

change that would make possible a simple equal chance for the first time. To define the reality of sex as difference and the warrant of equality as sameness is wrong on both counts. Sex, in nature, is not a bipolarity; it is a continuum. In society it is made into a bipolarity. Once this is done, to require that one be the same as those who set the standard – those which one is already socially defined as different from – simply means that sex equality is conceptually designed never to be achieved. Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one's entitlement to be equally treated is measured. Doctrinally speaking, the deepest problems of sex inequality will not find women 'similarly situated'¹⁵³ to men. Far less will practices of sex inequality require that acts be intentionally discriminatory.¹⁵⁴ All that is required is that the *status quo* be maintained. As a strategy for maintaining social power first structure reality unequally, then require that entitlement to alter it be grounded on a lack of distinction in situation; first structure perception so that different equals inferior, then require that discrimination be activated by evil minds who know they are treating equals as less.

I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak. So long as sex equality is limited by sex difference, whether you like it or don't like it, whether you value it or seek to negate it, whether you stake it out as a ground for feminism or occupy it as the terrain of misogyny, women will be born, degraded, and die. We would settle for that equal protection of the laws under which one would be born, live, and die, in a country where protection is not a dirty word and equality is not a special privilege.

SEXUAL DIFFERENCE, THE FEMININE, AND EQUIVALENCY: A CRITIQUE OF MACKINNON'S TOWARD A FEMINIST THEORY OF THE STATE¹⁵⁵

Drucilla Cornell¹⁵⁶

Introduction

Catharine MacKinnon's *Toward a Feminist Theory of the State* is a provocative challenge to both conceptions of liberal jurisprudence and to the traditional Marxist critique of liberalism. Each stands accused of erasing the centrality of gender, sex, and sexuality in the development of a modern legal system. This erasure, MacKinnon believes, can only perpetuate injustice at its base through

153 *Royster Guano Co v Virginia* (1920) 253 US 412 at 415: 'A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Reed v Reed* (1971) 404 US 71 at 76: 'Regardless of their sex, persons within any one of the enumerated classes ... are similarly situated ... By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.'

154 *Washington v Davis* (1976) 426 US 229 and *Personnel Administrator of Massachusetts v Feeney* (1979) 442 US 229 require that intentional discrimination be shown for discrimination to be shown.

155 (1990) 100 *Yale Law Journal* at 2247–75.

156 At the time of writing, Professor of Law, Benjamin Cardozo School of Law, Yeshiva University.

the pretence that equality has already been achieved – as in the case of her version of liberalism reduce it to a category of class domination which makes gender a secondary form of subordination as in the case of her interpretation of Marxism. Before turning to my critique of MacKinnon, I want to pay her the tribute she clearly deserves for her relentless insistence that any theory of equality for women will fall short of its own aspirations if it neglects the question of how sexual identity, and more specifically femininity, is constructed through a gender hierarchy in which women are subordinated and subjected. I share her insistence that we cannot begin to conceptualise a theory of equality that truly envisions the end of female domination without confronting the relationship between sex and sexuality as these have become constitutive of the gender identity imposed upon women by patriarchy. Her contribution has not been merely to criticise existing theories, she has been a proponent of specific doctrinal changes and played a key role, for example, in justifying the recognition of sexual harassment as a matter of sex discrimination and gender inequality.¹⁵⁷ This is one of many examples of how her understanding of the constitutive role of sexuality in the creation and perpetuation of male dominance has led to advocacy for legal and doctrinal reform.

My critique of MacKinnon, however, is that ultimately she does not fully develop her programme, which attempts to justify positive intervention by the State into current social arrangements of gender hierarchy and identity. I will argue that she cannot successfully develop her own feminist theory of the State because she is unable to affirm feminine sexual difference as other than victimisation. Of course, we need a programme that legally delegitimises the gender hierarchy and exposes the seriousness of sexual abuse. But we also need a more expansive, positive programme, for the reduction of feminine sexual difference to victimisation ultimately cannot sustain a feminist theory of the State. I propose a programme which recognises and incorporates equivalent rights.¹⁵⁸ Such a programme would be irreducible to an intermediary set of privileges like affirmative action – as important as these steps may be – and would go beyond addressing inequality in the name of making it possible for women to be more like men.

