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Tragic Rights: The Rights Critique in the Age of Obama

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TRAGIC RIGHTS: THE RIGHTS CRITIQUE IN THE AGE OF
OBAMA

ROBIN L. WEST*

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INTRODUCTION

Rights, Mark Tushnet once opined, are positively harmful to the party of humanity.¹ Conceding some exceptions—most notably the civil rights victories of the 1950s through 1970s—Morton Horwitz observed around the same time that U.S. constitutional rights have historically overwhelmingly served to further entrench the holdings of the propertied class against attempts at democratic redistribution, thereby discrediting both the idea of equality and the processes of democracy.² Rights, and particularly rights to privacy, Catharine MacKinnon argued in a series of searing articles in the 1980s, do little but legitimize and protect oppression within intimate spheres of social, sexual, and economic intercourse, thus injuring women's interests in security and equality far more than could any unwanted pregnancy.³ Antidiscrimination rights, Alan Freeman urged, do almost nothing to address, and indeed do quite a bit to further insulate, the subordination of racial minorities that is the product of private and institutional forces, which purportedly neutral government decisions then validate and further entrench.⁴ Rights against government intervention into private agreements or contracts might guard the rights holder against an over-reaching or moralistic government, Bob Gordon and others argued, but by doing so they strengthen the hand of the rights holder against weaker parties within the sphere of contractual insularity constructed by the right.⁵

These claims, and others like them, constituted what came to be called in the 1980s the “rights critique.”⁶ It was authored by a group of scholars, sometimes referred to as the “rights critics.”⁷ The rights critique, in turn, was the moral heart of the Critical Legal Studies

1. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984).

2. See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 396-98 (1988).

3. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 93 (1987).

4. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978).

5. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 198-99 (1987).

6. See *infra* notes 8, 13

7. See *infra* notes 8, 13.

(CLS) movement.⁸ It was also, for a brief moment in time, ubiquitous. It may have set your teeth on edge, but you could not get away from it even if you tried.⁹ But you should not have wanted to escape exposure to these critical challenges to the moral righteousness of rights, which were then and are still the moral coin of the realm of law, as Patricia Williams poignantly argued in her influential—and unwittingly fatal response.¹⁰ The rights critique challenged rights' moral stature. As such, it was one of the most vibrant, important, counterintuitive, challenging set of ideas that emerged from the legal academy over the course of the last quarter of the twentieth century.¹¹ It deserves recognition as a signature accomplishment.

The rights critique has also virtually disappeared from contemporary legal scholarship and pedagogy. We do not hear much, if anything, of rights' wrongs anymore—of their subordinating, legitimating, and alienating effects. The beginning of this silence can be traced to approximately 1990, when both founders and their critics started widely proclaiming the death of the CLS movement.¹² The

8. For other historical accounts of the origins and content of the rights critique, see generally Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002). Kennedy tends to center the indeterminacy critique over the political arguments I have summarized above and identifies as the essence of the critique the claim that rights simply reflect the political interests of their holders and nothing more transcendent. *Id.* at 184-85. There was unquestionably a strand of this “realist” critique of rights in the writings from the 1980s, but in my view this approach badly shortchanges the moral and political content of the critique, as expressed by most participants. I have criticized Kennedy’s “interest-based” account of the rights critique in ROBIN WEST, *Introduction to NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 1, 1-11 (2011). For other more contemporaneous accounts of the role of the rights critique in CLS writing, see Horwitz, *supra* note 2, at 393; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) [hereinafter Tushnet, *Critical Legal Studies*]; Tushnet, *supra* note 1, at 1363.

9. See generally Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986). Between these two very different accounts of CLS, the latter is considerably more sympathetic than the former.

10. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05 (1987) (arguing that CLS ignored the value of rights to minorities and the poor and the differences in which whites and blacks experience rights).

11. See Bernard J. Hibbitts, *Through a Glass, Darkly*, 51 U. PITT. L. REV. 167, 168 (1989) (book review) (“In its original incarnation at the Harvard Law School in the mid-1970s, the Critical Legal Studies movement represented the most significant intellectual challenge to conventional legal thought since 1930s Realism.”).

12. See E. Dean Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL’Y 415, 416 (2000) (“CLS no longer seems to possess a voice comprehensible to

rights critics have been particularly mute, however, during the age of Obama, from 2008 to the present.¹³

This muteness, I believe, is strange. The three-pronged rights critique articulated by the rights critics—that U.S. constitutional rights politically insulate and valorize subordination, legitimate and thus perpetuate greater injustices than they address, and socially alienate us from community—is, if anything, much easier to defend and explain today than it was then, in liberal rights' heyday. Then, to so many people, constitutional rights, welfare rights, civil rights, positive rights, human rights, the very idea of rights—rights per se¹⁴—were seemingly a vehicle for liberation from both oppression

anyone outside its own small circle.”); Louis Michael Seidman, *Critical Constitutionalism Now*, 75 *FORDHAM L. REV.* 575, 583 (2006) (stating that “critical constitutionalism” is less influential today than ever before); Tushnet, *Critical Legal Studies*, *supra* note 8, at 1539-41 (noting that the academy’s acceptance of CLS gave CLS legitimacy but also led to its weakening and a defusing of its “political explosiveness”).

13. The exception, if we look at the entire decade of the aughts, is Janet Halley and Wendy Brown’s attempt in 2002 to reignite Critical Legal Theory. *See supra* note 8. Other than Kennedy’s reprinted critique of rights in that volume, however, there is little in it that continues the moral and political themes of the rights critic. The book is far more absorbed with criticism of feminism on the familiar liberal grounds that it demonizes sex; diversity arguments for affirmative action, on the grounds that they essentialize racial difference; and campaigns for gay marriage, on the grounds that they normalize a healthy and vital political deviance. *See* Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 41-43; Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 80-82; Michael Warner, *Beyond Gay Marriage*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 262-63. The only piece in the book that argues forcefully that a left-liberal right legitimizes larger injustice in a way that tracks rights critiques from the 1980s, is Mark Kelman and Gillian Lester’s chapter on the construction of learning disabilities as a “civil right.” *See* Mark Kelman & Gillian Lester, *Ideology and Entitlement*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 137-39. For critical commentary on *Left Legalism’s* narrow focus, see Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right’s Rise*, 54 *BUFF. L. REV.* 1191, 1193-97 (2007) and ROBIN WEST, *Critical Legal Studies—The Missing Years*, in *NORMATIVE JURISPRUDENCE*, *supra* note 8, at 107, 170-76. *See also* Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 *PEPP. L. REV.* 515, 515-16 (2009) (attempting to explain the disappearance of CLS by reference to the prominence of the indeterminacy critique and the decline of its spiritual argument).

14. “We want our rights and we don’t care how / We want our revolution NOW.” PETER WEISS, *MARAT/SADE*, act 1, sc. 5 in PETER WEISS, *MARAT/SADE, THE INVESTIGATION, AND THE SHADOW OF THE BODY OF THE COACHMAN* 49 (Geoffrey Skelton & Robert Cohen trans., Continuum Publishing Co. 1998). Kennedy captures this mood in *The Critique of Rights in Critical Legal Studies* in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8. Barbara Jordan more famously captured it in one line in her statement in the House Judiciary Committee during the debate on the articles of impeachment against Richard Nixon: “My faith in the Constitution is whole, it is complete, it is total.” *Debate on Articles of Impeachment Pursuant*

and imperialism. Then, the gains to be had from counter-majoritarian institutions, such as individual rights, constitutionalism, judicial review, and an independent judiciary friendly to the party of humanity and ready to enforce rights, were still so palpable, so fresh, so present. Then, demanding rights still *tasted* so right in the mouths of the oppressed.¹⁵ Thirty years later, in the age of Obama, it is much easier to see the harms all those cherished and lauded rights have done, as I will briefly argue below.¹⁶

How to explain the disappearance of the rights critique? One possibility, much endorsed by the critics themselves, is that the rights critique collapsed under the weight of responses from feminists and minority scholars, who pushed back against the critics' characterization of rights as regressive and alienating. The responders found in the liberal rights traditions a path to greater racial and sexual justice—even assuming the legitimating, subordinating, and alienating features the rights critics noted.¹⁷

to *H. Res. 803 Before H. Comm. on the Judiciary*, 93rd Cong. 111 (1974) (statement of Rep. Jordan).

15. Williams, *supra* note 10, at 414 (“[For blacks,] the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.”).

16. *See infra* Part I.

