community.

The "constraint" from which political emancipation "frees" the individual is politicized identity—the treatment of a particular social identity as the basis for deprivation of suffrage, rights, or citizenship. But, Marx repeats, emancipation from this constraint does not liberate the individual from the conditions constitutive or reiterative of the identity. To the contrary, it is only in abstraction from such conditions that the individual can be "emancipated" by the universal state:

man frees himself from a constraint in a *political* way, through the state, when he transcends his limitations, in contradiction with himself, and in an *abstract*, narrow and partial way. Furthermore, by emancipating himself *politically*, man emancipates himself in a *devious* way, through an intermediary, however *necessary* this intermediary might be.¹⁸

Marx's characterization of political emancipation as "devious" does not constitute a moral objection to the evident hypocrisy of the liberal state.

¹⁶ "Jewish Question," p. 31.

¹⁷ *Ibid.*, p. 33.

¹⁸ *Ibid.*, p. 32.

Such an objection would remain within the rubric of liberalism in which certain attitudes or postures on the part of the state become eligible for moral criticism and, potentially, reform; this is exactly the kind of criticism in which Marx considered left Hegelians like Bauer to be wrong-headedly engaged. Rather, "deviousness" here signals a ruse of power necessitated when the requisites of power's legitimacy generate a promise upon which it cannot deliver; deviousness connotes the political culture of indirection and mediation inherent within, rather than accidental to, this political condition.¹⁹

In Marx's account, the ruse of power peculiar to liberal constitutionalism centers upon granting freedom, equality, and representation to abstract rather than concrete subjects. The substitution of abstract political subjects for actual ones not only forfeits the project of emancipation but resubjugates us precisely by emancipating substitutes for us—by emancipating our abstracted representatives in the state and naming this process "freedom." The subject is thus *ideally emancipated* through its anointing as an abstract person, a formally free and equal human being, and is *practically resubordinated* through this idealist disavowal of the material constituents of personhood, which constrain and contain our freedom. Thus, because we are in this way subjugated by the very discourse of our freedom, liberal freedom is structurally, not merely definitionally, ambiguous. The notion of "representative" and the process by which, according to Hobbes's *Leviathan*, we "author" the state exemplify this condition, and Rousseau makes a similar point in his critique of representative government in the "Discourse on Inequality" and the *Social Contract*.²⁰ Marx himself develops this point through an analogy between the state and Christianity:

Religion is simply the recognition of man in a roundabout fashion; that is, through an intermediary. The state is the intermediary between man and human liberty. Just as Christ is the intermediary to whom man attributes all his own divinity and all his religious *bonds*, so the state is the intermediary to which man confides all his non-divinity and all his *human freedom*.²¹

Here again it becomes clear not only why Marx considers political emancipation partial, narrow, and contradictory, but why he insists that the "secular" state is Christian in character: As Christ represents man's holiness, the state represents man's freedom, and in both cases, this represen-

¹⁹ Using the notion of the camera obscura, Marx will offer a more substantial account of this feature of political power in the theory of the relationship between consciousness and power developed in *The German Ideology*.

²⁰ Hobbes, *Leviathan*, chap. 16, and Rousseau, "Discourse on Inequality" and *The Social Contract*.

²¹ "Jewish Question," p. 32.

tation abstracts from the unfree and unholy conditions of man's actual life. Moreover, these unfree and unholy conditions are the basis of both state and Christianity: as the conditions of real as opposed to abstract human beings, they are the conditions that *necessitate* the state and Christianity. As Christianity consecrates a ghostly ideal of man as divine and leaves actual man to suffer on earth, so the state liberates its ideal of man and abandons actual man to the actual powers that construct, buffet, and subject him.

In one of his earliest formulations of the *political* structure of alienation in modern society, Marx then argues that both Christianity and the constitutional state require that "man lea[d], not only in thought . . . but in reality, in life, a double existence—celestial and terrestrial";²² this "double existence" is one in which heavenly life is inaccessible and earthly life is degraded. Insofar as Christianity and the bourgeois state are the available discourses for self-understanding and political articulation, it is in what Marx calls "real life"—life in civil society and on earth—that man will be most illusory to himself, while the "imaginary domains" of the state and heaven articulate the "real nature" of man:

[Man] lives in the *political community*, where he regards himself as a *communal being*, and in *civil society* where he acts simply as a *private individual*, treats other men as means, degrades himself to the role of a mere means, and becomes the plaything of alien powers. The political state, in relation to civil society, is just as spiritual as is heaven in relation to earth. It stands in the same opposition to civil society, and overcomes it in the same manner as religion overcomes the narrowness of the profane world; i.e. it has always to acknowledge it again, re-establish it, and allow itself to be dominated by it. . . . In the state, . . . where he is regarded as a species-being, man is the imaginary member of an imaginary sovereignty, divested of his real, individual life, and infused with an unreal universality.²³

In the political state, "man treats political life, which is remote from his own individual existence, as if it were his own true life"; this formulation constitutes the religious consciousness of the state. However, Marx also insists that "religion is here the spirit of civil society" insofar as it "expresses the separation and withdrawal of man from man," and insofar as every man is "considered a sovereign being, a supreme being," but as alienated man, man "lost to himself."²⁴ The Christian dimension of the liberal ideological formulation of the state and civil society ordered by capitalism rests here: although anointed as a sovereign, even a supreme

²² *Ibid.*, p. 34.

²³ *Ibid.*, p. 34.

²⁴ *Ibid.*, p. 39.

being, man's sovereignty is ghostly, alienated, and finally punishing, insofar as it casts this isolated and impotent creature as fully accountable for himself. Man is proclaimed king but limited by his powerlessness and alienation; his crown ultimately serves to bewilder, isolate, and humiliate him.²⁵

Remarking that "the political elevation of man above religion shares the weaknesses and merits of all such political measures," Marx makes clear that he is not against political emancipation, which he deems "a great progress[.]" . . . the final form of human emancipation *within* the framework of the prevailing social order";²⁶ rather, he seeks to articulate the historical conditions of its emergence and its consequent limitations. The deviousness of political emancipation—its removal of a stratifying social power from political standing—calls not for refusal of this form of emancipation but for analysis of the kind of social and political relations engendering and engendered by it. In particular, Marx is interested in how the state's "emancipation" from particular social powers operates as a form of political suppression that tacitly legitimates these powers, and how, at the same time, this process itself *constitutes* the power and legitimacy of the liberal state. Thus, for example, the elimination of the "property qualification" for citizenship constitutes the "ideal abolition" of private property, since the "property qualification is the last *political* form in which private property is recognized." Yet

the political suppression of private property not only does not abolish private property; it actually presupposes its existence. The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that [these] are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty. . . . But the state, none the less, allows private

²⁵ If Marx's analysis is difficult to follow at this point, this is because he is doing three things at once: he is criticizing religion and the state, establishing a homology between them, and establishing their philosophical, as well as material and historical, presupposition of each other. This is Marx, in other words, in his least economic and most deconstructive mode, but it is deconstruction in a historically progressive register, governed by the dialectic, by reason in history, and by analytically coherent, if contradictory, social totalities. While it is Marx's genius to sustain the analysis on all three levels at once, it may also be this genius, steeped in Hegelianism, that leads Marx to overstate the theological dimension of the constitutional state. Here is the extended passage from which the citation in the text is drawn:

The members of the political state are religious because of the dualism between individual life and species-life, between the life of civil society and political life. They are religious in the sense that man treats political life, which is remote from his own individual existence, as if it were his true life; and in the sense that religion is here the spirit of civil society, and expresses the separation and withdrawal of man from man. (*Ibid.*, p. 39)

²⁶ *Ibid.*, pp. 33, 35.

property, education, occupation, to *act* after *their* own fashion, namely as private property, education, occupation, and to manifest their *particular* nature. Far from abolishing these *effective* differences, it only exists so far as they are presupposed; it is conscious of being a *political* state and it manifests its *universality* only in opposition to these elements. . . . Only in this manner, *above* the *particular* elements, can the state constitute itself as universality.²⁷

If civil society is striated by forms of social power that the state declares politically insignificant, and the state's universality or "perfected secularism" is premised upon its transcendence of the particularism of civil society, then the state is premised upon that which it pretends to transcend and requires that which it claims to abolish; it reinforces by politically suppressing (removing from political discourse) that which grounds its *raison d'être*. But in addition to its legitimacy, the state achieves a good deal of its power through its devious claims to resolve the very inequalities that it actually entrenches by depoliticizing. Achieving its "universality" and reconstituting the "particularity" of civil society through this depoliticization, by this ruse it also acquires its own "right" to govern—to legislate and adjudicate, to mobilize and deploy force.²⁸

If, according to Marx, the bourgeois constitutional state is premised upon depoliticized inegalitarian social powers, if it depends upon naturalizing egoistic civil society and abstract representations of equality and community, then *rights* are the modern political form that secure and

²⁷ *Ibid.* p. 33.

