## Articles

# Liberal Rights and Critical Legal Theory

*By Frances Olsen*[*]

So much has been written about liberal rights and critical legal theory that many of us begin to find the topic boring. It is with some trepidation that I impose yet one more discussion of rights analysis upon the waiting – but satiated – world.

The bourgeois revolutions of the 18th and 19th centuries established the rights of man. Only later have rights for women been grudgingly added to national agendas. A number of reformers argue that the promise of the bourgeois revolutions has not yet been fulfilled. They suggest that many people do not yet enjoy the basic rights that wealthy white heterosexual able-bodied males take for granted. Political movements have formed around the ideas of rights for workers and poor people, rights for Blacks and other minorities, rights for gay men and lesbians, rights for the physically handicapped, and rights for women. There is a growing movement for animal rights and some environmentalists have begun to talk about the rights of trees and other living things.[1] Rocks and minerals cannot be far behind.

In addition to these movements to expand the base of those to whom rights are given, other movements are afoot to extend the reach of rights, to establish more extensive individual rights. Some people have argued the importance of establishing various forms of group rights or rights in community. Canada recently enacted a charter of rights, and the debate continues in England whether to enact a guarantee of rights in some form similar to the example of Canada or the earlier example of the United States.

At the same time that these social and political movements are trying to expand rights, many legal theorists have begun to criticize the practice of appealing to individual rights to analyze social conflict. These legal theorists, many of whom are associated with the Critical Legal Studies movement, generally support what they see to be the actual goals of reform

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[1] See Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

movements; they favor racial justice, freedom of sexual orientation, environmental responsibility. Their disagreement is not with the ultimate goals, but with the means and with certain characterizations of the goals (such as "to establish rights for workers").[2] The various criticisms that Critical Legal Studies people make against this appeal to rights are referred to collectively as "the critique of rights analysis" or "the rights critique". The critique has led to some hostility (especially from people who believe that they are only now beginning to get some rights) and to a good deal of misunderstanding. I propose to examine the critique of rights analysis and responses to that critique, with particular reference to the issue of women's rights.

## A. Introduction

Proponents of the rights critique make two major arguments. First, they argue that an appeal to individual rights is indeterminate or circular – in any important social conflict each side can present equally logical arguments that the concept of protecting individual rights requires that they prevail over the other side. Second, critics assert that individual rights support mere bourgeois individualism. Thus, the argument runs, rights analysis is related to alienation, reification and other such undesirable aspects of bourgeois capitalism as we know it. There are also a variety of other miscellaneous critiques of rights analysis, and I will touch upon them briefly, but my main focus will be on the indeterminancy critique and the alienation critique.

### *I. Rights as Description*

A good deal of confusion arises from the fact that the term "rights" is used in a variety of contexts with different meanings. It will be useful to separate out at least three of these meanings. The assertion that a person or group of people have rights may be descriptive, hortatory, or analytic. As description, the assertion that people have rights can be an expression of a set of established social practices that are fairly decent. For example, to say that in a particular country women have equal rights with men tells us something about the customs and behaviors of people living in that part of the world. Similarly, the assertion that Blacks in South Africa are denied basic rights describes an indecent set of social practices that take place in South Africa. To talk about the existence or denial of rights would certainly seem to be an intelligible and coherent way to describe a political situation that affects people's lives.

[2] See Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981).

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The claim that a certain group of people have certain rights may also refer to legal or institutional procedures that will be activated on behalf of that group of people. For example, last century the enactment of married women's property acts by the various states in the United States was said to have given women the right to own property and to sue and be sued. Prior to the enactment of these reform statutes, courts would summarily dismiss lawsuits brought by or against a married woman (except in particular cases in which she and her husband were both named as plaintiffs or defendants). The married women's property acts varied from state to state, but they usually provided that a woman could be named as a defendant without her husband and could bring a lawsuit similarly without her husband as a party.[3] After their enactment, courts usually would respond to a lawsuit filed by a married woman by trying the case instead of by summarily dismissing it. In this context, rights seem to have a rather determinate meaning.

Sometimes the claim that "people have the right to X" is taken to be true if and only if a court is likely to allow someone denied X to bring a successful lawsuit. In other words, if a person asking a court to give her some benefit would not prevail in her suit, some uses of "rights" would lead to the conclusion that the person did not have a right to the benefit. This use of "rights" is also basically descriptive and relatively unproblematic.

