

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.

persists in spite of the dominant liberal culture's adamant denial of the desire's existence.¹⁷⁸

In another sense, though, the longing for connection persists not so much 'in spite of the dominant culture's valuation of autonomy but because of that value. The value we place on autonomy, according to some critical legal theorists, aggravates our alienation, isolation and loneliness.¹⁷⁹

The longing for connection with the other, and the dread of alienation from him, according to the critical theorists, is in a state of constant 'contradiction' with the official value and official harm that flow from separation – autonomy from the other and annihilation by him. Nevertheless, in spite of that tension, both the dread of alienation and the desire for connection are constantly there. The dominant culture insists we value autonomy from the other and fear annihilation by him, but subjectively, the individual lives with a more or less unrealised desire to connect with the other, and a constant dread or fear, of becoming permanently alienated, isolated – lost – from the other.

To summarise: According to liberal legalism, each of us is physically separate from every other, and because of that separation, we value our autonomy from the other and fear our annihilation by him. I have called these our officially recognised values and harms. Critical legal theory tells the unofficial story. According to critical legal theory, we are indeed physically separate from the other, but what that existentially entails is that we dread the alienation and isolation from the separate other and long for connection with him. While liberal culture officially and publicly claims that we love our autonomy and fear the other, subjective life belies this claim. Subjectively and in spite of the dominant culture's insistence to the contrary, we long to establish some sort of human connection with the other in order to overcome the pain of isolation and alienation which our separateness engenders.

Let me now turn to feminist theory. Although the legal academy is for the most part unaware of it, modern feminist theory is as fundamentally divided as legal theory. One way to characterise the conflict – the increasingly standard way to characterise the conflict – is that while most modern feminists agree that women are different from men and agree on the importance of the difference, feminists differ over which differences between men and women are most vital. According to one group of feminists, sometimes called cultural feminists, the important difference between men and women is that women raise children and men don't. According to a second group of feminists, now called radical feminists, the important difference between men and women is that women get fucked and men fuck: 'Women,' definitionally, are 'those from whom sex is taken,' just as workers, definitionally, are those from whom labour is taken. Another way to put the difference is in political terms. Cultural feminists appear somewhat more 'moderate' when compared with the traditional culture: From a mainstream nonfeminist perspective, cultural feminists appear to celebrate many of the same feminine traits that the traditional culture has stereotypically celebrated. Radical feminists, again from a mainstream perspective, appear more separatist and, in contrast with standard political debate, more alarming. They also appear to be more 'political' in a sense which perfectly parallels the critical theory – liberal

178 Peter Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62 *Texas L Rev* 1563, 1566–67.

179 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard L Rev* 1685, 1774.

theory split described above: Radical feminists appear to be more attuned to power disparities between men and women than are cultural feminists.

I think this traditional characterisation is wrong on two counts. First, cultural feminists no less than radical feminists are well aware of women's powerlessness *vis-à-vis* men, and second, radical feminism, as I will later argue, is as centrally concerned with pregnancy as it is with intercourse. But again, instead of arguing against this traditional characterisation of the divide between radical and cultural feminism, I want to provide an alternative. My alternative characterisation structurally (although not substantively) parallels the characterisation of the difference between liberal and critical legalism. Underlying both radical and cultural feminism is a conception of women's existential state that is grounded in women's potential for physical, material connection to human life, just as underlying both liberal and critical legalism is a conception of men's existential state that is grounded in the inevitability of men's physical separation from the species. I will call the shared conception of women's existential lives the connection thesis. The divisions between radical and cultural feminism stem from divergent accounts of the subjectivity of the potential for connection, just as what divides liberal from critical legal theory are divergent accounts of the subjectivity of the inevitability of separation.