17. *See* Gary Minda, *Neil Gotanda and the Critical Legal Studies Movement*, 4 *ASIAN L.J.* 7, 13-14 (1997) (stating that CLS weakened as a political movement following the arrival of “outsiders (women, gays, lesbians, Marxists, Postmodernists, Rock n’Rollers, etc.)” whose identification as groups led to internal tension within the CLS movement); John Henry Schlegel, *For Peter, with Love*, 36 *PEPP. L. REV.* 535, 537-38 (2009) (stating that Schlegel turned from CLS when the movement abandoned its theoretical enterprise in order to accommodate the political positions of women and people of color); *see also* Wendy Brown & Janet Halley, *Introduction* to *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 1-37. There is an undeniable grain of truth here, although it is easy enough to overstate it. What is clear is that the most important response to the rights critique came from critical race scholars, including Kimberlé Crenshaw and Patricia Williams. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1334-35 (1988); Williams, *supra* note 10, at 404-05; *see also* Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 1-4 (1988); Robin West, *Commentary, Deconstructing the CLS-Fem Split*, 2 *WIS. WOMEN’S L.J.* 85, 86-87 (1986); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. REV.* 145, 146-47 (1985) [hereinafter West, *Jurisprudence as Narrative*]. Horwitz’s piece on rights was itself a response to the “minority scholars” response to the rights critics, as they were then called. *See* Horwitz, *supra* note 2, at 393; *see also* Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, *Introduction* to *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii-xxxii (Kimberlé Crenshaw et al. eds., 1995). On the other hand, it is also clear that the rights critique was largely built around contributions from

Others have urged a different explanation: that the rise of a conservative understanding of state power has forced an alliance between critical scholars and liberal rights aficionados, in effect a temporary truce in the face of a larger menace.¹⁸ On this account, the rights critique was a friendly or internal criticism of liberalism, and in the face of a common enemy, the differences were muted. Elsewhere I have suggested a different explanation: that the premature demise of the rights critique is best explained by reference to shortcomings internal to the critique itself.¹⁹ My suggestion in other work, in summary, has been that there was an internal tension, and perhaps a fatal contradiction, in the original presentation of the rights critique, which it simply did not survive over time.²⁰ The “rights critique” was almost always paired with, and sometimes viewed as a part of, the “indeterminacy critique”—that all of law, including law that is captured in rights, is indeterminate both in meaning and application.²¹ But if the indeterminacy critique is correct, then not only rights worship, so to speak, but also the rights critique, is in trouble: rights cannot *harm* any more than they can liberate, if they are inconsequential or meaningless. As between the critique of rights put forward on moral and political grounds—that rights alienate, subordinate, and legitimate—and the critique of rights as indeterminate, the latter simply won out. It has been

feminists and race scholars. MacKinnon’s work on both the legitimating effects of the privacy doctrine and the First Amendment fueled the rights critique in its original formulation, as did that of race scholars on the legitimating effects of Fourteenth Amendment doctrine on structural racism. See MACKINNON, *supra* note 3, at 206-13; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-23 (1980); Freeman, *supra* note 4; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-23 (1987). Critical legal scholars quite routinely cited and discussed the work of these critical race theorists, feminists, and others as exemplary of the major themes in critical scholarship, notably the legitimating and subordinating effects of liberal legalism. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 127-28, 285 (1987) (discussing the arguments of Catharine MacKinnon and myself); Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. REV. 23, 26-27 (1993) (discussing the arguments of Catharine MacKinnon).

18. See, e.g., Seidman, *supra* note 12, at 581-82, 588 (stating that liberals and conservatives have formed coalitions to attack terrorism-related policies on the basis of “rule-of-law” values).

19. WEST, *supra* note 13. Peter Gabel suggests a similar explanation for the demise of critical legal studies. Gabel, *supra* note 13, at 517-20.

20. See generally WEST, *supra* note 13.

21. Gabel, *supra* note 13, at 516.

completely absorbed into utterly mainstream legal thought. The moral and political critique of rights, though, has virtually disappeared.

For my purposes here, the cause of the rights critique's disappearance is not particularly important. What I argue in this Article is that whatever the reason, the disappearance of the rights critique is unfortunate. We need the rights critique, or some modernized, revitalized version of it, in the Obama era and in whatever era might follow, perhaps even more than when it was first conceived. More to the point, we need a critical way of thinking about rights that not only survives across generations but also adapts to the changing contours of rights. We need a body of scholarship critical of rights that is sufficiently robust to withstand internal disagreement, the winds of political correctness, the anger of compatriots who may feel abandoned or worse, and the rise or fall of various political alliances. The rights critique we have inherited from the 1980s, however, is virtually none of these; it did not prove robust, longstanding, or regenerative. Putting the points together yields this moral: we need to resuscitate and revise this line of thought, not bury it. In order to do so, we will have to first uproot it, shear its fading or dead branches, and then replant it in more generative soil. This task should not be so hard.

In Part I below, I first attempt a summary of the rights critique and then explain its continuing relevance to Obama-era rights. Parts II and III suggest how we might refashion the rights critique in a way that better reflects the sometimes tragic dimension of contemporary Obama-era rights. In the Conclusion I draw some general conclusions for the state of our politics.

I. THE RIGHTS CRITIQUE IN THE AGE OF OBAMA

Rights harm us, according to the Bill of Particulars put forward by the rights critics of the 1980s, in three distinct ways. First, even apparently liberating rights that seemingly expand the sphere of individual liberty also *subordinate*, at least according to the first and perhaps the most important of the rights critics' charges. Rights to privacy protect not only private decision making against the prying and moralistic eye of the state but also, even if inadvertently

or indirectly, private subordination of vulnerable family members.²² Rights to liberty of contract protect private choices of individuals but also the economic subordination of laborers by employers,²³ and rights to speech protect ideas but also, arguably, pornography and private verbal, racial, or sexual harassment.²⁴ Whatever else rights do, Horwitz, Tushnet, MacKinnon, and other critics argued, rights that protect spheres of privacy, liberty, or autonomy against state intervention also, and by virtue of that protection, facilitate the subordination of the weak by the strong, within whatever spheres of insularity, entitlement, and nonintervention from the government the particular right in question creates. Thus, the first charge: rights subordinate.

Second, by protecting against particularized but well-defined sorts of unfair relations in the private realm, even those rights that *do* operate to specify limits on a generalized liberty in the interest of equality—such as limits on our liberty to intentionally discriminate—also run the risk of legitimizing the larger unjust social world within which those particularized moments of injustice are framed. The censure of the intentional discriminator, and our right to be free of him, for example, legitimates not only structural or unintentional racism but also an unjust classism. Our condemnation of the errors in an error-ridden meritocracy legitimates the unjust stinginess of the ways we construct merit and blame, and even a purified and idealized meritocracy legitimates our nonresponsiveness to human need.²⁵ *Miranda* rights, critics argued, and more largely procedural protections in the criminal justice system, legitimate not only ongoing interrogation abuses that they only partially address but an overly punitive and blatantly racist system of excessive incarceration as well.²⁶ The targeting of gender-based “stereotypes” so as to free the nonconforming woman legitimate the belittling and cramped opportunities that attach to voluntarily assumed traditional gender roles.²⁷ Attempts to secure rights to a “minimum

22. MACKINNON, *supra* note 3.

23. Gordon, *supra* note 5; Horwitz, *supra* note 2.

24. MACKINNON, *supra* note 3, at 163-197.

25. See Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1010-19 (1996).

26. See Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 673 (1992).

27. See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 60 (2002) (finding

wage” render all the more difficult attempts to ensure a livable family wage—and so on.²⁸ Rights harm, then, not only because of the subordination they protect and valorize but also because they distract our critical gaze, thereby legitimating larger injustices. In brief, rights legitimate.²⁹

Lastly, critics argued, rights alienate, even those rights that seemingly empower the weakest of us in a hostile world. They alienate us from the dreaded other from whom they claim to protect us,³⁰ from our communities,³¹ and from a recognition of even the possibility of unmediated human connection.³² Rights do have a function: they facilitate essential trade between withdrawn selves, as elucidated by Peter Gabel’s artful description of us as deeply and paranoically fearful of others, the state, and human community.³³ But by so doing, rights intensify the very withdrawal from human life to which they then offer their poison pill as a necessary remediation. In short: rights alienate.

Now, whither the rights critique today? If anything, U.S. constitutional rights in the age of Obama are more overtly Lochnerian,³⁴

that greater value must be placed on community, care-taking, relationships, and fulfillment—values that are traditionally under-appreciated “feminine qualities”); Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1495 (2001) (observing that an increasing number of feminists argue that women will be unequal unless greater value is placed on supporting caretakers of dependents); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32-35 (noting that liberal feminism accommodates women but only on patriarchal terms without challenging the patriarch itself).

28. See Crenshaw, *supra* note 17, at 1344-45; Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-91 (1988).

29. Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 797 (“[Neo-classicism] is a method that could only be invented and adhered to by apologists, those whose interest was in reassuring us all of the beneficence of whatever order happens to emerge from the interplay of market forces, regardless of the nature of the society in which that market functions.”).

30. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1569 (1984).

31. *Id.* at 1569-71.

32. *Id.* at 1572-81.

33. *Id.* at 1567, 1576-78.

34. See *Lochner v. New York*, 198 U.S. 45 (1905). Lochnerism, of course, generally refers to a particular view of the liberty “prong” of the substantive Due Process Clause in the Fourteenth Amendment, which valorized contract and property at the expense of congressional and state legislative power to engage in paternalist or redistributive legislation initiatives. See David A. Bernstein, *Lochner Era Revisionism Revised: Lochner and the*

more economically regressive,³⁵ more aggressively colorblind,³⁶ more insulating of the private sphere and of intimate violence,³⁷ and, particularly when coupled with new technologies, more alienating than they were when Gabel first leveled that sad charge against them.³⁸ Obama-era rights, viewed from the perspective of the

Origins of Fundamental Rights Constitutionalism, 92 GEO. L.J. 1, 1-10 (2003). What I call the new Lochnerism relies not as much on the Fourteenth Amendment per se as on limits on the commerce power, and an emasculation of Section 5 of the Fourteenth Amendment, to achieve largely the same end. See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (holding that a civil remedy for victims of gender-motivated violence is outside Commerce Clause authority); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down a prohibition on the knowing possession of a firearm in a school zone as outside Congress's Commerce Clause authority); see also *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding that government may not restrict speech on the basis of corporate identity); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that prohibitions on handgun possession in the home and on use of a handgun for self-defense in the home violate the Second Amendment); Bernstein, *supra*, at 5-9 (stating that a growing tide of libertarian scholarship has come to challenge traditional views of *Lochner* as the Supreme Court's imposition of its laissez-faire views).

35. See *Citizens United*, 130 S. Ct. at 913.

36. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733-35, 748 (2007) (striking down student assignment plans that employed race as a factor in the assignment of students to oversubscribed schools and stating that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).

37. *Castle Rock v. Gonzales*, 545 U.S. 748, 766-68 (2005) (finding no due process interest in the enforcement by police of a restraining order against an estranged husband); *Morrison*, 529 U.S. at 601-02. For a critique of gay marriage cases and *Lawrence v. Texas*, 539 U.S. 558 (2003), for insulating intimate violence from public scrutiny and political redress, see Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1387-89 (2005) [hereinafter Spindelman, *Homosexuality's Horizon*]; Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1631-57 (2004) [hereinafter Spindelman, *Surviving Lawrence*].

38. See *supra* notes 13-17 and accompanying text; cf. Soledad Liliana Escobar-Chaves & Craig A. Anderson, *The Future of Children*, 18 CHILD. & ELECTRONIC MEDIA 147, 147-48 (2008) (evaluating research on connections between a minor's use of electronic media and unhealthy behaviors); Claus J. Tully, *Growing Up in Technological Worlds: How Modern Technologies Shape the Everyday Lives of Young People*, 23 BULL. OF SCI., TECH. & SOC'Y 444, 444 (2003) (describing the harmful impact of new technology on the social relationships of young people). The Supreme Court recently considered the possible impact of violent video games on children and concluded that restrictions on their sale to minors violates the First Amendment. *Brown v. Entm't Merchs. Ass'n.*, 131 S. Ct. 2729 (2011). Lower courts had been in agreement, as well. See, e.g., *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962-64 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 2398 (2010) (No. 08-1448); *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 769-772 (8th Cir. 2008) (affirming permanent injunction against enforcement of Minnesota law prohibiting the sale of “Mature” and “Adult Only” video games to minors); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (holding that criminalization of sale of sexually explicit video games to minors violated the First Amendment).

1980s rights critique, seem at first to be simply a story of *plus ça change*. Thus, our contemporary rights subordinate, just as the critics charged, and as *Heller*³⁹ and *Citizens United* illustrate.⁴⁰ It is hard to doubt that gun rights subordinate the interests of the weak to those empowered with lethal weaponry, particularly in the domestic setting of the home, and that extending speech rights to corporations to influence political elections subordinates individual to corporate interests.

Second, Obama-era rights rhetorically legitimate, again in much the way critics thought they might. Perhaps most notable, the new, improved, and expanded “right to marry” now extends to same-sex couples in much of the country⁴¹ and enjoys the support of both the progressive left and social conservatives alike.⁴² The right will also likely soon be given the Supreme Court’s seal of constitutional approval.⁴³ Nevertheless, it carries at least two quite serious and largely unnoticed legitimation costs. First, and as a number of commentators have noted, the “right to marry” is at heart an economic entitlement that extends a fairly long list of not very

39. *Heller*, 554 U.S. at 635. *Heller* creates a private world in which guns are permitted, thus subordinating the interests of the relatively weak to the interests of the strong, particularly in domestic households. Thus, on the day of the decision in *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment applies against the states), Mayor Daley complained that the case would exacerbate the problems faced by domestic violence victims and first responders, and would also affect armed abusers. Richard M. Daley, Mayor, City of Chicago, Press Conference (June 28, 2010).

40. *Citizens United*, 130 S. Ct. at 916-17. *Citizens United* clearly strengthens the hand of corporations by broadening their access to elected officials. *Id.*

41. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that the designation of marriage must be available to both same-sex and opposite-sex couples), *superseded by constitutional amendment* CAL. CONST. art. I, § 7.5 *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 93 (Cal. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (holding that state failed to sufficiently justify same-sex marriage ban in state equal protection challenge); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (holding that a statutory limitation of civil marriage to unions between a man and woman denied equal protection of the law to gay and lesbian people); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that ban on same-sex marriage violated state constitution).

42. Sandhya Somashekhar, *Same-Sex Marriage Gains GOP Support*, WASH. POST, Aug. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082705614.html>.

43. See Josh Gerstein, *Ted Olson: Supreme Court Could Give ‘Incremental’ Win to Same-Sex Marriage*, UNDER THE RADAR (May 18, 2011 12:52 PM), http://www.politico.com/blogs/joshgerstein/0511/Ted_Olson_Supreme_Court_could_give_incremental_win_to_samesex_marriage.html.

generous financial benefits to some members of the polity lucky enough to find a marriage partner.⁴⁴ The right grants entitlements to a spouse's employer-granted health insurance, his or her retirement benefits, military benefits, and workers' compensation payments, thereby allowing those with spouses to marginally hedge their bets against life's risks. Not coincidentally, whatever good this does the marital partners, it also further legitimates the lack of a more robust safety net for all. What poor people should do, simply, is marry, if they wish to improve their economic prospects. Trumpeting the economic value of marriage—its utility as a privatized safety net for the partners and hence a lifting of the burden of social responsibility on the rest of us—was a shared project of both the Bush and Clinton administrations, both of whom viewed marriage as a privatized safety net and therefore urged it on poor citizens.⁴⁵ The Bush- and Clinton-era marriage-promotion project for poor citizens and the equal rights advocates' case for same-sex marriage pushed by devotees of same-sex marriage rest on precisely the same premise: marriage is a privatized safety net given by the state to marital partners. The latter advocacy effort simply adds that it should be made available to gay as well as straight citizens.

The "right to marry" that has come to fruition during the Obama years is simply the logical outcome of both movements—the marriage promotion movement of the Clinton-Bush years and the equal rights campaign of more recent vintage. Once it comes to full realization, it will no doubt bring tremendous psychic benefits to

44. See generally ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 71-86, 141-45 (2007) (discussing the legitimating effects of marriage and the advantages under the law that married couples receive compared to unmarried couples).

45. For any overview of the empirical claims about the benefits of marriage, which were politically powerful during the 1990s and early 2000s, see LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000). The economic value of marriage has since emerged as a central argument of advocates for marriage rights for gay and lesbian citizens as well. See, e.g., Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 8, 2010, <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html> (discussing access to economic benefits and security as a crucial aspect of the equal protection of legal marriage); *Why Marriage?*, <http://www.whymarriagematters.org/pages/why-marriage> (last visited Oct. 11, 2011). For emerging mainstream criticism of the economics benefits angle to gay rights activism, made by people who support gay marriage for other rights-based reasons, see, for example, Jaye Cee Whitehead, Editorial, *The Wrong Reasons for Gay Marriage*, N.Y. TIMES, May 15, 2011, at A21.

those who have had their sexual and personal identities shattered or torn by societal nonrecognition. It will also, however, further cement, through the relentlessness of legitimating levers, the felt justice of an inadequate safety net for all others, who for whatever reason are not within the benighted circle of marital choice. That is the first legitimation cost.