*II. Rights as Exhortation*

As exhortation, the statement that people have rights is an assertion about the kind of society we want to live in, the kind of relations among people we wish to foster, and the kind of behavior that is to be praised or blamed. The assertion that women have rights, for example, is a moral claim about how human beings should act toward one another. On a personal level, to claim a right is to assert one's self-worth, to affirm one's moral value and entitlement. It is a way for a person to make a claim about herself and her role in the world. This claim has a positive emotional content that should not be trivialized; it would be difficult and unprofitable to drain the word "right" of its emotive value.

*III. Rights as an Analytic Tool*

As an analytic tool, the concept that people have rights sometimes seems powerful but in practice it usually turns out not to be helpful; it cannot answer any difficult questions. This failure of rights as an analytic tool can be illustrated by an examination of some of the attempts women have made to use rights analysis. It turns out that women's right to freedom of action conflicts with their right to security; their right to substantive equality

[3] See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, s. 7.1, 221-22 (1968); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 186 (1973).

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

conflicts with their right to formal equality. Only by ignoring at least half the rights that could be asserted on behalf of women can rights rhetoric even appear to solve concrete problems. This conflict between rights becomes even more apparent if we consider also men's rights to freedom and security. If we recognize these multiple rights claims and try to "balance" the conflicting rights or to choose between them, we wind up talking politically about how we want to live our lives, not abstractly about rights.

### B. Women's Rights and the "Bourgeois Individualism" Critique

The rights critique that is least convincing to feminists is the alienation critique, which debunks rights as an aspect of "bourgeois individualism" and complains that the rhetoric of rights undermines community by picturing people as separated owners of their respective bundles of rights. Proponents of this critique assert that the concept of "rights" grows out of and feeds our fear of one another, that it fosters alienation instead of autonomy, and that it does not contribute to a society in which we will be able to share life as a common creation.[4]

To the extent that family life and the treatment of women in general has remained "feudal" long after the success of the bourgeois revolutions, individualism can seem progressive. The denial to women of the "bourgeois rights" granted to men does not help to create a society in which we can share good community. To the contrary, it undermines such efforts. For many years women were forced into unequal and oppressive "community" under the control first of their fathers and then of their husbands. Nor is forced community just a problem of the past for women. Men are forcing community upon women when they make sexual advances to subordinates and coworkers or pester women strangers with unwelcomed conversations. A rapist may believe he is seeking community with his victim, especially if she is his wife or social friend. The male members of an organization may be attempting to force community when they object or try to prevent the female members from meeting by themselves.[5] When a woman is still struggling for "a room of her own,"[6] she is unlikely to complain that rights isolate her.

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[4] See generally, Gabel, *The Phenomenology of Rights- Consciousness and the Pact of the Withdrawn Selves*, 62 TX. L. REV. 1563 (1984) (presenting a more complex and less flawed "bourgeois individualism" critique of rights).

[5] See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TX. L. REV. 387, 393; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1516-20 (1983); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

[6] Virginia Woolf used this phrase as a metaphor for autonomy. Woolf suggested that in order to write, a woman must have "a room of her own" – an identity of her own, not merely physical space to herself in V. WOOLF, A ROOM OF ONE'S OWN (1929).

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

At this point, hard-core proponents of the alienation critique of rights analysis may protest. They may object that what I characterize as men's effort to force community upon women is at least a step away from alienated isolation. To the contrary, I would suggest that the expectation of access to women by men is part and parcel of our alienated existence. Capitalism, with its isolation and alienation is tolerable to men in part because they can dominate and oppress women. Thus, rights for women, including "individualistic" and "alienating" rights, may be necessary and should be supported.

It is important, however, to make some clear distinctions. The women's "rights" that we should support are an expression or description of the social practice of allowing women to resist forced community. The alienation critique of rights is mistaken to the extent that it opposes this social practice. The critique may nevertheless be correct to the extent that it accepts the social practice but criticizes a particular understanding of the underlying basis for that social practice. The distinction is important; the social practice that allows women to resist forced community is itself the result of collective political activity. Women may be politically demobilized if they come to think of their "rights" as something that exist separate and apart from the political activity that has established the social practice of allowing women to resist forced community. In this context "rights" simply describes a social practice. Women should have the right to autonomy, but must remember that they can secure the right only through continuous collective political activity.