²⁸ It may be appropriate here to mark the way in which Marx's critique of universalism, and the constitutional state's embodiment of it, differs from many contemporary critiques, particularly those trafficking under the sign of postmodernism, post-Marxism, or post-structuralism. For Marx, the false universalism of the state presupposes and entrenches unresolved particulars, stratifying social powers that not only enact subordination and sustain poverty, but estrange human beings from one another and divide us against our respective selves. For post-Marxist critics of liberal universalism, the problem is of a different order: universalism is less an unrealized political ideal than an unrealizable one, a bad political metonymy in which particular kinds of humans and positions masquerade as generic or universal. Marx is not without sympathy for this position—indeed, he clearly appreciates the extent to which universalist discourse is always strategically deployed by the dominant or the would-be dominant: "For each new class which puts itself in the place of one ruling before it, is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society, that is, expressed in ideal form: it has to give its ideas the form of universality, and represent them as the only rational, universally valid ones" (*The German Ideology*, in *The Marx-Engels Reader*, p. 174). But especially for the early Marx, history is making its way toward true, as opposed to strategic, universalism; for post-Marxist critics, universalism is unredeemable insofar as it is always one with the hegemonic aims of the historically dominant.

legitimate these tendencies. Rights emblemize the ghostly sovereignty of the unemancipated individual in modernity. In order to see the connections as Marx makes them, we must return briefly to his engagement with Bauer on the question of Jews' entitlement to rights.

According to Marx, Bauer argued that the Jew could neither acquire nor concede to others the universal rights of man because his "Jewish nature," and more particularly his avowal of its effect in *separating* him from other men (Gentiles), prohibited his entitlement to rights that *associate* all men with each other.²⁹ In Bauer's view, "man has to sacrifice the 'privilege of faith' in order to acquire the general rights of man," in order to acquire membership in the community which delivers these rights. But why should this be, Marx asks, when the rights of man are nothing more than the rights of "a member of civil society[.] . . . of egoistic man, of man separated from other men and from the community?"³⁰ Nothing about these rights, Marx notes, pertains to human association, membership, or participation in political community; consequently there is no basis for withholding them from anyone, regardless of particulars of social station, faith, or consciousness.

It is within this analytical vein, where rights are figured as both manifestations and entrenchments of a specific historical production of egoistic man in civil society, that Marx proffers his (in)famous critique of bourgeois rights. This critique does not condemn but exposes the way rights encode rather than emancipate us from the social powers and social formations that are the conditions of our unfreedom. Thus Marx calls the constitutional right to liberty the right of "separation" from other men, the "right of the *circumscribed* individual, withdrawn into himself." The right to private property, as the practical "application" of the right of liberty, is only "the right of self-interest." And equality, putatively the most profound political achievement of liberalism, Marx identifies as a "term [that] has here no political significance," since it is "only the equal right to liberty [in which] every man is equally regarded as a self-sufficient monad."³¹ Liberal equality, insofar as it neither constitutes political community nor achieves substantive equality, guarantees only that all individuals will be treated *as if* they were sovereign and isolated individuals. Liberal equality guarantees that the state will regard us all as equally abstracted from the social powers constituting our existence, equally decontextualized from the unequal conditions of our lives.

Marx concludes this brief assessment of rights with a consideration of the constitutional guarantee of security, "the supreme social concept of society; the concept of the *police*." Underpinning the basic bargain of the

²⁹ "Jewish Question," p. 40.

³⁰ *Ibid.*, pp. 40, 42.

³¹ *Ibid.*, p. 42.

social contract in which we largely surrender to the state the power to protect our lives and our property, the concept of "security," imprecisely termed a right, reveals the essential character of this society and the historically configured obsession of its members: "The concept of security is not enough to raise civil society above its egoism. Security is, rather, the *assurance* of its egoism."³² The state founded on the promise to secure its members against each other is thus the state that provides an anti-political "resolution" of the historically produced Hobbesian character of civil society. Like rights themselves, the state's constitutional guarantee of security, embodied in "the concept of the police," reifies a historical condition as an ontological one, naturalizing rather than redressing it.

Certainly Marx's polemical treatment of the civil liberties foundational to the liberal state could be criticized for the undeconstructed binary oppositions it deploys: ideal versus material, theological versus secular, state versus civil society, mediated versus unmediated freedom, egoism versus association, universal versus particular. It could also be impugned for presenting as immanent critique what is actually bound to a panoply of normative referents: radical egalitarianism, "real" popular sovereignty, and "true" political community unmediated by the state. Moreover, insofar as rights are not tethered to the values Marx endorses but serve other ends, he could be faulted for demanding from them what they were not intended to figure or deliver. His criticism of the liberal state for reducing the political to a "mere means" glosses the possibilities that on the one hand, rights need not be the *end* of liberal political states, and that on the other, liberal individuals, even socially subordinated ones, may want nothing more than state-secured rights and protection—they may bear no desire for radical freedom or community.

We shall return shortly to the problems of binarisms and progressive historiography in Marx's critique. For the moment, I want to suggest that while Marx's critique of the "egoism" of rights is fueled by ideals of political and economic life that exceed liberal aims, its force is not wholly dependent on these norms nor on the extent to which liberalism forecloses them. Rather, it depends upon a critical reading of the form of political life produced by the social relations of capital; it depends upon understanding the domination and alienation entailed in capitalist social relations as simultaneously reiterated and obscured by the political life they generate.

In Marx's view, the transition from feudal monarchy to bourgeois de-

³² *Ibid.*, p. 43.

mocracy entailed a form of economic and political revolution that "abolished the political character of civil society," that is, put an end to the ways in which "elements of civil life such as property, the family, and types of occupation had been raised, in the form of lordship, caste and guilds, to elements of political life." The European political revolutions that abolished monarchy at the same time shattered the expressly political form of social and economic stratifications, the estates and corporations. "The political revolution therefore *abolished the political character of civil society*" such that "a specific activity and situation in life no longer had any but an individual significance."³³ Marx is again underscoring how certain modalities of social and economic domination are less eliminated than *depoliticized* by the political revolutions heralding formal equality, although these modalities are transformed in the process, losing their formal representation in the state as estates. At the same time, Marx is seeking to articulate the extent to which the modern *individual* is produced by and through, indeed *as*, this depoliticization and in the image of it. He is proffering a political genealogy of the sovereign individual, whose crucial site of production is the depoliticization of social relations. Put the other way around, Marx exposes the modern formulation of sovereignty as itself a modality of discursive depoliticization. Power as circulating and relational—as located not in the state but in social relations and the movement of history—is ideologically suppressed in the congealed and static persona of sovereignty.

Marx's criticism does not stop with depicting the political emancipation or declared sovereignty of the individual as its effective depoliticization. He also posits the depoliticization of civil society as the "consummation" of the materialism of civil society, and the removal of political community to the realm of the state as the "consummation" of the idealism of the state.³⁴ Community is figured in a ghostly way in the state, and social atomism is the concrete reality of civil society. But in becoming celestial and otherworldly, abstracted from the real character of its subjects, the state also figures its future overcoming, its future irrelevance. And in becoming thoroughly material and egoistical, civil society forecasts its disintegration: "The bonds which had restrained the egoistic spirit of civil society were removed along with the political yoke. Political emancipation was at the same time an emancipation of civil society from politics and from even the *semblance* of a general content."³⁵ Establishing the breakup of the feudal state as that which "frees" civil society in a double sense—from feudal bondage but also from the bonds

³³ Ibid., pp. 44, 45.

³⁴ *Vollendung*, which Tucker translates as "consummation," means completion, termination, ending, perfection.