But there is a second legitimation cost, less noticed in the euphoria and struggle to win the right to marry for same-sex couples, particularly when that right is read, as it should be, in conjunction with the recently expanded right to sexual privacy for gay as well as straight sex.⁴⁶ The right to marry, and the right to gay sex, at least rhetorically, further cements the legitimacy of the subordination that occurs within the bounds of intimacy and marital privacy. Crimes that occur within intimate relationships such as marriage are indeed still crimes and have been recognized as such since the advent of domestic violence movements. But the valorization and now constitutionalization of marriage at the heart of a right to privacy risks further insulating that violence within walls of constitutional privacy.⁴⁷ The broad coalition of groups, individuals, and courts increasingly inclined to recognize and expand marital rights further protects intimate and marital privacy but arguably does so at the cost of rhetorically insulating the sexual violence and coercion that sometimes occurs within the bedroom walls. Now, it does so for the benefit of same-sex as well as opposite-sex partners.

The legitimation of institutional, unconscious, private, or simply unintentional forms of racial subordination has also arguably accelerated during this time of governance by an African American President, aided by a Court intent on restraining affirmative action or race conscious remedies of other sorts. *Parents Involved in Community Schools v. Seattle School District No. 1*⁴⁸ cleanly legitimates the inadequacy of unequal schooling and housing by granting a formal right against state-sponsored segregation in precisely the

46. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

47. See Spindelman, *Homosexuality's Horizon*, *supra* note 37, at 1405 (arguing that gay marriage legitimates wrongs of marriage, including its insulation of violence); Spindelman, *Surviving Lawrence*, *supra* note 37, at 1633-35 (arguing that the right to consensual sex created by *Lawrence* legitimates intimate violent sexual coercion).

48. 551 U.S. 701, 748 (2007).

way that Alan Freeman first predicted.⁴⁹ There could not be a clearer demonstration of the critical claim—put forward by Alan Freeman, Derrick Bell, Charles Lawrence, and a host of other early critical scholars—that achievement of limited formal racial equality in some spheres of employment and schooling, through a legal approach focusing on the perpetrator’s state of mind, legitimates the unfairness and lack of generosity of winner-take-all approaches to education and employment in which the losers, whether or not intentionally targeted by race, are both disproportionately black and nearly universally poor.⁵⁰

And finally, rights in the age of Obama alienate in both new and old ways. In its original formulation, Peter Gabel’s “pact of the withdrawn selves” was captured by a metaphoric transaction he used repeatedly to communicate the essence of his critique: the placid noncommunication between a customer in a bank and a teller, when the customer goes in to the bank to exercise his right to deposit or withdraw cash from his account.⁵¹ That entire transaction, Gabel observed, is heavily structured by layer upon layer of rights: rights protecting the bank owners from trespass, rights entitling the teller to a paycheck, rights protecting the employer’s power to fire her at will, rights entitling the customer to money charged to his account, rights that structure the relations of payor and payee, drawer and drawee, and so on, rights protecting both the bank and the customer against theft and fraud, and rights protecting the security of the customer’s account from calamitous bank failure.⁵² The human relation between the teller and customer is so

49. Freeman, *supra* note 4, at 1053-55.

50. See Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 371, 372 (1993) (“[Antidiscrimination policies] are [the] outward manifestations of unspoken and perhaps unconscious policy conclusions that racial remedies—when they occur—are promoted to secure or advance societal interests deemed important by the upper classes.”); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369-70 (1992) (critiquing use of formalistic equality language in order to mask policy preferences that privilege whites); Freeman, *supra* note 4, at 1053-55 (arguing that people generally view antidiscrimination law from a “perpetrator perspective” in which responsibility for discrimination belongs solely to specific actors—not as a result of a wider social phenomenon); Lawrence, *supra* note 17, at 324 (“[T]he existing intent requirement’s assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination and leads us to think about racism in a way that advances the disease rather than combating it.”).

51. Gabel, *supra* note 30, at 1568.

52. *Id.* at 1571.

encrusted with rights that its humanity virtually disappears. Might some of that layering of rights, he wondered, be implicated in the utter inability of the customer and the teller to even acknowledge, much less celebrate, their mutual humanity? Gabel thought so.⁵³ Today, thirty years later, hardly anyone encounters a teller for that transaction. We go outside to stand in line to effectuate the transaction with a machine, and we do that only on the rare occasions when our home banking system cannot accomplish the same end. Gabel might observe that rights now form the lingua franca of a pact not between withdrawn selves but between withdrawn selves and the machines that facilitate as well as police the withdrawal.

Indeed, rights that facilitate the mechanization of our interactive lives alienate our withdrawn selves from community, if anything, more aggressively and more blatantly than did the nondiscrimination rights and the identity rights to reproductive freedom that formed the target of the various rights critiques in the 1980s.⁵⁴ Again, one might think that rights critics would at least be claiming vindication. Maybe they are embarrassed by just how transparent it has all become; maybe it has all become too obvious for words. But for whatever reason, no one in the legal academy is examining whether the alienation cyberspace effectuates might be impacting communitarian values, and whether that trade-off is affecting legal regimes.

II. TRAGIC RIGHTS

The story of Obama-era rights, however, is not entirely *plus ça change*. Obama-era rights do not simply repeat, or exaggerate, the pathologies of rights about which the rights critics complained. There is something new afoot. Obama-era rights have two quite tragic characteristics that were not shared by the rights of the 1980s. As a result, Obama-era rights *harm* in ways not adequately captured by the three-pronged rights critique. Both features, I will argue, suggest that the rights critique of the 1980s should not

53. *Id.* at 1568-69.

54. *Id.* at 1587-88.

simply be revisited or expanded, but rather rethought in light of those differences.

First, Obama-era rights are simply more lethal than were those antidiscrimination and privacy rights targeted by the original rights critiques.⁵⁵ By far the most jurisprudentially far-reaching and singularly innovative Obama-Bush-era right—the Second Amendment right to bear arms, first articulated during the end of the Bush era in *District of Columbia v. Heller* and then underscored at the beginning of Obama’s presidency in *McDonald v. Chicago*—quite directly empowers individuals to kill.⁵⁶ The newly minted right created by the Supreme Court in those two cases grants a citizen the right to not only purchase and own a handgun but also the fundamental or “inherent” right to use it, rather than retreat, in self-defense or in defense of his family members, at least in his home, and perhaps outside his home as well.⁵⁷ Both the right to arm oneself and the newly recognized right to kill rather than retreat constitute a dramatic reinterpretation of the conventional and liberal Lockean and Hobbesian understanding of the social compact, the state, and its purpose.⁵⁸ The individual, it is worth recalling, under the traditional liberal account of the social compact, *gives up* his right to use violence in defense of his property and self in exchange for the state’s promise to provide equal protection of the state’s powers of enforcement against the threats posed by others inclined to invade one’s legal rights.⁵⁹

Under conventional criminal law principles governing self-defense rules of several centuries’ vintage, this compact is duly recorded: the threatened individual has a duty to “retreat” and abstain from force, in implicit reliance on the power of the state—rather than his own arsenal—to protect him. The duty to retreat was then qualified by the “castle doctrine,” which, under pre-*Heller* criminal law doctrine,

55. See *supra* notes 3-4 and accompanying text.

56. See *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

57. See *McDonald*, 130 S. Ct. at 3036; *Heller*, 554 U.S. at 628-29.

58. THOMAS HOBBS, *THE LEVIATHAN* ch. XVII at 117-21 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); John Locke, *An Essay Concerning The Truly Original Extent and End of Civil Government*, in *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* §§ 128-31 (J.W. Gough ed., Oxford 1948) (1690).

59. HOBBS, *supra* note 58; Locke, *supra* note 58.

provided a more expansive statutory or common law right of self-defense in the home.⁶⁰ With *Heller* now on the books, however, that classically liberal bargain has been rewritten: the individual has a constitutional right to own an unlocked gun in his home, and perhaps outside of it, and an inherent or fundamental right to use it, rather than retreat.⁶¹ Under the dicta in *DeShaney*, the individual has no such affirmative *right* to the protection of a state's police force,⁶² and under *Heller*, the individual has no *obligation* to rely on the state's use of force rather than his own.⁶³ Rather, the threatened individual may use his constitutionally protected handgun to kill, in furtherance of his constitutionally protected "inherent" right to defend himself.⁶⁴

Thus, the quintessential Obama-era right is basically a right to resort to the violence necessary to defend oneself.⁶⁵ In a state in which one has neither a right to police protection against private violence, nor, with steadily decreasing support for public services, a reasonable expectation that such protection might be forthcoming when sought, such a right obviously has salience; for fearful residents of dangerous neighborhoods it provides a right to just the self-help that seems not just prudent but necessary. The Court in *Heller* basically instructed individuals who find themselves in such straits to fend for themselves. Rather than provide a right to police protection, the Court has provided instead a right to resort to lethal violence.

60. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 790-1 (8th ed. 2007). These rules were undergoing change even before *Heller*, toward expanding the area of the "castle," thus restricting the obligation of "retreat." See P. Luevanda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right To Stand Your Ground*, 35 S.U. L. REV. 1 (2007).

61. Two decades before *Heller*, the Court suggested in dicta that the individual has no right to the state's protection against violence. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196-97 (1989).

62. *Id.*

63. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

64. *Id.* The individual has an inherent right to defend himself, according to Scalia, and now has a right to the lethal weaponry necessary to do so. *Id.* at 627-29.

65. *Id.* at 628-35; see also Anders Walker, *From Ballots to Bullets: District of Columbia v. Heller and the New Civil Rights*, 69 LA. L. REV. 509, 539-47 (2009) (discussing the implications of the Court's recognition of fundamental right to armed self-defense).

The strength, the centrality, and indeed the jurisprudential importance of *Heller* strongly suggests the possibility, and perhaps the necessity, of reinterpretations of older rights that also involve a right to kill, such as the right to an abortion created in *Roe v. Wade*.⁶⁶ As in *Heller*, the contested right in *Roe* is a right to use lethal force to protect a liberty interest. And as in *Heller*, the right to abort might be justified, in part, on the straightforward grounds of the right holder's interest in self-defense: in *Heller*, self-defense against intruders into a home and, in *Roe*, the intrusion of an unwelcome fetus into a woman's womb.⁶⁷ The not-yet-recognized right to die, long advocated by the political left,⁶⁸ might also be rethought as having a similar structure. The right could be justified, particularly in light of *Heller*, as a right to kill oneself to defend against a threat of disabling pain.

But second, and perhaps more fundamentally, a number of Obama-era rights—including not only *Heller*'s right to weaponry, but also the “right to marry” advanced by the liberal left⁶⁹ and the “right to homeschool” fervently desired by the social conservative right⁷⁰—recharacterize the relationship between the citizen and the state in a way not presaged by earlier civil rights and not foreseen by the rights critics. All of these rights, I suggest, can be generically characterized as *defensive rights of withdrawal*, or, in short, as “exit rights.” By that phrase, I mean that the rights and arguments for rights that have come to the fore during the Age of Obama involve a claimed right to defensively withdraw, or exit, from the social compact with an incompetent, sub-minimal state: a state that fails to perform basic, fundamental state functions. These “exit rights”—as opposed to either the “negative rights” that were the target of the rights critics or the “positive” rights that were the hoped-for alternative⁷¹—allow the holder to withdraw from the circle of rights

66. 410 U.S. 113, 154 (1973).

67. For a powerful presentation of this defense of the abortion right, see EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 6 (1996).

68. See generally David J. Garrow, *The Right To Die: Death with Dignity in America*, 68 *MISS. L.J.* 407, 409-22 (1998) (tracing the political history of efforts to legalize assisted suicide).

69. See *supra* note 41.

70. See *infra* note 77 and accompanying text.

71. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 *MICH. L. REV.* 2271, 2342-45 (1990).

and obligations incumbent upon members of a polity governed by a state where that withdrawal is desired or desirable not because of religious conviction or political ideology but rather because of the state's inadequacies or ineffectiveness. A defensive right to withdraw is a right to withdraw from the social compact in order to defend oneself against state incompetence: where the state has basically breached, the individual is free to exit. Obama-era rights, quintessentially, are rights to withdraw from a sub-minimal or failed state.

Again, *Heller* is the clearest example, and its history makes the point. It is important to remember that a constitutional right to bear arms was conceived in the 1980s by fringe militia as a right to hold at bay the feared black helicopters from international powers that would take over America and destroy American sovereignty⁷² and then re-conceived in the 1990s as a right to resist homegrown American totalitarianism.⁷³ By the time this most peculiar of all American rights was presented to the Supreme Court for decision, however, the justification urged by the parties, the various amici (which included civil rights groups) and then eventually embraced by the Court, had nothing to do with black helicopters, the United Nations, world government, or fascistic America. It had to do, rather, with the inadequacies of inner-city police forces.⁷⁴ Thus, the right to bear arms, as ultimately articulated by the Supreme Court, is not an ideologically driven right desired by a political fringe fearful of totalitarian or fascistic takeover. Instead, it is an individual defensive right of withdrawal from the liberal social compact as envisioned by every major liberal contract theorist from Hobbes and

72. See Michael L. Rowady, *Wolverine Fear: An Inside Look at the Citizen Militia Movement in Michigan and the United States*, 74 U. DET. MERCY L. REV. 771, 771-76 (1997). In the mid-1990s it was relatively easy to find militia websites making strong claims about international threats; today much of their rhetoric has moved to private chat rooms, email lists, and the like. See ANTI-DEFAMATION LEAGUE, *THE QUIET RETOOLING OF THE MILITIA MOVEMENT* 1 (2004), http://www.adl.org/extremism/Militia/Militia_retools.pdf. Criticism of the United Nations and its impact on gun rights, if not images of invading helicopters, can still be found in mainstream gun rights advocacy, however. See Ronald L. Schmeits, *How the United Nations Endangers Your Firearm Freedom*, NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION (Mar. 17, 2011, 2:03 PM), <http://www.nraila.org/Issues/Articles/Read.aspx?id=450&Issue=015>.

73. *Constitution Party National Platform*, THE CONSTITUTION PARTY, http://www.constitutionparty.com/party_platform.php (last visited Oct. 14, 2011).

74. See *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008).

Locke to John Rawls and Robert Nozick, according to which the state takes up the obligation to protect the citizen and the citizen lays down his arms. The right, in other words, is necessitated by the state's inability or refusal to perform its core duty, which is to protect the citizen against the violence of other citizens.⁷⁵

A state that is incapable of protecting citizens against the violence of other citizens can be fairly characterized as sub-minimal. A state that cannot protect citizens against violence is not performing basic, core responsibilities of the state, as conceived by even the most libertarian of liberal political philosophers.⁷⁶ The right to bear arms, meaning the right to keep a gun in one's home and use it against intruders, is a right to do for oneself what a sub-minimal or failed state cannot or will not do.

At least two other contemporary rights—a right to homeschool one's children and a right to marry someone of the same sex—that have not yet been recognized by the Supreme Court, but which have gained considerable support in lower courts, state legislatures, and among some segments of the public, share the same deep structure and even to some degree a similar history. The newly minted but deeply desired “right to unregulated homeschooling”—the right to educate one's children at home, regardless of the parent-educator's own level of education, and without any state regulation of either curriculum or outcomes—was initially pressed in the 1980s by conservative fundamentalist Protestant parents as a First Amendment-based right to be free of the secular, liberal, equalitarian, and feminist propagandizing of the public schools.⁷⁷ The parents' rights

75. On the duty of the state to protect its citizens, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1991).

76. See, e.g., *id.* at 515 (discussing Locke's assertion that individuals form communities for their mutual preservation).

77. See, e.g., *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting a First Amendment challenge to the school board's required reading textbooks); *Burrow v. State*, 669 S.W.2d 441, 443 (Ark. 1984) (holding that a compulsory school attendance law did not violate free exercise rights); *State v. Riddle*, 285 S.E.2d 359, 364 (W. Va. 1981) (holding that religious beliefs did not justify complete noncompliance with compulsory school attendance laws); Robert Reich, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*, in BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 145-46 (2002); James B. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1324 (1996).

groups that originally pushed for the right to unsupervised homeschooling wanted a homeschool education for their children, complete with highly traditional gender roles, a creationist approach to evolution, and an introduction to Western literature, history, and culture, that would be in line with their religious beliefs. They could not find this education in either public schools or affordable private schools.⁷⁸ Thus, a highly organized and remarkably successful campaign to legalize homeschooling emerged in virtually all fifty states.⁷⁹ Today, however, during the age of Obama, with two million homeschooled children⁸⁰—including some untold but large percentage with no state supervision whatsoever—courts are increasingly inclined to grant the existence of this right even if in a more limited form than parents wish. The rationale for it has shifted considerably. The “right to homeschool” is now argued both by parents’ rights groups and by courts that recognize it as necessitated not by an overly secular or liberal feminist public school curriculum that offends the sensibilities of some religious parents but rather by the inadequacies of failed public schools—not only for religious children but for all children. Parents, according to the newly secularized parents’ rights movements, should have the right to withdraw their children from the public school and educate them (or not) at home, not so much for ideological or religious reasons but simply because, in their judgment, the schools are no longer minimally competent at the basic core task of educating children.⁸¹ Most worrisome, school boards in states with cash-strapped education budgets are increasingly inclined to agree.⁸² Thus, like the right to own and use a gun

78. See Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 127 (2008).

79. See *id.* at 124-25. For additional perspectives on the history of the movement, see Reich, *supra* note 77, at 145-48; Laura J. Bach, Note, *For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment*, 38 VAL. U. L. REV. 1337, 1340 (2004).