I do not deny the horror and the reality of the story MacKinnon tells us about the extent to which sexual abuse perpetuated against women gets taken as the way of the world, but I do want to argue against the reduction of woman to the figure of the victim. The result of this reduction is not only that MacKinnon cannot develop a useful programme of reform, but that she cannot account for the very feminist point of view that she argues must be incorporated if we are to reach for a State in which equality between the sexes would be more than mere pretence for the perpetuation of masculine privilege and female subordination.

Equivalent rights, although meant to challenge gender hierarchy, do not do so by erasing sexual difference. Further, equivalent rights should not be understood as only a means to the end of sexual difference. Instead, a programme of equivalent rights seeks to value the specificity of feminine sexual difference. MacKinnon cannot take us beyond a 'negative' programme without the affirmation of the

157 See CA MacKinnon, *Sexual Harassment and the Working Women: A Case of Working Women* (1984); see also *Meritor Savings Bank FSB v Vinson* (1986) 477 US 57 (argued by Catharine MacKinnon).

158 See Drucilla Cornell, 'Sex Discrimination Law and Equivalent Rights' published as *Gender, Sex and Equivalent Rights in Feminists Theorise the Political* (eds J Butler and J Scott, 1991).

feminine difference which is irreducible to the current patriarchal trappings of her own understanding of femininity.

Crucial to my disagreement with MacKinnon is her reading of women's sexuality as constituted only by and for men and, therefore, as contrary to women's freedom from the chains of an imposed femininity, a femininity which constitutes 'our' sex and that can only justify women's domination. Thus, even if I agree with her that rape, battery, sexual abuse, and pornography must be seen not only as questions of criminal law but as barriers to the equality of women where the law has the ideological capacity to reinforce the devaluation of the feminine 'sex', I disagree with her structural analysis of feminine sexual difference and of feminine sexuality. As I already have indicated, it is not simply that MacKinnon's analysis cannot sustain a positive programme for intervention on the part of the State into gender arrangements. MacKinnon's own stance toward the feminine reflects the very 'sexual shame' of women's 'sex' that keeps the feminine from being valued and, more specifically, legally affirmed in a programme of equivalent rights. My criticism of the division she creates between freedom and sexuality assumes a conception of the self as a being of the flesh, in which sexual expression cannot be easily separated from freedom. For women, the concept of freedom cannot be separated from the struggle against the devalorisation of the feminine. Consciousness-raising, essential to fostering the dream of women's freedom, involves more than the exposure of the 'truth' of our victimisation. It demands the refiguration of what has been constituted 'to be' within patriarchy. It also demands that we think through the conditions of women's equality of well-being and capability in light of the recognition and value of feminine sexual differences.

Simply put, I will argue that women's sexuality cannot be reduced to women's 'sex', as sex has been currently defined, once we understand both the limit to institutionalised meaning and the possibility of remetaphorisation which inheres in the rule of metaphor.¹⁵⁹ MacKinnon's understanding of feminine sexuality accepts what Irigaray has called the 'old dream of symmetry'.¹⁶⁰ Irigaray uses the concept of symmetry to explain the masculine fantasy that our sexuality is symmetrical to that of men. In other words, what men fantasise women want is what they want us to want. In fact, women's sexuality is irreducible to the fantasy that we are only 'fuckees'. MacKinnon's reduction of feminine sexuality to being a 'fuckee' endorses this fantasy as 'truth' and thereby promotes the prohibition against the exploration of women's sexuality and 'sex' as we live it and not as men fantasise about it.

Men, defined by MacKinnon as sexual beings, may imagine that what they think women want, what they want women to desire, is what women desire. However, feminine writing on feminine sexuality has recognised the 'old dream of symmetry' as just that: a dream and, more specifically, a masculine dream. I want to emphasise the political and personal significance for women of challenging MacKinnon's view of feminine sexuality. The possibility of celebrating women's 'sex' and sexuality can keep us from the tragic disjuncture between sex, sexuality, and freedom that MacKinnon's analysis leads us to.

159 See Drucilla Cornell, 'Institutionalisation of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation' (1988) 136 *University of Pennsylvania Law Review* 1135.

