THE DIALECTIC OF RIGHTS AND POLITICS: PERSPECTIVES FROM THE WOMEN'S MOVEMENT

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Integrating the experience of the women's rights movement with her own experience as an activist and lawyer, Professor Elizabeth Schneider explores the role of rights discourse in the development of social movements. Emphasizing the dialectic of rights and politics, she developes an analysis that reflects the potential of rights both to advance and impede political struggle. Professor Schneider examines the role of rights in claims for equality and reproductive choice and for protection from sexual harassment and battering. She finds that although rights claims have illuminated the common experience of women and helped affirm a sense of collective identity, they have not adequately effected social change. Professor Schneider concludes that a focus on rights cannot, by itself, achieve social reconstruction, but nevertheless argues that, properly understood, rights discourse is a necessary aspect of any political and legal strategy for change.

INTRODUCTION

The nature of legal rights has long been a subject of interest to legal scholars and activists.[1] Recently, dialogue on the issue has intensified,

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The ideas discussed in this essay reflect the influence of many people. Arthur Kinoy, Nancy Stearns, and Rhonda Copelon shaped my view of rights as a lawyer; Ed Sparer's work persuaded me to look at these questions from a theoretical perspective; and continuing dialogue with Martha Minow has encouraged and strengthened me to enter the conversation on rights. I am particularly grateful to the many people who shared their ideas and responses with me: Katharine Bartlett, Margaret Berger, Rhonda Copelon, Martha Fineman, Lucinda Finley, Mary Joe Frug, Marsha Garrison, Linda Gordon, Joel Handler, Dirk Hartog, Bailey Kuklin, Kathleen Lahey, Sylvia Law, Isabel Marcus, Carrie Menkel-Meadow, Frances Olsen, Deborah Rhode, Jack Schlegel, Carol Stack, Nadine Taub, David Trubek, and Wendy Williams. Sylvia Law's support and generosity helped me work. Christina Clarke, Jim Williams, Judith Chananie, Linda Feldman, and Kathleen Turley provided helpful research assistance. Joel Kosman has been an unusually skilled and sensitive editor.

[1] See, e.g., R. Dworkin, Taking Rights Seriously (1977); S. Scheingold, The Politics of Rights (1974). Frank Michelman has suggested that the range of theoretical justifications ad-

provoked by numerous critiques of liberal rights, particularly by Critical Legal Studies (CLS) scholars.[2] These recent critiques have tended to view rights claims and rights consciousness[3] as distinct from and frequently opposed to politics, and as an obstacle to the political growth and development of social movement groups.[4]

This Article joins this dialogue on rights with a different voice. Recent critiques of rights have looked at rights and politics as static categories, and focused primarily on the way in which rights claims and rights consciousness mask and obscure important political choices and values.[5] In this Article, I develop a dialectical perspective on rights. Central to this perspective is an understanding of the dynamic interrelationship of rights and politics, as well as the dual and contradictory potential of rights discourse[6] to blunt and advance political development. Here I detail the rich, complex, and dynamic process through which political experience can shape the articulation of a right, and the way in which this articulation then shapes the development of the political process. I also explore the expressive aspect of rights claims and rights consciousness. I focus on the way in which the assertion or "experience" of rights can express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages. In addition, I examine the importance of context to rights assertion. The ability of a rights claim to constrain or assist a movement's political vision and struggle for change depends upon the particular movement that asserts the right and the particular time at which it does so. Thus, I turn to the recent women's movement's experience with rights as an example of the complex dimensions of the dialectic of rights and politics.

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vanced in support of rights indicates that "[h]owever articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions." Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Own Rights (pt. 1), 1973 Duke L.J. 1153, 1177.

[2] See, e.g., A Critique of Rights, 62 Tex. L. Rev. 1363 (1984); 36 Stan. L. Rev. i (1984) (issue devoted to collection of articles by CLS scholars); Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387 (1984).

[3] Michelman defines rights consciousness as "involvement in a legal discourse that channels normative argument into claims of rights." F. Michelman, Student Rights and Rights Consciousness: Reflections on the School Search Case (Jan. 17, 1985) (unpublished manuscript on file at New York University Law Review). Peter Westen has recently questioned why we use rights talk at all and has concluded that "the persuasiveness of rights discourse is to a significant extent semantic." Westen, The Rueful Rhetoric of "Rights," 33 UCLA L. Rev. 977, 978 (1986).