### C. Women's Rights and the Incoherence Critique

During much of the last century, struggles for women's rights centered on women's exclusion from public and political life. Feminists and their allies challenged laws denying women the vote, barring them from numerous occupations and trades, and all but forcing them to remain in the home – their "separate sphere". These challenges have been largely successful, although as late as 1961, the United States Supreme Court allowed the State of Florida to use predominantly male juries to try cases so that women could stay home with their domestic chores.[7] The Critical Legal Studies critique of rights is largely irrelevant to these early rights claims. No one argues that women's right to vote is incoherent.[8] The feminists worked together to achieve concrete political gains. They used rights claims as exhortation and description, not as analytic tools.

[7] In *Hoyt v. Florida*, 368 U.S. 57 (1961), the United States Supreme Court upheld a state law that put men on juries unless they qualified for an exemption, but exempted women unless they volunteered. The Court explained that "woman is still regarded as the center of home and family life". *Id.*, 62. One effect of the law was to reduce women's representation on juries, which can be particularly important in cases involving rape, wife battery, or pornography. More recent cases have recognized this point implicitly. See, *e.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating jury selection system that excluded women as violative of sixth amendment right to jury trial).

[8] Although a few people might claim that the right to vote is an abstraction that contributes to women's alienation or false consciousness, this does not distinguish it from men's right to vote.

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More recently, however, feminists have sought to use rights as analytic tools. The efforts by feminists in the United States to work out a rational elaboration of equal rights of human beings in order to achieve rights for women has not worked and it will not work. The classic conflicts between equality of opportunity and equality of result, between natural rights and positive rights, and between rights-as-a-guarantee-of-security and rights-as-a-guarantee-of-freedom, render rights analysis incapable of settling any meaningful conflict. The power of the indeterminancy critique can be illustrated by examining the conflicts that have developed among feminists regarding the content of the notion of women's rights, when used as an analytic tool.

*I. The Struggle for Equal Rights*

For years feminists have argued that laws violate women's rights when they draw irrational distinctions between men and women and that the law should treat women just as well as it treats men. This argument has often been successful, and American courts have overturned laws preferring male to female executors of estates, discharging parent's obligation to support daughters at a younger age than sons, and prescribing different legal drinking ages for males and females.[9]

Some feminists have also argued successfully that laws should forbid employers, schools, and other important private actors from discriminating against women. American anti-discrimination laws have been shaped and extended in part by feminist insistence upon the right to formal legal equality.

Feminists complain, however, that the United States Supreme Court does not fully implement equal rights for women. All too often, the Court reinforces an ideology that seeks to justify differential treatment of men and women. Although recent cases reject gross generalizations made in many earlier cases regarding the proper role for women, the Court continues to allow unequal treatment in other cases, particularly those involving pregnancy. In this way the Court appears to be concerned with equality, but allows discrimination to continue by finding "real" differences that prevent women from being similarly situated to men.[10] Thus, the Court perpetuates the inferior status of women while attempting to reconcile women to that status by "holding out the promise of liberation."[11] The Court uses the language of equality to legitimate the continuing unequal treatment of men and women.

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[9] See *Reed v. Reed*, 404 U.S. 71 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976).

[10] See Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

[11] Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW 134 (D. Kairys ed. 1982) (quoting Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978).

Feminist argue that this doctrine wrongly denies women their rights to formal equality; the Court defines the concept of "real sex differences" so broadly that it is meaningless as an analytical concept. Moreover, many decisions based on the doctrine of "real sex differences" confuse the relationship between biological sex differences and cultural arrangements and mistakenly treat a variety of culturally determined differences between men and women as natural and immutable.

For example, the Court upheld a state regulation limiting the work assignments of female prison guards in male prisons on the basis that women might be raped. The Court insisted that it was not being paternalistic but that women were uniquely rapable and such vulnerability created a discipline problem for the prison administration.[12] There is a certain irony in the Court's position insofar as prisons are the one institution that is probably the most closely identified in imagery and reality with the rape of men. It is of course a cultural arrangement, not a natural inevitability, that women are raped more than men are.