160 See Luce Irigaray, *Speculum of the Other Women*, pp 11–129, trans G Gill (1985).

In terms of a theory of equality, her critique cannot meet its own aspiration to legitimate and recognise the feminine point of view in law in the name of equality and not by appeal to special privilege. Her analysis cannot achieve this if it denies the equivalent value of the two sexes. Equivalent rights do not repeat the 'separate but equal' argument, but challenge the idea that sexual difference can or should be eradicated through the pretence that the human race is currently constituted as sex-neutral, or as if man is the equivalent of human. The view of equality I rely on to justify my understanding is Amartya Sen's equality of capability and well-being. As Sen reminds us, '[c]apability reflects a person's freedom to choose between different ways of living.'¹⁶¹ Sen's view of equality is valuable to feminists precisely because it allows for a 'positive' programme to guarantee women's equality of well-being and capability. Capability of well-being implies the affirmation of sex and sexuality and in the case of women more specifically, of living without shame of our sex.

The Social Construction of Women's Sexuality

Let me begin with MacKinnon's analysis of the social construction of femininity as an expression of male dominance and, more specifically, of male sexual desire. To MacKinnon: 'Male dominance is sexual. Meaning: men in particular, if not men alone, sexualise hierarchy; gender is one. As much a sexual theory of gender as a gendered theory of sex, this is the theory of sexuality that has grown out of consciousness raising.' Thus, for MacKinnon, inequality is sexual, and sexuality and the engagement in 'sex' perpetuates that inequality. An analysis of inequality that does not focus on inequality as a sexual dynamic in which male domination reduces women to their sex will ultimately 'limit' feminism to correcting sex bias by acting in theory as if male power did not exist in fact. It will 'limit' feminist theory the way sexism limits women's lives: to a response to terms men set. As a result, MacKinnon argues:

A distinctively feminist theory conceptualises social reality, including sexual reality, on its own terms. The question is, what are they? If women have been substantially deprived not only of their own experience but of terms of their own in which to view it, then a feminist theory of sexuality which seeks to understand women's situation in order to change it must first identify and criticise the construct 'sexuality' as a construct that has circumscribed and defined experience as well as theory. This requires capturing it in the world, in its situated social meanings, as it is being constructed in life on a daily basis.¹⁶²

The study of the construct of sexuality is, for MacKinnon, the examination of how women come to have a 'sex'. Women are, very simply put, defined as women because 'we get fucked'.

First sexual intercourse is a commonly definitive experience of gender definition. For many women, it is a rape. It may occur in the family, instigated by a father or older brother who decided to 'make a lady out of my sister'. Women's sex gender initiation may be abrupt and anomic: 'When she was 15 she had an affair with a painter. He fucked her and she became a woman.' Simone de Beauvoir implied a similar point when she said: 'It is at her first abortion that a woman begins to 'know'. What women learn in order to 'have sex', in order to 'become women' – women as gender – comes

161 Amartya Sen, 'Inequality Reexamined: Capability and Well-Being' (unpublished).

162 *Toward a Feminist Theory of the State*, p 129.

through the experience of, and is a condition for, 'having sex' – woman as sexual object for man, the use of women's sexuality by men. Indeed, to the extent sexuality is social, women's sexuality is its use, just as femaleness is its alterity.¹⁶³

Femininity is the sex imposed on us by a world of male power in which men seek the fulfilment of their desire through us. Feminine gender identity is this imposed sexuality, reinforced in all gendered social arrangements and through the State, which reflects male sexual desire and legitimates sexual dominance as the rule of law. The challenge then to femininity as imposed sexuality as the subjection of our 'selves' to our 'sex,' is feminism, and ultimately this forms the basis of the feminist theory of the State.

In feminist terms, the fact that male power has power means that the interests of male sexuality construct what sexuality as such means, including the standard way it is allowed and recognised to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones. Existing theories, until they grasp this, will not only misattribute what they call female sexuality to women as such, as if it were not imposed on women daily; they will also participate in enforcing hegemony of the social construct 'desire', hence its product sexuality, hence its construct 'woman', on the world.