[4] See text accompanying notes 19-46 infra.

[5] Id.

[6] I intend the term rights discourse to encompass both rights claims and rights consciousness.

This Article emerges directly from my experience as a civil rights lawyer who has assisted groups in asserting rights, and as a law teacher who seeks to help students understand the role of law in social change.[7] As lawyer and law teacher, I have sought to understand how, when, and under what circumstances the use of rights claims by social movement groups is useful, and what effect the use of rights claims has on social movements. Further, my perspective has been shaped by social philosophy, feminist theory, and my experience as an activist in the women's movement. In this Article, I seek to integrate these diverse experiences as part of an effort to understand the relationship between theory and practice. Both the form and substance of this Article reflect my view that it is important to explore theory and practice simultaneously and look closely at how they are interrelated.[8]

The interrelationship of theory and practice in the experience of social movements[9] interested me before I became a lawyer.[10] But these issues became critical to me in my work as a civil rights lawyer at the Center for Constitutional Rights, an organization founded to provide legal support for progressive social movements.[11] At the Center, I

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[7] In this respect, I take seriously Ed Sparer's description of the work of a law teacher committed to social change.

> [Our] responsibility is not simply to expose doctrinal incoherencies and build historical accounts. It is to point the way to a different kind of practice, one which utilizes that historical account. . . .
>
> [Our job] is to study such practice, analyze its conditions, and demonstrate it . . . by personal example. . . .
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> [T]here is still another task: to demonstrate concern and ways of working . . . that . . . are helpful to some oppressed human beings . . . .

Sparer, Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 Stan. L. Rev. 509, 573-74 (1984).

[8] While CLS scholarship has purported to look at the interconnection of theory and practice, most CLS writing has looked only at theory. Sparer, supra note 7, at 554-55; see Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 589 (1984).

[9] The term "social movement" encompasses the term "political movement" as well.

[10] As an undergraduate, I studied philosophy with Richard Bernstein, and his work influenced me enormously. See, e.g., R. Bernstein, Praxis and Action (1971) [hereinafter R. Bernstein, Praxis and Action]; R. Bernstein, The Restructuring of Social and Political Theory (1978). In particular, I learned about praxis and dialectics from him, and I attempted to apply these concepts to social movements, specifically the New Left movements of the 1960s. See E. Schneider, The Contemporary American Left: A Study in Political Dialectic (1968) (unpublished manuscript on file at New York University Law Review). As a graduate student in political science, I studied political sociology with Ralph Miliband, who helped me to focus on the interrelationship between political theory and practice. See generally R. Miliband, The State in Capitalist Society (1969).

[11] The Center "was born in 1966 out of the southern civil rights struggle. Founded by attorneys Arthur Kinoy, William M. Kunstler, Ben Smith and Morton Stavis, with the help of Robert Boehm, it was soon joined by Peter Weiss and others dedicated to the creative use of law as a positive force for social change." Center for Constitutional Rights, Docket Report 1985-1986 (on file at New York University Law Review).

worked with other lawyers to articulate legal theory and fashion legal relief responsive to the specific needs of social movements. My understanding of rights discourse was shaped by the Center's own rich history and experience.[12] Through my work within the women's movement, I recognized the importance and power of legal theory derived from social movement practice. Most recently, my experience as a law teacher, exposure to the work of the Conference on Critical Legal Studies,[13] and my interest in feminist theory have shaped the particular theoretical framework that I detail here.

Current characterizations of rights discourse have not adequately captured either the richness or the complexity of the interrelationship of rights and political struggle which I have experienced as an activist and lawyer. I am moved to enter the dialogue on rights because I believe that recent scholarship on rights reinforces current disillusionment with the use of law for social change.[14] This Article develops a perspective on rights that describes the richly textured experience of law and social movement practice. It is premised on a view of rights discourse that is

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[12] Center lawyers have been involved in a wide range of cases in the areas of government misconduct, racial justice, women's rights, criminal justice, and international law. See A. Kinoy, Rights on Trial: The Odyssey of a People's Lawyer (1983); W. Kunstler, Trials and Tribulations (1985).