80. Yuracko, *supra* note 78, at 124.

81. See NAT’L CTR. FOR EDUC. STATISTICS, ISSUE BRIEF, 1.5 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2007, at 3 (2008) (noting that 38 percent of homeschooling parents chose “concern about the school environment” or “dissatisfaction with academic instruction at other schools” as their most important reason for homeschooling).

82. The California Department of Education, for example, filed a brief in *Jonathan L. v. Superior Court of Los Angeles County*, 81 Cal. Rptr. 3d 571, 591 (Ct. App. 2008), supporting the rights of parents to homeschool with minimal oversight, in part “to allow freedom from the limitations of the regular classroom.” Michael E. Hersher, “Home Schooling” in California,

to protect oneself and one's property against intruders, the right to homeschool today is articulated as a "defensive right," or, as above, an "exit right." It is a right to withdraw from participation in the web of rights and responsibilities: in the case of homeschooling, the right and the obligation to have one's children educated through the public or private schools and, in the case of the right to own a gun, the right and the obligation to rely on the state for protection against violence. They are implied by a civil society governed by a democratic state that has become incapable of performing the basic functions—including educating children and protecting against violence—for which the state is formed.

Just as the self-defense rationale of *Heller* has the potential to recast some long-standing rights of liberal vintage—abortion rights and the right to die, as well as the newer, or at least reformulated, "right to marry"—these rights can also be reinterpreted in light of *Heller* as defensive or exit rights against a failed state. Start with abortion. The most novel argument being put forward today for a right to abort is that the extraordinarily high cost of parenting basically necessitates the right to abortion.⁸³ With absurdly inadequate help from the state for the costs of the health care demanded by pregnancy and childbirth, almost no state-funded child care, and no public nursery schools or pre-kindergarten programs in most of the country, childbirth is an economically calamitous event for millions of people already living in or near poverty.⁸⁴ A child, either a first or an additional, can throw a working-class parent into poverty and an impoverished parent into utter destitution. A right to an abortion, against this backdrop, can easily be understood as a *Heller*-like defensive right against a state incapable of providing the requisite degree of assistance to struggling parents necessary to keep families out of poverty.⁸⁵ The right to abort, then, is being recast today as essential to the work of resisting impoverishment, in a society governed by a state that fails to embrace support for

118 YALE L.J. POCKET PART 27 (2008), [http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/"home-schooling"-in-california/](http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/).

83. Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RTS. L. REP. 3, 3-4 (2006).

84. *Id.*

85. *Id.* at 11 (noting that the privatization of childrearing in America is driven by the attitude, "If you can't take care of your kids, why did you have them?").

poor families as a core state responsibility. So understood, abortion is a defensive right against a sub-minimal state—a defensive right to avoid the web of parental responsibilities and rights implied by communal life, in which the state cannot perform essential state duties. The right to die, more briefly, might follow the same logic: it can be conceived as an individual right to withdraw from a compact with a state that cannot provide assistance through palliative care.⁸⁶

Finally, the right to marry, not yet embraced by the Court but accepted by a number of state supreme courts⁸⁷ and pushed with increasing success by the liberal left,⁸⁸ can also be understood through this *Heller* paradigm. The right to a state-recognized marriage gives individuals who may or may not be in love with each other a right to join in a compact with each other for mutual monetary benefit.⁸⁹ The case for this right, as articulated by the Human Rights Campaign, has almost nothing to do with the integrity of gay life or the morality of gay sex. Rather, it turns largely, if not entirely, on the inadequacy of the compact between the single individual and the state or, put differently, between the individual and civil society.⁹⁰ What state-regulated marriage grants, in other words, is a right to one's spouse's health insurance, retirement benefits, military benefits, if any, and pension.⁹¹ Given a state with a shrunken public purse and a shattered safety net, the necessity of these economic rights is in part a function of single individuals'

86. See Felicia Cohn & Joanne Lynn, *Vulnerable People: Practical Rejoinders to Claims in Favor of Assisted Suicide*, in *THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE* 238-40 (Kathleen Foley & Herbert Hendlin eds., 2002) ("Our current health care system, focused as it is on acute care needs and high-tech procedures, is largely neglectful of the growing and expensive need for chronic and palliative care."); Ani B. Satz, *The Case Against Assisted Suicide Reexamined*, 100 MICH. L. REV. 1380, 1386-87 (2002).

87. See sources cited *supra* note 41.

88. The most recent legislative victory at the state level is New York's Marriage Equality Act. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State To Pass Law*, N.Y. TIMES, June 25, 2011, at A1; see also, e.g., Elizabeth Gill, *Historic Victory in Prop. 8 Case, and a Call to Action*, ACLU BLOG OF RIGHTS (Aug. 5, 2010, 10:45 AM), <http://www.aclu.org/blog/lgbt-rights/historic-victory-prop-8-case-and-call-action>.

89. See *supra* notes 44-45 and accompanying text.

90. See HUMAN RIGHTS CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY 3-6 (2004), available at http://www.hrc.org/files/assets/resources/HRC_Foundation_Answers_to_Questions_About_Marriage_Equality_2009.pdf; WEST, *supra* note 44, at 141-45.

91. HUMAN RIGHTS CAMPAIGN, *supra* note 90.

economic fragility. Married partners are somewhat better protected against the risks and vulnerabilities of middle age, old age, and declining health than unmarried individuals.⁹² Extending marriage rights, then, is simply an extension of a right to withdraw from the social compact in favor of the marital one.

To generalize, defensive rights of withdrawal are collectively rights to withdraw from the social compact with a failed state and to internalize the functions the state would normally be expected to perform had it not collapsed. Such rights are justified on the basis of the inadequacies of the sub-minimal state. A state should protect citizens against violence. If it fails to do so, a right to own a gun and use it in self-defense obviously becomes much more desirable. A state should run a decent public school system. If it cannot or will not, a right to homeschool becomes far more pressing. A state should assist with the extraordinary costs of child care, particularly in early years. If the state fails to do so, the right to avoid parenting through abortion or contraception becomes vital. A state should assist with end-of-life care. If it fails to do so, a right to die becomes much more appealing. A state should assist with the management of life's risks, through social security systems, pensions, military benefits, and the like. If it fails to do so, marriage simply becomes a better compact and the right to marry all the more imperative. Unmarried life—that is, an individual's life lived simply in compact with the state—is economically untenable, if not calamitous, for citizens at the edge of poverty.

The tragic rights of our age grant the citizen the right to withdraw from those bonds of citizenship, and they presuppose a state incapable of performing basic functions. They are rights to withdraw from the risks, lethality, and irresponsibility of a shredded social compact. They are rights to choose a state of nature over a state of a badly tattered and increasingly dangerous civil society.

92. See Marc S. Schulz & Robert J. Waldinger, *What's Love Got To Do With It?: Social Functioning, Perceived Health, and Daily Happiness in Married Octogenarians*, 25 *PSYCHOL. & AGING* 422, 422 (2010).

III. THE FAILURE OF COMMUNITY

Before examining what it would mean to reinvigorate the rights critique for Obama-era rights, it would help to be much clearer on what the rights critique was *not*. First, the critics did not, for the most part, target the *idea* of rights—whether the Kantian idea of rights,⁹³ a universalist idea of human rights, an ideal understanding of what our rights should be, or any other philosophical understanding of the point, potential, deep structure, or promise of rights. They were not, for example, criticizing the antipositivist idea of rights held by the American and French revolutionaries and targeted by Bentham’s complaint that rights are “nonsense upon stilts.”⁹⁴ They did not take aim at various natural rights traditions sometimes pilloried by the Legal Realists⁹⁵ or the rights central to the natural law traditions addressed by H.L.A. Hart.⁹⁶ They were not targeting essential attributes that all rights anywhere and everywhere share, regardless of their institutional or historical context.⁹⁷ The critics did not attack the philosophical structure of rights, the conception of human nature that bolsters such a structure, or the ideals of liberty and equality toward which rights often aspire. The rights critique, in sum, was not a critique of the general or philosophical idea of rights.

Nor were the rights critics, however, merely criticizing the particular rights held by particular interest groups at the time they were writing—the antidiscrimination right held by racial minor-

93. See Horwitz, *supra* note 2, at 399.

94. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (1843).

95. See Felix S. Cohen, *Transcendental Nonsense and the Functionalist Approach*, 35 COLUM. L. REV. 809, 837-38 (1935); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471-72 (1923).

96. H.L.A. HART, THE CONCEPT OF LAW 185-212 (2d ed. 1994); H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 978-79 (1977).

