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The Dialectic of Rights and Politics: Perspectives from the Women's movement

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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. . . .
>
> [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.
>
> 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.

nature of consciousness and social change[47] and a view that theory and practice must be understood as interrelated.[48] These ideas shape the methodology of my analysis. My effort is to transcend the purported oppositions of rights and politics, theory and practice, individual and community, and to understand their dialectical relationship. In this way, I hope to describe how two purportedly contradictory notions can, at the same time, be inextricably linked to one another, such as the liberating and constraining aspects of rights discourse. Rights discourse may sometimes appear to be distinct from politics and an obstacle to political growth, but it is actually part of a larger process of political struggle.

The concept of dialectics has shaped much of contemporary social theory[49] and has developed different meanings and uses. Most significantly here, it stands for the idea of the process, connection, and opposition of dualities, and for subsequent change and transcendence. The dialectical approach that I use in this Article explores the process which connects ideas that appear to be in opposition to one another. One "moment" in the process gives rise to its own negation, and "out of this negativity, emerges a 'moment' which at once negates, affirms, and transcends the 'moment' involved in the struggle."[50] Thus, an idea may be both what it appears to be and something else at the same time; the idea may contain the seeds of its own contradiction, and ideas that appear to be in opposition may really be the same or connected. At any given "moment," ideas may appear to be connected or in opposition because this connection or opposition exists in only one stage of a larger process. The dialectical process is not a mechanical confrontation of an opposite from outside, but an organic emergence and development of opposition and change from within the "moment" or idea itself.[51]

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[47] Karl Klare explains the dialectical theory of consciousness as the basis for a "constitutive" theory of law.

> [This] dialectical theory of consciousness—a theory of human self-activity or objectification as social world-creating . . .; a conception of people as beings in relation to, and dependent on, others; a conception of the relationship of subject and object in which the subject derives its contents from objects and relationships external to it, but nevertheless one in which the subject shapes, changes, and gives meaning to objects in the process of coming to know them.

Klare, supra note 20, at 128.

[48] While some CLS scholarship theoretically accepts the interconnection of theory and practice, not much CLS writing has actually examined this interconnection. See Sparer, supra note 7, at 552-55; Trubek, supra note 8, at 589.

[49] See R. Bernstein, Praxis and Action, supra note 10, at xiii (discussing importance of dialectical approaches to range of philosophical schools since Hegel).

[50] Id. at 20-21.

[51] In Praxis and Action, Bernstein describes the process of dialectics in the following way:

> There has been a lot of loose talk about Hegel's dialectic being a movement from thesis to antithesis to synthesis. Not only do these concepts play an insignificant role in Hegel's philosophy, they are essentially static concepts and completely misrepresent

The critiques of rights that I have described suffer from an analysis that divorces theory from practice.[52] Rights are analyzed in the abstract, viewed as static—as a form of legal theory separate from social practice—and then criticized for being formal and abstract. My approach to rights views theory and practice as dialectically related, and I look to the philosophical concept of praxis to describe this process. The fundamental aspect of praxis is the active role of consciousness and subjectivity in shaping both theory and practice, and the dynamic interrelationship that results.[53] As Karl Klare has explained, lawmaking can be a form of praxis; it can be constitutive, creative, and an expression of "the embeddedness of action-in-belief and belief-in-action."[54] For purposes of this Article, my focus on praxis impels me to explore how rights claims can flow from and express the political and moral aspirations of a social movement group, how rights claims are experienced or perceived in social movement practice, and how rights discourse impacts on social movement practice generally.

My methodological lens for viewing rights—the concepts of dialectics and praxis—is shaped by my philosophical orientation as well as my own experience of rights. Both feminist theory and feminist legal prac-

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what Hegel means by "dialectic." The dialectic of *Geist* is essentially a dynamic and organic process. One "moment" of a dialectical process, when it is fully developed or understood gives rise to its own negation; it is not mechanically confronted by an antithesis. The process here is more like that of a tragedy where the "fall" of the tragic hero emerges from the dynamics of the development of his own character. When *Geist* is dirempted, alienated from itself, a serious struggle takes place between the two "moments." Out of this conflict and struggle, out of this negativity, emerges a "moment" which at once negates, affirms, and transcends the "moments" involved in the struggle—these earlier moments are *aufgehoben*. In the course of *Geist* realizing itself, this process which involves a stage of self-alienation that is subsequently *aufgehoben* is a continuous, restless, infinite one. The logic of the development of *Geist* is dialectical where *Geist* struggles with what appears to be "other" than it—a limitation, or obstacle which must be overcome. *Geist* "returns to itself" when it overcomes the specific obstacle that it encounters, only to renew the dialectical process again. *Geist* finally "returns to itself" when all obstacles and determinations have been overcome, when everything that has appeared "other" than itself is fully appropriated and thereby subjectivized. This is the final aim or goal of *Geist*. The negativity and activity of *Geist* come into focus in this dialectical characterization.

Id. at 20-21 (footnotes omitted). Kathleen Lahey observed that although I use the notion of dialectic as a means of transcending a dualistic or dichotomized formulation of rights and politics, the notion of dialectic is nonetheless premised on a dualistic framework. As I see it, however, the dialectical process has many dimensions and is not simply dualistic since, as Bernstein writes, it is a process of constant and organic change.

52 See, e.g., Tushnet, supra note 19, at 1394.

53 See R. Bernstein, Praxis and Action, supra note 10, at 42-43. Praxis describes "a unity of theory and action." Sparer, supra note 7, at 553 (footnote omitted). It is used in this essay as it was used in Sparer's "as a shorthand term for the theory-practice-social change relationship." Id. at 553 n.10. Karl Klare uses the term praxis in the broadest sense—"any social-world producing activity." Klare, supra note 20, at 124 n.5.

54 Klare, supra note 20, at 124 n.5.

tice exemplify aspects of this methodological perspective[55] and shape my approach to rights. Over the last several years, feminist theoretical work in a range of disciplines has made important contributions to the development of social and political theory.[56] This work emphasizes dialectical change and the relationship between theory and practice, thereby enriching social perspectives on law and understandings of rights.[57] At the same time, my experience with feminist legal practice gives me a concrete understanding of the dialectical nature of rights discourse—of the way in which rights claims can not only constrain, but also can creatively express political vision, and the way in which rights claims can be understood as a form of praxis.

A. Feminist Theory

Feminist theory is characterized by an emphasis on dialectical process[58] and the interrelationship of theory and practice. Feminist theory

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[55] See text accompanying notes 58-91 infra.

[56] Feminist theoretical work has exploded in the last ten years with the institutionalization of women's studies programs and courses. See, e.g., A Feminist Perspective in the Academy (E. Langland & W. Gove ed. 1981); Men's Studies Modified (D. Spender ed. 1981); The Study of Women: Enlarging Perspectives of Social Reality (E. Snyder ed. 1979); see also Feminist Studies (feminist theoretical journal); Signs: J. Women Culture & Soc'y (same).

[57] There has been a recent outpouring of legal scholarship grounded in feminist theory that seeks to apply feminist theory to law generally. See, e.g., Cole, Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory, 8 Harv. Women's L.J. 59, 79-90 (1985); Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buffalo L. Rev. 11, 12 (1985)[hereinafter Feminist Discourse]; Karst, Woman's Constitution, 1984 Duke L.J. 447, 480-508; Spiegelman, Court-Ordered Hiring Quotas After *Stotts*: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine, 20 Harv. C.R.-C.L. L. Rev. 339, 344 (1985). So applied, feminist theory "can provide for a reconceptualization of some of the most basic terms of political life." K. Ferguson, The Feminist Case Against Bureaucracy 166 (1984). I believe that feminist theory has much to offer legal thinking, and indeed feminist jurisprudence was recognized as such at the Association of American Law Schools' Annual Meeting, which included a panel on feminist jurisprudence as part of the Mini-Workshop on Emerging Trends in Legal Scholarship and Legal Education (Los Angeles, California 1987), which I recently attended. Still, I am concerned that feminist theory will become oversimplified and canonized as it becomes more widely accessible. Feminist theory is significant precisely because it is dynamic and complex. If feminist theory becomes an intellectual commodity within legal thought, feminist analysis will be marginalized and stultified.

[58] The notion of a dialectical process is a critical aspect of feminist theory. The term dialectical and the concept of dialectic are frequently used by feminist theorists in a wide range of contexts. See, e.g., S. De Beauvoir, The Second Sex xvi-xxi (1952) (discussing dialectical relationship between one and other, master and slave); K. Ferguson, supra note 57, at 197 (writing that "[a] community that recognizes the dialectical need for connectedness within freedom and for diversity within solidarity would strive to nurture the capacity for reflexive redefinition of self"); C. Gilligan, supra note 39, at 174 (discussing "the dialectic of human development"); A. Jaggar, Feminist Politics and Human Nature 12 (1983) (discussing "the on-going and dialectical process of feminist theorizing"); New French Feminisms: An Anthology xi-xii (E. Marks & I. de Courtivron ed. 1981) (writing that recent French feminists "take from . . . dialectics those modes of thinking that allow them to make the most connections between the

emphasizes the value of direct and personal experience as the place that theory should begin,[59] as embodied in the phrase "the personal is political."[60] This phrase reflects the view that the realm of personal experience, the "private" which has always been trivialized, particularly for women, is an appropriate and important subject of public inquiry, and that the "private" and "public" worlds are inextricably linked.[61] The notion of consciousness-raising as feminist method[62] flows from this insight. In consciousness-raising groups, learning starts with the individual and personal (the private), moves to the general and social (the public), and then reflects back on itself with heightened consciousness through this shared group process. Consciousness-raising as feminist method is a form of praxis because it transcends the theory and practice dichotomy. Consciousness-raising groups start with personal and concrete experience, integrate this experience into theory, and then, in effect, reshape theory based upon experience and experience based upon theory. Theory expresses[63] and grows out of experience but it also relates back to that experience for further refinement, validation, or modification.

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oppression of women and other aspects of their culture"); Feminist Discourse, supra note 57, at 86 (comment by C. Menkel-Meadow) (discussing process of development within women's movement as "part of a much larger dialectical process where we begin with a reform, be it liberal, radical, or in some cases even conservative, and some of us unite behind it while others do not").

[59] A. Jaggar, supra note 58, at 101; MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 Signs: J. Women Culture & Soc'y 515, 534-36 (1982).

[60] Z. Eisenstein, Feminism and Sexual Equality 11 (1984).

[61] See MacKinnon, supra note 38, at 655-56; MacKinnon, supra note 59, at 534-35; see also Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1457, 1500, 1510-11 (1983) (structure of consciousness that divides interdependent spheres of market and family has limited effectiveness of reform, leaving women subjugated in both spheres).

[62] Catharine MacKinnon maintains that "consciousness-raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement." MacKinnon, supra note 59, at 519. Sylvia Law recently emphasized the critical role that consciousness-raising has played in the rise of feminism and still can play in social problem solving generally. She observed that "feminist consciousness-raising is a process of self-reflection and action that values women's personal experience and understands that experience as political." Law, Book Review, 95 Yale L.J. 1769, 1784 (1986) (footnote omitted). For feminist works on consciousness-raising, see J. Cassell, A Group Called Women: Sisterhood & Symbolism in the Feminist Movement 15-20 (1977); S. Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left 214-32 (1979); Bose, Consciousness-Raising, in Mother Was Not a Person 176, 176-84 (M. Anderson ed. 1972); Hartsock, Fundamental Feminism: Process and Perspective, 2 Quest: Feminist Q. 67, 71-79 (1975); McWilliams, Contemporary Feminism, Consciousness-Raising and Changing Views of the Political, in Women in Politics 157, 157-70 (J. Jacquette ed. 1974). Consciousness-raising also reflects a political understanding about the interrelatedness of women's subordination in the private sphere (the family) and the public sphere (the market). See Olsen, supra note 61, at 1510-11.

[63] Cf. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 64 (1984) (legal theory can be expressive because it "can help create communal ties and shared

The idea of consciousness-raising as a method of analysis suggests an approach to social change which recognizes dynamic tension, reflection, and sharing as essential aspects of growth. Feminist theory values this process which starts with experience, generalizes through self-reflection and evaluation, and then returns to experience. This dialectical process transcends the oppositions of self and other, public and private, individual and community, and is simultaneously grounded in an understanding that any connections between these apparent dualisms will be only partial and tentative, and that distinctions will again emerge.[64]

Feminist theory thus reveals the social dimension of individual experience and the individual dimension of social experience. It recognizes "the dialectical tension between freedom that does not entail isolation and community that does not enforce uniformity."[65] In particular, it values the dynamic interrelationship of the individual and community. "Feminist discourse and practice entail a struggle for individual autonomy that is with others and for community that embraces diversity—that is, for an integration of the individual and the collective in an ongoing process of authentic individuation and genuine connectedness."[66]

The fact that this process begins with the self, and then connects to the larger world of women, is important. For feminists, theory is not "out there," but rather is based on the concrete, daily, and "trivial" experiences of individuals, and so emerges from the shared experience of women talking. Because feminist theory grows out of direct experience and consciousness actively asserting itself, feminist theory emphasizes context and the importance of identifying experience and claiming it for one's own.[67]

Feminist theory involves a particular methodology, but it also has a substantive viewpoint and political orientation.[68] Recognizing the links

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values by forcing us from the sense that current practices and doctrines are natural and necessary and by suggesting new forms of expression to replace outworn ones").

[64] Many feminist theorists have alluded to the process of consciousness-raising as one in which these distinctions are transcended in a dialectical fashion. See sources cited in note 62 supra. Similarly, MacKinnon sees consciousness-raising as dialectical method. She sees it as "a collective 'sympathetic internal experience of the gradual construction of [the] system according to its inner necessity . . . .' " MacKinnon, supra note 59, at 536 (quoting F. Jameson, Marxism and Form xi (1971)).

[65] K. Ferguson, supra note 57, at 198.

[66] Id. at 157 (emphasis omitted).

[67] A. Jaggar, supra note 58, at 11.

[68] Substantively, feminist theory is concerned with the articulation of women's voices and issues of silence. Power gives people a voice and lack of power silences them. Women's voices and experiences have not been heard because the subordination of women has denied them access to power. See sources cited in note 57 supra. As feminist scholars understand that women's experience and history have been submerged, they feel compelled to discover, recast, and reclaim women's experience. For example, Kathy Ferguson notes that feminist discourse contains two related dimensions.

between individual change and social change means understanding the importance of political *activity*, not just theory. Theory emerges from practice and practice then informs and reshapes theory. At the same time, because of its dialectical cast, feminist theory encompasses a notion of process that encourages a grounded and reflective appreciation of this interrelationship—its possibilities and limits, visions and defeats.

B. Feminist Legal Practice: Feminist Theory in Practice

While feminist theory has shaped my view of the relationship between theory and practice, much of my perspective on the use of rights has understandably been shaped by my own experience as a lawyer. In a sense, this Article is both a lesson in and example of praxis. My view of

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> The first is the buried historical knowledge about women, about what women have done and been, spoken and dreamed, sought and found. These blocks of historical knowledge are present to a degree in the dominant domain of discourse, but they are disguised and distorted; the task of feminist scholarship is and has been to unearth this buried knowledge. The second is women's invisible and disqualified knowledge about themselves and their world . . . .

K. Ferguson, supra note 57, at 157; see also, e.g., C. Christ, Diving Deep and Surfacing: Women Writers on Spiritual Quest (1980) (essays on women's spiritual quest and mystical experiences as portrayed in works by leading female authors and poets); A. Jaggar, supra note 58 (discussion and evaluation of different feminist theories on women's oppression and liberation); Feminism and Philosophy (M. Vetterling-Braggin, F. Elliston & J. English ed. 1977) (collection of essays presenting various views of feminism as an ethical theory); New French Feminisms: An Anthology, supra note 58 (collection of essays representing spectrum of new French feminism since 1968 by French authors); The Future of Difference (H. Eisenstein & A. Jardine ed. 1980) (collection of essays drawn from "The Scholar and the Feminist VI: The Future of Difference," sponsored by the Barnard College Women's Center in 1979); Toward an Anthropology of Women (R. Reiter ed. 1975) (collection of essays applying anthropological methods to explain subjugation of women); Woman, Culture, and Society (M. Rosaldo & L. Lamphere ed. 1974) (essays discussing issues ranging from role of biology in asymetrical relation of sexes to nature, implications, and extent of female power in social processes).

Feminist theory has also come to recognize the difference in sameness. Much feminist theory emphasizes women's divergent experiences—that women are not all the same, that women are divided by race and class, and that there is no single experience for all women. See, e.g., P. Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 183-97 (1984) (arguing that issues have been promoted by white feminists which were not in the interests of black women); B. Hooks, Feminist Theory: From the Margin to the Center 43-65 (1984) (arguing that to build sustained feminist movement women must confront sexism, racism, and classism that divide women from one another); Powell, Black Macho and Black Feminism, in Home Girls 283, 291-92 (B. Smith ed. 1983) (calling for continued development of black feminist politics because issues of racism and sexism impact black women disproportionately); The Combahee River Collective, A Black Feminist Statement, in All the Women are White, All the Blacks are Men, But Some of Us are Brave 13, 13-22 (G. Hull, P. Bellscott & B. Smith ed. 1982) (discussing oppression Afro-American women have suffered from in white, patriarchical society).