The gender issue, in this analysis, becomes the issue of what is taken to be 'sexuality'; what sex means and what is meant by sex, when, how, with whom, and with what consequences to whom.¹⁶⁴

'Sex' difference is the consequence of this imposed sexuality. To celebrate women's difference is a form of 'false consciousness,' because women's so-called difference is only women's lives as 'fuckees,' and the affirmation of difference is only an excuse for reducing women to those who 'get fucked' in whatever way men want to do it to us. This reduction of women to 'fuckees' is what MacKinnon means when she argues that our social reality is fundamentally pornographic.

We can now begin to understand why, according to MacKinnon, pornography is absolutely central to the way in which the State enforces the male viewpoint and particularly the male vision of woman as sexual object. The representation of having men forced down women's throats is not just men's masturbatory fantasy but the truth of women's reality. '*Deep Throat*', in other words, gives us a depiction of what we are forced to become under our current system of gender domination. This is why MacKinnon can say in all seriousness that we are all Linda Lovelace, with oral sex being the essence of women's subordination.

Yet this reality of subordination is not only ignored by the State, it is protected as a matter of right – the right of free speech under the First Amendment. Pornography, for MacKinnon, is not a matter of speech at all, but a matter of the systematic silencing of women. The image of men being shoved down women's throats is the very symbol of shutting us up.

Thus the question Freud never asked is the question that defines sexuality in a feminist perspective: what do men want? Pornography provides an answer. Pornography permits men to have whatever they want sexually. It is their 'truth about sex'. It connects the centrality of visual objectification to both

163 *Toward a Feminist Theory of the State*, p 111.

164 See CA MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987), pp 127, 129.

male sexual arousal and male models of knowledge and verification, objectivity with objectification. It shows how men see the world, how in seeing it they access and possess it, and how this is an act of dominance over it. It shows what men want and gives it to them. From the testimony of the pornography, what men want is: women bound, women battered, women tortured, women humiliated women degraded and defiled, women killed. Or, to be fair to the soft core, women sexually accessible, haveable, there for them, wanting to be taken and used, with perhaps just a little light bondage. Each violation of women – rape, battery, prostitution, child sexual abuse, sexual harassment – is male sexuality, made sexy, fun, and liberating of women's true nature in the pornography.¹⁶⁵

That pornography is seen as the 'right to speak' is another sign of the way in which the State and the law simply reflect the male point of view and the right of men to subordinate women to their sexual desires. As MacKinnon explains:

The State is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal State coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms, forms, relation to society, and substantive policies. The State's formal norms recapitulate the male point of view on the level of design.

The feminist point of view, on the other hand, is impossible, because, according to MacKinnon, the male 'point of view' enforces itself as true and as the totality of a pornographic social reality. As MacKinnon tells us:

Feminism criticises this male totality without an account of women's capacity to do so or to imagine or realise a more whole truth. Feminism affirms women's point of view, in large part, by revealing, criticising, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which a struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.

For MacKinnon, the impossibility of a woman's point of view is constantly reinforced by the State, which reflects the male point of view as the rule of law and which erases what it has done in the name of neutrality. The rule of law is then transformed into ideology, further enforcing the male viewpoint not just as perspective but as the definitive interpretation of the Constitution.

Conclusion

If MacKinnon ultimately repudiates the feminine, she perpetuates rather than challenges the gender hierarchy which lies at the base of women's inequality. If the feminist point of view is to be incorporated into the State, we must have an account of its possibility. I have argued that such an account is possible once we correctly understand the role of deconstruction and, beyond this, the place of remetaphorisation and refiguration of the feminine in reinventing and thus affirming, sexual difference. This affirmation allows us to identify the wrongs to women within a context of sexual shame imposed upon women by gender hierarchy. It also allows us to challenge the idea that the human species is only one genre and therefore that the 'rights of man' give us a full conception of rights. To argue for equivalence is not to advocate special privilege once we value sexual difference as necessary for women's equality of capability and well-

165 *Toward a Feminist Theory of the State*, p 138.

being, and recognise sexuality itself as necessary for a creature of the flesh to enjoy a full life.