[13] The Conference on Critical Legal Studies is a loosely-organized group composed largely of legal academics. The Conference offers "a set of viewpoints, descriptions, and prescriptions that vary substantially from those embraced by the mainstream legal culture." President's Page, 36 Stan. L. Rev. i, i (1984); see also The Politics of Law: A Progressive Critique (D. Kairys ed. 1982) (essays on CLS, social role and operation of law, and alternative progressive approaches written by members of the Conference on Critical Legal Studies and the Theoretical Studies Committee of the National Lawyers Guild).

[14] While it is understandable that the Reagan Administration's policies and changes in the composition of the federal judiciary could have this effect, it is important to resist it. An example of the Administration's move away from the language of rights is reflected in a recent report designed "to study the ethical and legal implications of differences in the availability of health services." 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Securing Access to Health Care 1 (1983). This report supported a societal obligation to ensure equitable access to health care, id. at 4, but not a corresponding right to health care itself. See Bayer, Ethics, Politics, and Access to Health Care: A Critical Analysis of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 6 Cardozo L. Rev. 303, 319-20 (1984).

> The concept of positive or social welfare rights has emerged in recent American history as the most potent political language for those seeking to make claims against an inegalitarian social structure. By explicitly rejecting the concept of a right to health care, thus breaking with recent public discourse on this matter, the Commission deprived those poorly served by the current health care system of a language with which to express their discontent. In so doing, the Commission implicitly adopted a perspective that views social change as the consequence of the recognition of moral obligations by the socially powerful, rather than as a result of demands pressed from below as a matter of rights. Though such a conservative reading of history might be defended, it ought not be put forward in the guise of a theoretical refinement of philosophical terminology.

Id.

independent of the success or failure of a particular rights claim in a particular court. I set forth this alternative perspective in a tentative and speculative way, as this Article is a beginning effort in a larger project. By developing the outlines of this perspective and formulating issues for further work, I hope to recast, even in some small way, the current dialogue on rights.[15]

This Article has five parts. Part I provides an overview of the present CLS and feminist critiques of rights. In Part II, I detail the methodology which shapes this Article and then discuss feminist theory and feminist legal practice as examples of it. Next, in Part III, I develop the contours of a dialectical perspective on rights. Then, in Part IV, I turn to specific examples from the rights experience of the women's movement to examine the way in which rights emerge from, and are shaped by, political struggle. Finally, in Part V, I draw on the women's rights experience to reconsider a dialectical perspective on rights.

I

THE DEBATE ON RIGHTS

The idea that legal rights have some intrinsic value is widespread in our culture.[16] A rights claim can make a statement of entitlement that is universal and categorical.[17] This entitlement can be seen as negative because it protects against intrusion by the state (a right to privacy), or the same right can be seen as affirmative because it enables an individual to do something (a right to choose whether to bear a child). Thus, a rights claim can define the boundaries of state power and the entitlement to do something, and, by extension, provide an affirmative vision of human society. Rights claims reflect a normative theory of the person, but a normative theory can see the rights-bearing individual as isolated or it can see the individual as part of a larger social network.[18] Recently, legal scholars, in particular CLS and feminist scholars, have debated the meanings of rights claims and have questioned the significance of legal argumentation focused on rights.

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[15] One historian of the Conference on Critical Legal Studies recently observed that there is a "recent explosive growth of a serious feminist presence in the group." Schlegel, Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 Stan. L. Rev. 391, 410 (1984). He noted that "this presence, dominated as it is with a heavy legal rights analysis and agenda, cannot but alter an organization that has until now eschewed such an approach to law in favor of grander social theory and explanation." Id. To the extent that this Article reflects a "heavy legal rights analysis and agenda" from a feminist perspective, I hope that Schlegel's prediction is not unduly optimistic.

[16] Michelman, supra note 1, at 1177.

[17] F. Michelman, Hayek's Complaint (Dec. 1985) (unpublished manuscript on file at New York University Law Review).

[18] See id.