³⁵ "Jewish Question," p. 45.

of association that express our ontological sociality, "from even the semblance of a general content"—Marx signals the ambiguity that for him characterizes not only bourgeois rights but the spirit of capitalism. (Recall that this double freedom is also how Marx ironically frames the condition of the proletariat in *Capital*. In contrast with the serf, the proletarian is free to sell his labor power to any buyer. But he is also "free" in the sense of being unburdened and deracinated: he lacks any means of survival other than selling his labor power. The proletarian's "freedom" is thus the source of his radical exploitability *and* of his expanded political capaciousness.) Similarly, when Marx refers to the representation of man in the political state as the "ideal" of man, he is identifying the state representation of community and equality as directly contradicted by the egoism of rights-bearing sovereign individuals in the depoliticized domain of civil society. And he is identifying rights as fundamentally ambiguous: a marker both of our unfreedom and of our expanded political capaciousness.

What should be evident by now is that in contrast with some Critical Legal Studies scholars' anxieties about the individualism of rights, Marx's analysis in the "Jewish Question" is neither a moral critique nor an ontological claim about the "nature of rights." Rather, Marx's characterization of rights as egoistic rests on a reading of the ways in which the historical emergence of the "rights of man" naturalizes and thus entrenches historically specific, unavowed social powers that set us against each other, preoccupy us with property, security, and freedom of movement, and economically and socially stratify us. "The liberty of egoistic man, and the recognition of this liberty . . . is the recognition of the *frenzied* movement of the cultural and material elements which form the content of his life."³⁶ In other words, the kind of liberty that bourgeois rights discourse casts as natural is actually the *effect* of the historically specific elements constitutive of life in civil society. Through rights discourse, bourgeois social relations are reified as bourgeois man, and the rights required by this "frenzied" (*zugellosen*; actually, "unbridled") social order are misapprehended as required by and confirming the naturalness of the man it produces.

For Marx, then, the political culture of "egoism" and rights produces not mere individualism but anxious, defended, self-absorbed, and alienated Hobbesian subjects who are driven to accumulate, diffident toward others, obligated to none, made impossibly accountable for themselves, and subjected by the very powers their sovereignty is supposed to claim. "Egoism" also connotes the discursive depoliticization of this production: an order of sovereign, self-made, and privatized subjects who sub-

³⁶ Ibid.

jectively experience their own powerlessness as their own failure vis-à-vis other sovereign subjects. In sum, even as they emancipate certain groups and certain energies from historical suppression, bourgeois rights codify the social needs generated by historically specific, traumatic social powers as natural, unhistorical, and permanent.

Marx's criticisms of bourgeois rights might be distilled thus: (1) Bourgeois rights are rendered necessary by the depoliticized material conditions of unemancipated, inegalitarian civil society, conditions that rights themselves depoliticize rather than articulate or resolve. (2) They entrench by naturalizing the egoism of capitalist society, reifying the "frenzied movement of the material elements" of this society as the nature of man, thereby masking social power and mistaking its effects—atomistic individuals—for its wellspring and agents. (3) They construct an illusory politics of equality, liberty, and community in the domain of the state, a politics that is contradicted by the unequal, unfree, and individualistic domain of civil society. (4) They legitimize by naturalizing various stratifying social powers in civil society, and they disguise the state's collusion with this social power, thereby also legitimating the state as a neutral and universal representative of the people. Thus they disguise the actual power constitutive of both civil society and the state through the ruse of establishing fictional sovereignty in the domain of civil society and illusory liberty, equality, and community in the state.

Marx's enthusiasm for political emancipation, including bourgeois rights, could be distilled thus: (1) Being regarded by the state *as if* we were free and equal is an improvement over being treated as if we were naturally subjected and unequal vis-à-vis stratifying social powers. Insofar as personhood and membership in community is ideally cast as unconstrained by these social powers, political emancipation constitutes *progress*. (Here, a discerning contemporary eye might see an analysis concerned with the way ideological idealism masks social power sliding into one that emphasizes the discursive production of political possibility.) (2) The ideals of freedom, equality, and community in the bourgeois state figure the (historically unrealized) *desire* for these goods and, in a historical process governed by dialectical materialism, they will be realized through the establishment of the material conditions for them. (3) Political emancipation in the form of civil and political rights can be embraced precisely because it represents a "stage" of emancipation. In dialectical analysis, the failure of rights to procure "true human emancipation" is made manifest in our experienced unfreedom and alienation, and it is overcome by the development of forms of association appropriate to a society that has "revolutionized its elements" and transcended its egoism.

Marx's essay produces two sets of questions for contemporary political struggles waged under the rubric of identity politics. First, if the desire for rights in liberalism is, in part, a desire to depoliticize or unmark one's social existence, to be free of the politicization of subordinating social powers, and if, in this respect, rights entail a turn away from the political, how do they also advance a political struggle to transform the social conditions of one's making? What, if anything, guarantees their instrumental deployment in this direction? Marx's account could be cast in a more Foucaultian register: To the extent that the egoism of rights—their discursive formation of the sovereign individual—obscures the social forces *producing* rather than merely marking particular groups or behaviors as subhuman, rights appear to discursively bury the very powers they are designed to contest. To the extent that the "egoism of society" both provokes rights claims and is entrenched by them, the social relations iterating class, sexuality, race, and gender would appear to be individualized through rights discourse, ascribed to persons as attribute or internal content rather than social effect. If rights thus reify the social power they are designed to protect against, what are the political implications of doing both? What happens when we understand individual rights as a form of protection against certain social powers of which the ostensibly protected individual is actually an effect? If, to paraphrase Marx, rights do not liberate us from relations of class, gender, sexuality, or race, but only from formal recognition of these elements as politically significant, thereby liberating them "to *act* after their own fashion," how does the project of political emancipation square with the project of transforming the conditions against which rights are sought as protection?

The second set of questions pertains to the place of rights in legitimating the humanist dimensions of liberal discourse. To what extent is the power of a humanist fiction of universality affirmed as the mantle of generic personhood sought by the historically disenfranchised? How is the metonymic operation of the generic person obscured by the increasingly wide distribution of its political attributes? How can the invidious dimensions of universalist claims be contested even as the historically disenfranchised seek a place under their auspices?

These questions become more vexed when the progressive historiography presumed by Marx is excised from his critique of rights, when the contradiction between "political emancipation" and "true, human emancipation" is no more likely to erupt as radical consciousness or be transcended through revolution than various contradictions within capitalism are likely to explode into a socialist alternative. Absent this teleol-

ogy, instead of rights constituting a "historical stage" of the progress toward emancipation, they figure a political culture that daily recapitulates its value in anointing and protecting personhood and daily reiterates the egoism out of which rights emerge. Operating as a discursive regime rather than a stage in the history of emancipation, rights appear as political ends rather than historical or political instruments. And situated within the larger context of Weberian rationalization in modernity, a process whereby instrumental rationality cancerously supplants all other values as all means become ends, the so-called litigious culture disparaged across the contemporary political spectrum becomes more than a contingent item for political criticism.³⁷ In this recasting, rights discourse appears in opposition to—rather than a stage in the progress toward—alternative modes of redressing social subjugation expressed as politicized identity. When "history" is no longer regarded as driven by structural contradictions and tethered to the telos of freedom, the delusion is no longer possible that "every emancipation is a restoration of the human world and of human relationships to man himself."³⁸

Yet it is also the case that when we cease to regard history as composed of coherent social totalities and single threads of progress, viewing it instead in terms of converging and conflicting discourses and genealogies, a different order of political thinking becomes possible. Consider the difference in the relationship between history and freedom conceived by Marx and by Foucault: For Marx, political promise inheres in the dialectical movement of history toward freedom. (Animated generally by a drive to overcome scarcity expressed in the developmental aspect of modes of production, history is specifically powered by the class struggles that occur at the point of contradictions between the means, mode, and relations of production.) Thus, for Marxists, history voided of a teleological project—an emptiness achieved by exposing the reli-

³⁷ The political range of critics of the "litigious society" is quite wide: from George Bush's 1992 campaign attack on "trial lawyers" to Mary Ann Glendon's *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), to Ben Barber's worry over the contemporary privatizing turn of rights discourse ("Constitutional Rights: Democratic Institution or Democratic Obstacle?" in *The Framers and Fundamental Rights*, ed. Robert A. Licht (Washington, D.C.: AIE, 1992), and Michael Walzer's kinder worry in *What It Means to Be an American*, especially the essay therein entitled "Constitutional Rights and the Shape of Civil Society" (New York: Marsilio, 1992).