JURISPRUDENCE AND GENDER¹⁶⁶

Robin West¹⁶⁷

Introduction

What is a human being? Legal theorists must, perforce, answer this question: Jurisprudence, after all, is about human beings. The task has not proven to be divisive. In fact, virtually all modern American legal theorists, like most modern moral and political philosophers, either explicitly or implicitly embrace what I will call the 'separation thesis' about what it means to be a human being: A 'human being,' whatever else he is, is physically separate from all other human beings. I am one human being and you are another, and that distinction between you and me is central to the meaning of the phrase human being. Individuals are, in the words of one commentator, 'distinct and not essentially connected with one another'.¹⁶⁸ We are each physically 'boundaried' – this is the trivially true meaning of the claim that we are all individuals. In Robert Nozick's telling phrase, 'the 'root idea' of any acceptable moral or political philosophy is that 'there are individuals with separate lives'.¹⁶⁹ Although Nozick goes on to derive from this insight an argument for the minimal state, the separation thesis is hardly confined to the libertarian right. According to Roberto Unger, premiere spokesperson for the communitarian left, 'to be conscious is to have the experience of being cut off from that about which one reflects: it is to be a subject that stands over against its objects ... The subjective awareness of separation ... defines consciousness'.¹⁷⁰ The political philosopher Michael Sandel has recently argued that most (not all) modern political theory is committed to the proposition that 'what separates us is in some important sense prior to what connects us – epistemologically prior as well as morally prior. We are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity'.¹⁷¹ The same commitment underlies virtually all of our legal theory. Indeed, Sandel's formulation may be taken as a definitive restatement of the 'separation thesis' that underlies modern jurisprudence.

The first purpose of this essay is to put forward the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory – by which I mean 'liberal legalism' and 'critical legal theory' collectively – is essentially and irretrievably masculine. My use of 'I' above was inauthentic, just as the modern, increasing use of the female pronoun in liberal and critical legal theory, although well intended is empirically and experientially false. For the cluster of claims that jointly constitute the 'separation thesis' – the claim that human beings are, definitionally, distinct from one another, the claim that the referent of 'I' is singular and unambiguous, the claim that the word individual

166 (1988) 55 *University of Chicago Law Review*, 1. (Article abridged and footnotes edited.)

167 Professor of Law, University of Maryland.

168 Naomi Scheman, 'Individualism and the Objects of Psychology', in Sandra Harding and Merrill B Hintikka (eds) *Discovering Reality* (1983).

169 R Nozick, *Anarchy, State and Utopia* (1974), p 33.

170 RM Unger, *Knowledge About Politics* (1975), p 200.

171 M Sandel, *Liberalism and the Limits of Justice* (1982).

has an uncontested biological meaning, namely, that we are each physically individuated from every other, the claim that we are individuals 'first,' and the claim that what separates us is epistemologically and morally prior to what connects us – while 'trivially true' of men, are patently untrue of women ...

Masculine Jurisprudence and Feminist Theory

The by now very well publicised split in masculine jurisprudence between legal liberalism and critical legal theory¹⁷² can be described in any number of ways. The now standard way to describe the split is in terms of politics: 'liberal legal theorists' align themselves with a liberal political philosophy which entails, among other things, allegiance to the Rule of Law and to Rule of Law virtues, while 'critical legal theorists,' typically left wing and radical, are sceptical of the Rule of Law and the split between law and politics which the Rule of Law purportedly delineates. Critical legal theorists are potentially far more sensitive to the political underpinnings of purportedly neutral legalistic constructs than are liberal legalists. I think this traditional characterisation is wrong for a number of reasons: liberal theorists are not necessarily politically naive, and critical theorists are not necessarily radical. However, my purpose is not to critique it. Instead, I want to suggest another way to understand the divisions in modern legal theory.

An alternative description of the difference (surely not the only one) is that liberal legal theory and critical legal theory provide two radically divergent phenomenological descriptions of the paradigmatically male experience of the inevitability of separation of the self from the rest of the species, and indeed from the rest of the natural world. Both schools, as we shall see, accept the separation thesis; they both view human beings as materially (or physically) separate from each other, and both view this fact as fundamental to the origin of law. But their accounts of the subjective experience of physical separation from the other – an individual other, the natural world, and society – are in nearly diametrical opposition. Liberal legalists, in short, describe an inner life enlivened by freedom and autonomy from the separate other and threatened by the danger of annihilation by him. Critical legal theorists, by contrast, tell a story of inner lives dominated by feelings of alienation and isolation from the separate other and enlivened by the possibility of association and community with him. These differing accounts of the subjective experience of being separate from others, I believe, are at the root of at least some of the divisions between critical and liberal legal theorists. I want to review each of these experiential descriptions of separation in some detail, for I will ultimately argue that they are not as contradictory as they first appear. Each story, I will suggest, constitutes a legitimate and true part of the total subjective experience of masculinity.