CLS scholars question whether rights claims and rights discourse can facilitate social reconstruction.[19] The CLS critique has several interrelated themes which flow from a more general critique of liberalism.[20] CLS scholars argue that liberalism is premised on dichotomies, such as individual and community or self and other, that divide the world into two mutually exclusive spheres. Rights claims only perpetuate these di-

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[19] See Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves, 62 Tex. L. Rev. 1563 (1984); Gabel & Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982-1983); Olsen, supra note 2; Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363 (1984).

[20] Sparer, supra note 7, at 516. Sparer notes, however, that the definitions of liberalism used by CLS scholars are extremely broad. For example, liberalism has been defined in the following way:

> In its broadest expression, liberalism is defined as "the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life." It is not confined to the "liberal-conservative" debate in American politics, though it includes both strands of that debate. Liberalism is so fundamental to our thinking "that it can be contrasted only with radically different ways of understanding the world, such as that based on medieval thought or that derived from modern critiques of liberalism itself."

Id. (footnotes omitted) (quoting Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057, 1074 (1980)).

Karl Klare has described "liberal legalism" in the following way:

> I mean by "liberal legalism" the particular historical incarnation of legalism . . . which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general "democratically" promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ration decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis ("legal reasoning"). The rise and elaboration of the ideology, practices and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating "legal reasoning" and the legal process.
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> Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.

Klare, Law-Making as Praxis, 40 Telos 123, 132 n.28 (1979). For earlier definitions of "liberal legalism," see Trubek, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 Law & Soc'y Rev. 529, 550-55 (1977); Trubek & Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. Rev. 1062, 1070-72.

chotomies,[21] which, to CLS scholars, limit legal thinking and inhibit necessary social change. CLS scholars base their critique of rights on the inherently individualistic nature of rights under legal liberalism, the "reification" of rights generally, and the indeterminate nature of rights claims.

CLS scholars argue that rights are "permeated by the possessive individualism of capitalist society."[22] Because rights "belong" to individuals—rights rhetoric portrays individuals as "separated owners of their respective bundles of rights[23]—they are necessarily individualistic." This notion of ownership delimits the boundaries of state authority from that of individual autonomy, the self from other. Rights discourse tends to overemphasize the separation of the individual from the group, and thereby inhibits an individual's awareness of her connection to and mutual dependence upon others.[24]

CLS scholars also see rights discourse as taking on a "thing-like" quality—a fixed and external meaning—that "freezes and falsifies" rich and complex social experience.[25] This "attribution of a thing-like or fixed character to socially constructed phenomena," called reification, "is an essential aspect of alienated consciousness, leading people to accept existing social orders as the inevitable 'facts of life.' "[26] This process thus gives people a sense of "substitute connection" and an illusory sense of community that disables any real connection.[27] Finally, these scholars

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[21] Sparer, supra note 7, at 516-17; see Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1108 (1981); Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 209, 212-13 (1979).

[22] Lynd, Communal Rights, 62 Tex. L. Rev. 1417, 1418 (1984); see also Gabel, supra note 19, at 1577 (explaining how our self-identity is based, in large part, on individualistic nature of rights).

[23] Olsen, supra note 2, at 393.

[24] F. Michelman, supra note 3, at 23.

[25] Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1, 3-6 (1984); see also Gabel, supra note 19, at 1582 (discussing how we give a "false concreteness" to legal concepts and rights); Tushnet, supra note 19, at 1382 (discussing how we conceptualize rights as real based upon our experiences in exercise of those rights).

[26] Gabel & Harris, supra note 19, at 373 n.10.

[27] In describing the process of substitute connection, Gabel writes:

> As soon as we begin to look for it, we find this substitute connection throughout legal thought in what we might call the latent content of rights themselves. By representing our alienated performances as exercises of the rights to freedom of speech, freedom of contract, equality of opportunity, good faith cooperation, and so on, we "make it the law" that these performances be conceived as embodying the qualities that would characterize genuine connection. While at the purely rational, or manifest, level, these abstract rights signify only the universally allowed possible actions available to each individual in suspended form (we imagine we "have" these possible actions, and in acting "exercise" them, through a process of simple deduction), at the irrational, or latent, level they link the totality of our current alienated experience with the realization of desire as a collective fantasy. To the extent that these legal images of our existing social

see rights claims as indeterminate because argumentation based on rights does not solve the problem of how to resolve conflicts between rights[28] and cannot transform social relations.[29]