³⁸ "Jewish Question," p. 46. There is a question, at least in my mind, about whether poststructuralist critiques of historical metanarrative should be historicized such that only in our time does progressive historiography collapse, or whether the stronger poststructuralist claim that all progressive notions of history were thoroughgoing fictions should be advocated. I remain enough of a Marxist to find it difficult to surrender the notion of "development" in a historiography that accounts for the "transition" from feudalism to capitalism, from competitive capitalism to corporate capitalism, and from industrial to postindustrial capitalism in the global economic core (Europe and North America).

gious Hegelian metanarrative at the core of Marxist historiography—implies the political nightmare of nihilism or of eternal daylight, of time frozen. The forfeiture of historical design implied by the "end of history," by the bankruptcy of the principle of temporal (dialectical) movement forward, signals the political crisis of a total present. It heralds totalitarianism insofar as the pervasive domination in the social totality Marxism depicts is left without a principle of self-overcoming. Marxist critique absent redemption through dialectic, it may be recalled, was precisely the logic structuring the dark conclusions of Marcuse's *One-Dimensional Man*.

For Foucault, on the other hand, the end of history is less a political problem than a political relief. The critique of metanarrative offers reprieve not only from humanist conceits but from temporal or structural models of power: economic models in which power is figured as a wieldable commodity, and repressive models, in which power is figured as suppressing the capacities of a transcendent subject. The critique of teleology in history releases us as well from models of the political subject framed in the (global) narrative of identity, subjugation, and redemption. Reason in history, which requires both the fiction of social totalities and the fiction of epochal periodization, is made to give way to genealogical analyses of selected regimes of truth, analyses that make no claim to spatial or temporal comprehensiveness. We are also urged to conceive the problematic of power in spatial yet nonstructural terms and temporal yet nonlinear terms: space is refigured as the domain in which multiple and contestable discourses operate, time as a domain of imprecise and refigurable repetition. Intervention or resignification is possible in both dimensions insofar as power is reconceived outside discourses of structures, laws of history, and even hegemony. In this regard, Foucault's insistence on the spatialization of power means that "history" finally becomes human.

Yet if Foucault's critique of progressivist historiography offers a reprieve from historical and political perspectives tied to social totalities and temporal stages, thereby varying and widening the field of political intervention, his investigations into the nature of power also complicates the problem posed by depoliticizing discourses such as those of rights. In his concern with disciplinary power, in his articulation of how certain discourses are forged into regimes of truth, and in his formulation of power as that which produces subjects rather than simply suppressing or positioning them, Foucault conjures a political field with relatively little open space and none of the tricks of self-overcoming, of forward motion, contained in Marxist historiography. This Foucaultian discernment of power where neither Marxism nor liberalism perceives it forces a rethinking of the Marxist formulation of politicized identity and rights

claims. Foucault's account not only severs "political emancipation" from a phantasmic progress of emancipation, it also problematizes the Marxist presumption that the quest for such emancipation issues from historically subordinated or excluded subjects seeking a place in a discourse of universal personhood. It suggests instead that these claims may issue from contemporary productions of the subject by regulatory norms, productions that may be entrenched as much as challenged or loosened through political recognition and acquisition of rights. In other words, the collapse of a progressivist historiography becomes more serious given the extent to which contemporary discourses of rights converge with the disciplinary production of identities seeking them, given the extent to which contemporary discourses of political emancipation may be products not simply of stratified and egoistic civil society, but of disciplinary modalities of power producing the very subjects whose rights become a method of administering them. Here, one additional comparison between Marxist and post-Marxist social theory will indicate how certain limitations in Marx's formulation of power interact in a complex way with his problematic historiography.

For Marx, subordination is a function of social position, of where one is positioned within hierarchical relations of power constitutive of a social order. At its most economistic, the Marxist formula for measuring subordination involves ascertaining a subject's relationship to the means of production within a particular mode of production. In its less economistic moments (for example, in the "Jewish Question" or "The Holy Family"), elements of social power other than production may be considered relevant, but the issue remains one of positioning. The problem of political consciousness thus becomes one of accurately apprehending one's social positioning and hence the truth of the social totality, a matter that requires "piercing the ideological veil" in which the order is shrouded and, in particular, reversing the "camera obscura" by which it disguises its power. Political consciousness in egalitarian societies is thus a matter of perceiving the power by which such societies are objectively stratified, a perception that depends upon a critique of the ideological mystification (and especially naturalization) of stratification in order to recognize its achievement by power. (This process is mapped in the discussion of ideology in the *The German Ideology* and is modeled in the discussion of commodification in volume 1 of *Capital*.) For Marx and in many social theories heavily indebted to Marxism—for example, Catharine MacKinnon's—subject position is social position; determined by social relations that structure stratification, subject position can be apprehended through scientific discernment of these relations, a science elaborated in various incarnations of standpoint epistemology.

While critical theories of gender, race, and sexuality probably cannot

dispense entirely with a notion of subject position, the formulations of power and of the subject entailed by this notion are also inadequate to the aspirations of such theories. Consequently, much contemporary critical theory has moved to augment the Marxist account of subordination as a function of social positioning. Post-Marxist feminist theory, for example, figures the political problem of women both as a problem of constructed subjectivities (local, particular, unfixable, always exceeding the denotations of woman or women) and as one of social positioning (nameable, tangible yet always abstract, a potent designation evacuated of any particular inhabitant). If "identity" "occurs," is named or produced, at the point where these touch, where the particulars of subject formation intersect with vectors of social stratification such as race or gender, then the richest accounts of racial formation or gendering will prevail when subjectivity and social positioning are figured simultaneously.³⁹ More than simply recognizing the importance of both analytic registers, this requires interlacing them such that social "positioning" is formulated as part of subject production and the construction of subjectivity is formulated as an element in the making of social hierarchy and political domination.

What are the implications for the emancipatory potential of rights of replacing an account of subjugation as subject position with an understanding of "subject formation" and with an understanding of power as "something which circulates[,] . . . which is never appropriated as a commodity or piece of wealth . . . but is employed and exercised through a net-like organization"? What happens when we come to understand subjects as not only *positioned* by power, as not only created out of the expropriation or exploitation of their powers, but as *effects* of power, as formed or produced by power, and as "simultaneously undergoing and exercising . . . power"?⁴⁰ What happens when we understand subjects of racial or sexual domination to be the partial *effects* of *regimes*

³⁹ Yet this project is made difficult by virtue of the articulation of subject positioning and formations of subjectivity in such different registers. While subjectivity is local, particular, psychoanalytic, concerned with the problem of consciousness and unconscious, body and psyche, and desire and culture, social positioning invariably refers to orders or structures of power; it involves reading them historically and deducing how subjects are located within a field of power rather than how subjects are formed by specific operations of power. Many (but not all) contemporary battles about the "discursive" versus the "material" elements of power are drawn over this line, where those most concerned with subjectivity insist that all is discourse while those who see only social positioning insist on the pre- or extradiscursive materiality of that positioning. Resolving this matter will undoubtedly require a more thoroughly developed notion of discursive materiality and the different valences of, for example, political discourses of race and discourses of racial subjectivity.

⁴⁰ Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. C. Gordon (New York: Pantheon, 1980), p. 98.

and formations of race and sexuality, rather than positioned within and fully formed by totalizing systems? What is implied for rights when we understand politicized identity as a regulatory production of a disciplinary society and not only as political consciousness of one's social positioning in orders stratified by hierarchical social power? Might rights then appear as a means both of contesting state power by asserting individual autonomy and of more deeply articulating identity by forgetting the social norms and regulatory discourses that constitute it? Do rights affixed to identities partly function to imprison us within the subject positions they are secured to affirm or protect?

Contemporary reflection on Marx's critique of right portrays its value as mixed. On the one hand, a number of Marx's operative assumptions are called into question by post-Marxist theory: the "real universality" embodied in "true human emancipation"; the progress toward this universalism secured by a Hegelian historiography rooted in the resolution of systemic contradictions through dialectic; the ontological, historical, and epistemological distinctions between state and civil society, politics and economy, ideal and material orders; and the distinction between social position and subjectivity presumed by the possibility of scientific critique and rational consciousness. On the other hand, the experience of late modernity poses questions about the emancipatory function of rights never entertained by Marx: these include attention to disciplinary power, subjectivity, and subject production; political culture understood in spatial rather than temporal dimensions; and power and politics formulated in the metaphor of "battle" or permanent contestation rather than the metaphors of contradiction, progress, and transcendence.