I will start with the liberal description of separation, because it is the most familiar and surely the most dominant. According to liberal legalism, the inevitability of the individual's material separation from the 'other' entails, first and foremost, an existential state of highly desirable and much valued freedom: Because the individual is separate from the other, he is free of the other. Because I am separate from you, my ends, my life, my path, my goals are necessarily my own. Because I am separate, I am 'autonomous.' Because I am separate, I am existentially free (whether or not I am politically free). And, of course, this is true not just of me, but of everyone: It is the universal human condition. We are each

172 On which see Chapter 8.

separate and we are all separate, so we are each free and we are all free. We are, that is, equally free.

This existential condition of freedom in turn entails the liberal's conception of value. Because we are all free and we are each equally free, we should be treated by our government as free and as equally free. The individual must be treated by his government and by others in a way that respects his equality and his freedom. The government must honour at the level of politics the existential claim made above: that my ends are my ends; that I cannot be forced to embrace your ends as my own. Our separation entails our freedom which in turn entails our right to establish and pursue our own concept of value, independent of the concept of value pursued or favoured by others. Ronald Dworkin puts the point in this way:

What does it mean for the government to treat its citizens as equals? That is ... the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity ... [To accord with this demand, a government must] be neutral on what might be called the question of the good life ... [P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.¹⁷³

Because of the dominance of liberalism in this culture, we might think of autonomy as the 'official' liberal value entailed by the physical, material condition of inevitable separation from the other: separation from the other entails my freedom from him, and that in turn entails my political right to autonomy. I can form my own conception of the good life and pursue it. Indeed, any conception of the good which I form, will necessarily be my conception of the good life. That freedom must be respected. Because I am free, I value and have a right to autonomy. You must value it as well. The state must protect it. This in turn implies other (more contested) values, the most important of which is (or may be) equality. Dworkin continues:

I now define a liberal as someone who holds ... [a] liberal ... theory of what equality requires. Suppose that a liberal is asked to found a new state. He is required to dictate its constitution and fundamental institutions. He must propose a general theory of political distribution ... He will arrive initially at something like this principal of rough equality: resources and opportunities should be distributed, so far as possible, equally, so that roughly the same share of whatever is available is devoted to satisfying the ambitions of each. Any other general aim of distribution will assume either that the fate of some people should be of greater concern than that of others, or that the ambitions or talents of some are more worthy, and should be supported more generously on that account.¹⁷⁴

Autonomy, freedom, and equality collectively constitute what might be called the 'up side' of the subjective experience of separation. Autonomy and freedom are both entailed by the separation thesis, and autonomy and freedom both feel very good. However, there's a 'down side' to the subjective experience of

173 R Dworkin, *A Matter of Principle* (1985), p 191.

174 *Ibid*, pp 192–93.

separation as well. Physical separation from the other entails not just my freedom; it also entails my vulnerability. Every other discrete, separate individual – because he is the ‘other’ – is a source of danger to me and a threat to my autonomy. I have reason to fear you solely by virtue of the fact that I am me and you are you. You are not me, so by definition my ends are not your ends. Our ends might conflict. You might try to frustrate my pursuit of my ends. In an extreme case, you might even try to kill me – you might cause my annihilation.