At the same time, feminist theory reveals sameness in difference—that women regardless of race, class, and culture have commonly been subordinated and so need to unite based upon the desire to eliminate all group oppression. See Z. Eisenstein, supra note 60, at 11-15; B. Hooks, supra, at 61-65.

the dialectical relationship between rights and politics, and theory and practice, has been formed by my own work. I will detail some of this experience to explain my perspective on the importance of a dialectical approach to rights.

As a college student in the 1960s, active in civil rights and other political work, and studying political science and social theory, I saw many examples from the civil rights movement of lawyers using the law to advance the political efforts of social movement groups. Yet I also observed that the law could be used to constrain political organizing and vision. For that reason, although strongly drawn to law school, I chose to do other work instead. During this time I became actively involved in the women's movement, and my experience as an activist gave me the incentive and impetus to go to law school. It was 1970, and efforts to reshape the law to include women's experience were just beginning. There was a need for women with a feminist perspective to go to law school.

First as a law student and then as a lawyer, I was privileged to work at the Center for Constitutional Rights. Center lawyers had a long history of using the law to affect social change and to change the law to reflect the experience of those previously excluded by the law. In the early 1970s, women lawyers on the Center's staff began to work on women's rights issues.[69]

We asserted rights not simply to advance legal argument or to win a case, but to express the politics, vision, and demands of a social movement, and to assist in the political self-definition of that movement. We understood that winning legal rights would not be meaningful without political organizing to ensure enforcement of and education concerning those rights.[70] Through the work at the Center, the law was used to capture a vision of and advance a burgeoning sense of community. There was an important understanding that lawmaking could be a form of

[69] I started working at the Center as a law student in 1971 and left the Center in 1980. Nancy Stearns, Rhonda Copelon, Janice Goodman, and I worked primarily on women's rights issues. Many other lawyers, either on the Center staff or as Center cooperating attorneys, worked closely with us. We operated as a close group—part of a network of feminist litigators around the country who attempted to use our experience as women, as activists, and as women lawyers to reshape the law by including women's perspective in it. We worked in a wide variety of legal areas: pregnancy discrimination, employment discrimination, reproductive rights, and violence against women, as lead counsel and sometimes in an amicus curiae capacity. We worked with other lawyers to analyze problems from a feminist perspective and to translate our analysis into legal argumentation to be presented to the courts. We also were involved in a wide range of other activities, such as legislative reform, public speaking, political organizing, and outreach work. More recently, other Center lawyers such as Anne Simon, Sarah Wunsch, and Ellen Yaroshefsky have continued this work.

[70] Although the enforcement of rights is a critical element in evaluating the significance of rights claims, discussion of rights enforcement is beyond the scope of this Article.

praxis. It could be constitutive and creative, and it could have political meaning independent of its success or failure in the courts.

Of the many cases on which I worked at the Center, one, *State v. Wanrow*,[71] stands out for me because it so clearly demonstrates that legal argumentation which is tied to and expresses the concerns of a social movement can assist in the political development of that movement. In *Wanrow*, a jury convicted Yvonne Wanrow, a Native American woman, of second-degree murder for shooting and killing a white man named William Wesler, whom she believed had tried to molest one of her children.[72] Wesler had entered her babysitter's home uninvited when Wanrow and her children were there. Wanrow, who had a cast on her leg and was using crutches at the time, claimed that, based on her perceptions of the danger created by Wesler, she had acted in self-defense.[73] The trial court, however, instructed the jury to consider only the circumstances "at or immediately before the killing" when evaluating the gravity of the danger the defendant faced,[74] even though Wanrow claimed that she had information which led her to believe that Wesler had a history of child molestation and had previously tried to molest one of her children.[75] The trial court also instructed the jury to apply the equal force standard, whereby the person claiming self-defense can only respond with force equal to that which the assailant uses.[76] Wesler had not been carrying a gun.[77]

Center lawyers became involved in the case on appeal to the Washington Supreme Court. Reading the trial transcript, we realized that the judge's instructions prevented the jury from considering Yvonne Wanrow's state of mind, as shaped by her experiences and perspective as a Native American woman, when she confronted this man. The jury had not been presented with evidence concerning the lack of police protection generally in such situations, the pervasiveness of violence against women and children, the effect on Wanrow of her knowledge of Wesler as a child molester, and Wanrow's belief that she could only defend herself with a weapon. Moreover, the judge's instructions to the jury directed the jury

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[71] 88 Wash. 2d 221, 559 P.2d 548 (1977). Nancy Stearns and I were co-counsel in *Wanrow* on appeal. For a fuller discussion of *Wanrow*, see Schneider, Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 15 Harv. C.R.-C.L. L. Rev. 623, 641-42 (1980); Schneider & Jordan, Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault, 4 Women's Rts. L. Rep. 149, 156-58 (1978); Recent Developments, 54 Wash. L. Rev. 221 (1978); MacKinnon, Book Review, 34 Stan. L. Rev. 703, 725-34 (1982).

[72] *Wanrow*, 88 Wash. 2d at 224-26, 559 P.2d at 550-51.

[73] Id. at 226, 559 P.2d at 551.

[74] Id. at 234, 559 P.2d at 555.

[75] Id. at 225-26, 559 P.2d at 550-51.

[76] Id. at 239-40, 559 P.2d at 558.

[77] Id. at 226, 559 P.2d at 551.

to apply the equal force standard and not to consider Wanrow's perspective when evaluating her claim of self-defense.[78] Consequently, our decision to challenge the sex-bias in the law of self-defense—as reflected in these instructions—was formed from the insight that Yvonne Wanrow's perspective as a Native American woman had to be included in the courtroom.

We developed the legal argument for women's "equal right to trial," which challenged sex-bias in the law of self-defense, based upon our knowledge of the particular problems women who killed men faced in the criminal justice system: the prevalence of homicides committed by women in circumstances of male physical abuse or sexual assault; the different circumstances in which men and women killed; myths and misconceptions in the criminal justice system concerning women who kill as "crazy"; the problems of domestic violence, physical abuse, and sexual abuse of women and children; the physical and psychological barriers that prevented women from feeling capable of defending themselves; and stereotypes of women as unreasonable. If the jury did not understand Yvonne Wanrow's experience and the way in which it shaped her conduct, it could not find her conduct to have been reasonable and therefore an appropriate act of self-defense. Since the jury would not be able to consider this defense, Wanrow, then, could not be treated fairly.

On appeal, Wanrow's conviction was reversed.[79] A plurality of the court voted to reverse on the ground that the trial court's instructions violated Washington law in three ways. First, the instruction that limited the jury's consideration to the circumstances "at or immediately before the killing" misconstrued Washington law.[80] Properly construed, state law allowed the jury to consider Wanrow's knowledge of the deceased's reputation, prior aggressive behavior, and all other prior circumstances, even if that knowledge were acquired long before the killing.[81] Second, the instruction concerning equal force misstated state law and denied Wanrow equal protection:

> The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.[82]

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[78] Id. at 240-41, 559 P.2d at 558-59.
[79] Id. at 224, 559 P.2d at 548.
[80] Id. at 234-36, 559 P.2d at 555-56.
[81] Id. at 237-38, 559 P.2d at 557.
[82] Id. at 240, 559 P.2d 558-59.

Third, the trial court's instructions failed to direct the jury to consider the reasonableness of Wanrow's act *from Wanrow's perspective*, or, in other words, "seeing what [s]he sees and knowing what [s]he knows."[83] The Washington Supreme Court affirmed a standard of self-defense based on the individual defendant's perception, as required by Washington law, and underscored the need for this standard by recognizing the existence of sex-bias in the law of self-defense generally.

> The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and unfortunate history of sex-discrimination." . . . Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.[84]

Thus, the political insights into sex-bias in self-defense that could help to explain Yvonne Wanrow's situation arose out of legal formulation and argumentation. But the legal argument concerning the "equal right to trial" grew out of a political analysis of sex discrimination that the legal team shared, discussed, and applied to the particular case. The legal argumentation brought together diverse strands of feminist analysis and theory concerning sex-biased treatment of women in the criminal justice system.

This legal argumentation reflected a perspective which feminist activists and lawyers were beginning to express and share.[85] Feminist writers were beginning to explore these issues as well.[86] Further, aspects of this argument were asserted at the same time in other courts in different cases.[87] The rights formulation reflected the political analysis and activity of women's groups concerned with violence against women, the treatment of women within the criminal justice system, and the work of defense committees organizing around particular women defendant's

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[83] Id. at 238, 559 P.2d at 557 (citing State v. Dunning, 8 Wash. App. 340, 342, 506 P.2d 321, 322 (1973)).

[84] Id. at 240-41, 559 P.2d at 559 (citation omitted).

[85] See sources cited in Schneider & Jordan, supra note 71, at 151-53.

[86] See S. Brownmiller, Against Our Will (1975); R. Langley & R. Levy, Wife Beating: The Silent Crisis (1977); D. Martin, Battered Wives (1976).

[87] See cases cited in Schneider & Jordan, supra note 71, at 149. "National attention on women 'fighting back' first focused on the cases of Inez Garcia and Joan Little who had both killed assailants following sexual assault." Id. (citing People v. Garcia, Cr. No. 4259 (Super. Ct. Cal. 1977) and State v. Little, 74 Cr. No. 4176 (Super. Ct. N.C. 1975)).

cases. It was a formulation which made sense to many women on an experiential level.

In this sense, the legal formulation grew out of political analysis, but it also pushed the political analysis forward. The particular legal focus on sex-bias in the law of self-defense, and on the absence of a women's perspective in the courtroom, clarified feminist analysis of the problems facing women who kill. It explained why both women defendants and lawyers representing them were more likely to claim insanity or impaired mental state rather than assert self-defense.[88] The legal formulation thus moved the political work to a different level. It raised the political question of what a woman's perspective might be and what equal treatment would look like. It focused further legal work on the disparate hurdles that limited women defendants' choice of defense—particularly the various ways in which women's experiences were excluded from the courtoom—and laid the foundation for political and legal strategies to remedy the problems created by this exclusion.

What has become known as women's self-defense work is now an established part of both feminist litigation and legal literature.[89] Many courts have now accepted the view that there is sex-bias in the law of self-defense.[90] Still, the ongoing legal work in this area teaches us new lessons. It demonstrates the difficulty courts have in hearing women's experiences and modifying the law to take them into account. Some courts which have applied the insight reflected in the equal trial argument have unwittingly recreated the very sex stereotypes of female incapacity that women's self-defense work was intended to overcome.[91] But these new

[88] See Schneider, supra note 71, at 636-38; Schneider & Jordan, supra note 71, at 159-60.

[89] There is an enormous legal literature on women's self-defense issues. See, e.g., A. Jones, Women Who Kill (1980); Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 Harv. Women's L.J. 121 (1985); Robinson, Defense Strategies for Battered Women who Assault Their Mates: State v. Curry, 4 Harv. Women's L.J. 161 (1981); Rosen, The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill, 36 Am. U.L. Rev. 11 (1986); Note, Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why, 34 Stan. L. Rev. 615 (1982); Comment, The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis, 77 Nw. U.L. Rev. 348 (1982); Comment, The Use of Expert Testimony in the Defense of Battered Women, 52 U. Colo. L. Rev. 587 (1981); sources cited in note 71 supra.

[90] See, e.g., State v. Anaya, 438 A.2d 892 (Me. 1981) (holding trial court committed reversible error in excluding testimony concerning battered wife syndrome); State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (holding battered women's syndrome to be relevant to honesty and reasonableness of defendant's belief of imminent danger and exclusion of testimony concerning it required reversal and remand for new trial).

[91] I have argued elsewhere that the development and judicial acceptance of battered woman syndrome reveals important tensions in feminist theory and practice concerning themes of women's victimization and agency. See Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women's Rts. L. Rep. (forthcoming 1987).

dilemmas of feminist theory can also help to clarify issues, sharpen debate, and deepen insight into these matters.

Wanrow exemplifies the way in which the legal formulation of rights emerging from political analysis and practice can be expressive. It demonstrates the way a rights claim initially flows from political analysis and then becomes the basis for a more self-reflective political analysis. The rights formulation is part of an ongoing process of politics. The rights claim is a "moment" in that process in which the political vision emerges from within the claim of rights.

The Center's work in *Wanrow*, as in many other cases, was an example of feminist theory in practice—of what lawmaking as praxis is like. The legal theory emerged from political experience; the legal theory in turn served to refine and sharpen political insights and to clarify tensions in the political struggle; the political struggle was reassessed in light of the legal theory; and, finally, experience reshaped the legal theory. In short, the rights claims grew out of politics and then turned into politics. This experience of praxis, then, provides a framework for my analysis of rights and politics.

III

TOWARDS A DIALECTICAL UNDERSTANDING OF RIGHTS AND POLITICS

The dialectical methodology detailed in the previous section suggests that rights discourse and politics can be understood as interconnected, even though they may appear at times to be in opposition. The rights claim can emerge from a political vision and the rights claim can be a form of political statement. Further, rights discourse can be a form of praxis—a form of legal practice that can define and reshape the articulation of theory.

As suggested earlier, recent rights critics have viewed the experience of rights discourse and rights assertion in a static and rigid way.[92] They have accepted the opposition of rights and politics and the reification of rights generally. A dialectical perspective, however, sees rights and politics as part of a more dynamic, complex, and larger process characterized by the possibility that rights discourse can simultaneously advance and obscure political growth and vision. A dialectical view of rights develops the expressive, transformative, and problematic aspects of rights. It underscores the idea that "[a]s much as rights are instruments of legitimizing oppression, they are also affirmations of human values. . . . [A]s often as they are used to frustrate social movement, they are also among the

[92] See text accompanying notes 19-36 supra.

basic tools of social movement."[93] Duncan Kennedy supports this dialectical impulse when he suggests that "[e]mbedded 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."[94] The recognition of paradox, of the seeming contradiction of two opposites that are really interconnected, is critical to the dialectical perspective I am suggesting.

Recent rights critics have emphasized appropriate caution concerning the use of rights discourse to further political struggle.[95] However, the limits of rights discourse have been so emphasized because rights have not been understood as part of a larger process, as a forum for politics, and as a stage within the development of political movements generally. True, there is always a risk that a political struggle will be so fixed on rights discourse or winning rights in courts that it will not move beyond rights[96] and will freeze political debate and growth. Rights discourse can be an alienated and artificial language that constricts political debate. But it can also be a means to articulate new values and political vision. The way in which a social movement group uses the rights claim and places it in a broader context affects the ability of rights discourse to aid political struggle. Rights discourse and rights claims, when emerging from and organically linked to political struggle, can help to develop political consciousness which can play a useful role in the development of a social movement.

Rights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity. Rights discourse can also have a dimension that emphasizes the interdependence of autonomy and community.[97] It can play an important role in giving individuals a sense of self-definition,[98] in connecting the individual to a larger group and community,[99] and in defining the goals of a political struggle, particularly during the early devel-

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[93] Sparer, supra note 7, at 555.

[94] Kennedy, supra note 28, at 506 (emphasis added).

[95] See text accompanying notes 30-44 supra.

[96] Gabel and Harris suggest that "a rights-oriented legal practice . . . does not address itself to a central precondition for building a sustained political movement—that of overcoming the psychological conditions upon which both the power of the legal system and the power of social hierarchy in general rest." Gabel & Harris, supra note 19, at 375. They argue that "an excessive preoccupation with 'rights consciousness' tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves." Id.

[97] See text accompanying notes 104-71 infra.

[98] See text accompanying notes 113-41 infra.

[99] See text accompanying notes 113-71 infra.

opment of a social movement.[100]

My effort to detail these affirmative dimensions of rights discourse owes much to the many rights theorists who are engaged in similar efforts to reimagine rights. For example, Ed Sparer's work on rights is grounded in a dialectical understanding of the relationship between rights and political struggle, theory and practice, and autonomy and community.[101] Sparer forcefully articulates the dual potential of rights to both impede and advance political struggle. He challenges legal theorists to move beyond a dichotomized conception of rights and politics.[102] He urges us to look closely at the political and social context in which rights are asserted in order to evaluate the role that rights can play in performing politicizing and consciousness-raising functions for a social movement.[103]

A. Communal Rights

Although it has been argued that rights are inherently individualistic because individuals can "possess" them,[104] rights need not be perceived this way. Staughton Lynd, for example, has developed the idea of rights as "communal," infused with the values of community, compassion, and solidarity.[105] Although he focuses on some rights as particularly communal,[106] he argues in favor of fighting for the communal

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100 See text accompanying notes 172-76 infra.

101 Sparer's work in this area parallels important insights of feminist theory. For example, Sparer notes that "[c]entral to the argument I have made thus far is the notion that individual autonomy and community are not contradictions at all; rather, they shape and give meaning and richness to each other." Sparer, supra note 7, at 547. His work also reflects a feminist self-reflective dialectical method—he starts with his own experience, extrapolates from it, and turns back again to it. For example, Sparer discusses his experience with rights as a member of the Communist Party and how that experience shaped his view that rights are a protection against totalitarianism. Id. at 539-47.

102 My contention is: The notion of "legal right" is one which can affirm and defend human autonomy and solidarity or merely give the appearance of such autonomy and solidarity while in fact excusing oppression. Various kinds of legal rights and entitlements may be used in a manner that helps to develop social movement, which in turn leads to expanded opportunities for a more humane society, or they may be used to help frustrate social movement by legitimizing existing relationships. The meaning of a right or entitlement depends upon the way in which it intertwines with social movement.

Id. at 560.

103 Id.

104 See Lynd, supra note 22, at 1418-19.

105 Id. at 1419. Staughton Lynd notes that the conventional view of rights "implicitly assumes that the supply of rights is finite, and thus that 'right' is a scarce commodity. In this view the assertion of one person's right is likely to impinge on and diminish the rights of others." Id.