97. Examples of such rights include supposed attributes shared by the constitutional rights of slaveholders to their slaves, the aspirational rights of those same slaves to freedom, or the First Amendment rights of pornographers to their pornography, or of the victims of pornography to be free of it, of South Africans to a decent living wage, or of property owners not to have their property “taken” for redistribution to others.

ities,⁹⁸ the right to privacy held by pregnant women,⁹⁹ the rights to hate speech held by racist groups,¹⁰⁰ rights to property or contract held by landowners and employers, respectively,¹⁰¹ and so on. The rights critique was not a collection of individualized criticisms of particular, constitutional rights any more than it was a critique of the general concept of a right. Rather—and this is obviously itself an interpretive claim—the rights critique, viewed “in its best light,”¹⁰² was concerned with putting forward a new interpretation of the dominant rights of the last third of the twentieth century: antidiscrimination rights stemming from the Fourteenth Amendment and the Civil Rights Acts,¹⁰³ contract and property rights of longer vintage,¹⁰⁴ privacy rights created by the Court in *Griswold v. Connecticut*¹⁰⁵ and *Roe*,¹⁰⁶ rights of criminal defendants,¹⁰⁷ and various speech rights.¹⁰⁸ According to the rights critique, these rights first presupposed, and then implicitly propagated, a particular conception of the human being, the citizen, and the state, and hence of the relation of citizen and state. Contingently, they argued, that conception of the state, of the human being, and the citizen was more harmful than not: the good it did was overshadowed by its legitimating, subordinating, and alienating consequences.¹⁰⁹ It was that understanding of state,

98. Freeman, *supra* note 4, at 1053-54.

99. MACKINNON, *supra* note 3, at 93.

100. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-22 (1989).

101. See sources cited *supra* notes 23, 28.

102. RONALD DWORKIN, *LAW'S EMPIRE* 90 (1986).

103. Freeman, *supra* note 4, at 1056-57.

104. See Gabel, *supra* note 30, at 1581-82; Gordon, *supra* note 5, at 203; Kelman, *supra* note 29, at 797.

105. 381 U.S. 479 (1965).

106. MACKINNON, *supra* note 3, at 93; Tushnet, *supra* note 1, at 1365-69.

107. Seidman, *supra* note 26, at 680; Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 154 (1990).

108. Tushnet, *supra* note 1, at 1386-92.

109. Thus, Horwitz's article on rights addresses the position of rights in nineteenth- and twentieth-century America, not rights in general, human rights, or South African rights, or even rights in other western democracies. See Horwitz, *supra* note 2. On the other hand, the rights critique was not simply a critique of those particular rights but rather a claim that those nineteenth- and twentieth-century rights both presuppose and then propagate a particular understanding of the relationship of citizen, state, and community that prioritizes the interests of property holders over everyone else—and does real harm. Part of that harm

citizen, individual, community, and the relations between them, as defined and reflected in the dominant rights of the era, the rights critics quite plausibly claimed, that was harmful to the party of humanity. It was not the general idea of rights and not simply the particular rights themselves.

In brief, the rights critics targeted a particular conception of citizen and state implied by liberal rights, and central to what critics and their targets alike called “legal liberalism.”¹¹⁰ It is helpful to affirmatively articulate that liberal conception and then restate the critique. Late twentieth-century liberal rights, according to their most ardent devotees, rested on an ideal conception of free and equal citizens, empowered by rights against a potentially dangerous state that was overly inclined toward intrusive, moralistic, and discriminatory actions and was at times paranoically fearful of the disruptive effects on law and order of individual criminality, ram-bunctious behavior, licentious speech, political extremism, an unregulated media, and treasonous thoughts.¹¹¹ Deontic, liberal, individual rights against the policies and utilities of the state, then, would protect individuals against states so inclined and basically would do so for all time, both when governing majorities believed the intrusions to be warranted and when they did not.¹¹² The legislative and executive branches in particular, ruled by irrational, whimsical, and indeed infantile majorities, like any unruly mob, could not be trusted not to intrude into individual thought, behavior, or speech, or to do so in a rational—rather than invidiously irrational and

in turn is the effect it has on other and later rights, including rights advocated on behalf of the dispossessed. *Id.* at 399-400. Similarly, Mark Tushnet’s claim that rights do harm was primarily directed at negative U.S. constitutional rights. Tushnet, *supra* note 1, at 1392-94. The claim was not that all rights necessarily carry these harms; Tushnet recognizes explicitly the logical possibility of positive rights. Nevertheless, U.S. rights have been overwhelmingly negative—that presupposes a minimalist understanding of the state, nonresponsive to citizens’ needs. *Id.* at 1393. Given the dominance of these rights, attempts to create new and better rights are more likely than not to be co-opted. *Id.*

110. For an overview of the how the concept of legal liberalism emerged, changed over time, and was challenged by critics, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1998).

111. One can see this portrayed powerfully in Ronald Dworkin’s definitive work. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). For representative critical commentary on this vision, see Peter Gabel, *Dworkin: Taking Rights Seriously*, 91 HARV. L. REV. 302, 314-15 (1977) (book review).

112. DWORKIN, *supra* note 111, at 184-205, 259-65.

discriminatory—way.¹¹³ Individuals must be protected by rights, the liberal concludes, against the state's missteps so that they can be free to act on their own individualized conceptions of the good life,¹¹⁴ exercise their natural autonomy, make choices about their reproductive and productive lives,¹¹⁵ worship freely to connect with the God of their choosing or of their faith,¹¹⁶ be judged on their merits, rather than skin color or sex, and choose intimacy by reference to their inclination or orientation. The state, in its legislative and executive mode, might be overly intrusive or might act on uninformed or bigoted short-term preferences of voters or legislate in hateful or simply irrational ways and thereby threaten all of this.¹¹⁷ The courts, however, with life-tenured judges, a longer time frame, a sensitivity to long-term interests, a built-in capacity to resist short-term pressures, a professional dispensation to exercise reason

113. See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1550-51 (2000).

114. The claim that individuals must be free to act on their own conception of the good life was central to all forms of mid- and late twentieth-century liberalism. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 327 (1980); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 343-44 (1981).

115. See RONALD DWORKIN, *FREEDOM'S LAW: MORAL READINGS OF THE AMERICAN CONSTITUTION* 21 (1996).

116. For a recent liberal defense of traditional understandings of the free exercise clause, see MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: DEFENDING AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 3-5 (2008).

117.

It cannot be true, on this test, that anyone has a right to have all the laws of the nation enforced. He has right to have enforced only those criminal laws, for example, that he would have a right to have enacted if they were not already law. The laws against personal assault may well fall into that class. If the physically vulnerable members of the community—those who need police protection against personal violence—were only a small minority, it would still seem plausible to say that they were entitled to that protection. But the laws that provide a certain level of quiet in public places, or that authorize and finance a foreign war, cannot be thought to rest on individual rights. The timid lady on the streets of Chicago is not entitled to just the degree of quiet that now obtains, nor is she entitled to have boys drafted to fight in wars she approves. There are laws—perhaps desirable laws—that provide these advantages for her, but the justification for these laws, if they can be justified at all, is the common desire of a large majority, not her personal right. If, therefore, these laws do abridge someone else's moral right to protest, or his right to personal security, she cannot urge a competing right to justify the abridgement. She has no personal right to have such laws passed, and she has no competing right to have them enforced either.

DWORKIN, *supra* note 111, at 194-95

rather than will, and the ability to rest decision making on principle rather than the irrational passions of the moment, can protect our rights. Hence, because the state is, after all, us, the Court can protect the individual rights holder from his own worst instincts when voting.¹¹⁸ With rights in place limiting the powers of the state, majorities, executives, and voting publics, a fragile balance can be struck between “individual” freedom and “public” policy; between dialogue, dissent, and idiosyncratic genius on the one hand and legislative necessity on the other.

This liberal image of society and of the state on which rights rest was the target of most of the rights critique. It was also, to revert to aesthetic metaphor, overwhelmingly “comedic,”¹¹⁹ perhaps even a bit euphoric. In a liberal utopia, powers are nicely separated and balanced but, more importantly, so is the relation of community and individual. Communities need to be secure and safe, and must protect the morals, health, and welfare of the people, or at least must do so to some extent. At the same time, the individuals within that community need to be given the liberty to be autonomous and to take risks. Individual freedom is threatened not by anything terribly mendacious but rather by states, legislatures, and majorities inclined toward nothing worse than excessive moralism, nanny-state interference, and a tad too much redistributive tinkering, all directed toward the laudable and noble end of protecting the sensitivities of the weak and the needs of the disempowered. Unrestrained states will incline toward being overly punitive, overly intrusive, and overly paternalistic, and too inclined to legislate for the interest of the weak, thus sapping the life-giving powers of the strong. But rights, protected by courts, can restrain them from doing so. The same state whose will is exercised through legislation that sometimes overreaches is capable, through courts, of principled reason that stays the legislator’s hand. The state can be willful and reasoned, as can the human being; its willfulness exercised legis-

118. Rebecca Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531, 572 (1998).

119. I am drawing on Northrop Frye’s conception of comedy, as described in his classic book of literary criticism, *ANATOMY OF CRITICISM: FOUR ESSAYS* 43-49 (1957). Elsewhere, I have drawn out an extended comparison of Frye’s aesthetic categories—tragedy, comedy, irony, and romance—and correlated them with jurisprudential impulses. See West, *Jurisprudence as Narrative*, *supra* note 17, at 146-47.

lately, its reason, judicially. Like the natural person, it can appreciate long-term and short-term interests and achieve a harmony between the two.