Yet for all the limitations and aporias in Marx's formulation of rights and political emancipation, there are strong claims to be made for its contemporary relevance. In fact, rather than vitiating the Marxist critique of rights, the suspension of certain Marxist assumptions and the addition of certain Foucaultian insights may intensify its force. Indeed, post-Marxist theory permits us to understand how rights pervasively configure a political culture (rather than merely occupying a niche within it) and discursively produce the political subject (rather than serving as the instrument of such a subject). It also permits us to grasp the way in which disciplinary productions of identity may become the site of rights struggles that naturalize and thus entrench the powers of which those identities are the effects.⁴¹

⁴¹ See n. 6 above. The point here is that naming may be simultaneously a form of empowering recognition and a site of regulation: this is the ambiguity about identity that Foucault articulated in his concern that we might be excavating only to then interinsurrec-

But to suggest that rights sought by politicized identities may cut two (or more) ways—naturalizing identity even as they reduce elements of its stigma, depoliticizing even as they protect recently produced political subjects, empowering what they also regulate—is not to condemn them. Rather, it is to refuse them any predetermined place in an emancipatory politics and to insist instead upon the importance of incessantly querying that place. I want to proceed with such querying now by reflecting on the formulation of rights by two of their progressive exponents in contemporary law and politics, Patricia Williams and Catharine MacKinnon.

What happens, in the kind of culture Marx diagnosed as producing the need and desire for rights, to those without them, or to those largely sequestered in domains marked "private" or "natural" where rights do not apply? What happens to the "frenzied" order of egoistic civil society where those subordinated via race, sexuality, gender, or age—locked out or thrust into the ontological basement of the social structure—are routinely exploited or violated by those armed with rights, social power, and social legitimacy? What happens when the lack of a right to property or speech, bodily integrity or sexual conduct, is conjoined with the vulnerability and dependence created by relative social powerlessness and marginalization?

This is the perspective, in her terms "the subject position," from which Patricia Williams's defense of rights issues in *The Alchemy of Race and Rights*. This defense is mindful of critiques from the left wing of the legal establishment as well as of the failure of civil rights, once gained, to substantially augment the socioeconomic condition of the majority of blacks in the United States. It is also a defense that de-emphasizes the ways the emergence of rights interlocked with the triumph of the bourgeoisie in postfeudal Europe, with capital's pressing need for the free circulation of land and labor, and with individual propertied male ownership of the members and elements of his household. It is a defense that eschews the way that, historically, rights discourse legitimated the new class formations as well as a constitutional state designed to secure and naturalize them. Williams's account begins already inside this history, presumes the Hobbesian/Adam Smithian culture it figures, and dwells

tionary discourses. Moreover the emancipatory function of rights cannot be adjudicated in abstraction from the bureaucratic juridical apparatus through which they are negotiated. Who, today, defends their rights without an army of lawyers and reams of complex legal documents? In this regard, rights, rather than being the "popular and available" currency depicted by Patricia Williams, may subject us to intense forms of bureaucratic domination and regulatory power even at the moment that we assert them in our own defense.

upon the experience of those explicitly deprived of rights within it: those whom, *Dred Scott* opined, "were so far inferior, that they had no rights which the white man was bound to respect."⁴² For Patricia Williams, in whose analysis of the law "subject position is everything,"⁴³ thinking about rights is unavoidably tethered to the experience of those persons historically denied them in a political culture in which political membership, civic belonging, bodily, emotional, and sexual boundary, social respect, legitimacy as an actor, capacity as a transactor, autonomy, privacy, visibility, and generative independence are all negotiated through the language and practice of rights and rightlessness.

While the importance of this link cannot be overstated, neither can its partiality. For deprivation on this scale is not merely lack but the creation of desire through lack. As homosexuals may crave the legitimacy conferred by the institution of marriage from which we are debarred—and thus reinscribe the very mechanism of our subjection in our yearning for that which is *premised* on our exclusion—Patricia Williams's defense of rights on the basis that it is "a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance" poses a conundrum.⁴⁴ What if this deeply enmeshed symbol operates not only in but against that psyche, working as self-reproach, depoliticized suffering, and dissimulation of extralegal forms of power? To see how this might be the case, I want to consider three strands of Williams's argument in *The Alchemy of Race and Rights*: her critique of the phenomenon she calls "privatization," her analysis of black women's cultural positioning, and her effort to proliferate and resignify the meaning and distribution of rights.

For Patricia Williams, the "over-expanded mental state we call 'privacy'" is among the most pernicious and subtle enemies of contemporary democracy, as well as a powerful mode of legitimizing class and race inequalities. "The tyranny of what we call the private," she argues, risks reducing us to "the life-crushing disenfranchisement of an entirely owned world," where "permission must be sought to walk upon the face of the earth." Williams spies the corrosive effects of privatization in contemporary arguments about "reverse discrimination" and for "employer preference," in Supreme Court decisions permitting states to determine levels of indigent support, in police commissioner complaints about being singled out for media attention during police brutality investigations, in John Tower's promise to give up drinking if confirmed as Bush's de-

⁴² Quoted in *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), p. 162.

⁴³ *Ibid.*, p. 3.

⁴⁴ *Ibid.*, p. 165.

fense secretary. Criticizing not only privatization of public functions by the economy (workfare or school vouchers), Williams also assails increased privatization of the economy, represented by restricted access in commerce. The latter frames an incident in which a young white Benetton salesman refused her entry to a buzzer-controlled shop in New York and characterizes as well a sign she saw in a Greenwich Village boutique—"Sale! \$2 overcoats. No bums, no booze"—which commodifies poverty while excluding the poor.⁴⁵

Williams also traces forms of privatization that, like the design of corporate parks and shopping malls, effectively resegregate populations along lines of race and class. Reflecting on Mayor Koch's plea for black compassion toward white Howard Beach residents unhappy about an interracial protest march through "their" streets, she writes: "Koch was, in effect, pleading for acceptance of the privatization of public space. This is the de facto equivalent of segregation; it is exclusion in the guise of deep-moated property 'interests' and 'values.' Lost is the fact that the object of discussion, the street, is public."⁴⁶ Williams also examines how the language of privacy and its cousin, "choice," are used to mask state coercion as private desire. When defendants in child abuse or rape cases are "offered a 'choice' between . . . jail and sterilization[.] . . . the defendant is positioned as a purchaser, as 'buying' . . . freedom by paying the price of her womb" or by "choosing" castration.⁴⁷ This repackaging of state domination as the market freedom of individuals, she argues, imperils both public morality and the meaning of citizenship. It vandalizes a language of public obligation and at the same time legitimizes the de facto racism, misogyny, and hatred of the poor that, in her analysis, it is the task of the political to mitigate. In short, "privatization" violates public space, depoliticizes socially constructed problems and injustices, exonerates public representatives from public responsibility, and undermines a notion of political life as concerned with the common and obligating us in common.

How is this searing political critique reconcilable with Williams's unalloyed defense of rights? Rights in liberal capitalist orders, Marx reminds us, are bits of discursive power that quintessentially privatize and depoliticize, that mystify and reify social powers (property and wealth, but also race, sexuality, and gender) as the natural possessions of private persons, that analytically abstract individuals from social and political context, that are in fact *effects* of the social power they obfuscate. Indeed, to the extent that rights discursively mask stratifying social powers

⁴⁵ *Ibid.*, pp. 43, 42.

⁴⁶ *Ibid.*, p. 69.