106 Lynd focuses on § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982), see Lynd, supra note 22, at 1423-30, and the first amendment to the United States Constitution, see id. at 1430-35.

content of as many rights as possible and challenging the zero-sum perspective on rights generally.[107] He looks to the historical context in which a right develops as a primary force shaping the particular collective aspect of the right. The communal dimension of a claim of right may differ depending on the social and political context in which the right claim emerges and the way in which formulation of the right reflects a corresponding political vision. For example, Lynd's view of the right to engage in collective activity under section 7 of the National Labor Relations Act as a paradigmatic communal right is based on his perception of this right as "derived from the actual character of working-class solidarity and accordingly a right that foreshadows a society in which group life and individual self-realization mutually reinforce each other."[108] Lynd's understanding of the collective aspect of rights has several dimensions. He maintains that a right developed in the context of a social movement struggle may have a collective cast to it.[109] Further, the exercise of rights by an individual can expand the ability of the larger group to exercise their rights generally.[110] Finally, Lynd suggests that the concept of the inalienability of rights—that an individual cannot give up a right because it belongs to the group—is premised on an underlying assumption based on the communal aspect of rights.[111] Lynd's analysis, then, provides a framework to challenge the notion that rights claims must necessarily be articulated and perceived as the property of rights-bearing individuals.[112]

B. Individual Selfhood and Collective Identity

Another aspect of a dialectical view of rights is the role that rights discourse can play for individual self-development and collective identity. Carol Gilligan's work in charting differences between male and female moral and psychological development provides a basis for exploring this

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[107] See Lynd, supra note 22, at 1423. Lynd argues that

> rights do not come neatly divided into inherently individual and inherently communal rights. Most rights are sufficiently ambiguous that they can be pushed in different directions by political and intellectual struggles. Thus, the point may be less to identify and champion peculiarly communal rights than to fight for communal content in as many rights as possible.

Id. at 1422.

[108] Id. at 1430.

[109] See id.

[110] See id. at 1427-28.

[111] See id. at 1441.

[112] Lynd has recently developed these ideas more fully in the context of a community right to industrial property. See S. Lynd, The Genesis of the Idea of a Community Right to Industrial Property In Youngstown and Pittsburgh, 1977-1986 (1987) (unpublished manuscript on file at New York Univeristy Law Review).

issue.[113] Gilligan's work suggests that these differences can shape the way that individuals experience rights.

Gilligan's research focused on interviews with women considering abortion, a study of female and male college students, and a study of age-matched males and females at nine points in the life cycle.[114] Listening to the voices of the women she interviewed, Gilligan heard a morality based on responsibility, connection, and caretaking, rather than separation.[115] She heard a "different voice" which she linked to gender.[116] Based on this research, Gilligan posited that there are different paths to maturity which are roughly tied to gender. During development, men emphasize individuation and autonomy. Women, on the other hand, emphasize caretaking and connection with others.[117]

Gilligan suggests that at an early stage of development men will more likely seek to resolve moral dilemmas and conflict through the use of rights.[118] She sees rights as abstract, formal, and hierarchical, and as a means of resolving problems through an emphasis on separation and the individual.[119] Women's morality of care and responsibility differs from the male model because it emphasizes context, connection, and relationship.[120] In this morality, problems are resolved, in what Gilligan calls a "web"-like manner, by considering all the people involved in the situation and the connections between them.[121] Gilligan believes this approach challenges the "premise of separation"[122] underlying the notion of rights. She sees these two approaches as not simply different from, but potentially threatening to, one another.[123]

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113 C. Gilligan, supra note 39.

114 See id. at 2-3.

115 See id. at 19-21.

116 See id. at 2. However, Gilligan notes:

> The different voice I describe is characterized not by gender but by theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.

Id. Gilligan's more recent comments suggest that the two modes of thought may not be explicitly linked to gender. See Feminist Discourse, supra note 57, at 48. Nonetheless, Gilligan's work has been widely seen as linking these two perspectives to gender. See, e.g., Broughton, Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development, 50 Soc. Res. 597 (1983).

117 See C. Gilligan, supra note 39, at 18, 22.

118 See id. at 19-22.

119 See id. at 32. Kenneth Karst describes this means of resolving problems as "ladder"-like. Karst, supra note 57, at 462 (citing C. Gilligan, supra note 39, at 62).

120 See C. Gilligan, supra note 39, at 173.

121 See id. at 28, 38, 54, 57.

122 Id. at 57.

123 See id. at 22.

Gilligan posits that the developmental challenges of maturity are different for men and women. Men, whose lives have emphasized separateness, must ultimately learn care and connection.[124] Women, whose lives have emphasized connection to and caretaking for others, must ultimately learn to value and care for themselves.[125] Mature moral and psychological development for both sexes would seek to synthesize moral perspectives based on both rights and responsibilities.[126]

For this reason, Gilligan suggests that the assertion of rights can play a particularly important role in women's moral development.[127] She suggests that women's articulation of rights challenges women's sense of self and transforms women's experience of selflessness. "[T]he essential notion of rights [is] that the interests of the self can be considered legitimate. In this sense, the concept of rights changes women's conceptions of self, allowing them to see themselves as stronger and to consider directly their own needs."[128]

Gilligan's description of this psychological process of moral rights assertion has several facets. It allows women to consider their own needs directly and care for themselves, not just care for others.[129] But instead of resting on an individually centered, hierarchically based concept of rights, rights assertion in this context takes on a different character and moves beyond a formal "paralyzing injunction not to hurt others."[130] Gilligan describes it in the following way.

> Thus, changes in women's rights change women's moral judgments, seasoning mercy with justice by enabling women to consider it moral to care not only for others but for themselves. The issue of inclusion first raised by the feminists in the public domain reverberates through the psychology of women as they begin to notice their own exclusion of themselves. When the concern with care extends from an injunction not to hurt others to an ideal of responsibility in social relationships, women begin to see their understanding of relationships as a source of moral strength. But the concept of rights also changes women's moral judgments by adding a second perspective to the consideration of moral problems, with the result that judgment becomes more tolerant and less absolute.[131]

Gilligan outlines a process of moral development for women that

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124 Id. at 38-39.

125 Id. at 39.

126 Id. at 166.

127 Wendy Williams helped me understand that I was affirmatively extending Gilligan's insights concerning moral claims of rights to legal rights.

128 C. Gilligan, supra note 39, at 149.

129 Id. at 149.

130 Id.

131 Id.

moves from an emphasis on selflessness and care for others,[132] to a recognition of self and autonomy,[133] and then to a self-reflective understanding of the way in which self and other are interconnected.[134] She suggests that assertion of rights, particularly women's rights, can play a crucial role in the transformation of women's sense of self.[135] Public assertion of women's legal rights reverberates in the consciousness of individual women.[136] This process of differentiation through women's assertion of their own rights provides a basis for women to distinguish self from other. This enables women to exercise genuine responsibility, while at the same time, because people can "experience relationship only insofar as we differentiate other from self,"[137] to recognize the interrelationship of self and other. Gilligan suggests that, in this way, assertion of rights for women in the context of women's morality of caretaking and responsibility can transform and enhance women's moral development.

Gilligan also suggests a further transformative dimension of women's experience with rights. She implies that assertion of women's rights can provide women with a sense of collective identity, a sense that self and other are connected.[138] For women, the assertion of rights replaces a hierarchy of rights with a web-like understanding of responsibility in relationships that "changes an order of inequality into a structure of interconnection."[139] Assertion of rights by women can thus change the rights experience itself. She suggests that rights shaped by the values of the web can transform the process by which rights are asserted and the way they are experienced.

Gilligan's suggestion that the psychological experience and social function of rights assertion may perform different developmental tasks for men and women may be overbroad in its link to gender.[140] But the

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132 See id. at 64-66 ("the moral person is one who helps others; goodness is service").

133 See id. at 70-71, 82-83.

134 See id. at 127 ("the realization that self and other are interdependent and that life . . . can only be sustained by care in relationships").

135 See id. at 128-29.

136 Id. at 149-50.

137 Id. at 63.

138 Describing the experience of a woman she interviewed, Gilligan writes:

> Now, however, she sees the limitation of the "individually-centered" approach of balancing rights and claims in the failure of this approach to take into account the reality of relationships, "a whole other dimension to human experience." In seeing individual lives as connected and embedded in a social context of relationship, she expands her moral perspective to encompass a notion of "collective life." *Responsibility now includes both self and other, viewed as different but connected rather than as separate and opposed.*

Id. at 147 (emphasis added).

139 Id. at 62.

140 While Gilligan's work is powerful and rich, and her characterizations feel subjectively accurate in many ways, In a Different Voice is also troubling. See On In A Different Voice: An Interdisciplinary Forum, 11 Signs: J. Women Culture & Soc'y 304 (1986). A conversation

sense of self-definition and collective identification that Gilligan details is, nevertheless, an important apsect of rights claims. Gilligan expressly links public assertion of legal rights to psychological and moral development. Rights can be an essential way of understanding and experiencing "self-in-other," a foundation for selfhood,[141] and can be critical to the growth and development of any movement, particularly at its early stages. The assertion of rights claim and the use of rights discourse may thus not be purely individual—it can link the individual to a broader

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with Rhonda Copelon increased my understanding of this. Although Gilligan says that the different voices are not always linked to gender, she makes gender-based assumptions without sufficient emphasis and analysis of the complex factors shaping gender. For example, Gilligan's work has been criticized for its insensitivity to race and class differences, and its disregard of historical context. See Nicholson, Women, Morality and History, 59 Soc. Res. 514, 530-33 (1983); O'Loughlin, Responsibility and Moral Maturity in the Control of Fertility—Or, a Woman's Place is in the Wrong, 50 Soc. Res. 556, 570-72 (1983); Tavris, Women and Men and Morality, N.Y. Times, May 2, 1982, § 7 (Book Review), at 32. It has also been criticized for a failure to analyze the social and political context of the spheres in which women's care-based approach develops. See, e.g., Colby & Damon, Listening to a Different Voice: A Review of Gilligan's In a Different Voice, 29 Merrill-Palmer Q. 473, 476 (1983); Walker, In a Diffident Voice: Cryptoseparatist Analysis of Female Moral Development, 50 Soc. Res. 665, 690-94 (1983); Reardon, Book Review, 84 Tchrs. C. Rec. 966, 968 (1983); Squier & Ruddick, Book Review, 53 Harv. Educ. Rev. 338, 341 (1983). Gilligan also fails to identify properly the problem of self-sacrifice when women emphasize caretaking for others without recognizing their own autonomy and needs. See, e.g., Benjamin, Book Review, 9 Signs: J. Women Culture & Soc'y 297, 298 (1983); Squier & Ruddick, supra, at 341.

Indeed, Catherine MacKinnon has observed that Gilligan's "different voice" may be the voice of the victim.

> [I]t makes a lot of sense that women might have a somewhat distinctive perspective on social life. We may or may not speak in a different voice—I think that the voice that we have been said to speak in is in fact in large part the "feminine" voice, the voice of the victim speaking without consciousness. But when we understand that women are forced into this situation of inequality, it makes a lot of sense that we should . . . want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way. It sure would be nice if somebody would care for *us* . . . . It makes a lot of sense that women should claim our identity in relationships because we have not been allowed to have a social identity on our own terms.

Feminist Discourse, supra note 57, at 27 (emphasis in original); see also Lloyd, Reason, Gender and Morality in the History of Philosophy, 50 Soc. Res. 490, 512-13 (1983) (women's voices must be understood in context of fundamental inequality; voice heard may be voice of the suppressed.). For these reasons, although Gilligan's characterizations based on gender confirm common perceptions, affirm women's experience, and validate a woman-centered perspective, see, e.g., Karst, supra note 57, at 481-86; Douvan, Book Review, 28 Contemp. Psychology 261, 261-62 (1983); Reardon, supra, at 967, their roughness is still troubling, see, e.g., Nails, Social Scientific Sexism: Gilligan's Mismeasure of Man, 50 Soc. Res. 643, 662-64 (1983). For my purposes, however, the significant aspect of her work is her insight into the way in which rights claims can be an aspect of psychological and social transformation—a moment in a dialectical process of change—and the way in which rights claims asserted as part of that process might be different. See C. Gilligan, supra note 39, at 147.

[141] F. Michelman, supra note 3, at 27. Michelman suggests that "rights can be understood as the institutionally embodied form of the mirroring of self-in-other that both Hegelian philosophy and psychological theory see as the foundation of self-hood." Id.

social group. In this sense, rights discourse can play a role in transcending the dichotomy of individual and community.

C. *Interdependent Rights*

Gilligan implies that the gender-linked oppositions of rights and care-based morality can be transcended in dialectical fashion in a third stage of development in which both men and women see the importance and interconnection of rights and responsibilities.[142] She also suggests that rights discourse in this third stage, modified by what she perceives as characteristically female concerns regarding context, care, and connection, might be different.[143]

Gilligan imagines that this third stage of development will be based upon the synthesis of male and female voices—those of rights and responsibilities.[144] She suggests that if you include both voices, you will

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142 See C. Gilligan, supra note 39, at 174. Gilligan uses the term dialectic to describe the process of human development. "To understand how the tension between responsibilities and rights sustains the dialectic of human development is to see the integrity of two disparate modes of experience that are in the end connected." Id.

143 Id. at 164-66; see Feminist Discourse, supra note 57, at 47-49 (comments by C. Gilligan).

144 See Feminist Discourse, supra note 57, at 35. Gilligan explains how this synthesis might work:

> This is what I mean by two voices, two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection, not hurting, care, and response. My point is that these voices are in tension with each other. In my work, I have attempted to ask, "What does it mean to include both voices in defining the domain of morality, of humanity, and so forth?" I want to give one example that illustrates well what I think it means, and what this inclusion implies. I do not think it implies a simple addition, a kind of separate-but-equal thing or an androgynous solution. I think it implies a transformation in thinking.
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> The best way I can illustrate this is through an example provided by two four-year-olds who were playing together and wanted to play different games. The girl said: "Let's play next-door neighbors." The boy said: "I want to play pirates." "Okay," said the girl, "then you can be the pirate who lives next door." She has reached what I would call *an inclusive solution* rather than *a fair solution*—the fair solution would be to take turns and play each game for an equal period. "First we will play pirates for ten minutes and then we will play neighbors for ten minutes." Each child would enter the other's imaginative world. The girl would learn about the world of pirates and the boy would learn about the world of neighbors. It is a kind of tourism on a four-year-old's level. Really, it's simple. But the interesting thing is that neither game would change—the pirate game would stay the pirate game, and the neighbor game would stay the neighbor game. Both children would learn both games, hopefully for an equal period of time. It is what is called "androgyny."
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> Now look what happens in the other solution, what I would call *the inclusive solution*. By bringing a pirate into the neighborhood, both the pirate game and the neighbor game change. In addition, the pirate-neighbor game, the combined game, is a game that *neither* child had separately imagined. In other words, a new game arises through the relationship.
>
> That is basically my point: The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer

transform the very nature of the conversation;[145] the discourse is no longer either simply about justice or simply about caring; rather it is about bringing them together to transform the domain.[146] Although feminist scholars have questioned whether this third stage is really transformative,[147] Gilligan's vision of rights articulated in this different voice has stimulated attempts by legal scholars to reimagine rights[148] and to conceive of them as "interdependent".

For example, in a number of recent articles Martha Minow has sought an understanding of rights that resolves the tension between autonomy and caretaking.[149] She explores reconstructive visions of rights shaped by a "conception of self . . . [that locates] each individual within social networks [where] membership helps constitute the 'I,' and belonging is essential to becoming."[150] Minow attempts to redefine the substance of purportedly individualistic rights by positing a right to connection, by developing the interconnection of rights and responsibilities, and by suggesting that rights claims can focus on the social and

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> either simply about justice or simply about caring; rather, it is about bringing them together to transform the domain. We are into a new game whose parameters have not been spelled out, whose values are not very well known. We are at the beginning of a process of inquiry, in which the methods themselves will have to be re-examined because the old methods were from the old game.

Id. at 44-45 (emphasis in original).

[145] See id. at 45.

[146] See id.

[147] Commentators have noted that the premise of Gilligan's third stage is that there can be a dialogue or conversation between the different voices. This premise may be unrealistic and overly romanticized if men cannot hear women's voices and tend to universalize based on their own particular experience. For example, Kathy Ferguson criticizes Gilligan's analysis of a different voice for its lack of political context. She also criticizes Gilligan's analysis of the third stage of development for its failure to emphasize the degree to which it rests on political struggle. K. Ferguson, supra note 57, at 169-70. Kathleen Lahey has told me that she questions whether this third stage involves a conversation in which there is genuine mutuality.

[148] Gilligan's work has also influenced legal scholars concerned with reimagining rights generally. See Karst, supra note 57; Menkel-Meadow, Portia in a Different Voice: Speculations on a Woman's Lawyering Process, 1 Berkeley Women's L.J. 39 (1985); Rifkin, Mediation from a Feminist Perspective: Promise & Problems, 2 Law & Inequality: J. Theory & Prac. 21 (1984); Spiegelmen, supra note 57. Carrie Menkel-Meadow suggests that women's forms of lawyering might have aspects which mirror Gilligan's web—such as a broader use of problem-solving forms (such as mediation and negotiation) rather than rights. See Menkel-Meadow, supra, at 50-63. Kenneth Karst has suggested that the substance of web-like rights might differ from a more traditional conception of rights because of its focus on access, participation, and continuity. See Karst, supra note 57, at 490-95.