The connection thesis is simply this: Women are actually or potentially materially connected to other human life. Men aren't. This material fact has existential consequences. While it may be true for men that the individual is 'epistemologically and morally prior to the collectivity,' it is not true for women. The potential for material connection with the other defines women's subjective, phenomenological, and existential state, just as surely as the inevitability of material separation from the other defines men's existential state. Our potential for material connection engenders pleasures and pains, values and dangers, and attractions and fears, which are entirely different from those which follow, for men, from the necessity of separation. Indeed, it is the rediscovery of the multitude of implications from this material difference between men and women which has enlivened (and divided) both cultural and radical feminism in this decade (and it is those discoveries which have distinguished both radical and cultural feminism from liberal feminism). As Carol Gilligan notes, this development is somewhat paradoxical: During the same decade that liberal feminist political activists and lawyers pressed for equal (meaning same) treatment by the law, feminist theorists in nonlegal disciplines rediscovered women's differences from men.¹⁸⁰ Thus, what unifies radical and cultural feminist theory (and what distinguishes both from liberal feminism) is the discovery, or rediscovery, of the importance of women's fundamental material difference from men. As we shall see, neither radical feminists nor cultural feminists are entirely explicit in their embrace of the connection thesis. But both groups, implicitly if not explicitly, adhere to some version of it.

If both cultural and radical feminists hold some version of the connection thesis, then one way of understanding the issues that divide radical and cultural feminists, different from the standard account given above, is that while radical and cultural feminists agree that women's lives are distinctive in their potential for material connection to others, they provide sharply contrasting accounts of the subjective experience of the material and existential state of connection. According to cultural feminist accounts of women's subjectivity, women value

180 Carol Gilligan, *In a Different Voice* (1982), pp 6–8.

intimacy, develop a capacity for nurturance, and an ethic of care for the 'other' with which we are connected, just as we learn to dread and fear separation from the other. Radical feminists tell a very different story. According to radical feminism, women's connection with the 'other' is above all else invasive and intrusive: Women's potential for material 'connection' invites invasion into the physical integrity of our bodies, and intrusion into the existential integrity of our lives. Although women may 'officially' value the intimacy of connection, we 'unofficially' dread the intrusion it inevitably entails and long for the individuation and independence that deliverance from that state of connection would permit. Paralleling the structure above, I will call these two descriptions feminism's official and unofficial stories of women's subjective experience of physical connection ...

... We might summarise cultural feminism in this way: Women's potential for a material connection to life entails (either directly, as I have argued, or indirectly, through the reproduction of mothering) an experiential and psychological sense of connection with other human life, which in turn entails both women's concept of value, and women's concept of harm. Women's concept of value revolves not around the axis of autonomy, individuality, justice, and rights, as does men's but, instead, around the axis of intimacy, nurturance, community, responsibility, and care. For women, the creation of value and the living of a good life therefore depend upon relational, contextual, nurturant, and affective responses to the needs of those who are dependent and weak, while for men the creation of value and the living of the good life depend upon the ability to respect the rights of independent coequals, and the deductive, cognitive ability to infer from those rights rules for safe living. Women's concept of harm revolves not around a fear of annihilation by the other but around a fear of separation and isolation from the human community on which she depends and which is dependent upon her. If, as I have suggested, cultural feminism is our dominant feminist dogma, then this account of the nature of women's lives constitutes the official text of feminism, just as liberal legalism constitutes the official text of legalism.

These two official stories sharply contrast. Whereas according to liberal legalism, men value autonomy from the other and fear annihilation by him, women, according to cultural feminism, value intimacy with the other and fear separation from her. Women's sense of connection with others determines our special competencies and special vulnerabilities, just as men's sense of separation from others determines theirs. Women value and have a special competency for intimacy, nurturance, and relational thinking and a special vulnerability to and fear of isolation, separation from the other, and abandonment, just as men value and have a special competency for autonomy and a special vulnerability to and fear of annihilation.

Against the cultural feminist backdrop, the story that radical feminists tell of women's invaded, violated lives is 'subterranean' in the same sense that against the backdrop of liberal legalism, the story critical legal theorists tell of men's alienation and isolation from others is subterranean. According to radical feminism, women's connection to others is the source of women's misery, not a source of value worth celebrating. For cultural feminists, women's connectedness to the other (whether material or cultural) is the source, the heart, the root, and the cause of women's different morality, different voice, different 'ways of knowing,' different genius, different capacity for care, and different ability to nurture. For radical feminists, that same potential for connection – experienced materially in intercourse and pregnancy but experienced existentially in all spheres of life is the source of women's debasement, powerlessness, subjugation,

and misery. It is the cause of our pain and the reason for our stunted lives. Invasion and intrusion, rather than intimacy, nurturance, and care, is the 'unofficial' story of women's subjective experience of connection.