⁴⁷ *Ibid.*, pp. 32, 33.

through their constitution of sovereign subjects rendered formally equal before the law, they would appear to be among the most basic strategies of the privatization Williams condemns. As the Reagan-Bush years made clear, rights discourse is precisely what furnishes the claims of reverse discrimination and employer preference, the justifications for school voucher systems, regressive tax reform, union busting, and the prerogatives of store owners and neighborhoods to restrict access. Rights discourse in liberal capitalist culture casts as private potentially political contests about distribution of resources and about relevant parties to decision making. It converts social problems into matters of individualized, dehistoricized injury and entitlement, into matters in which there is no harm if there is no agent and no tangibly violated subject. And if we shift here from Marx to Foucault in querying the incommensurability of Williams's critique of privatization and defense of rights, we can ask: What more thoroughly obscures domination by regulatory norms—the "whiteness" or "maleness" of certain standards of excellence—than the figure of the sovereign subject of rights? And what would more neatly converge with the late modern disciplinary production of identity, and regulation through identity, than the proliferation of rights Williams counsels?⁴⁸

None of this is to suggest that those without rights in a rights-governed universe should abandon the effort to acquire and use them. Williams and others make clear enough that such counsel, especially from white middle-class academics, is at once strategically naive and a disavowal of cultural prerogatives.⁴⁹ But to argue for the importance of having rights where rights are currency is not yet an assessment of how they operate politically nor of the political culture they create. Rather, that argument underscores both the foolishness of walking into a pitched battle unarmed and the crippling force of being deemed unworthy of whatever a given culture uses to designate humanity. The question Williams's defense leaves unasked is whether the proliferation of rights she advocates might not abet the phenomenon she calls privatization, the encroachment of "a completely owned earth," the disintegration of pub-

⁴⁸ Ibid., p. 165.

⁴⁹ See both Williams's account of mental experiments she undertook to see if she could get help for her enslaved great-great-grandmother without the discourse of rights (ibid., pp. 157–58) and her account of the different subject positioning that led her and a white male colleague to have very different attitudes toward formal legal arrangements such as rental contracts (pp. 146–49). See also the essay by Robert Williams, Jr., "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color" (*Law and Inequality: A Journal of Theory and Practice* 5 [1987], pp. 103–34), in which he argues that Critical Legal Studies critiques of rights and those who clamor for them involve a certain condescension, even racism, in their blindness to the privileged position from which they make their arguments.

lic obligations and a political culture of responsibility. It also leaves uninterrogated the relationship between the promise of rights for black people as "an illusion [that] became real for only a few"⁵⁰ and the function of rights in depoliticizing economic power, in privatizing economic circumstance—in short, in disguising the workings of class.

Williams's defense of rights veers away from these questions and instead focuses on the historical deprivation of social, sexual, and physical integrity that rightlessness conjured for blacks in the United States. With Robert Williams, she argues that if rights function to individuate, separate, and defend individuals, if they grant individuals a sphere of bodily integrity and privacy, if they announce our personhood even in abstract fashion and our membership even in an abstract community, then these may be exactly what is needed and wanted by those denied them in a culture which marks its "others" through such deprivation.⁵¹ "[W]here one's experience is rooted not just in a sense of illegitimacy but in *being* illegitimate, . . . then the black adherence to a scheme of . . . rights—to the self, to the sanctity of one's own personal boundaries—makes sense." Given the history of violent "familiarity" and "informality" with which blacks have been treated by whites in the United States, some distance, abstraction, and formal rather than intimate recognition might be an important remedy. "For me," Patricia Williams argues, "stranger-stranger relations are better than stranger-chattel."⁵²

Elaborating this argument, Williams delineates the dilemma of "exposure and hiding" as the constant experience and measure of subjugation of black women. The choice between humiliating exposure and desperate hiding is the nonchoice that configures the drama of Tawana Brawley, Anita Hill, Williams's own "exaggerated visibility and invisibility" as black female law professor, black women as slaves—"teeth and buttocks bared to interested visitors"—and black women's present positioning in a racial-sexual economy that routinely marks their sexuality as unbarred availability.⁵³

This unnavigable "choice" between exposure and hiding clearly calls for redress through social practices that accord black women autonomy and privacy, agency and respect. But perhaps, heeding a Foucaultian appreciation of subject formation, this violent legacy also takes shape as a complex form of desire in the subjects it creates, a desire symptomized in Patricia Williams's deeply personal and quasi-confessional writing. Indeed, how else to explain her production of our *intrusion* into her morn-

⁵⁰ Patricia Williams, *Alchemy of Race and Rights*, p. 163.

⁵¹ Robert Williams, "Taking Rights Aggressively."

⁵² *Alchemy of Race and Rights*, pp. 154, 148.

⁵³ Ibid., pp. 18, 92–93, 175–77, 196.

ing toilette—her *exposure* of how with astringent, mascara, and lip glaze she hangs her face in contradictions to “deny pain[,] . . . be a role model[,] . . . pav[e] the way for [her] race”—and in this way restages the scene of invasion, the absence of bodily privacy that is the history of African American women? How else to explain the revelation of bouts of depression, humiliating teaching evaluations, unedited dreams and nightmares, long hours of suffering in her terrycloth bathrobe, and vanity before the mirror? Perhaps this historically produced desire—for the right to expose oneself without injury, and for the right to hide without recrimination—undergirds a certain desire for rights, those implements that promise, as liberalism does more generally, to guard exposed subjects and legitimize hiding. But rights could only fulfill this promise if they could bring into view the complex subject formation consequent to a history of violation, precisely the articulation they thwart in figuring desire as natural, intrinsic, and unhistorical.

Thus, as with the relationship between rights and privatization, it may be that the very condition that designates liberalism’s “others”—being condemned to exposure or hiding (here homosexuality also comes to mind)—is both intensified and redressed by rights: the same device that confers legitimate boundary and privacy leaves the individual to struggle alone, in a self-blaming and depoliticized universe, with power that seeps past rights and with desire configured by power prior to rights. It may be that the discourse of rights, Maxine Thomas’s stock in trade, is precisely what could not protect her from, and indeed what stole the political language for, the unlivable contradictions that finally made this stunningly accomplished black female judge “split at the seams and return to the womb . . . exploded into fragments of intelligence and scattered wisdom.”⁵⁴ It may be that the withdrawal that rights offer, the unmarking or destigmatizing they promise, has as its cost the loss of a language to describe the character of domination, violation, or exploitation that configures such needs. Indeed, what if the desire for withdrawal into the buffered and enclosed space of liberal personhood marked by rights is *symptom*, and what if treating the symptom distracts us from and thus covers over its generative source? What if, as Marx put it, the “right of the circumscribed individual, withdrawn into himself” responds to the socially produced condition of exposure or hiding, excessive vulnerability or invisibility, humiliation or death, by codifying that condition as natural and installing it in the law?⁵⁵

There is still another strand to Williams’s defense of rights: as the historically and currently existing social form of freedom, they are both con-

cretely available and “magic” in the mouths of black people. Yet, even as Williams insists upon the immediate political efficacy of rights and contrasts this efficacy with the “timeless, formless futurism” held out by rights critics, she also makes a fierce argument for the exploitability of the indeterminacy of rights:

The task . . . is not to discard rights but to see through or past them so that they reflect a larger definition of privacy and property: so that privacy is turned from exclusion based on self-regard into regard for another’s fragile, mysterious autonomy; and so that property regains its ancient connotation of being a reflection of the universal self. The task is to expand private property rights into a conception of civil rights, into the right to expect civility from others. . . . Society must *give* [rights] away . . . to slaves[,] . . . to trees[,] . . . to cows[,] . . . to history[,] . . . to rivers and rocks.⁵⁶

The risk here is that the appreciation of the power and flexibility of the word afforded by recent literary theory may have converged with what Marx identified as liberalism’s theological impulses to exaggerate a sense of what can be accomplished with words. How resonant of Bauer’s understanding of civic emancipation is Patricia Williams’s proclamation that “the problem with rights discourse is not that the discourse itself is constricting but that it exists in a constricted referential universe.”⁵⁷ In literalizing the promise of rights on the one hand and lifting them from historical and social context on the other, an analysis so dependent upon floating signifiers appears to end up intensifying the idealist tendencies of liberal thought. Indeed, how could extending “to all of society’s objects and untouchables the rights of privacy, integrity, and self-assertion”⁵⁸ contest the steady commodification of the earth and of public life that Williams also decries? Might words be more mutable, more subject to alchemical fire, than the political histories that generate rights, the political economies in which they operate, and the subjectivities they fashion?

In this sense, what Williams calls the “magic” of rights may pertain less to their transmutational capacities than to the fact that while they formally mark personhood, they cannot confer it; while they promise protection from humiliating exposure, they do not deliver it. (Hence the Benetton incident, which no truckload of rights can ameliorate or redress.) The necessarily abstract and ahistoricizing discourse of rights mystifies the conditions and power that delimit the possibility of achieving personhood, while its decontextualizing force deprives political consciousness of recognition of the histories, relations, and modalities of power that produce and situate us as human.

⁵⁴ *Ibid.*, pp. 196–97.

⁵⁵ “Jewish Question,” p. 42.