[149] See Minow, Book Review, 13 Reviews in American History 240 (1985); Minow, Book Review, 98 Harv. L. Rev. 1084 (1985); Minow, Book Review, 53 Harv. Educ. Rev. 444 (1983).

[150] Minow, "Forming Underneath Everything that Grows": Towards a History of Family Law, 1985 Wisc. L. Rev. 819, 894 (footnote omitted); see also Note, Reinterpreting the Religion Clauses: Constitutional Construction and the Conceptions of the Self, 97 Harv. L. Rev. 1468, 1471-73 (1984) (proposing alternative conception of human identity encompassing both separateness of self and its connection to others).

economic preconditions for rights.[151]

William Simon's recent article on welfare rights,[152] which contrasts the New Deal social work jurisprudence of welfare rights with the contemporary New Property conception of rights, suggests a similar perspective that he calls "regenerative."[153] Simon sees the New Property conception of rights as reincarnating classical legalist views of rights based on the protection of individual independence and self-sufficiency from the collective power of the state.[154] In contrast, he suggests that rights in New Deal social work jurisprudence differed from the classical model because they challenged this distinction between the individual and the community and reflected a norm of interdependence.[155] Rights were used as part of a dialectical process of political development and a means of education for the welfare claimant. Rights claims were a means by which people on welfare came to understand their goals and a way for the individual claimant to get involved in political activity, to have greater participation in the process of decisionmaking, and to have a more articulate understanding of her interests.[156]

Rights in this context became a way to have a dialogue, a conversation; they "facilitated the beginning and middle as well as the conclusion of analysis."[157] In contrast with classical liberal conceptions of rights, this conception implicated collective concerns and reflected the "social or communal dimension of the self and of legal entitlement."[158] Rights claims were made "for" something, not only against others and the state.[159] Simon's description implies that the process by which the rights claims were developed and articulated and the interdependent content of the rights might be related. It suggests that the communal dimension of the right helped to shape the role that rights played for the welfare claimant and the rights-enforcing social worker.

Kenneth Karst's effort to reconstruct constitutional law as a "jurisprudence of interdependence"[160] is similarly premised on Gilligan's

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151 See Minow, Rights for the Next Generation: A Feminist Approach to Children's Rights, 9 Harv. Women's L.J. 1, 24 (1986).

152 Simon, The Invention and Reinvention of Welfare Rights, 44 Md. L. Rev. 1 (1985).

153 Id. at 16.

154 See id. at 23.

155 See id. at 14-15.

156 See id. at 17-18.

157 Id. at 15.

158 Id. at 13.

159 Id. at 17. In this sense, although a principal argument against the use of rights discourse is that it sets up an adversarial model of interests, the message of a rights claim may, nevertheless, be overwhelmingly affirmative.

160 Karst, supra note 57, at 495. Karst suggests that the existing language of rights, equality, and autonomy does not adequately "express the active mutual responsibility and care that are central to the morality of the web." Id. at 504.

work.[161] Karst accepts Gilligan's dichotomy of rights and care-based systems of moral development as fundamentally male and female, and he uses this opposition as a framework to reimagine constitutional law and litigation. Karst seems to accept the notion of rights as historically hierarchical and individualistic, but he wants to synthesize rights with care so as to develop "a conception of justice that recognize[s] our interdependence."[162] He understands, though, that concepts of rights and the language of rights will still be necessary to further this process, albeit as an interim measure.[163] As such, he seeks to infuse rights-talk with the values of the web, and to modify rights-dominated constitutional litigation to take greater account of the morality of care.[164]

Karst seeks to synthesize these perspectives by looking for ways in which the male experience of rights can be creatively "feminized" and modified in litigation.[165] He suggests that legal argumentation should include a broader social, institutional, and political perspective;[166] a closer focus on the particular human context of a case;[167] the use of intuition and experience as the basis for the articulation of rights;[168] and the use of vocabulary which particularizes and names experience.[169] Significantly for the next section of this Article, he observes that this may be particularly possible in the area of sex-discrimination litigation.[170]

The notions of interdependent rights that these various theorists have envisioned are efforts to redefine the substance of rights claims and the process of rights assertion so as to modify and transform the individualistic dimensions of rights. They are efforts to reimagine rights shaped by a vision of self which Gilligan posits as female—a sense of self based

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161 See id. at 461.

162 Id. at 471.

163 See id. at 505-06.

164 See id. at 506.

165 See id. at 504-05. Paul Spiegelman sees the task of infusing the legal system with the morality of the web as difficult. He suggests that "[t]he options for those who wish insights from the web to be effective are either to transform the system so that it speaks the language of the web or to translate those insights into the vocabulary of the ladder." Spiegelman, supra note 57, at 424.

166 See Karst, supra note 57, at 495-503.

167 See id.

168 See id. at 500-02.

169 See id. at 503-08.

170 Karst suggests that this modification of rights with the language of the web might occur first in the field of sex discrimination.

> In the field of sex discrimination itself, we might even expect constitutional law to develop at a rate that outpaces the progress of consciousness-raising among women generally. The women who will directly influence the growth of constitutional doctrine will be professionals and policymakers—a relatively small group of women who are the most likely to be conscious of the harms caused by the traditional construct of femininity.

Id. at 507 n.230.

upon connection instead of separation or distance. These views of interdependent rights emphasize the ability of rights discourse to express human values and affirm the creative, expressive, and connective possibilities of rights.

D. Rights as Conversation

The theoretical efforts discussed above focused on the way that rights connected to political struggle can be part of an ongoing conversation and can have a character, content, and meaning that is more communal because they reflect the very political struggle from which they emerged. This political context might affect both the process by which rights are articulated[171] as well as the content of the rights themselves: what the rights mean to individuals and members of the group who claim them at a particular time, and how they are understood and experienced at that time. However, even if rights discourse is understood as part of a process of political education and mobilization, how do we ensure that the articulation of rights claims will truly assist in that larger process? How can we be sure that if rights discourse starts the conversation of politics, the conversation will ever move beyond rights?[172] We must take seriously Peter Gabel's caution that rights can substitute the illusion of community for a more authentic and genuine sense of community.[173] A preoccupation with or excessive focus on rights consciousness can reinforce alienation or powerlessness and weaken the power of popular movements.[174] In and of themselves, rights claims are not a basis for building a sustained political movement, nor can rights claims perform the task of social reconstruction. Still, their importance should not be underestimated. Articulation of political insight in rights terms *can* be an important vehicle for political growth, and can help develop a sense of collective identity.

If rights claims can provide a sense of selfhood and collective identity and start political conversation, a series of questions should be raised to help guide our evaluation of the use of rights claims in a given context. Does the use of legal struggle generally and rights discourse in particular help build a social movement? Does articulating a right advance political

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171 I do not directly address the fact that rights formulations—at least those used in legal fora—set up a contest between competing rights, and are in that sense hierarchical or, as Karst puts it, the mode of the ladder. Id. at 462. The development of a jurisprudence of interdependence might infuse the values of the web into the substance of the law, by developing rights of access, participation, and continuity, but can it also modify the process by which competing claims of rights might be resolved? See id. at 495; Menkel-Meadow, supra note 148, at 54-55.

172 See J. Handler, Social Movements and the Legal System 233 (1978).

173 See Gabel, supra note 19, at 1577.

174 Gabel & Harris, supra note 19, at 375-76.

organizing and assist in political education? Can a right be articulated in a way that is consistent with the politics of an issue or that helps redefine it? Does the transformation of political insight into legal argumentation capture the political visions that underlie the movement? Does the use of rights keep us in touch with or divert us from consideration of and struggle around the hard questions of political choice and strategy? Does it keep the movement passive or help it begin to act? Does it help the movement to determine what it really wants? Does it limit or constrain the movement's vision of what might be possible?[175] These questions will shape our inquiry as we examine the women's rights experience.

IV

WOMEN'S RIGHTS AND FEMINIST STRUGGLE

Recent experience with claims of legal rights for women suggests the importance of understanding the relationship between rights and political struggle from a dialectical perspective. This experience demonstrates the richly textured process by which a social movement group articulates political demands through a rights claim and the way in which that claim affects the development of the group.[176] Most significantly, the experi-

[175] Ed Sparer notes that although it is critical to link theory with social movement practice, reform efforts are risky because "the reform theorist or practitioner undergoes the risk of developing a theory to promote not a 'transformative' reform but a 'coopting reform'—one in which the reformer helps sustain the belief system which supports what is wrong in the world." Sparer, supra note 7, at 566.

[176] In this section, I begin to explore the relationships between a jurisprudential perspective on legal rights, the way in which social movement groups experience rights, and the role that rights can play in political development. It is a preliminary and speculative effort and, in a sense, an outline for further work. David Trubek's comments on this section, and his insights into the various levels of analysis that I am seeking to integrate here, were most helpful. I share his view that legal scholars must go beyond the analysis of legal doctrine and legal theory and look at the impact that law has on social groups. See Trubek, supra note 20, at 567. I have included this section out of a commitment to begin this inquiry. It is important to start to ask questions about the interrelationship of legal theory and social movement practice, even if one cannot give answers.

My sources for the analysis set forth in this section are based primarily on my own observations, discussions with other women's rights lawyers and feminist activists, and participation in a wide range of feminist legal activities over the last fifteen years. I have also looked to a developing literature analyzing the impact of the women's rights movement. See, e.g., M. Berger, Litigation on Behalf of Women (1980); N. McGlen & K. O'Connor, Women's Rights: The Struggle for Equality in the Nineteenth and Twentieth Centuries (1983); K. O'Connor, Women's Organizations' Use of the Courts (1980); Cowan, Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project 1971-1976, 8 Colum. Hum. Rts. L. Rev. 373 (1976); McGlen & O'Connor, An Analysis of the U.S. Women's Rights Movements: Rights as a Public Good, 1 Women & Pol. 65 (1980); O'Connor & Epstein, Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court, 67 Judicature 134 (1983) [hereinafter O'Connor & Epstein, Beyond Legislative Lobbying]; O'Connor & Epstein, Sex and the Supreme Court: An Analysis of Support for Gender-Based Claims, 64 Soc. Sci. Q. 327 (1983). While the empirical basis for my discussion is incomplete

ence of the women's rights movement simultaneously reveals the communal possibilities of rights and underscores the limits of political strategy focused on rights. This part briefly examines four areas of women's rights work which highlight this experience: equality, reproductive rights, sexual harassment, and legal treatment of battered women.

Historically, the feminist movement in this country has focused on notions of rights.[177] In 1848, the women's rights convention at Seneca Falls issued a Declaration of Sentiments and passed resolutions which set forth a platform on women's rights.[178] The first wave of feminism in the nineteenth century sought to enhance women's access to political and economic opportunity by challenging laws that denied women the right to vote and barred them from various occupations.[179] For example, the struggle to win passage of the nineteenth amendment emphasized the importance for women of the right to vote.[180] Rights claims grew out of early feminists' political analyses which saw women's exclusion from public and political life as central to their continued subordination.[181]

Spurred by the explosion of feminist consciousness in the 1960s, women's rights have been claimed in a variety of contexts, focusing primarily on issues of equality—the right to equal treatment and the right to reproductive choice. The reemerging women's rights movement has also led to new understandings of women's legal oppression in such areas as sexual harassment and the treatment of battered women. Claims of rights and use of the language of rights have affected both public discourse and individual consciousness, and suggest the possibilities and limits of rights discourse.

A. Rights Claims and Discourse in the Women's Movement

Over the last twenty years, claims for women's rights have increasingly been used to articulate political demand for equality and for change in gender roles. A claim of right can make a political statement and transmit a powerful message concerning "the kind of society we want to

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by the standards of legal sociology, the perspectives it reflects are, I believe, commonly held, at least by feminist lawyers who have been actively involved in litigation for the women's rights movement.

177 Olsen, supra note 2, at 392; see id. at 393-400. McGlen and O'Connor have identified three stages of women's rights activity in the United States: (1) the early women's rights movement (1848-1875), (2) the Suffrage movement (1890-1925), and (3) the current women's rights movement (1966-present). N. McGlen & K. O'Connor, supra note 176, at 2.

178 See N. McGlen & K. O'Connor, supra note 176, at 1-2.

179 Olsen, supra note 2, at 392; see N. McGlen & K. O'Connor, supra note 176, at 43-60, 149-64. My use of the phrase "first wave of feminism" collapses McGlen and O'Connor's first two stages into one.

180 See generally E. Flexner, Century of Struggle (1968).

181 See Olsen, supra note 2, at 392.

live in, the kind of relations among people we wish to foster, and the kind of behavior that is to be praised or blamed. [It] is a moral claim about how human beings should act toward one another."[182] As we have already seen, on an individual level, a claim of right can be an assertion of one's self-worth and an affirmation of one's moral value and entitlement. Claims of women's rights are "a way for a woman to make a claim about herself and her role in the world."[183]

The women's rights movement has had an important affirming and individuating effect on women's consciousness. The articulation of women's rights provides a sense of self and distinction for individual women, while at the same time giving women an important sense of collective identity. Through this articulation, women's voices and concerns are heard in a public forum and afforded a legal vehicle for expression.

But rights claims do not only define women's individual and collective experience, they also actively shape public discourse. Claims of equal rights and reproductive choice, for example, empowered women. Women as a class had not previously been included within the reach of the fourteenth amendment.[184] Women's concerns now rose to the level of constitutional (serious, grown-up) concerns. By claiming rights, women asserted their intention to be taken seriously in society. This "liberal" assertion of rights gave women the "audacity to compare" themselves with men.[185] Women could now claim that they were *entitled* to the equal protection of the law, not just *permitted to seek* it.[186]

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[182] Id. at 391.

[183] Id.

[184] See Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring).

[185] MacKinnon, Excerpts from MacKinnon/Schlafly Debate, 1 Law & Inequality: J. Theory & Prac. 341, 342 (1983). MacKinnon notes, in analyzing the radical potential of feminism, that

> [l]iberalism has been subversive for us in that it signals that we have the audacity to compare ourselves with men, to measure ourselves by male standards, on male terms. We *do* seek access to the male world. We *do* criticize our exclusion from male pursuits. But liberalism limits us in a way feminism does not. We also *criticize* male pursuits, from women's point of view, from the standpoint of our social experiences as women.

Id. at 342-43 (emphasis in original).

[186] Olsen has suggested,

> The claim that women have rights may be seen, however, simply as a way of asserting that women should be allowed to do something; rights are merely the generic vehicle for making such claims. From this perspective, one's inner experience of a right is nothing more than the claim that one should be allowed to do a particular thing.

Olson, supra note 2, at 391 n.12. In contrast, Linda Gordon phrased the issue in conversation with me as women's entitlement to relief from the state. The choice of words reflects a difference in perspective on whether rights claims have more potential for activation than pacification. I agree that the inner experience of a right has the self-defining aspects that Olsen

Women's interests, previously relegated to the private sphere, and therefore outside the public protection of the law,[187] now received the protection of the Constitution.[188] The claims reinforced on a powerful ideological level that the "personal is political"[189] and changed previously private concerns into public ones that needed to be dealt with by the society at large.

The public nature of rights assertion is especially significant because of the private nature of discrimination against women. The locus of women's subordination is frequently the private and individual sphere—the home and family—and is thus perceived as isolated and experienced in isolation. Women also tend to see individual fault rather than to identify a systemic pattern of social discrimination. Thus, public claims of legal rights do more than simply put women's sense of self into the personal moral equation.[190] The assertion of rights claims and use of rights discourse help women to overcome this sense of privatization and of personal blame which has perpetuated women's subordination. Rights claims and rights discourse have thus had a self-defining aspect as well as a collective dimension because the inner experience of the right ties the

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suggests, but I believe that this inner experience has a collective dimension as well. Rights claims tie the individual experiences of a woman to the larger experience of women as a class.

187 Excluded in the past from the public sphere of marketplace and government, women have been consigned to a private realm to carry on their primary responsibilities. . . . This separation of society into the male public sphere and the female private sphere was most pronounced during the nineteenth century, when production moved out of the home. But even today, women's opportunities in the public sphere are limited by their obligations in the private domestic sphere.

Taub & Schneider, Perspectives on Women's Subordination and the Role of Law, in The Politics of Law: A Progressive Critique 117, 118 (D. Kairys ed. 1982)(footnote omitted); see also Olsen, supra note 61, at 1498.

The law has been in large part absent from the private sphere and that absence has contributed to male dominance and female subservience. Isolating women from the legal order has denied women legal relief, but it also carries "an important ideological message to the rest of society. . . . [T]he law's absence devalues women and their functions: women simply are not sufficiently important to merit legal regulation." Taub & Schneider, supra, at 122.

> The message of women's inferiority is compounded by the totality of the law's absence from the private realm. In our society, law is for business and other important things. The fact that the law in general has so little bearing on women's day-to-day concerns reflects and underscores their insignificance. Thus, the legal order's overall contribution to the devaluation of women is greater than the sum of the negative messages conveyed by individual legal doctrines.

Id. at 123.

188 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding that state criminal abortion laws that prohibit certain classes of abortions without accounting for stage of pregnancy and other interests violates fourteenth amendment); Reed v. Reed, 404 U.S. 71 (1971) (holding that provision of Idaho probate code which gives preference to men over women for appointment as administrators of decedent's estate violates fourteenth amendment).