CLS scholars criticize the use of rights claims by social movement groups on related grounds.[30] They argue that the use of rights discourse by a social movement group and the consequent reliance on rights can keep people passive and dependent upon the state because it is the state which grants them their rights.[31] Individuals are only allowed to act—to "exercise their rights"—to the degree to which the state permits.[32] Legal strategies based on rights discourse, then, tend to weaken the power of a popular movement by allowing the state to define the movement's goals.[33] Rights discourse obscures real political choice and determination.[34] Further, it fosters social antagonisms by magnifying disagreement within and conflicts between groups over rights.[35] From a strategic perspective, then, reliance on rights by social movements can be politically debilitating.[36]

Nevertheless, at least one prominent CLS scholar sees rights claims as potentially important and useful. To this end, Duncan Kennedy urges the "transformation of rights rhetoric."

> [T]he critique of rights as liberal philosophy does not imply that the left should abandon rights rhetoric as a tool of political organizing or legal argument. Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom. We need to work at the slow transformation of

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> life produce mere fantasies of connection, it seems accurate to say that through them we "use" our desire for connection to legitimize our real absence of connection, just as patriotism is often used to produce a feeling of unreal solidarity in order to deny our real experience of a lack of solidarity. Yet, as with patriotism, our production of these legal images in common from our dispersed and withdrawn locations reveals our residual ontological bond. Although we are absorbed in a collective fantasy, we are actually still together insofar as we are "watching the same movie."

Gabel, supra note 19, at 1580 (footnote omitted).

28 See Kennedy, Critical Labor Law Theory: A Comment, 4 Indus. Rel. L.J. 503, 506 (1981); Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L.J. 450, 478 (1981); Olsen, supra note 2, at 389; Tushnet, supra note 19, at 1375-82; Dalton, Book Review, 6 Harv. Women's L.J. 229, 235 (1983).

29 Klare, supra note 20, at 133-34.

30 See Gabel, supra note 19, at 1573; Tushnet, supra note 19, at 1384.

31 See Gabel, supra note 19, at 1577.

32 See id. at 1578 (noting that people silently agree to this relationship allowing state to define their individual rights).

33 Gabel & Harris, supra note 19, at 375.

34 Id. at 375-79; Olsen supra note 2, at 391; Tushnet, supra note 19, at 1394.

35 See Gabel & Harris, supra note 19, at 376 n.13; Olsen, supra note 2, at 390.

36 Tushnet, supra note 19, at 1375-85.

rights rhetoric, at dereifying it, rather than simply junking it.[37]

Some feminist critiques of rights see rights claims as formal and hierarchical—premised on a view of law as patriarchal.[38] From this perspective, law generally, and rights particularly, reflect a male viewpoint characterized by objectivity, distance, and abstraction.[39] As Catharine MacKinnon, a leading exponent of this position writes, "Abstract rights will authoritize the male experience of the world."[40] However, these critics do not argue that rights claims should be given up completely either.[41]

Some legal writers see similarities between the CLS critique of rights based on "liberal legalism" and the feminist critique based on "patriarchy."[42] Both liberal legalism and patriarchy rely upon the same set of dichotomies.[43] Further, the critiques usefully emphasize the indeterminacy of rights, and the ways in which rights discourse can reinforce alienation and passivity. Both critiques highlight the ways in which rights discourse can become divorced from political struggle. They appropriately warn us of the dangers social movements and lawyers encounter when relying on rights to effect social change.

But both critiques are incomplete. They do not take account of the complex, and I suggest dialectical, relationship between the assertion of rights and political struggle in social movement practice.[44] They see only

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[37] Kennedy, supra note 28, at 506; see also Gabel & Harris, supra note 19, at 376 n.13 (many lawyers on left support use of rights rhetoric to aid effective political organizing).

[38] See MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs: J. Women Culture & Soc'y 635, 644-45 (1983); Olsen, supra note 2, at 400; Polan, Toward a Theory of Law and Patriarchy, in The Politics of Law 294, 300-02 (D. Kairys ed. 1982); Rifkin, Toward a Theory of Law and Patriarchy, 3 Harv. Women's L.J. 83 (1980).