Feminists also contend that current equal protection doctrine denies women formal equal rights by upholding rules that are "pseudo-neutral". Nadine Taub, for example, has argued that "rules formulated in a male-dominated society reflect male needs, male concerns, and male experience".[13] An example of such pseudo-neutrality is a state employees' insurance plan that covers all male medical conditions, but excludes pregnancy and other female medical conditions.[14] Some feminists propose replacing these male-oriented pseudo-neutral rules with "truly neutral rules" that will serve "neutral" interests and apply equally to everyone.

*II. The Struggle for Substantive Rights*

A few feminists have recognized that formal equality can perpetuate inequality in actual practice and have begun to search for ways in which women can achieve substantially equality. To achieve a substantive equality of outcome, however, may require more than a rejection of "pseudo- neutrality". It may be necessary for the law to take account of existing differences among people and in the process actually to deny formal legal equality. The effort to bring about substantive equality has produced sharp disagreements among feminists. In some cases there is a conflict between feminists seeking formal equality rights for women and those seeking substantive equality rights. In the United States, feminist legal scholars are divided on this issue. Those advocating juridical equality – "equal treatment" – accuse those in favor of substantive equality of seeking "special treatment"

[12] See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[13] Taub, *Book Review*, 80 COLUM. L. REV. 1686, 1694 (1980)

[14] See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

for women.[15] It is important to understand that these disagreements are part of a debate within rights analysis; they are particular manifestations of the classical liberal debate between equality of opportunity and equality of result.

About ten years ago, Catharine MacKinnon presented a powerful argument in favor of substantive rather than merely formal equality for women. In *Sexual Harassment of Working Women* she proffered an "inequalities" approach to sex discrimination as an alternative to the more conventional approach, which she referred to as the "differences" approach. The "differences" doctrine, the dominant perspective of the United States Supreme Court, focuses on the relationship between a gender-based classification and the state's purpose for making the classification. Here, the issue of sex inequality is the accuracy of the classifications.[16]

The "inequalities" approach, by contrast, explicitly inquires whether a particular classification tends to facilitate and reinforce the subordination of women to men. Under this approach, sex discrimination is wrong not because it is irrational or arbitrary, but because it creates and maintains a sexual hierarchy that systematically disadvantages women. The "inequalities" doctrine criticizes the search for "neutral principles" and recognizes that "the best way to preserve a concretely unequal status quo may be by the rigorous application of a neutral standard".[17] Here, the issue of sex inequality is male dominance; sex equality means an end to it.

*III. The Equal Treatment/Special Treatment Debat*

Nadine Taub interpreted MacKinnon's "inequalities" analysis as an argument in favor of special treatment and presented the classic – though I believe flawed – argument in favor of equal treatment. Taub warned that MacKinnon's "inequalities" analysis was likely to deteriorate into a new form of "detrimental protectionism."[18] To Taub the concept of "neutrality" was crucial. She argued that the use of MacKinnon's "inequalities" analysis, even as a "short-run tool", would be very risky. The male-dominated court system too often will fail to recognize women as disadvantaged. Thus, women's best chance for equality is to advocate "truly neutral" standards applicable to everyone. Any legislation

[15] For a summary of the "equal treatment/special treatment" debate, see Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois* 1869-1895, 84 MICH. L. REV. 1518, 1518-21 (1986).

[16] See C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). MacKinnon's argument could also be interpreted as more than just an argument for substantive equality, but as a complete departure from rights analysis.

[17] C. MacKinnon, *supra*, note 15, 127.

[18] Taub, *supra*, note 12, 1691.

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

that grants special benefits for women provides doctrinal support for imposing special detriments upon them also. As Wendy Williams argues, "[W]e can't have it both ways, [and] we need to think carefully about which way we want to have it."[19]

Feminists on the other side of the debate disagree. They point out that ending the subordination of women is hardly special protection. The idea that conflict should be resolved by a system of neutral rules was itself formulated in a male-dominated society and reflects male needs, male concerns, and male experience. If, as Taub argues, a male-dominated legal system cannot be trusted to apply an "inequalities" approach, what reason is there to believe that it can be trusted to apply the "differences" approach? These feminists further argue that the equal treatment analysis is based on the disempowering concept that the best way for feminists to get what they want is to set up ground rules and then pretend to ignore the results. They contend that this approach is alienated and misguided. They point to the continued oppression of women as evidence of its failure.