189 Z. Eisenstein, supra note 60, at 11; see text accompanying notes 59-61 supra.

190 Wendy Williams framed the issue in this way for me.

individual and her particular experiences to the larger experiences of women as a class. Rights claims assert women's selfhood collectively, thereby giving women a sense of group identity and pride; they make manifest the fact that women can act and claim their place in history.[191]

Formulations of women's rights emerged from the women's movement itself, from the experiences of women, and from feminist theory. This integration of experience and theory reflected in rights claims was heightened by the fact that at the same time notions of women's rights were articulated, the number of women in the legal profession was increasing dramatically.[192] Many of the women lawyers who have focused on women's rights work entered law school because of the women's movement or were drawn into the women's movement during law school. These women, then, articulated rights claims in a dual capacity as lawyers and as activists. Lawyering was not "other" to these women but rather a deepening process of identification, self-reflection, and connection with others (both women clients and lawyers), which mirrored the experience of the movement itself.[193] This made the experience of

[191] Kathy Ferguson underscores the importance for women of asserting rights as a means of "active participation in public life." K. Ferguson, supra note 57, at 174. Ellen DuBois also emphasizes that "women *act* in history." Feminist Discourse, supra note 57, at 70 (emphasis in original).

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CATEGORY	PERCENT OF TOTAL	
	1970	1983
Law Students	8.5	37.7
Supreme Court Clerks	3.0*	21.2
Lawyers	4.0	15.3
Law Professors	2.2	13.5
Judges	1.0	6.0

Sources: Law Students—1970: C. Epstein, Women in Law 53 (1981); 1983: Law School Admission Council/Law School Admission Services, 1985-1986 Prelaw Handbook: The Official Guide to U.S. Law Schools 13 (1985). Supreme Court Clerks: *Cook, Women Judges: A Preface to Their History, 14 Golden Gate U.L. Rev. 573, 589 (1984)(3.0% figure given for Supreme Court Clerks from 1971). Lawyers—1970: C. Epstein, supra, at 5; 1983: U.S. Dep't of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 49 (June 1985). Law Professors—1970: C. Epstein, supra, at 219; 1983: Cook, supra, at 589. Judges—1970: Fossum, Women in the Legal Profession: A Progress Report, 67 A.B.A. J. 578, 582 (1981); 1983: Cook, supra, at 573.

[193] Mary Dunlap explains it in this way, "As one reads, or as one perceives, feminist involvement in law as an agenda, it is plain that such an agenda encompasses every realm of our lives, every aspect of who we are, who we are becoming, and what our experiences are." Feminist Discourse, supra note 57, at 14. Carrie Menkel-Meadow explores this issue as an aspect of a woman's lawyering process. See Menkel-Meadow, supra note 148, at 55-60. She agrees with Catherine MacKinnon that the methodology of consciousness-raising "creates knowledge from shared, collective experience" and suggests that this may affect the way that women practice law. Id. at 55 (footnote omitted). She gives an example from a colleague's brief-writing project on a topic involving a matter of feminist jurisprudence, in which the colleague described the brief-writing process as "communitarian and communicative, full of feeling and interper-

lawyering in these cases particularly intense and powerful. It undoubtedly shaped the way in which women lawyers perceived legal problems, the insights that women litigators brought to sex-discrimination cases, and the strategies that women litigators developed to handle these cases.

Perhaps for this reason, women's rights litigation has involved several important aspects of Karst's reconstructed constitutional litigation: the use of experience and intuition as starting point and guide, the creative use of both political and social contexts, and the exploration of the human impact and context of the case in concrete terms. Much women's rights litigation has implemented a strategy which uses amicus curiae briefs to present these broader perspectives to ensure that women's voices are heard in court.[194] In this way, women's rights litigation has frequently expanded the possibilities of creative political envisioning through the use of rights discourse.[195]

It is sometimes difficult to remember how visionary the notion of equality from a woman's perspective is—how much it really challenges.[196] Recent critiques of rights have suggested that rights rhetoric inevitably abstracts and distances, but women's rights litigation has concretized women's experience and emphasized women's specificity and particularity.[197] Women's rights litigation began the process of shaping

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sonal experience." Id. at 56 (footnote omitted). In the course of this project Menkel-Meadow reports that "women shared information about their personal lives and brought sustenance to each other." Id. at 56-57. Menkel-Meadow observes that "[v]irtually every report of women lawyers discusses the impact of personal lives on professional lives and vice versa, where one finds almost no such reports on the descriptions and ethnographies of male lawyers." Id. at 57. She concludes that the concern for the relation between one's work and personal life is consistent with Gilligan's ethic of care and relationship. See id.

194 See K. O'Connor, supra note 176, at 100. A recent example is the amicus brief submitted by the National Abortion Rights Action League (NARAL) and sixteen other groups in Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986). The idea for the brief came from "the thousands of letters written by women and men from all over the country in response to NARAL's call for letters under the 'Silent No More' Campaign." Paltrow, Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists, 9 Women's Rts. L. Rep. 3, 3 (1986). The brief "reflects the goals of the reproductive rights movement by including the voices of women and men talking not just about abortion but also the conditions of their lives." Id.; see also Cowan, supra note 176, at 397 (discussing amicus curiae brief filed by Center for Constitutional Rights in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)).

195 Some CLS rights critics frequently view creative envisioning in politics as in opposition to the use of rights discourse. See text accompanying notes 17-47 supra. Some feminist commentators have done so as well. See, e.g., Olsen, supra note 2, at 429.

196 Zillah Eisenstein emphasizes the need "to move toward a theory of sexual equality that does not reject the radical potential of feminism to move toward egalitarianism" and underscores how pervasive and threatening the idea of equality is. Z. Eisenstein, supra note 60, at 14.

197 See K. Lahey, Equality and Specificity in Feminist Thought (July 1985) (unpublished paper on file at New York University Law Review).

the law of equality to reflect a women's perspective.[198] Women's rights discourse linked the specific experience of women with the universal claim of rights.[199] This is, in and of itself, a radical and transforming notion.

In addition, the advocacy process itself has had a significant effect in mobilizing women for political action.[200] For women who have historically been excluded from public life and political action, activity in the public sphere helps to transcend the public and private dichotomy. It also helps women learn skills that are necessary to organize and mobilize political support. In this sense, the struggle for rights has enabled women to become politically active and to gain power.[201]

At the same time, the women's movement's experience with rights suffers from some of the problems discussed by rights critics. First, in some sense the idea of equal rights, although radical in conception, has not captured the scope and depth of the feminist program. Women's rights have been, in a sense, "too little" for the women's movement, although perhaps "too much" for society.[202] Feminists understand that genuine equality for women will not be achieved simply by winning rights in court. Rather, equality requires social reconstruction of gender roles within the workplace and the family. Rights claims, however, do not effectively challenge existing social structures. Reflecting on the reproductive rights experience, Rosalind Petchesky wrote:

> [T]he concept of "rights," [is,] in general, a concept that is inherently static and abstracted from social conditions. Rights are by definition claims staked within a given order of things. They are demands for access for oneself, or for "no admittance" to others; but they do not challenge the social structure, the social relations of production and

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198 Cole, supra note 57, at 83-84.

199 Kathleen Lahey's insightful paper, supra note 197, enriched my understanding of sexual specificity and particularity and the way in which equality and specificity are interrelated. It is important to recognize that rights claims are both particular and universal at the same time—they link the particular and specific experience of a group or individual to a more universal claim. Frank Michelman has suggested that a feminist theory of rights is important because it attacks the pretension to universality which rights claims make and raises questions about the degree to which some kind of generalized conversation about rights is possible. F. Michelman, Comments on Cornell and Thurschwell, Feminism, Negativity and Intersubjectivity (1984) (paper on file at New York University Law Review).

200 Rhonda Copelon discussed this point with me. Kathy Ferguson underscores the idea as well. See K. Ferguson, supra note 57, at 193-94.

201 For this reason, I find the sharpness of the dichotomy between rights and politics that Gabel and Harris draw unsatisfactory. Gabel and Harris appropriately criticize the use of rights in some circumstances as insufficiently focused on ways of gaining power, Gabel & Harris, supra note 19, at 375-77, but they underestimate the ways in which rights claims can be linked to claims for power.

202 Zillah Eisenstein argues that this was a fatal problem with the equal rights amendment. See Z. Eisenstein, supra note 60, at 162-67.

> reproduction. The claim for "abortion rights" seeks access to a necessary service, but by itself it fails to address the social relations and sexual divisions around which responsibility for pregnancy and children is assigned. In real-life struggles, this limitation exacts a price, for it lets men and society neatly off the hook.[203]

Second, the articulation of a right can, despite a movement's best efforts, put the focus of immediate political struggle on winning the right in court. Thus, even if one is concerned with and understands the need for social reconstruction, it is hard to sustain an understanding of short term goals at the same time. The concreteness and immediacy of legal struggle tends to subsume the more diffuse role of political organizing and education. Thus, while there has been a positive attitude toward the use of legal rights in court as an aspect of law reform work, the problems with rights have caused the women's movement to view the use of rights with some ambivalence.

Third, since women's rights formulations oblige the state to act, serious questions about the appropriate role of the state in the context of women's rights have emerged.[204] Women's rights litigators argue that by fighting for women's rights in the courts they do not exclusively rely on the state. However, feminist skepticism over the ability of the state to help women understandably heightens concern over feminist law reform efforts both in the courts and the legislatures.[205]

Finally, despite some substantive gains in the legal treatment of wo-

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[203] R. Petchesky, Abortion and Woman's Choice 7 (1984) (footnote omitted). Similarly, Isabel Marcus has questioned, in conversation with me, whether the language of rights is inherently too constraining. Does rights formulation make it hard for us to think beyond the language of rights and get to the task of social reconstruction? For one answer, see Olsen, supra note 2, at 429 n.199 ("rights . . . are devices used by feminists to deny what we really want while getting what we want indirectly"). Sylvia Law has articulated a similar feminist reaction to rights. She believes that rights can permit access to male experience but cannot do the job of social reconstruction. For example, rights, particularly those won through litigation efforts, might actually perpetuate the interrelated problems that exacerbate women's subordination, such as primary responsibility for childrearing. See Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 995-97 (1984); see also Rhode, Equal Rights in Retrospect, 1 Law & Inequality: J. Theory & Prac. 1, 72 (1983) ("[O]btaining formal rights within existing institutional structures is not sufficient. The objective must be to recast those structures to accommodate more humane, less hierarchical forms of social experience.").

[204] See MacKinnon, supra note 38, at 643; Olsen, supra note 2, at 393; Olsen, supra note 61, at 1506. Carrie Menkel-Meadow explains the feminist dilemma concerning reliance on the state in the following way:

> It is simplistic to the point of being incorrect to say that we want to avoid using the state at all costs to fight our battles. The use of the state in fighting feminist battles has been a mixed bag. In that bag have come some very good things. Feminists have fought very hard for laws that protect battered women and a number of other things . . . . It would be incorrect for us all to abandon the state, as it would be for us to totally embrace the state. There are times that it helps us and times that it hurts us.

Feminist Discourse, supra note 57, at 86.

[205] O'Connor and Epstein have suggested that women's rights efforts have been more suc-

men,[206] rights claims generally have had only limited success in the

cessful in the courts than in the legislatures. O'Connor & Epstein, Beyond Legislative Lobbying, supra note 176, at 142-43.

[206] The women's rights legal movement has improved legal treatment of women in all aspects of women's lives—in education, in employment, within the family, and in terms of reproductive control and personal autonomy. For a more detailed description of women's rights under present laws, see S. Ross & A. Barcher, The Rights of Women (1983); Women and the Law (C. Lefcourt ed. 1984 & Supp. 1987).

Sex discrimination in both public and private education has been challenged based on a variety of constitutional theories. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that admission policies prohibiting men from enrolling in state-sponsored nursing school violated fourteenth amendment). Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(1) (1982) prohibits sex discrimination in educational programs receiving federal financial assistance. This law broke down many barriers based on sex in higher education, especially in athletic programs and master's degree programs. However, in Grove City College v. Bell, 465 U.S. 555, 571 (1984), the Supreme Court held that Title IX is "program specific," in that it bans sex discrimination in particular educational programs receiving federal funds, but not within the institution as a whole. Although this narrow reading of Title IX has substantially weakened its impact, legislation pending in Congress would prohibit discrimination on the basis of sex at any educational institution receiving federal funding. See Civil Rights Restoration Act of 1985, S. 431, 99th Cong., 1st Sess. (1985), H.R. 700, 99th Cong., 1st Sess. (1984).

In the area of employment, sex discrimination litigation has been based on a range of federal and state laws as well as the Constitution. See 1 A. Larson & L. Larson, Employment Discrimination: Sex §§ 3.00, 5.00-9.70 (1985). Much of the litigation has focused on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1982). Under Title VII, employers may not lawfully discharge, limit, or classify their employees in any way which deprives the employees of employment opportunities or otherwise adversely affects their status as employees, because of sex. See 42 U.S.C. § 2000e-2(a)(2) (1982). The articulation of sexual harassment as a violation of Title VII has been a major development in the area. See note 251 infra. Similarly, the emerging doctrine of comparable worth—equal pay for work of comparable value—is being developed through Title VII litigation. See, e.g., County of Washington v. Gunther, 452 U.S. 161 (1981); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

Employment treatment of pregnant workers has raised many difficult problems. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-1985). In Geduldig v. Aiello, 417 U.S. 484, 494 (1974), the Supreme Court held that California's disability benefits program's exclusion of benefits for normal pregnancy did not violate equal protection. Likewise, in General Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976), the Court, relying heavily on *Geduldig*, determined that for Title VII purposes, discrimination on the basis of pregnancy was not sex discrimination. In response to *Gilbert*, Congress amended Title VII by passing the Pregnancy Discrimination Act (PDA) in 1978. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as 42 U.S.C. § 2000e(k) (1982)). The PDA requires that "women affected by pregnancy, childbirth, or related medical conditions . . . be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k). Recently, the Supreme Court held that the PDA did not preempt a California statute providing preferential treatment to pregnant employees. California Fed. Sav. & Loan Ass'n v. Guerra, 106 S. Ct. 683 (1987). Nevertheless, it remains unclear whether similar legislation from other states will also be upheld.

In the area of family law, the legal rights of women are in a state of flux; this is true in "traditional" heterosexual family units as well as family units created by single women and lesbians. See Women and the Law, supra, §§ 4.01-6.10; Sexual Orientation and the Law §§ 1.01-1.05 (R. Achtenberg ed. 1985). Recently, many states have modified laws and created new laws concerned with issues of divorce, but these legal reforms have not always accom-

courts.[207] Although rights critics argue that even looking to results makes it easier to rely on what courts do as the primary measure of the movement's success, it remains necessary to consider results. For example, even though women's rights to reproductive choice have improved,[208] access to those rights for poor women and especially poor women of color has not been adequately protected.[209] More generally,

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plished their goal. See Fineman, Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, 1983 Wis. L. Rev. 789, 886 (arguing that divorce reform legislation's "focus on equality impeded the development of doctrine that would have more effectively represented a female perspective"). Many of these laws have had unfortunate, unexpected economic consequences for women. See generally L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) (arguing that "gender-neutral" divorce laws ignore economic inequality that marriage and society have created for women); note 210 infra. In the area of reproductive rights, there is some legal protection of women's rights to reproductive control. See note 209 infra.

207 See generally M. Berger, supra note 176; S. Ross & A. Barcher, supra note 206; Freedman, Sex Equality, Sex Differences and the Supreme Court, 92 Yale L.J. 913 (1983).

208 In 1973, the Supreme Court decided that the fundamental right of privacy—which derived from the concept of personal liberty embodied in the fourteenth amendment—encompassed a woman's rights, in consultation with her physician, to decide whether to bear a child. Roe v. Wade, 410 U.S. 113 (1973).

209 Since 1973 when Roe v. Wade was decided, many individuals and groups have sought to limit women's access to abortion via a variety of strategies. For example, proposed constitutional amendments have been introduced in Congress which seek to eliminate entirely the choice of abortion. See, e.g., Human Life Federalism Amendment, S.J. Res. 3, 98th Cong., 1st Sess. (1983). To date, these proposals have not met with success. See Pearson & Kurtz, The Abortion Controversy: A Study in Law and Politics, 8 Harv. J. L. & Pub. Pol. 427, 446-47 (1985). The Reagan Administration's Justice Department submitted amicus curiae briefs in two cases requesting that the Supreme Court abandon the *Roe* analysis. See Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169 (1986); Diamond v. Charles, 106 S. Ct. 1697 (1986). In *Thornburgh*, the *Roe* analysis was reaffirmed, but only by a single vote.

Further, access to abortion for many women has been limited through the elimination of Medicaid funding for most abortions. See Harris v. McCrae, 448 U.S. 297 (1980)(holding that state need not pay for abortions for which federal reimbursement unavailable). Approximately one-quarter of American jurisdictions limit the use of state, local, and federal pass-through funding for abortions. See George, State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980's, 12 Pepperdine L. Rev. 427, 508-09 (1985).

Finally, many states have enacted statutory provisions attempting to limit a woman's access to abortion. The Supreme Court has been called upon many times to interpret the constitutionality of these limitations. See, e.g., City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (striking down various portions of Akron, Ohio abortion ordinance relative to parental consent, informed consent, 24 hour waiting period, performance of all second trimester abortions in hospital, and disposal of fetal remains); H.L. v. Matheson, 450 U.S. 398 (1981) (upholding Utah statute that required physician to notify parents of dependent, unmarried minor seeking abortion); Belotti v. Baird, 443 U.S. 622 (1979) (striking down Massachusetts statute that required parental consent before abortion could be obtained by unmarried woman under age of eighteen, on ground that it permitted court to withhold judicial authorization for abortion from minor found to be mature and competent to make independent decision, and failed to provide alternative means by which authorization could be obtained); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down various provi-

even with concrete legal gains, it is not clear how the lives of most women, particularly poor women and women of color, have changed. Certainly women's economic realities have not improved.[210]

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sions of Missouri statute which required husband's, or in the case of unmarried minor, parent's, prior written consent for abortion unless abortion was necessary to save woman's life); Doe v. Bolton, 410 U.S. 179 (1973) (invalidating section of Georgia Criminal Code requiring hospitalization for all abortions because first trimester abortions were not excluded as required by Roe v. Wade).