[39] See MacKinnon, supra note 38, at 645 ("[L]aw not only reflects a society in which men rule women; it rules in a male way."); Polan, supra note 38, at 301 ("The whole structure of law—its hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values—defines it as a fundamentally patriarchal institution."); see also Rifkin, supra note 38, at 84, 87 (arguing that this ideology of law masks underlying social and political questions, thereby reinforcing its own legitimacy). Carol Gilligan's work suggests that rights-based jurisprudence, characterized by objectivity, distance, abstraction, and hierarchy, might be distinctively male. See C. Gilligan, In a Different Voice (1982), discussed in text accompanying notes 113-48 infra. For example, Olsen reads Gilligan to suggest that "[l]iberal legalism . . . might seem to be a 'masculine' response to problems." Olsen, supra note 2, at 400 n.64.

[40] MacKinnon, supra note 38, at 658.

[41] See Olsen, supra note 2, at 401; Polan, supra note 38, at 300-01.

[42] Olsen, supra note 2, at 400 n.64; see D. Trubek, Taking Rights Lightly? Radical Voices in Legal Theory 16 (Oct. 8, 1984) (paper on file at New York University Law Review).

[43] See F. Olsen, The Sex of Law (1984) (paper on file at New York University Law Review); Trubek, supra note 42, at 20-23.

[44] Ed Sparer has observed that the CLS exaggeration of the negative aspects of rights discourse promotes an " 'undialectical' approach despite Critical theory's emphasis on dialectics." Sparer, supra note 7, at 519. He argues that CLS has not grasped the dialectics of rights. "As much as rights are instruments of legitimizing oppression, they are also affirma-

the limits of rights, and fail to appreciate the dual possibilities of rights discourse.[45] Admittedly, rights discourse can reinforce alienation and individualism, and can constrict political vision and debate. But, at the same time, it can help to affirm human values, enhance political growth, and assist in the development of collective identity.

By failing to see that both possibilities exist simultaneously, these critiques have rigidified, rather than challenged, the classic dichotomies of liberal thought—law and politics, individual and community, and ultimately, rights and politics. Radical social theory, such as CLS and feminist scholarship, must explore the dialectical dimensions of each dichotomy, not reinforce the sense that the dichotomies are frozen and static. Radical social theory must explain how these dichotomies can be transcended.[46]

II

DIALECTICS AND PRAXIS AS METHODOLOGY: THE EXAMPLES OF FEMINIST THEORY AND FEMINIST LEGAL PRACTICE

My perspective on rights is grounded in a view of the dialectical

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tions of human values. As often as they are used to frustrate social movement, they are also among the basic tools of social movement." Id. at 555.

[45] For other, arguably more appreciative, analyses of the possibilities of rights discourse, see, e.g., Colker, Pornography and Privacy: Towards the Development of Group Based Theory for Sex Based Intrusions of Privacy, 1 Law & Inequality: J. Theory & Prac. 191, 236-37 (1983) (seeking to expand individualistic nature of rights by adding group component); Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 158-60 (1976) (arguing for a group-disadvantaging principle based on experience of Blacks to replace narrow vision of equality based on individual disadvantage); Horwitz, The Jurisprudence of Brown and the Dilemmas of Liberalism, 14 Harv. C.R.-C.L. L. Rev., 599, 610 (1979) (noting that "legal system is overwhelmingly geared to the conception of redressing individual grievances, not of vindicating group rights"); Lynd, supra note 22, at 1421 (1984) (searching for rights that "do not require a choice between our own well-being and the well-being of others); Sparer, supra note 7, at 515 (arguing that "[l]iberal rights *theory* may be incoherent, but certain liberal rights themselves need be defended, not disparaged"); Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 597-648 (1983) (arguing that rights, properly asserted, can help transform society by revealing interrelationship between self and community); Villmoare, The Left's Problems With Rights, 9 Legal Stud. F. 39, 42 (1985) (arguing for rights as ideological and concrete force tied to exercise of political power and capable of use as political weapon).

[46] Trubek suggests that

> the point is not to say that object is better than subject, public than private, female than male: rather, the point is to do away with a representational structure that seems to force us to such choices because it carves the world up this way. Indeed, the desire to transcend, deconstruct, the dualism may be what distinguishes the radical from the liberal voice.

D. Trubek, supra note 42, at 27-28.