Both sides in the debate tend to assume that "equal treatment" is a more coherent and meaningful concept than it really is. Those who claim that feminists cannot have it "both ways" fail to recognize the male supremacy built into the "neutral" rights doctrine. The crucial issue is how "both ways" is defined. One could argue, for example, that antifeminists have long had it "both ways". During the heyday of legal formalism, courts nullified popular legislation for interfering with liberty of contract and threatening property rights,[20] but never hesitated to transfer a woman's property to her husband by fiat and against her will.[21] Courts that understood equality to mean that employers and employees were "equal contracting partners" with a vested right to enter into exploitative contracts never felt forced by logic to treat married women as equal contracting partners – or even as capable of forming a contract. More important than the debate between equal treatment and special treatment is the question of what kind of special treatment women would receive. Rights analysis does not seem to contribute much to this concern.

Another problem with rights as an analytic concept can be seen from examining feminist struggles against the patriarchal family. Laws granted men considerable power over their

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[19] Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. L. REP. 175, 196 (1982).

[20] See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum wage law for women based on liberty to contract of employer and employee); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women and children on same basis); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating law setting maximum hours for bakers based on liberty to contract of employer and employee). But, see *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 400 (1937) (overruling *Adkins*).

[21] At common law, a woman's property was transferred to her husband upon their marriage. This was changed by statutes ("married women's property act"), not by case law. In fact, some courts invalidated reform statutes when they were first passed. See L. Friedman, *supra*, note 3, 184-86 (1973).

wives and all too often left women subject to their husbands' unfettered oppression; women have not been able to count on legal protection in the home. According to some scholars, the courts' refusal to monitor a husband's treatment of his wife carries an ideological message: all the important affairs of life are regulated by law; the domestic sphere is not regulated by the law and is not important.[22] (In fact, of course, laws have regulated domestic life directly and indirectly for centuries. For example, courts have never hesitated to "intrude into the home" to penalize women who rebelled against or killed their husbands).[23]

The long-asserted judicial reluctance to intrude into family finds expression today in the "right to privacy". State regulation of the family raises complex problems similar to those raised by state regulation of other "private" matters, such as sexuality. Here the critique of rights is relevant. The freedom promised by the right to privacy runs up against women's right to security in the home, and rights rhetoric cannot decide the conflict. Any effort to protect women from private oppression by their husbands may expose them to public oppression by the state; any effort to keep the state out of our personal lives will leave us subject to private domination.

The problem with rights analysis in this context is that if one outcome will protect the plaintiff's right to freedom of action, the opposite outcome will often protect the defendant's right to security. If one outcome will protect a woman's right to formal equality of treatment, her right to substantive equality of result may seem to require a different outcome. Law does not provide a rational basis for choosing which right to recognize and protect in any particular case. Rights analysis cannot settle these conflicts, but merely restates them in a new – at most somewhat obscured – form.

The debate between special treatment and equal treatment becomes more interesting when it is expressed in overtly political terms. Proponents of equal treatment argue that any form of special protection can divide women – from one another, as well as from men. For example, provisions for special pregnancy leaves might shift attention away from the general inadequacy of sick-leave policies and focus it on the unfairness of protecting one class of worker and not others.

These concerns raise complicated questions of political strategy. Protective legislation limited to one group might or might not divide people and divert attention, depending on the historical and political context within which the legislation is enacted and enforced.

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[22] See Taub & Schneider, *supra*, note 11, 122-23. The insulation of the women's sphere conveys an important message: "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". *Id.* 123.

[23] See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501-07 (1983).

There is no simple way to determine a priori whether a partial reform that protects one class will advance or retard the general reform effort. The abstract legal concepts that most equal treatment advocates think important do not help us decide whether to support a particular reform. The choice between equal treatment and special is meaningful – if at all – only on a case-by-case basis. The critique of rights analysis is helpful in coming to this recognition.