[210] Women are disproportionately represented among the poor in the United States. See generally, H. Scott, Working Your Way to the Bottom: The Feminization of Poverty (1984). The number of poor people living in female-headed households rose dramatically between 1970 and 1983 from 7.5 million to 12 million. National Soc. Sci. & L. Center, Women and Poverty 3 (July 23, 1985) (memorandum on file at New York University Law Review). Though the number of poor people living in households headed by women declined in 1984 (paralleling a decrease in the poverty rate for the nation as a whole), it remains alarmingly high. While only 16% of the nation's households are headed by women, according to 1984 Census Bureau figures, these households comprise 48% of all families living below the poverty line. See N.Y. Times, Aug. 28, 1985, at A1, col. 3. The poverty rate for the country as a whole is 14.4%, yet 34.5% of all female-headed households are poor. The picture for minority women is even bleaker—53.4% of female headed hispanic families and 51.7% of female headed black families live below the poverty line. Id. Poverty is very prevalent among elderly women as well. In 1982, women accounted for 59.1% of the non-institutionalized aged population, but were 70.9% of the aged poor. Institute for Research on Poverty, Univ. of Wisconsin-Madison, Poverty in the United States—Where Do We Stand Now, 7 Focus 7 (1984).

Further, many women in the United States are "invisibly poor." H. Scott, supra, at 17. Although half the women of working age were in the labor force in 1980, only about half of these workers earned more than the minimum necessary to keep a family of two above the poverty line. Thus, some 75% of all American women aged 16 to 64 would be dependent on resources other than their own earned income if they had to support themselves and one other person. Id.

Women who are employed in the workplace receive much lower salaries and work related benefits than do men. They continue to be concentrated in traditional female-dominated low paying job categories which offer little possibility for advancement. Bureau of Labor Statistics, U.S. Dep't of Labor, Women at Work: A Chartbook 10-11 (1983). The disparity in wages of male and female full-time workers has increased over time. Whereas in 1955 women earned 63.9 cents for every dollar earned by men, by 1981 women were earning only 59.2 cents for every dollar earned by men. Women's Bureau, U.S. Dep't of Labor, Time of Change: 1983 Handbook on Women Workers 82 (1983)[hereinafter Time of Change: 1983 Handbook on Women Workers].

Women's income increases at a much more modest rate than men's with increasing levels of education and is lower than men's for any given level of education. For example, in 1983, women workers with four or more years of college had an average income only slightly above that of men who had only one to three years of high school—$14,679 and $12,117, respectively. See 131 Cong. Rec. H4012 (daily ed. June 6, 1985) (statement of Rep. Long).

Because women often take time out from the workforce to raise families, they qualify for lower and fewer benefits than men and have less opportunity for career advancement. This problem is particularly felt by mature women entering or reentering the labor force. Faced with severely limited employment opportunites, women experience joblessness more often than men. Time of Change: 1983 Handbook on Women Workers, supra, at 88-89.

There are 5.4 million "displaced homemakers" in the United States. H. Scott, supra, at 23. These women have never held jobs outside the home; rather, they worked in the home producing children and maintaining the household. These workers have never earned employment wages, thus they are not entitled to unemployment benefits if forced to leave their jobs

Yet in some areas of women's rights, there have been important victories for individual women, for women as a class, and for the development of substantive legal doctrine. Public consciousness of sex discrimination in the law, for example, has increased.[211] Looking at the gains and losses together, I believe that the struggles around legal rights have moved the women's movement forward and reinforced a sense of collective experience for the movement. In sum, I share Mary Dunlap's view that

> I think we have to look, if only to maintain momentum, at the parts of what we have done with feminism in law that have moved us forward. . . . Just the fact that we have prioritized and gotten as far as we have, just the fact that there is so much vital activity in each of these [areas], just the fact that women are in court and are being heard—sometimes, at least—in a different voice makes a difference.[212]

B. Rights to Equality and Reproductive Choice

The women's rights movement articulated women's right to equal treatment as a claim of equal protection under the fourteenth amendment, and women's right to procreative freedom as a claim of liberty and privacy under the due process clause of the fourteenth amendment. The way in which equality and reproductive rights issues were formulated by women and distorted and limited by the courts raises serious questions about how rights claims affect social movements.

The issue of equal treatment[213] poses the theoretical problem of

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because of the divorce from or death of their spouse. While men often experience economic benefit from divorce, contrary to popular belief, women seldom do. Id.

When women reach old age, a lifetime of work at low paying jobs or as homemakers leave them with few resources on which to fall back. Only 14% of all women retirees, both homemakers and workers, receive any pension benefits other than Social Security. See 131 Cong. Rec. H4010 (daily ed. June 6, 1985) (statement of Rep. Schroeder). Most women receive lower social security benefits than do men. Id.

211 The presence of many articles in "popular" magazines regarding sex discrimination and related issues indicates increased public consciousness of the problem. See, e.g., Connelly, Women on the Job: Are Things Really Changing?, Seventeen, Aug. 1985, at 152; Is Teaching a Hands-on-Profession? Two Educators Warn of Sexual Harassment in America's Colleges, People Weekly, Oct. 15, 1984, at 99; Rhoads, Money: Getting Credit When Credit is Due—The New Legal Options for Women, Vogue, Apr. 1985, at 177; Sullivan, A Law That Needs New Muscle, Sports Illustrated, Mar. 4, 1985, at 9.

212 Feminist Discourse, supra note 57, at 17-18.

213 A rich body of legal scholarship on equality theory has been developed by feminist scholars over the last ten years. I have drawn on many of these articles for my analysis in this section, even though this section only touches on some of the themes more fully developed in this literature. See, e.g., C. MacKinnon, Sexual Harassment Of Working Women (1979); Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971); Dunlap, Toward Recognition of "A Right to Be Sexual," 7 Women's Rts. L. Rep. 245 (1982); Freedman, supra note 207; Ginsburg, Sexual Equality Under the Fourteenth and Equal Rights Amendments, 1979 Wash. U.

sameness and difference. Equal protection of the law is guaranteed only to those who are similarly situated.[214] Thus, the issue for equality theory is comparative—who is the same as whom.[215] In deciding this issue of comparability, difficult questions must be considered concerning whose standards are the norm, whether women and men really are different, what differences are real (biologically based or socially constructed),[216] and whether these differences, if they do exist, really matter.

The comparative equal rights approach has had limited political and doctrinal success in the courts and legislatures. The equal rights vision was substantially limited by the defeat of the federal equal rights amendment.[217] Because both the public and the courts viewed the equal rights amendment as a litmus test of political support for the women's movement, its defeat affected the movement nationally,[218] even though on the state level, state equal rights amendments have had greater success.[219] Further, despite efforts by feminist litigators to formulate women's rights claims as if no differences existed between men and women, the Supreme Court has read in differences.[220] Finally, the Supreme Court has viewed equality claims as distinct from reproductive choice claims.[221] Despite

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L.Q. 161; Kay, Models of Equality, 1985 U. Ill. L.F. 39; Law, supra note 203; Scales, Towards a Feminist Jurisprudence, 56 Ind. L.J. 375 (1981); Segal, Sexual Equality, the Equal Protection Clause, and the ERA, 33 Buffalo L. Rev. 85 (1984); Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984); Williams, The Crisis in Equality Theory: Maternity, Sexuality and Women, 7 Women's Rts. L. Rep. 175 (1982); Williams, supra note 206; Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487 (1981); Taub, Book Review, 80 Colum. L. Rev. 1686 (1980).

214 Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 344 (1949). The authors go on to raise a second issue of equal protection analysis which questions precisely when individuals or groups are similarly situated. Id. at 344-53.

215 See generally Freedman, supra note 207, at 931-49 (discussing "definitional" differences and "legally created" differences between men and women); Williams, supra note 213, at 176-90 (reviewing "gender equality" decisions of Supreme Court); Note, supra note 213 (discussing redefinitions of meaning of sexual equality).

216 See sources cited in note 213 supra.

217 See generally Rhode, supra note 203, at 9-47 (chronology of defeat of equal rights amendment).

218 Id. at 38-47, 62-67.

219 See B. Brown, A. Freedman, H. Katz & A. Price, Women's Rights and the Law: The Impact of the ERA on State Laws 37-38 (1977); Avner, Some Observations on State Equal Rights Amendments, 3 Yale L. & Pol'y Rev. 144, 145-46 (1985); Note, State Equal Rights Amendments: Legislative Reform and Judicial Activism, 4 Women's Rts. L. Rep. 227, 232-34 (1978).

220 Freedman, supra note 207, at 938-40; Taub & Schneider, supra note 187, at 134-35.

221 Law, supra note 203, at 988. Sylvia Law explains that there are several reasons for this separation of equality claims from reproductive choice claims.

> [D]uring the early 1970's the constitutional rights of women began to be recognized by the Supreme Court, but several forces encouraged the Court to avoid addressing the relationship between sex-based equality and biological differences. First, those primarily responsible for developing a constitutional doctrine of sex-based equality, including the ACLU and the proponents of the ERA, adopted what amounted to an assimilationist

the vigorous efforts of feminist litigators to argue that pregnancy discrimination violates equality principles,[222] the Supreme Court has held that since the capacity to become pregnant is "unique" to women, rules concerning pregnancy do not violate equal protection.[223] Thus, despite widespread acknowledgement by the women's movement of the centrality of pregnancy and reproductive choice to women's subordination, pregnancy and reproductive choice have not been seen by the Court as problems of equality.

The movement for reproductive choice played a critical role in the early development of the women's movement.[224] In the early 1970s large

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vision of sex equality, which minimized the significance of biological differences. Second, many who worked to develop constitutional doctrine to support reproductive freedom emphasized rights of privacy, physician discretion, and the vagueness and uncertainty of the criminal laws prohibiting abortions. The decision to deemphasize sex discrimination in the reproductive freedom cases reflected a judgment that privacy was a more conservative and, hence, stronger constitutional tool than sex-based equality.

Id. at 981-82 (footnotes omitted). Nevertheless, equality arguments were presented by feminist litigators in Roe v. Wade, 410 U.S. 113 (1973), see Brief for Amici Curiae New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition 25-33, *Roe v. Wade* (Nos. 70-18, 70-40) (on file at New York University Law Review), and later in Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982), see Brief for Amici Curiae N.J. Coalition for Battered Women, N.J. Coalition for Abortion Rights and Against Sterilization Abuse (CARASA), Women's Equity Action League (WEAL), Women's Resource and Survival Center, *Right to Choose v. Byrne*, reprinted in 7 Women's Rts. L. Rep. 286-90, 296-99 (1982). Indeed, Justice Blackmun's opinion in Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169 (1986), suggests that an equal protection dimension might exist in privacy issues. Id. at 2184-85.

222 See generally Williams, supra note 206, at 329-32 (describing general doctrinal framework of "equal treatment" approach developed in sex discrimination cases by feminist litigators).

223 Geduldig v. Aiello, 417 U.S. 484, 492-97 (1974). Sylvia Law has observed that

> [d]octrinally, however, *Geduldig* has made it more difficult to claim that reproductive freedom is an aspect of sex-based equality. If discrimination against pregnant women is not sex-based when the woman seeks to carry her pregnancy to term, it is hard to argue that it is sex-based for the state to create obstacles to abortion. Since 1973, literally hundreds of legal challenges to restrictive abortion laws have been brought, and only a very few of the cases have argued that the restrictions violated sex equality norms.
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> However, doctrine is not the only reason why sex equality claims have not been asserted in defense of women's abortion rights. Over the years following *Roe v. Wade*, women's struggle for control of their bodies has been transformed into debates about medical practice and moral and religious views of the personhood of the fetus. In the abortion debate, women's lives and sex-based equality have become distinctly secondary issues. The decision in *Roe v. Wade* established the Court as a single, highly visible target for opponents of abortion. By raising issues of institutional competence, the decision also provided a basis of opposition to abortion distinct from the merits of reproductive freedom itself.

Law, supra note 203, at 985-86 (footnotes omitted).

224 See generally Law, supra note 203, at 969-73 (describing early development of women's movement); Goodman, Schoenbrod & Stearns, Doe and Roe: Where Do We Go from Here?, 1 Women's Rts. L. Rep. 20, 23-24 (1973) (panel discussion on landmark decisions of Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973)).

groups of women organized to demonstrate against state laws that criminalized abortion and to challenge abortion laws in the courts.[225] Although feminists articulated this "women's right" as a right to liberty, the Supreme Court in *Roe v. Wade*[226] decided the issue on privacy grounds.[227] Thus, in *Roe*, a woman's right to choose whether to have an abortion was seen as a woman's private decision, which left her free from state and medical interference in the first trimester, but allowed the state's interest in the decision to increase in the second trimester and eventually outweigh her interest in the third trimester.

The development of women's rights to equality and reproductive choice have had an important ideological effect on the women's rights movement, but the doctrinal evolution of these rights, as the reproductive rights example suggests, has muddied their ideological meaning. First, feminist commentators widely believe that the Court's distinct theoretical articulation of reproductive control as a right to privacy separate from equality constrains political analysis on both a practical and ideological level and reinforces ideological separation of deeply interrelated oppression.[228]

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[225] Sylvia Law describes the early abortion struggle in this way.

> By the late 1960's many women had participated in the civil rights and antiwar movements and had learned new political skills. Also of invaluable importance to the struggle for women's rights were the consciousness-raising groups of the late 1960's. Through these groups women discovered that their most intimate personal concerns were shared by other women and that their private, individual lives were shaped by deep social and cultural structures. These groups provided women with the solidarity and strength to seek transformation of themselves and society. The contemporary revision of constitutional doctrine in relation to sex equality and reproduction is the product of these radical shifts in women's consciousness and behavior. When women began challenging legal restraints on human liberty, their central focus was on laws denying women access to abortion.
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> > In a number of cities across the country there were women coming forward and saying, I had an abortion, I had an illegal abortion and this is how I had it, and telling the details. What was really happening to women day in and day out was no longer a matter of private horror and embarrassment but became a public issue.
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> These women, in cooperation with medical, family planning, and religious groups, persuaded many state legislatures to liberalize criminal statutes prohibiting abortions.
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> In 1969 women began integrating constitutional litigation into this organizational and educational effort. Suits often named hundreds and sometimes thousands of women as individual plaintiffs. Live testimony educated judges, lawyers, and the public about the impact of unwanted pregnancy upon women's lives. Women filled courtrooms, bringing babies and the coat hangers that symbolize illegal abortions. Despite women's paramount concern for the right to obtain abortions, the constitutionality of government restrictions on the right was not presented to the courts as a clear issue of sex equality.

Law, supra note 203, at 971-73 (quoting Goodman, Schoenbrod & Stearns, supra note 224, at 23.

[226] 410 U.S. 113 (1973).

[227] Id. at 152-56.

[228] See, e.g., Colker, supra note 45, at 232-37; Law, supra note 203, at 987-1002; Editor's

Second, feminist commentators find the very articulation of the women's right to procreative freedom as a matter of privacy to be problematic,[229] because it reinforces and legitimizes the public and private dichotomy which historically has been damaging to women. For women, the domestic sphere and sexuality—primary areas of subordination—have been viewed as private and unregulated.[230] Although the right has a powerful collective dimension which could be used to emphasize group values as well as to develop the strands of individual autonomy,[231] as interpreted by the Court, it is primarily individualistic in that it simply protects an individual's right to choose.[232] Most significantly, analyzing the right to reproductive choice as a right of privacy emphasizes the process of decision making, which entails a balancing of interests throughout the term of the pregnancy, rather than the importance of abortion itself, which concerns the control that a woman should have over her own body and life decisions.

On the other hand, the impact on social movements of a court's particular decision or doctrinal formulation cannot be easily measured.[233] For example, how do we know what effect the doctrinal limitations which the Supreme Court has placed on the right to reproductive choice has had on the consciousness and politics of the women's movement? How do we know that the Court's rejection of the right to liberty and the narrower characterization of the reproductive right as a right of privacy have not affected the women's movement's understanding, for instance, of issues of doctor-patient relationships or state-funded abortion? Winning the right to procreative choice in the Supreme Court certainly helped many women regardless of the particular doctrinal formulation developed. Winning it as a right of privacy may have given some activists a false sense of security, but it has led others to greater insights into the mutable nature of the legal right to choose.

Ultimately, women's rights formulations by both feminists and the courts are best considered from a dialectical perspective. On an ideological level, the formulation of women's rights in both the equality and reproductive rights contexts has simultaneously expanded and limited our

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Note, Privacy or Sex Discrimination Doctrine: Must There Be a Choice?, 4 Harv. Women's L.J. ix, ix-xiv (1981). Rhonda Copelon has helped me to understand this.

229 See Colker, supra note 45, at 198-201; Law, supra note 203, at 1016-17.

230 See Olsen, supra note 61, at 1521-22; Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 78; Taub & Schneider, supra note 187, at 118-25.