Annihilation by the other, we might say, is the official harm of liberal theory, just as autonomy is its official value. Hobbes, of course, gave the classic statement of the terrifying vulnerability that stems from our separateness from the other:

there bee found one man sometimes manifestly stronger in body, or of quicker mind then [sic] another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself ... From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which neverthelesse they cannot both enjoy, they become enemies; and in the way to their End (which is principally their owne conservation ...) endeavour to destroy, or subdue one an other. And from hence it comes to passe, that where an Invader hath no more to feare, than another mans single power; if one plant, sow, build, or possesse a convenient Seat, others may probably be expected to come prepared with forces united, to dispossesse, and deprive him, not only of the fruit of his labour, but also of his life, or liberty. And the Invader again is in the like danger of another.¹⁷⁵

Thus, according to liberal legalism, the subjective experience of physical separation from the other determines both what we value (autonomy) and what we fear (annihilation). We value and seek societal protection of our autonomy: The liberal insists on my right to define and pursue my own life, my own path, my own identity, and my own conception of the good life free of interference from others. Because I am me and you are you, I value what I value, and you value what you value. The only value we truly share, then, is our joint investment in autonomy from each other: We both value our right to pursue our lives relatively free of outside control. We can jointly insist that our government grant us this protection. We also share the same fears. I fear the possibility – indeed the likelihood – that our ends will conflict, and you will frustrate my ends and in an extreme case cause my annihilation, and you fear the same thing about me. I want the right and the power to pursue my own chosen ends free of the fear that the you will try to prevent me from doing so. You, of course, want the same.

We can call this liberal legalist phenomenological narrative the ‘official story’ of the subjectivity of separation. According to the official story, we value the freedom that our separateness entails, while we seek to minimise the threat that it poses. We do so, of course, through creating and then respecting the state. Whether or not Robert Nozick is right that the minimal state achieves the liberal’s ideal, he has nevertheless stated that liberal ideal well in the following passage:

175 Thomas Hobbes, *Leviathan* (1651) CB Macpherson ed (1968), pp 183–84.

The minimal state treats us as inviolate individuals; it treats us as persons having individual rights with the dignity this constitutes. [This treatment] allows us, individually or with whom we choose, to choose our life and to realise our ends and our conception of ourselves, insofar as we can, aided by the voluntary co-operation of other individuals possessing the same dignity. How dare any state or group of individuals do more. Or less [There is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of the others, uses him and benefits others. Nothing more.¹⁷⁶

Now, critical legal theory diverges from liberal legalism on many points, but one striking contrast is this: critical theorists provide a starkly divergent phenomenological description of the subjective experience of separation. According to our critical legal theorists, the separate individual is indeed, in Sandel's phrase, 'epistemologically prior to the collective'. Like liberal legalists, critical legal theorists also view the individual as materially separate from the rest of human life. But according to the critical theorist, what that material state of separation existentially entails is not a perpetual celebration of autonomy but, rather, a perpetual longing for community, or attachment, or unification, or connection. The separate individual strives to connect with the 'other' from whom he is separate. The separate individual lives in a state of perpetual dread not of annihilation by the other, but of the alienation, loneliness, and existential isolation that his material separation from the other imposes upon him. The individual strives through love, work, and government to achieve a unification with the other, the natural world, and the society from which he was originally and continues to be existentially separated. The separate individual seeks community – not autonomy – and dreads isolation and alienation from the other – not annihilation by him. If we think of liberalism's depiction of the subjectivity of separation as the official story, then, we might think of this alternative description of the subjectivity of separation as the unofficial story. It is the subterranean, unofficial story of the unrecognised and – at least by liberals – slightly detested subjective craving of lost individuals.

Thus, there is a vast gap, according to critical theory, between the 'official value' of liberal legalism – autonomy – and what the individual truly subjectively desires, which is to establish a true connection with the other. Similarly, there is a vast gap between the 'official harm' of liberal legalism – annihilation by the other – and what the individual truly subjectively dreads, which is not annihilation by him, but isolation and alienation from him. According to the critical theorist, while the dominant liberal culture insists we value autonomy and fear the other, what the individual truly desires, craves, and longs to establish is some sort of connection with the other, and what the individual truly dreads is alienation from him.¹⁷⁷

Indeed, the individual longs to re-establish connection with the other in spite of the very real possibility (acknowledged by most if not all critical theorists) that that other might, at any moment, frustrate his ends, threaten his autonomy, or annihilate him. But this longing for community survives in the face of an even more powerful source of resistance. The longing for attachment to the other

176 R Nozick, *Anarchy, State and Utopia*, *op cit*, pp 333–34; 32–33.

177 R Unger, *Knowledge and Politics* (1975), p 201.