*IV. Feminist Criticism of Law as Patriarchy*

Some feminists question the value of not only of rights theory, but of law itself in achieving concrete political gains for women. They criticize the fundamental premises underlying liberal thought and challenge the structural framework of conventional legal practice – referred to disparagingly as "liberal legalism".[24] They argue that law is fundamentally patriarchal, that objectivity and neutrality are male norms, and that resolution of conflict through appeal to legal rights is a limited, masculine approach.[25]

These feminists suggest that if women articulate their grievances in terms of equal rights and confine their struggles to litigation and lobbying, they are "giving up the battle" for broader reform, which can occur only "in the context of broader economic, social, and cultural change."[26] Some argue that litigation "cannot lead to social changes, because in upholding and relying on the paradigm of law, the paradigm of patriarchy is upheld and reinforced."[27] To eliminate patriarchy, "the male power paradigm of law [must be] . . . challenged and transformed". These criticisms are very useful, although I do not entirely agree with them. As I argue elsewhere, law is not fundamentally patriarchal, however much some men may try to claim law as their own. Objectivity and neutrality are – on an ideological level – "male norms", but law is not objective or neutral. Liberal legalists cannot make law objective and neutral any more than they can really settle conflicts by appealing to legal rights. Law is a complex social practice and some feminist gains have been and will

[24] See Klare, *Law-Making as Praxis*, TELOS 123, 132 n.28(Summer 1979); see also Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941, 62 MINN. L. REV. 265, 276-77 (1978) (offering a similar definition). For earlier uses of "liberal legalism", see Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOCIETY REVIEW (LAW & SOC'Y REV.) 551- 55 (1977); Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062, 1070-1102 (1974).

[25] See C. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE & SOCIETY 635, 655 (1983); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83 (1980); Polan, *Toward a Theory of Law and Patriarchy*, *in* THE POLITICS OF LAW, 302 (D. Kairys ed. 1982).

[26] Polan, *supra*, note 24, 302.

[27] Rifkin, *supra*, note 24, 88.

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

continue to be achieved in the legal arena. Although these gains are often characterized as achieving rights for women, they result from concrete struggles, not from rights analysis.[28]

### D. The Rights Critique as new Scholastic Orthodoxy

There is another important aspect of the critique of rights analysis that should be mentioned, and that is the growing popularity and institutionalization of the rights critique within Critical Legal Studies. It would not be a great exaggeration to describe the rights critique as a new orthodoxy.

The concept of rights was a radical and liberating idea a couple of hundred years ago. Over time, the notion of rights became stabilized and rights came sometimes to have a deadening effect on thinking. Within legal academia, talk of rights became routinized and the pursuit of rights became sometimes an empty scholastic enterprise.

The rights critique was important when it was inaugurated because it was a radical and liberating idea. The indeterminancy claim that was leveled against rights can and to some extent has become itself stable and deadening. The pursuit of indeterminancy can replace the pursuit of rights as an empty scholastic enterprise. As so often happens, the initial radical potential of the critique becomes lost as the force that was supposed to liberate becomes itself a new source for domination. At that point, it becomes important to subject the critique to a critique. We can look at it as an important dialectic process in which the critique of rights is the antithesis that becomes a thesis and gives rise to the new antithesis of the critique of the critique of rights analysis. Or we can consider it an infinite regression and laugh at the idea of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of the critique of rights analysis. Uncertainty regarding which of these views to take may contribute to the interest that some people take in the rights debate, now, long after others have become bored with it. On the other hand, the uncertainty may contribute to the discomfort that those who claim to be bored really feel about the rights debate, which does indeed continue to be interesting to those who do not feel such discomfort that they need to escape to claimed "boredom". Indeterminancy is everywhere.

But let me end on a skeptical note. We all know that we've had some successes and some failures in movements for social change in both our countries. The Americans at this conference seem to attribute some of our failures to the negative aspects of rights analysis; the Germans seem to attribute some of their successes to the positive aspects of rights. Both assertions are plausible, but frankly neither is very convincing. In both cases

[28] See Olsen, *Feminism, Post-Modernism and Critical Legal Studies*, 5 U.C.L. WORKING PAPERS 29 (1987).

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press

the simple coexistence of rights analysis and failure and of rights consciousness and success – that both exist together makes it possible to believe there is a causal link – but in neither case in the cause and effect relationship shown, nor, do I believe, could it be shown.

https://doi.org/10.1017/S2071832200016849 Published online by Cambridge University Press