231 Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy, 14 Harv. C.R.-C.L. L. Rev. 361, 366-67 (1979).

232 Roe v. Wade, 410 U.S. 113, 155 (1973).

233 David Trubek raised this important issue with me.

perspective on women's subordination. In both contexts, the articulation of the right was necessary to allow new contradictions to unfold.

The equal rights focus of the early women's movement is a good example. The emphasis on equal rights, which reflected an egalitarian strain in the women's movement and has historically dominated the women's movement, was adopted for several reasons. The contemporary women's movement grew out of the civil rights struggle.[234] Thus, there was a strategic orientation to analogize to the civil rights experience, this time struggling to include sex within the ambit of the fourteenth amendment and to ensure passage of the equal rights amendment. The women's movement also recognized the risks of asserting a distinct women's perspective and asserting differences because difference had historically led to paternalism and exclusion.[235]

This emphasis on equality rights, however, although understandable, arguably narrowed the movement's focus and constricted its vision of possible change. It certainly tended to cause women to analyze their experience from a comparative perspective and to stress political debate over equal treatment with men, rather than over empowerment, self-actualization, or "women-centered" perspectives generally.[236] This limitation on the scope of equality rights was also encouraged by the fact that many of the plaintiffs raising and benefitting from equal rights claims were men.[237] The factual context of much litigation that featured an individual plaintiff's attempt to "get" something from society, such as military dependents' benefits,[238] increased social security,[239] property tax exemptions,[240] or admission to a sex-segregated nursing school,[241] appeared to narrow the focus of equality rights even further.

Moreover, because the women's movement articulated its equality concerns using a rights language that frequently becomes symbolic and reified,[242] the movement's ability to account for the range of potential political strategies and to determine appropriate reforms in any given area became more difficult. The equal rights perspective also made it

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234 M. Berger, supra note 176, at 6-7; S. Evans, supra note 62, at 24-101.

235 This problem has been mirrored in feminist theory generally. See Z. Eisenstein, supra note 60, at 12-14 (arguing for new feminist politics that will allow women to move beyond issue of sameness and difference).

236 For analysis of the development of a woman-centered perspective in feminist theory, see A. Jaggar, supra note 58, at 369-77.

237 See Cole, Strategies of Difference: Litigating for Women's Rights in a Man's World, 2 Law & Inequality: J. Theory & Prac. 33 (1984) (analyzing how equality doctrine has been shaped by claims of male plaintiffs).

238 Frontiero v. Richardson, 411 U.S. 677 (1973).

239 Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

240 Kahn v. Shevin, 416 U.S. 351 (1974).

241 Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

242 See Fineman, supra note 206, at 884-85; Rhode, supra note 203, at 7-8.

easier for women to avoid the complex question of biological and social differences. Finally, some argue that the pervasiveness of an equality perspective contributed to an emphasis within the women's movement on the "symbolic" equality of rules that reflected formal, as opposed to substantive, fairness and justice.[243]

Nevertheless, the struggle over equal rights was a necessary development for the women's movement. Through the beginning efforts to articulate equal rights, the women's movement acquired a broader and clearer understanding of what it wanted, what obstacles it faced, how deep the phenomenon of sexism went, and how hard it was to affect meaningful change.[244] The movement also learned about the limitations and inadequacies of rights to perform the prerequisite economic and social reconstruction for meaningful change for women. The development of an equality perspective enabled women to understand the tenacity of "neutral" standards based on male experience[245] and legitimized discussion of equality within public discourse.[246]

Further, both the legal movements for equal rights and reproductive rights emerged organically out of the women's movement. At the grass roots level, the movement helped to shape legal strategies, particularly for reproductive rights.[247] The articulation of these rights expressed a collective project that began with a description of women's experience, translated that experience into legal formulation, and through that formulation asserted a demand for power.

In a certain sense, these claims, articulated in the language of rights, have advanced the political development and organizing potential of the movement, and expanded and concretized the consciousness of feminist activists and litigators. By thus providing a public vehicle for expressing what women want,[248] the rights struggle clarified and heightened the de-

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243 See Fineman, supra note 206, at 885; Note, supra note 213, at 505-06.

244 See, e.g., Freedman, supra note 207, at 913-17; Williams, supra note 213, at 190-200.

245 See Segal, supra note 213, at 146-47; Note, supra note 213, at 487-88; Taub, supra note 213, at 1690-91.

246 See sources cited in note 211 supra.

247 However, my colleague Margaret Berger has noted that women's rights litigators were sometimes cut off from grass roots efforts. M. Berger, supra note 176, at 60-61.

248 But see Olsen, supra note 2, at 429 n.199.

> One of the basic premises underlying most feminist legal writing is that we can move toward a more just and equal society by establishing rights for women and enforcing these rights. . . . But feminist legal criticism is most successful as it moves away from these notions and into the risky territory of real concerns that are political rather than neutral or impartial. Abstract rights and neutral rules are devices used by feminists to deny what we really want while getting what we want indirectly.

Id. Fran Olsen suggests that feminists should "stop trying to fit our goals into abstract rights arguments and instead call for what we really want." Id. at 430.

bates within the movement itself[249] and then turned these insights back into theory. For instance, even though the efforts of feminist litigators to treat pregnancy as an equality issue failed in the courts,[250] the Pregnancy Discrimination Act was passed as a result of efforts based on feminist legal argumentation to fit pregnancy into a discrimination model—Title VII.[251] Now, however, the Pregnancy Discrimination Act's equal treatment model has been challenged on the ground that it bars employers from taking account of women's special needs for maternity leave.[252]

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[249] Olsen has also suggested that, in the context of the women's movement, rights formulations have an arguably negative impact on the development of social movements because they magnify disagreement. See id. at 430. Martha Fineman has raised a related question with me: Is there a difference between a dialogue among ourselves on issues of disagreement and going to court (particularly since courts and judges have not been receptive to women's rights claims)? My response reflects the recent women's movement experience with the issue of pornography.

The strategy of raising the issue of pornography as a violation of a woman's civil rights (through legislation, not merely claims of rights in court) has generated much controversy and disagreement within the women's movement. See MacKinnon, Not a Moral Issue, 2 Yale L. & Pol'y Rev. 321 (1984) (pornography is a politics of male dominance, distinct from obscenity law, based on male morality, and therefore free speech arguments applied to obscenity should not bar efforts to stop pornography); Emerson, Pornography and the First Amendment: A Reply to Professor MacKinnon, 3 Yale L. & Pol'y Rev. 130 (1984) (governmental suppression of pornography is not proper method to increase power of women because it involves "dangerous evisceration of the first amendment"); Hoffman, Feminism, Pornography and Law, 133 U. Pa. L. Rev. 497 (1985) (although antipornography laws have some value, feminists should be wary of male-dominated state and should accordingly avoid endorsing state regulation of pornography). This disagreement has certainly been experienced by many women as unfortunate and painful, particularly when women's groups have argued opposing positions before courts. See, e.g., American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985). Further, some feminists who proposed antipornography ordinances did not submit their strategy to wide critique before their implementation, nor were they receptive to critique after implementation, thereby creating friction within the movement. I found this friction particularly evident during a debate between Catharine MacKinnon and Nan Hunter at the Sixteenth National Conference on Women and the Law (New York, New York 1985). Any controversial strategy that goes "public" can magnify disagreements which many would rather debate internally within the women's movement. This problem may be exacerbated, of course, when we are arguing contrary positions in court. Most recently, the issues raised in California Fed. Sav. & Loan Ass'n v. Guerra, 106 S. Ct. 683 (1987), exemplified this problem.

[250] See Law, supra note 203, at 979-87; see also Williams, supra note 206, at 333-80 (analysis of developing feminist perspective on pregnancy as an equality issue).

[251] Williams, supra note 206, at 347-48.

[252] See note 206 supra. Compare Williams, supra note 206, at 380 (arguing that "the 'equal treatment' approach to pregnant wage workers, both as a litigative and legislative matter, is demonstrably" better than the "special treatment" approach) with Krieger & Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 Golden Gate U.L. Rev. 513, 542 (1983) (arguing that equal treatment model "fails to focus on the effect of the very *real* sex difference of pregnancy and the relative positions of men and women in society") and Finley, Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate, 86 Colum. L. Rev. 1118, 1182 (1986) (arguing that equality analysis is of little use to women in context of pregnancy and should be supplemented "with a concept of responsibility, to others arising out of [human] interconnectedness").

Thus, at each stage of the process, contradictions have emerged which have clarified differences and moved the debate to new levels.

Both the right to equality and the right to reproductive choice are rights derived from the contexts of political struggle and feminist organization. Both rights emerged from a radical feminist vision that equality was not limited to formal legal treatment or assimilation of women into male roles, but rather required the radical restructuring of society. The expression of these visions began with the formulation of rights claims in the courts. Yet even though these visions have neither been nor could be achieved in the courts, their introduction through rights claims started the "conversation" in society at large about women's roles and women's subordination under the law.

The radical impulse behind the notion of women's equality and reproductive control, then, is powerful. By concretizing an abstract idea and situating it within women's experience, these rights claims did not simply "occupy" an existing right, but rather modified and tranformed the nature of the right. These claims, then derived from concrete struggle and political vision, articulate a notion of collective experience. They do not simply reflect an individual woman's claim, but rather have a communal dimension that can expand opportunities for women as a class.

C. Sexual Harassment and Battering

Both the concept of sexual harassment and the notion of legal protection for battered women emerged directly from feminist thinking on issues of sexuality in the 1970s. Both areas suggest the importance of legal thinking tied to political struggle and to the experience of women themselves.

The history of sexual harassment is an important example of the creative development of rights.[253] The experience of what is now called sexual harassment[254] did not even have a name until feminist thinkers

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[253] For the history of the development of sexual harassment as a legal claim, see generally C. MacKinnon, supra note 213; MacKinnon, Introduction, Symposium: Sexual Harassment, 10 Cap. U.L. Rev. i (1981).

[254] State and federal courts have recognized various common law and statutory causes of action available to employees who have experienced some form of sexual harassment in the workplace. The common law causes of action include wrongful discharge claims in both contract, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984), and tort, id.; Holien v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984), and claims for intentional infliction of emotional distress, Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983), and for negligence, Cox v. Brazo, 165 Ga. App. 888, 303 S.E.2d 71, aff'd, 251 Ga. 491, 307 S.E.2d 474 (1983). Statutory causes of action have been based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1982) and various state civil rights statutes. See, e.g., Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (holding that claim of hostile environment sexual harassment is form of sex-discrimination actionable under Title VII); Barnes v. Costle,

provided it with one.[255] Widely practiced, it was viewed as a normal and inevitable activity of men when exposed to female co-workers. The idea of sexual harassment as a harm, and as an experience that was not simply normal, private, or individual to one woman, was developed through the work of feminist theorists and litigators.[256] This work gave formerly private and hidden experience a public dimension and so legitimized it as a subject of public discourse.

Sexual harassment defined an injury to an individual woman and to women as a class from a woman's perspective.[257] It emerged out of femi-

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561 F.2d 983 (D.C. Cir. 1977) (holding that Title VII protects the job of woman who repelled her male superior's sexual advances); see also *Holien*, 298 Or. 76, 689 P.2d 1292 (discussing application of Title VII to claims of sexual harassment and remedies available under it and state law). Under Title VII, courts have analyzed sexual harassment claims in terms of disparate treatment. See Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (where employer treated particular individual less favorably than other employees based upon sex). Courts have also analyzed these claims in terms of an offensive work environment. See, e.g., id. at 901-03 (sexual harassment constitutes discrimination on the basis of sex with respect to a condition of work); *Meritor*, 106 S. Ct. at 2404-06 (an "offensive work environment" sexual harassment claim was actionable under Title VII).

The articulation of sexual harassment in the workplace as a legally cognizable wrong is important because it facilitates the ongoing process of creating a social norm which recognizes that to impose a burden upon workers based on irrelevant sexual attributes is unacceptable in any context. Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451 (1984). Yet, recognition by courts of a cause of action based on sexual harassment is only the initial step in providing a remedy to the individual victims of sexual harassment and to the class of individuals to which they belong.

Although claims of sexual harassment have been recognized under a range of legal theories, there are significant legal obstacles that prevent women from obtaining relief. Plaintiffs who articulate their claims under Title VII must anticipate judicial reluctance to agree that the conduct they complain of constitutes sexual harassment. See, e.g., EEOC Dec. No. 85-9, 37 Fair Empl. Prac. Cas. (BNA) 1893 (May 7, 1985) (woman's clothing store that required female employees to wear revealing swimsuits as part of swimwear promotion did not violate Title VII when it discharged three employees for refusing to comply). Further, courts continue to struggle with the concept that sexual harassment constitutes employment discrimination. See, e.g., *Henson*, 682 F.2d at 900 n.2. The Supreme Court's decision in *Meritor*, holding that sexual harassment in the workplace is a serious wrong, 106 S. Ct. 2399, should, however, support efforts to define sexual harassment broadly.

[255] See Karst, supra note 57, at 505 n.227. "As the first legal wrong to be defined by women, sexual harassment has been called a feminist invention. Women were subjected to sexual attention they were not in a position to refuse long before the state recognized it is an injury under some circumstances." MacKinnon, supra note 253, at i.

[256] The Working Women's Institute was founded in 1975 to develop educational and training programs concerning sexual harassment. See Letter from Working Women's Institute (May 1984) (on file at New York University Law Review). For an example of the Institute's work, see, e.g., Sexual Harassment Brief Bank and Bibliography, 8 Women's Rts. L. Rep. 267 (1985). In addition to Catharine MacKinnon, other feminist litigators such as Nadine Taub, Anne Simon, Joan Vermeulen, and Mary Dunlap have been involved in sexual harassment litigation and the development of the legal theory of sexual harassment.

[257] "[I]t took a feminist movement to expose these experiences [of sexual harassment] as systematic and harmful in the first place, because feminism was the first politics to take women's point of view on our own situation as definitive of that situation." MacKinnon, supra note 253, at ii.

nist perceptions and theories about the role of sexuality and from an effort to name and define women's experience and oppression.[258] It developed as part of an effort to assist women in asserting control over their sexuality.[259] The concept of sexual harassment and the definition of harm that developed reflected the methodology of consciousness-raising applied to law.

At the same time, the articulation of claims of sexual harassment has led to the unfolding of new problems, arising in part because of the very gains realized in the recognition of sexual harassment as a cognizable wrong. These new dilemmas concern the scope of employer liability, visions of women as sexual victims, not actors, and victim-precipitation.[260] These tensions highlight important concerns which can then reshape theory and so push feminist analysis forward.

The assertion of rights for battered women developed as an outgrowth of the women's movement experience and the insights of feminist theory.[261] In the 1970s, projects to help battered women suddenly appeared throughout the United States, and by the 1980s a real national battered women's movement existed.[262] Legal claims emerging from this movement, based on the right of battered women to protection from abuse,[263] revealed important dimensions of patriarchy. The movement sought to change police practices, develop legislation to criminalize battering, enforce the victim's rights, and increase a victim's protection and legal options.[264] Some of these legislative reforms made particularly cre-

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258 Id. at viii.

259 Id.

260 See Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2406-09 (1986).

261 S. Schechter, Women and Male Violence: The Visions and Struggles of the Battered Women's Movement 29 (1982).

262 Id. at 1.

263 See id. at 157-83.

264 Beginning in the mid-1970s, American feminists began to organize nationally to end domestic violence in the United States. See S. Schechter, supra note 261, at 136-38. As a result of this work, almost every state has passed legislation creating new legal remedies for battered women. See Lerman & Livingston, State Legislation on Domestic Violence, 6 Response 1 (1983) (on file at New York University Law Review). For example, state laws now provide for the issuance of civil orders of protection, and in many states these may be awarded on an ex parte basis in emergency situations. See id. at 6-8. In most states, such orders may include a provision that the abuser vacate the home. Id. Further, many states now have provisions for warrantless arrests for misdemeanors. Id. at 4; see, e.g., State ex. rel. Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (upholding warrantless arrest for misdemeanor).

Many battered women have successfully brought civil damage actions against their attackers. See, e.g., Gay v. Gay, 62 N.C. App. 288, 302 S.E.2d 495 (1983). Additionally, some battered women have brought successful suits against local police who did not arrest their assailants. See, e.g., Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). The marital rape exemption has been successfully challenged as well. See, e.g., People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984); see also National Center on Women & Family Law, Marital Rape Exemption Packet (Oct. 1986) (compiling case, statutory, and

ative connections between battering and patriarchy as, for example, state legislation which used money from marriage license fees to fund battered women's shelters.[265] The claim that women had a right not to be battered, a right to require husbands to leave the house, and a right to get orders of protection emerged from the efforts of feminist activists and thinkers to define the problem of battering.

Both the articulation of the right to be free from sexual harassment and claims for legal protection of battered women appear more affirmative and less problematic than the previous rights struggle over equality. Legal challenges involving equality have not explicitly argued for the social reconstruction necessary to help women achieve sufficient freedom and equality. The legal formulation of the battered women and sexual harassment rights claims, however, flows more directly from the political statement that these claims of right make than does the formulation of equal rights claims. Is it because the political message and demand of these claims is narrower, simpler, or clearer? Is it because these claims have done better, thus far, in the courts? Or is it because the development of both legal rights is at an earlier stage than that of equality and reproductive rights? Both sexual harassment and battered women's rights emerged directly out of collectively developed political theory and practice concerning patriarchy and sexuality. The theory exposed new harms and expanded understanding by labeling these previously private issues as public harms. The claims of right reflected a shared political understanding that women needed to be free from sexual subordination and violence and made important statements about women's autonomy. Moreoever, the scope of both rights as articulated by feminist litigation was broad. For example, sexual harassment claims did not simply rest on the employment treatment of individual women, but rather on a broader understanding of how a workplace environment can be tainted

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other information on the marital rape exemption) (on file at New York University Law Review).