⁵⁶ *Ibid.*, pp. 163, 164–65.

⁵⁷ *Ibid.*, p. 159.

⁵⁸ *Ibid.*, p. 165.

Thus, if the provision of boundary and protection from "bodily and spiritual intrusion"⁵⁹ offered by rights are what historically subjugated peoples most need, rights may also be one of the cruelest social objects of desire dangled above those who lack them. For in the very same gesture with which they draw a circle around the individual, in the very same act with which they grant her sovereign selfhood, they turn back upon the individual all responsibility for her failures, her condition, her poverty, her madness—they privatize her situation and mystify the powers that construct, position, and buffet her. In this respect, perhaps they not only failed to save Judge Maxine Thomas—perhaps they also intensified the isolation of her struggle with all the contradictory forces of power and freedom that rights disavow in their occupation of the field of justice. If rights are all that separate Williams from her bought-and-sold, raped-and-abused great-great-grandmother, they are also the device that demeans Clarence Thomas's now infamous sister, that permits him to ratify a larger social presumption that if he could become a Supreme Court justice, then so could they both, and only her laziness, her lack of moral fiber or industriousness, or her corruption by "welfare culture" accounts for the difference. Perhaps Williams's contrast of the concrete, immediate, and available character of rights discourse with the "timeless, formless futurism," the "unrealistic[,] . . . unattainable[,] or otherworldly" characteristic of other emancipatory political projects⁶⁰ is, finally, a false contrast dependent on a false concreteness. Under the guise of the concrete, what rights promise may be as elusive, as otherworldly, as unattainable as that offered by any other political myth.

Catharine MacKinnon's effort to rectify the masculinism of the law and redress women's inequality depends upon taking seriously Marx's critique of rights, bending it in a feminist direction, and incorporating it into a form of jurisprudence that Marx never entertained. Unlike Marx, MacKinnon seeks to make visible *within* the law, and particularly within rights discourse, precisely the kind of social power that Marx argued was inherently obscured by bourgeois rights discourse. For MacKinnon, the project of feminist jurisprudence, especially in the domain of sexual harassment and pornography, is to make rights articulate and respond to rather than mask the systematic workings of gender subordination.

In MacKinnon's analysis, gender is the congealed effect of a patriarchal organization of sexuality as male dominance and female submission. A

specific organization of sexuality creates gender as a specific organization of work creates class, and a politics that redresses gender inequality is therefore a politics that makes visible the construction and enforcement of women's subordination through the appropriation, commodification, and violation of female sexuality. Sexual harassment, rape, battery, and pornography in this way appear not simply as violations, but as violations that specifically reduce persons to women, that iterate and reiterate—indeed, perform—the category "women," and that thus constitute a violation of women's civil rights, women's right to civic and political equality. In Althusserian terms, MacKinnon regards these practices not simply as hurting but as *interpellating* women as women, where "woman" is analytically conceived as only and always an effect of male dominance constituted by and operationalized as sexual dominance.

MacKinnon criticizes legal claims to objectivity as inherently masculinist, casting the law's claimed aperspectivalism and universalism as "male" in substance as well as form: "In the liberal state, the rule of law—neutral, abstract, elevated, pervasive—both institutionalizes the power of men over women and institutionalizes power in its male form."⁶¹ In arguing that point-of-viewlessness is the law's maleness, she adapts for feminism the Marxist view that universal discourse—the discourse of liberal constitutionalism—in an unequal social order is a ruse of power, presenting as generic what actually privileges the dominant. More specifically, she argues that the universalism of the state masks its masculinist substance through the (masculinist) aperspectival form, a form that covers the law's maleness just as the "universality" of the state both constitutes and legitimizes the state's bourgeois character.

MacKinnon thus seeks to make the law "gender equal" precisely by prying this project loose from one of "gender neutrality," indeed by opposing gender equality to gender neutrality. Arguing that the law is most gender biased where it is most gender blind, she seeks to make the law "gender sighted," in part by bringing to light its gendered perspective. MacKinnon's effort to use the law as a means of *recognition* and *rectification* of gender subordination depends upon forcing the law to recognize and reform its own masculinism. This she aims to achieve by establishing both the partiality and the veracity of women's "perspective," a perspective rooted in women's experience of sexual subordination and violation.

MacKinnon seeks to realize the universal claim of liberal equality not by expanding the law's range of inclusion but by installing within the law the capacity to recognize stratifying social power, which its formal categories ordinarily make invisible and which rights discourse in particular

⁵⁹ Ibid., p. 164.

⁶⁰ Ibid., pp. 163–64.

⁶¹ *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), p. 238.

depoliticizes. Thus, MacKinnon does not abandon the universal formulation of justice claimed for the present by liberals and anticipated in the future by Marxists; nor, however, does she postpone the realization of true universal equality and liberty to a postliberal, nonstate millennium. Rather, MacKinnon aims to compel the law to fulfill its universalist promise by forcing it to recognize and rectify relations of domination among its subjects—in particular, by making it recognize gender as a relation of domination rather than a benign or natural marker of difference.

If the law can be made to articulate rather than mask social domination, if it can be made to reveal gender as the effect of eroticized male dominance, then perhaps substantive rather than merely formal equality can be won through civil rights law. This is what MacKinnon seeks to achieve through a jurisprudence that equates women's equality with women's rights against the incursions of male sexuality, against what MacKinnon posits as the *material basis* of female subordination. The project is ingenious in the parsimony and radicalism of its basic formula: If sexual subordination defines the category "woman," then sexual subordination—whether through rape or marriage, incest or harassment, abortion restrictions or pornography—must be legally construed as a violation of women's civil rights in an egalitarian legal order, a violation of women's right not to be socially subordinated. In this way, sexual harassment and pornography become issues of gender equality rather than issues of gender "difference," and rather than gender generic issues of obscenity, assault, or labor relations.

In this effort to install an *analysis* of women's sexual subordination in the law, MacKinnon attempts to resolve the chief Marxist ambivalence about rights and legal reform, namely, their potential mystification of the "real, material basis" of subordination even as they offer formal protection to marked subjects. MacKinnon resolves this dilemma by refusing it, by installing within legal discourse an analysis of the material basis of women's subordination. Thus, rather than emancipating women abstractly while leaving intact the substantive conditions of their subordination, MacKinnon's legal theory and legislative proposals seek to emancipate women from these conditions by making the conditions themselves illegal, by *politicizing them in the law*. Put the other way around, instead of emancipating us abstractly by denying the relevance of sexuality to gender and gender to personhood, a move that, to paraphrase Marx, emancipates sexuality to act after its own fashion, namely as male dominance and female subordination, MacKinnon insists that the emancipation of women is the right of women to be free from sexual incursion, violation, appropriation, and subordination. She would thus seem to be doing precisely what Marx thought could not be done: em-

ploying rights discourse to expose and redress inequalities that its abstract formulations of personhood and equality are thought to obscure and depoliticize.

With due admiration for the brilliance of MacKinnon's argument, there are a number of political and strategic questions to be posed about this work, many of them now sufficiently familiar (and considered at length in chapter four) to be summarized rather than detailed here.

First, if MacKinnon aims to write "women's experience into law," precisely which "women's experience(s)," drawn from which historical moments, and which culture, racial, and class strata, is MacKinnon writing? Certainly many women have argued that MacKinnon's depiction of pornography as "the graphic sexually explicit subordination of women," which violates women's civil rights, squares with neither their experience of being female, their experience of pornography, nor their ambivalence about the legal regulation of porn. Similarly, many feminists have protested MacKinnon's reduction of gender to sexuality, arguing that motherhood or other gendered practices are at least as constitutive of their subordination through gender.

Second, what does it mean to write historically and culturally circumscribed experience into an ahistorical discourse, the universalist discourse of the law? What happens when "experience" becomes ontology, when "perspective" becomes truth, and when both become unified in the Subject of Woman and encoded in law as women's rights? Moreover, what if the identity of women as keyed to sexual violation is an expressly late-twentieth-century and white middle-class construction of femininity, consequent to a radical deprivatization of sexuality on the one side, and erosion of other elements of compulsory heterosexuality, such as the sexual division of social labor, on the other? What does it mean to install in the universalist discourse of law an analysis of women's subordination that may be quite historically and culturally circumscribed?