Without denying too much of this essentially comedic picture of social life and the individual's place within it, the 1980s rights critics complemented it with a heavy dose of irony.¹²⁰ The private realm that rights protect, the critics argued, consists not only of individuals going about their madcap, idiosyncratic, free-wheeling, dissenting, licentious business, but also of individuals willfully subordinating others, whose subordination is then insulated against even notice—much less critique—in the name of liberty.¹²¹ It consists not only of individuals wanting nothing so much as to be left alone but also of individuals who want very much to connect in meaningful ways with others, but who find those desires for connection frustrated.¹²² It consists not only of individuals enjoying the rewards of rightful meritocracy and freedoms to choose but also of individuals suffering the injustices of a world in which their needs are neither acknowledged nor fulfilled.¹²³ This world of subordination, of longing for connection, and of abject need and misery is what the world of liberal, individualistic, comedic rights denies. The liberal envisioned a world with a nanny state sometimes inclined to be overly intrusive but happily constrained by principle, articulated and governed by wise and benign paternalistic courts, so that the often childish but occasionally brilliant citizenry might thrive and grow into their autonomous, freely chosen sexual, reproductive, and productive lives. The critic saw a world constructed by those same rights as one in which the state perpetuates subordination, alienation, and injustice and does so in the name of individual liberty.

120. Again, I am comparing the critics' ironic portrayal of private life with the definition and account of irony presented in Frye's account of irony in literature. FRYE, *supra* note 119, at 40-49.

121. The critics drew heavily on earlier writing by American Realists that made a comparable point. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 605-06 (1943); Hale, *supra* note 95, at 477.

122. Gabel, *supra* note 30, at 1566-67.

123. Tushnet, *supra* note 1, at 1394 ("People need food and shelter right now, and demanding that those needs be satisfied—whether or not satisfying them can today persuasively be characterized as enforcing a right—strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.").

And what of the world portrayed in Obama-era rights? What kind of social order does the world of recently minted or newly reminted rights contemplate? It is not the comedic world of 1960s through 1980s liberalism. Rather, I believe it is fair to characterize the world envisioned and constructed by lethal and exit rights as deeply, although darkly, romantic.¹²⁴ The individual is heroic (unless or until he becomes criminal), and the state that would legislate to take his property or his liberty is not simply nannyish, inclined toward overreach, but malignant, inclined toward theft. The state cannot or will not protect him from the violence of criminals, so the romantic hero must have a gun to protect himself, his home, and his hearth. The state cannot educate his children decently, so the heroic individual must educate them himself, free of the state's undue and unwanted secularism. The state cannot be trusted to take from the wealthy through taxation to give to the unfortunate, so the heroic individual must do it himself through his church. The state cannot or will not help with the expenses required for child care, palliative care, or health care, so the heroic individual must make choices regarding whether to have children, whether to abort, whether to suffer pain or to kill himself, whether to risk life and limb or hunker down and buy health insurance. All of these decisions are made, whether or not in splendid isolation, without the burden of malignant regulation, of a state seeking rents and taxing effort, of collectives bending the will and snuffing the spirit of the individual. The state will protect the individual from criminality both here and abroad, and will do so with fierce determination. Otherwise, it is incapacitated, and properly so, from interfering with the heroism of individual will and wit.

As the comedic world of 1960s to 1980s liberalism omitted an ironic underside, which the rights critics of the era brought to the surface, so this libertarian romance with an incapacitated state and empowered supermen omits its tragic complement. It should be the work of contemporary rights critics to unearth its tragic undertow. The rights peculiar to the age of Obama protect the romantic individual's right to withdraw from an utterly incapacitated state. But what of the world left behind? Those guns, in home cupboards or

124. FRYE, *supra* note 119, at 33.

which we legally carry, kill. Every abortion ends a life, as does every medicinal suicide. The homeschooled child may pass tests but may have badly hampered life opportunities as a result. The married couple, both heterosexual and homosexual, can withdraw into a cocoon of mutual financial benefit. The unmarried are left struggling with the meager and unraveling remains of a deeply inadequate social safety net.

And what of the domestic *state* in this world of romantic individuals? Some of those individuals, in fitting tragic fashion, are scattered dead on the stage, but at least some of them are still free to wander. The state and the community that gives rise to it, however, is nowhere; it is shattered. It is not simply sensibly constrained by benign patriarchal courts. It is annihilated. It was not simply prone to nannyism, such that it had to be reined in; it was prone to malignancy, such that it had to be destroyed. And destroyed it was. It cannot educate children, because it lacks the funds to do so. Instead, it offers rights to educate at home and public schooling is something to avoid. It cannot support the efforts of poor and working-class individuals to parent; if they choose to abort, so be it. It cannot support the health-care needs of the sick and dying. If they cannot bear it, the state offers them rights to die. It cannot support entitlements to a living wage, shelter, or food, a decent education, or a dignified job. Its purse is spent elsewhere. So the state gives its needy citizens rights instead: rights to kill, abort, and die; rights to enjoy sex with whom, and even to marry whom, they please, and all free of unpleasant reproductive consequences. It gives them death or carnivals.

CONCLUSION

We are in a different era now, one in which the relationship of state and citizen implied by individual rights is quite different than that suggested by liberal rights devotees or their 1980s-styled critics. Today's defensive rights to withdraw imply a state that is either incapacitated, and thus incapable of performing the minimal duties of statehood, or malignant, and thus not to be trusted to do so. It is not the ironic or comedic bumbling liberal state, inclined to be a bit too intrusive, or even the state suggested by liberalism's

critics: a state that neglects the subordination or private injustice it so blithely chooses to ignore. The state presupposed by these modern rights to withdraw is instead the state that has been shattered. The tragedy of these rights of withdrawal is not just the lethality that follows in their wake. It is also the horrific, yawning chasm where a civic society, a community, and state could once be found.

Tragic dramas end. But our world does not; these are not end times. The response to these rights, if this account is at all accurate, is not to press against them in court or outside of courts, or to press for better rights, positive rights, or “the right rights,” as they used to be called. The response has to be to rebuild the domestic state so darkly presupposed by the rights to withdraw. That requires, in turn, a reactivated citizenry ready to create bonds of mutual assistance. Citizens are sovereigns in an active democracy,¹²⁵ and sovereigns are responsible for the well-being of subjects. Citizens, then, are responsible for the well-being of each other, if a democratic state is to function effectively. Yet, we have no discourse, or even language, with which to describe these sovereign responsibilities of citizenship. We have a language of negative rights to describe the rights we each possess to be sovereign over our own individual lives. We have a language of positive rights, even if we lack the rights themselves, to express our entitlement as citizens to assistance from the state, if only we had one. We also have a private language of our obligations, as people of faith or good will, of charitable assistance to each other. We do not, however, have a language or a discourse with which we regularly express our sovereign obligations to support and assist each other. We are the state; citizen-sovereigns are the state, as Hannah Alejandro has powerfully argued.¹²⁶ If the state should protect each of us from private violence, we have a sovereign obligation, as sovereign citizens, to support the police forces through taxes and labor so that it might do so. If the state is obligated to educate all of our children,

125. For an excellent discussion of the general obligation of citizens as sovereigns, and a general accounting of the idea of citizen sovereignty, see Hannah Alejandro, *The Sovereign Obligations of We, the People: An Argument for Compulsory Voting in the United States* 18-23 (Mar. 18, 2011) (unpublished manuscript) (on file with author), *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstract=1789900>.

126. *Id.*

then we have an obligation, through our labor and our taxes, to support the system of public education by which that education is conveyed. If we do not, as citizen sovereigns, support these public functions of states, then the state will fail, and we will turn, inevitably, to tragic rights to withdraw so that we might perform these state functions ourselves. If we believe that protection of citizens against violence, education of children, assistance with health and child care, and provisions for persons in abject poverty are basic state functions, then citizens, as the sovereigns from whom the state draws its power, must support and fund these state functions. Courts and the rights they create, when they create them, will not be of any help in that effort. The only response to tragic individual rights to withdraw must come from citizens, who might one day come to prefer, as central to the meaning of their sovereignty, an obligation to engage, rather than a right to withdraw.