Yet, despite these changes in the laws and successful court actions, women who are subjected to violence in their homes still encounter difficulties at all levels of the legal and criminal justice systems when seeking to put an end to these attacks. See, e.g., Pastoor, Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws, 2 Law & Inequality: J. Theory & Prac. 557 (1984) (arguing that "domestic abuse" laws cannot be effectively enforced without appropriate police activity); see also Woods, Mediation: A Backlash to Women's Progress on Family Law Issues, 19 Clearinghouse Rev. 431 (1985) (growing trend to use mediation may dissipate gains achieved in legislatures and courts and hinder development of further rights). Much work remains to be done to change misconceptions about domestic violence still prevalent among law enforcement officials and within society at large. See Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash. L. Rev. 267, 269 (1985).

265 Lerman, A Model State Act: Remedies for Domestic Abuse, 21 Harv. J. on Legis. 61, 65 (1984).

by sexual harassment and innuendo, and therefore harm all women who work there.[266] In addition, the claims as articulated recognized the connection between the individual and collective components of the claim.[267] Similarly, in the battered women context, the idea that women needed ex parte orders of protection and that police owed a duty of care to battered women transcended the individual dimension of the claim and illuminated the problems of patriarchy.[268]

Further, the articulation of these rights claims developed feminist theory in several important ways. For example, in the battered women's movement, claims of right in both civil and criminal contexts raised important questions for feminists about how to view the state. The claims sharpened debate over the role of law in modifying the public and private dichotomy, especially given the historic absence of law in the area of domestic relations generally. Debates over whether feminists should support criminalization and other reform efforts within the criminal justice

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266 The Supreme Court's opinion in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986), affirms this broad perspective. Yet controversy exists over whether to formulate a claim for relief from sexual harassment in the workplace as a tort (focusing on individual harm) or as a violation of the civil rights of the class of individuals to which the victims of sexual harassment belong (focusing on group harm). Catharine MacKinnon has argued that a tort remedy for sexual harassment incorrectly treats the occurrence of sexual harassment in the workplace as an injury to an individual, rather than as an injury to a class of individuals. C. MacKinnon, supra note 213, at 88. On the other hand, courts have noted that statutory remedies fail to capture the personal nature of the injury done to a sexually harassed plaintiff. Statutory remedies "vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care." Holien v. Sears, Roebuck & Co., 298 Or. 76, 97, 689 P.2d 1292, 1303 (1984). In fact, most courts have held that common law remedies are not preempted by statutory causes of action. See, e.g., Cox v. Brazo, 165 Ga. App. 888, 303 S.E.2d 71, aff'd, 251 Ga. 491, 307 S.E.2d 474 (1983); *Holien*, 298 Or. 76, 689 P.2d 1292. But see Wolk v. Saks Fifth Avenue, 728 F.2d 221 (3d Cir. 1984) (refusing to allow state common law cause of action for tortious discharge where state statutory relief was exclusive remedy and where highest state court had not addressed issue of coexistence of statutory and common law causes of action).

267 In relation to sexual harassment claims, MacKinnon observes that the notion that individual and group claims are different "is elusive under a legal theory of group-based injury in a legal system which requires representatively injured individual plaintiffs." MacKinnon, supra note 253, at iv. She goes on to note:

> Although sometimes injured one at a time, women are not discriminated against *as* individuals. Indeed, the absence of treatment based upon personal differential qualities is part of the harm of discrimination. At the same time, sexuality is no less individual to a particular woman for being an attribute of women as a gender. In short, there is no individual/group distinction here.

Id. (emphasis in original).

268 The need for ex parte orders is premised on a view that women as a class and battered women as a subclass do not have the same access to the courts as do men. See Taub, Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny, 9 Hofstra L. Rev. 95, 97 (1980).

system to ameliorate the problem of battering[269] clarified the need for a feminist theory of the state that neither expressly relied upon nor rejected the state. These debates underscored the ideological function of criminalization in defining battery as a public and not a private harm, and heightened the movement's analysis of reforms for battered women. For instance, reforms could focus on the individual "bad" man, or the individual woman's "victimization," but they then would not address the shared experience of battered women, the common problems of patriarchy, the conditions that create or perpetuate violence against women, or the economic and social resources—jobs, child care, housing—that battered women need to free themselves from dependence.

Some within the battered women's movement have been sensitive to these tensions and have recognized the need for litigation and legal reforms in the context of political organizing and education.[270] These advocates have sought to consider reform efforts within a theoretical

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269 See S. Schechter, supra note 261, at 175-79. Schechter notes that most within the battered women's movement maintain an ambivalent attitude toward the criminal courts.

> [C]riminal punishment is seen as one way to force men to assume responsibility for their actions. By making violence a crime, the movement offers psychological, symbolic, and actual relief to women in their search to free themselves from abuse and self-blame. Women's attempts to win justice through the courts is one important assertion of their dignity and control over their lives.

Id. at 176. Yet reform efforts within the criminal justice system have severe limitations. "In reality, the criminal justice system leaves many women frustrated. . . . Working within the criminal justice system is particularly problematic for poor and third world women." Id. at 177.

270 Schechter argues that

> [t]he battered women's movement must continue its advocacy and social change efforts within the criminal justice system. At the same time, however, a fine tension needs to be maintained so that advocacy and reform are balanced with building a broad-based, well organized feminist movement and continuing community education efforts. Only in this way will battered women's organizations retain the power base and community support for which to demand institutional change. Although criminal sanctions to stop abuse are a vital part of a solution to battered women's immediate problems, in the long run, the community, not just the criminal justice system, must understand that violence against women is rooted in male domination. Only by developing a philosophy of and struggle for gender equality will a movement change public consciousness which in turn will force individuals and institutions to treat violence against women as a serious offense.

Id. at 180. Kathy Ferguson notes that the utility of legal reform efforts should be evaluated on the basis of their "ability to challenge, not simply extend, the language and the practice of bureaucratic capitalism." K. Ferguson, supra note 57, at 193 (footnote omitted). She argues that reform efforts are critical for feminism because they make other struggles possible—they give women a sense of the possibilities of change, alleviate the pressure of immediate needs, develop political skills, and build the capacity to translate personal problems into public issues. Id. at 193-94. She distinguishes three different situations for legal reform effort: (1) where the problem at hand is immediate, such as rape and battery; (2) where claims of equal opportunity or affirmative action are made that can benefit individual women without challenging the system, and (3) where women seek access to the military, which she rejects as an inappropriate legal reform. Id. at 194-95.

framework that focuses on the political effect and message of these efforts. Such an approach evaluates a reform based on whether it helps to redress the balance of power within the family, emphasize the broader experience of sex discrimination within the family (rather than individual victimization), and challenge the public and private dichotomy. Most significantly, this approach evaluates whether a particular reform helps to strengthen the women's movement and organize more women.[271] This approach underscores the role that rights claims can play in furthering political development.[272]

In both the areas of sexual harassment and legal treatment of battered women, rights claims have strengthened public consciousness on the issues and illuminated broader political perceptions of patriarchy and sexual subordination. The women's movement has begun to reshape the law in women's terms and has thus exposed new dilemmas and challenges. This effort to reshape law through the articulation of legal rights has been an important aspect of the political struggle around these issues.

V

A Dialectical Perspective Reconsidered

What does an examination of the practice and experience of the women's rights movement reveal about rights? Does it suggest that a dialectical approach to the relationship between rights and politics is appropriate? I want to draw some implications for theory from the women's movement's experience with rights and relate this experience to the earlier discussion of a dialectical perspective.

The women's movement's experience with rights shows how rights emerge from political struggle. The legal formulation of the rights grew out of and reflected feminist experience and vision and culminated in a political demand for power. The articulation of feminist theory in practice in turn heightened feminist consciousness of theoretical dilemmas and at the same time advanced feminist theoretical development. This

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271 Feminist theoretician and activist Charlotte Bunch has posed five questions to help evaluate reform efforts for women. See Bunch, The Reform Tool, in Building Feminist Theory: Essays from Quest 189, 196-98 (1981). First, "Does [the reform] materially improve the lives of women and if so, which women and how many?" Id. at 196. Second, "Does the reform build an individual woman's self-respect, strength, and confidence?" Id. at 197. Third, "Does working for the reform give women a sense of power, strength and imagination as a group, and help build structures for further change?" Id. Fourth, "Does the struggle for reform educate women politically, enhancing their ability to criticize and challenge the system in the future?" Id. at 198. Fifth, "Does the reform weaken patriarchal control of society's institutions and help women gain power over them?" Id.

272 Although there may be practical and strategic differences between making rights claims in courts, utilizing legal fora generally, and pursuing legislative reform, discussion of the distinct considerations involved in each is outside the scope of this Article.

experience, reflecting the dynamic interrelationship of theory and practice, mirrored the experience of the women's movement in general.

This analysis of the women's rights movement, shaped by an understanding of praxis, reveals a conception of both the process through which rights are formulated as well as the content of the rights themselves. The process has been "regenerative"[273] as rights were developed in the "middle," not at the "end," of political dialogue. Rights were the product of consciousness-raising and were often articulated by both political activists and lawyers translating and explaining their own experience. Further, rights asserted in the context of the women's movement enabled women to develop an individual and collective identity as women and to understand the connection between individual and community. The articulation of rights, then, has been a means of projecting, reflecting, and building upon a burgeoning sense of community developing within the women's movement.

The content of these rights contained both individual and communal dimensions. A particular right did not simply benefit a particular woman, but rather benefited women as a class. Rights claims illuminated and expressed experiences of women as a class because newly developed perceptions of women's experience defined and gave meaning to the individual claims of rights. In this sense, as Lynd's formulation suggests, these rights did not simply relate to individual women, but expanded the opportunities for women as a class.[274] Litigation over reproductive rights, sexual harassment, and battering illuminated the common experiences of women by establishing individual women's entitlement to relief.

Admittedly, claims for equal rights have not captured the experience of women as a class as effectively as the other rights claims detailed above.[275] Although these claims for equal rights have been shaped and defined to some degree by collective experience, they appear to have a weaker collective and stronger individual dimension. Further, equality litigation itself has not focused on the social and economic preconditions for equal treatment.[276] Thus, although these cases attacked important stereotypes affecting women as a class, they communicated the sense that an equal rights perspective only affords individual women access to treatment as males.

In fairness, it could be said that the content of women's rights in all these areas was "traditional" or individualistic. But this characterization minimizes the importance of context.[277] Since rights in the women's

[273] See text accompanying notes 152-59 supra.
[274] See text accompanying notes 104-12 supra.
[275] See text accompanying notes 238-41 supra.
[276] See Fineman, supra note 206, at 816-20; Finley, supra note 252, at 1120-22.
[277] Karst suggests that "women's insistence on the need to appreciate the whole context in

movement experience emerged in the middle of "conversation," and began a process of articulating political vision connected to political program, their meaning and content have been closely tied to the political practice of the women's movement. If the rights claim is part of a larger process and the movement believes that the rights claim expresses its vision, the claim is likely to have a greater impact on the movement itself. If the movement sees rights claims as an integral part of the struggle, but not the exclusive focus, the process of rights assertion will more likely activate, than pacify, the social movement.

Indeed, the content of women's rights claims suggests Karst's jurisprudence of interdependence.[278] Rights language was not simply "occupied." The source of the claims, women's experience, modified the substance of the claims themselves. Feminist litigation has reflected many of the aspects which Karst discusses—creativity, experience, intuition, and the use of a broader political and social context.[279] Perhaps the ladder of rights can, in some contexts, be reshaped by the web of connection. Perhaps rights, in some contexts, can truly be interdependent or at least can have interdependent dimensions.

The use of rights and legal struggle by the women's movement started the "conversation" about women's role in society. Assertion of equal rights, reproductive rights, rights to be free from sexual harassment and battering assisted political organizing and education at least early in the women's movement. Rights discourse encouraged the articulation of feminist vision and furthered the process of political assertion. In this sense, legal formulations of these rights laid the basis for the further articulation of women's demands. By challenging notions of equality, for example, women sought to enter the world of public citizenship. But the persistence of separate spheres of work and family divided along gender-based lines, and the tenacity of female responsibility for child rearing emerged as limitations to that world. Nonetheless this language of equality was a necessary prerequisite for the development of the different visions and strategies that the legal formulation of this problem, the debate over equal/special treatment of pregnancy, has eventually revealed.[280]

The articulation of rights claims energized the women's movement and started the conversation. But once a right is articulated, or even won, the issues change. How will the right be applied? How will it be enforced? Women's rights have been necessary for the political develop-

which moral issues arise drives them to widen inquiry, to redefine issues, to expand the range of possible solutions." Karst, supra note 57, at 499. The full development of these issues in the context of women's right litigation is beyond the scope of this Article.

278 Id. at 494-95.

279 See text accompanying notes 165-70 supra.

280 See note 252 supra.

ment of women, particularly because they combat the privatization of women's oppression. However, rights, although they must vigorously be fought for, cannot perform the task of social reconstruction. The present economic crisis for women in this country[281] underscores the need for a radical redefinition of social and economic responsibility and a restructuring of work and family which would transform the lives of women, particularly the many women who live in poverty. Rights, even rights which are interdependent, can only begin to help people organize themselves and identify with larger groups.

Even if one agrees that rights claims can be interdependent and that the rights claims in the women's movement have had this character, an important question remains: does the experience of rights change according to gender, culture, class, or race?[282] Are rights asserted by a particular group at a particular time *in fact* more interdependent, or are they just perceived that way? Is the content of an interdependent right more collective than a traditional right?[283]

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281 See note 210 supra.

282 Carol Stack, an anthropologist whose work examines issues of class and race, see C. Stack, All Our Kin: Strategies for Survival in a Black Community (1974), has suggested to me that it is difficult to know if the psychological developmental issues which Gilligan raises concerning the role that rights can play will be the same for different groups. See also Stack, The Culture of Gender: Women and Men of Color, 11 Signs: J. Women Culture & Soc'y 321, 323 (1986) (positing "contextualization of morality and the meaning of social ties as a cultural alternative to Gilligan's model of moral development"). The richness and power of the presentations challenging the CLS critique of rights from different minority perspectives, that I heard while attending the Tenth Annual Conference on Critical Legal Studies (Los Angeles, California 1987), confirm the importance of this inquiry.

283 Important questions lurking beneath the surface of this Article are whether women's experience of rights might be more interdependent than men's experience, and whether the content of rights asserted by the women's movement has been more collective. Gilligan now claims that the dichotomy of rights and care is not linked to gender; her recent work underscores that she is talking about a "different voice," not a female voice. Feminist Discourse, supra note 57, at 47. This suggests that an understanding of the dialectical relatedness of the ladder of rights and web of connection is not particular to women—it may be an aspect of an individual's or a group's experience of rights more generally.

On the other hand, some feminist theorists have argued that Gilligan's description of web-like rights is particular to women because women have a sense of self based more on connection with others than separation. See K. Ferguson, supra note 57, at 161. For example, Carol Stack has suggested to me that since women's sense of self is more closely intertwined with a sense of other, women's experience of rights may have less of an exclusively individual and more of a collective dimension. Does this suggest that women's experience of a sense of self-assertion through rights claims has a more dialectical aspect and communal dimension than men's experience? If, as Gilligan suggests, empathy, compassion, and the ability to integrate diverse needs rather than balance opposing claims are more common to women, how does this affect women's experience of legal rights?

Of course it is arguable that rights are not transformative—that even rights infused by values of the web will not be different. Perhaps rights merely legitimize grumbling and dissatisfactions, but retain their individual focus. Perhaps a more realistic and limited view of rights claims for women is that rights can only help women to assert themselves and see self and

The experience of rights in the women's movement supports the need for a perspective on rights and politics grounded in a dialectical sensibility, a view that allows us to acknowledge both the universal, affirming, expressive, and creative aspects of rights claims and at the same time, maintain a critical impulse towards rights. We must hold on to and not seek to deny the contradictions between the possibilities and the limits of rights claims and discourse. In the women's movement, a wide range of feminist activists and commentators have participated in a broad critique of rights analysis, both on theoretical and practical levels.[284] A common theme of these critiques has been the need to strengthen legal challenges for equal rights while at the same time not limiting our vision to a narrow conception of rights. We need to continue to strive for a political strategy that expresses a politics and vision of social reconstruction sensitive to women's real concerns. Legal strategy must be developed in the context of political strategy. It should attack formal doctrinal barriers which inhibit the recognition of the interconnectedness of women's oppression and look at the particular factual context of discrimination in shaping legal responses.

A struggle for rights can be both a vehicle of politics and an affirmation of who we are and what we seek. Rights can be what we make of them and how we use them. The experience of rights assertion in the women's movement can move us forward to a self-reflective recognition of the importance and the limitations of political and legal strategy that utilizes rights.

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other as separate and individuated, but cannot do more. Perhaps web-like rights simply encourage judgment that is more tolerant and less absolute.

As feminists we want the possibilities of inclusion without the problems of self-sacrifice. We want to inform rights with feminist concerns of care and connection and use rights to protect women from too much caring. Id. at 171. With rights as a buffer, women's experience will not be "distorted by subordination or rendered partial by a too-great fear of loss." Id. at 197.

284 See sources cited in note 213 supra.

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