Third, does a definition of women as sexual subordination, and the encoding of this definition in law, work to liberate women from sexual subordination, or does it, paradoxically, reinscribe femaleness as sexual violability? How might installation of "women's experience" as "sexual violation" in the law reiterate rather than repeal this identity? Foucault (along with certain strains in psychoanalytic thought) reminds us that the law *produces* the subjects it claims to protect or emancipate. How, then, might a formulation of women's civil rights as violated by pornography or sexual harassment produce precisely the figure MacKinnon complains we have been reduced to by sexism, a figure of woman wholly defined by sexual violation, wholly identified with sexual victimization?

Fourth, insofar as MacKinnon's attempt to legally encode "women's experience" interpellates women as sexually violable, how does this

effectively deny the diversity and complexity of women and women's experience? Might this interpellation be particularly unemancipatory for women whose lived experience is not that of sexual subordination to men but, for example, that of sexual outlaw? How does the encoding of women's civil rights as rights against male sexual violation reaffirm the operations of exclusion enacted by the heterosexually normative category, woman?

Fifth, by returning to the analogy with class that inaugurates MacKinnon's analysis of gender and feminist jurisprudence, we can see from yet another angle how her effort to achieve substantive equality through rights may reiterate rather than resolve the opposition between rights and equality articulated in Marx's critique. MacKinnon's method of installing within rights discourse an analysis of the social power constitutive of gender ought to be applicable to class, that form of social power from which her analysis took its inspiration. But to render class exploitation illegal, to outlaw its conditions as MacKinnon seeks to outlaw the conditions of gender domination, would entail circumscription if not elimination of the right to private property, one of the most fundamental rights of liberal capitalist orders. (As Marx reminds us, real emancipation from private property requires the abolition of private property, not the abolition of political distinctions based upon property ownership.)

Now if substantive economic equality, the abolition of class, is incompatible with private property rights, might it be the case that substantive gender equality as MacKinnon defines it is equally incompatible with rights of free speech? If, as MacKinnon argues, sexual dominance is in part a matter of speech (e.g., sexual harassment) and representation (e.g., pornography), then is it any surprise that MacKinnon's effort to "get equality for women" comes into direct conflict with the First Amendment? Here it would appear that MacKinnon has not so much countered as extended and affirmed Marx's critique of rights as masking power and social inequalities. Her analysis *confirms* rather than resolves the opposition Marx articulates between "the rights of man" on one side (property, freedom of expression, freedom of worship, etc.) and the substantive equality (which she calls the civil rights) of women on the other. Appropriating a discourse of civil rights to procure equality for women, MacKinnon opposes the liberties secured by constitutional universalism and in this sense reaffirms rather than reworks Marx's formulation of the opposition between political emancipation and true human emancipation, between liberal universalism and domination in civil society, between bourgeois liberty and real equality.

On the one hand, MacKinnon seeks to encode the "experience" or "subject position" of a fiction called "women" in the timeless discourse of the law, such that women are produced as the sexually violable crea-

tures the law says we are. On the other, she appears engaged in a critique of rights in the name of women's equality. Together these efforts may reveal the extent to which deployment of a Marxist critique of liberal universalism *as* law, rather than *against* the law, paradoxically breeds a politics of severe unfreedom. Legally codifying a fragment of history as a timeless truth, interpellating women as unified in their victimization, and casting the "free speech" of men as that which subordinates women, MacKinnon not only opposes bourgeois liberty to substantive equality but potentially intensifies the regulation of gender and sexuality through rights discourse, abetting rather than contesting the production of gender identity as sexual. In short, as a regulatory fiction of a particular identity is deployed to displace the hegemonic fiction of universal personhood, we see the discourse of rights converge insidiously with the discourse of disciplinarity to produce a spectacularly potent mode of juridical-disciplinary domination.

Perhaps the warning here concerns the profoundly antidemocratic elements implicit in transferring from the relatively accessible sphere of popular contestation to the highly restricted sphere of juridical authority the project of representing politicized identity and adjudicating its temporal and conflicting demands. MacKinnon's ingenious and failed effort at appropriating Marx's critique for legal reform may also stand as a more general caution against installing identity in the law, where inevitably totalized formulations of identity converge with the individuating effects of rights to produce levels of regulation through juridical individuation not imagined even by Foucault. Her failure may caution too that even as the generic man of the universal "rights of man" is problematic for the social powers it discursively cloaks, the specifications of identity in late-twentieth-century rights discourse may be equally problematic for the social powers they discursively renaturalize. In this regard, Marx's critique of rights may function most effectively in an era of proliferating politicized identities as a warning against confusing the domain of rights with the domain of political contestation: rights must not be confused with equality nor legal recognition with emancipation.

What if the value of rights discourse for a radical democratic project today lies not in its potential affirmation of difference, its guarantees of protection, its circumscriptions of autonomy, or as remedy to social injury, but in the (fictional) egalitarian imaginary this discourse could engender? Might rights campaigns converge most effectively with "prepolitical" struggles for membership or postpolitical dreams of radical equality? Certainly the contemporary right-wing reading of campaigns for equal rights for gays and lesbians suggests that the political disruptiveness, the democratizing dimension of rights discourse, may pertain precisely to the sustained universalist fiction of this discourse, a

universalism that the charge of "special rights" attacks. The moment at which, through the discourse of rights, lesbians and gays claim their personhood against all that would disallow it is a radically democratic moment, analogous to those moments in U.S. history when white women and African Americans made similar claims.

If, as Marx argued 150 years ago, the democratizing force of rights discourse inheres in its capacity to figure an ideal of equality among persons qua persons, regardless of socially constructed and enforced particularities, then the political potency of rights lies not in their concreteness, as Patricia Williams argues, but in their idealism, in their ideal configuration of an egalitarian social, an ideal that is contradicted by substantive social inequalities. Such a claim further implies, with Marx, that the democratic *value* of political emancipation lies partly in its revelation of the *limits* of political emancipation. But while Marx counted on a progressive dialectical process for such revelation, it now becomes a project for discursive struggle whose parameters are invented rather than secured in advance and whose outcome is never guaranteed.

If rights figure freedom and incite the desire for it only to the degree that they are void of content, empty signifiers without corresponding entitlements, then paradoxically they may be incitements to freedom only to the extent that they discursively deny the workings of the substantive social power limiting freedom. In their emptiness, they function to encourage possibility through discursive denial of historically layered and institutionally secured bounds, by denying with words the effects of relatively wordless, politically invisible, yet potent material constraints. Still more paradoxically, when these material constraints are articulated and specified as part of the content of rights, when they are "brought into discourse," rights are more likely to become sites of the production and regulation of identity as injury than vehicles of emancipation. In entrenching rather than loosening identities' attachments to their current constitutive injuries, rights with strong and specified content may draw upon our least expansive, least public, and hence least democratic sentiments. It is, rather, in their abstraction from the particulars of our lives—and in their figuration of an egalitarian political community—that they may be most valuable in the democratic transformation of these particulars.

CHAPTER SIX

Liberalism's Family Values

Women represent the interests of the family and of sexual life. The work of civilization has become increasingly the business of men, it confronts them with ever more difficult tasks and compels them to carry out instinctual sublimations of which women are little capable. . . . Thus the woman finds herself forced into the background by the claims of civilization and she adopts a hostile attitude toward it.

—Sigmund Freud, *Civilization and Its Discontents*

The family, as person, has its real external existence in property; and it is only when this property takes the form of capital that it becomes the embodiment of the substantial personality of the family. . . .

The family as a legal entity . . . must be represented by the husband as its head. Further, it is his prerogative to go out and work for its living, to attend to its needs, and to control and administer its capital.

—G. W. F. Hegel, *Philosophy of Right*

The bourgeoisie has torn away from the family its sentimental veil. . . .

—Karl Marx, *Manifesto of the Communist Party*

AT THE CLOSE of *The Protestant Ethic and the Spirit of Capitalism*, Max Weber unsettles his account with the reflection that capitalism no longer requires the religious asceticism he painstakingly established as indispensable to its formation:

The Puritan wanted to work in a calling; we are forced to do so. . . . To-day the spirit of religious asceticism . . . has escaped from the cage. But victorious capitalism, since it rests on mechanical foundations, needs its support no longer. The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading, and the idea of duty in one's calling prowls about in our lives like the ghost of dead religious beliefs.¹

¹ *The Protestant Ethic and the Spirit of Capitalism*, trans. T. Parsons (New York: Charles Scribner's Sons, 1958), pp. 181–82.