Thus, modern radical feminism is unified among other things by its insistence on the invasive, oppressive, destructive implications of women's material and existential connection to the other. So defined, radical feminism (of modern times) begins not with the 1980s critique of heterosexuality but, rather, in the late 1960s with Shulamith Firestone's angry and eloquent denunciation of the oppressive consequences for women of the physical condition of pregnancy. Firestone's assessment of the importance and distinctiveness of women's reproductive role parallels Marilyn French's.¹⁸¹ Both women view women's physical connection with nature and with the other as in some sense the 'cause' of patriarchy. But their analyses of the chain of causation sharply contrast. For French, women's reproductive role – the paradigmatic experience of physical connection to nature, to life, and to the other and thus the core of women's moral difference – is also the cause of patriarchy, primarily because of men's fear of and contempt for nature. Firestone has a radically different view. Pregnancy is indeed the paradigmatic experience of physical connection, and it is indeed the core of women's difference, but according to Firestone, it is for that reason alone the cause of women's oppression. Male contempt has nothing (at first) to do with it. Pregnancy itself, independent of male contempt, is invasive, dangerous and oppressive; it is an assault on the physical integrity and privacy of the body. For Firestone, the strategic implication of this is both clear and clearly material. The technological separation of reproduction from the female body is the necessary condition for women's liberation.¹⁸²

In a moment, I will turn to heterosexual intercourse, for it is intercourse, rather than pregnancy, which consumes the attention of the modern radical feminism of our decade. But before doing so it's worth recognising that the original radical feminist case for reproductive freedom did not turn on rights of 'privacy' (either of the doctor-patient relationship, or of the marriage, or of the family), or rights to 'equal protection,' or rights to be free of 'discrimination.' It did not turn on rights at all. Rather, the original feminist argument for reproductive freedom turned on the definitive radical feminist insight that pregnancy – the invasion of the body by the other to which women are distinctively vulnerable – is an injury and ought to be treated as such. Pregnancy connects us with life, as the cultural feminist insists, but that connection is not something to celebrate; it is that very connection that hurts us. This argument, as I will argue later, is radically incommensurate with liberal legal ideology. There's no legal category that fits it. But it is nevertheless the radical argument – that pregnancy is a dangerous, psychically consuming, existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming, intrusive, invasive assault on the mother's self-identity – that best captures women's own sense of the injury and danger of pregnancy, whether or not it captures the law's sense of what an unwanted pregnancy involves or why women should have the right to terminate it.

The radical feminist argument for reproductive freedom appears in legal argument only inadvertently or surreptitiously, but it does on occasion appear. It appeared most recently in the phenomenological descriptions of unwanted

181 M French, *Beyond Power* (1985).

182 Shulamith Firestone, *The Dialectic of Sex* (1970).

pregnancies collated in the *Thornburgh amicus brief* recently filed by the National Abortion Rights Action League (NARAL). The descriptions of pregnancy collated in that peculiarly nonlegal legal document are filled with metaphors of invasion – metaphors, of course, because we lack the vocabulary to name these harms precisely. Those descriptions contrast sharply with the ‘joy’ that cultural feminists celebrate in pregnancy, childbirth, and child raising. The invasion of the self by the other emerges as a source of oppression, not a source of moral value.

‘During my pregnancy,’ one woman explains, ‘I was treated like a baby machine – an incubator without feelings. ‘Then I got pregnant again’, another woman writes:

This one would be only 13 months younger than the third child. I was faced with the unpleasant fact that I could not stop the babies from coming no matter what I did

Almost exactly a decade ago,’ writes another, ‘I learned I was pregnant I was sick in my heart and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong.’

One woman speaks directly, without metaphor: ‘On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. I had a future again. I had my body back.’

According to these women’s self-descriptions, when the unwanted baby arrives, the injury is again one of invasion, intrusion, and limitation. The harm of an unwanted pregnancy is that the baby will elicit a surrender (not an end) of the mother’s life. The fear of unwanted pregnancy is that one will lose control of one’s individuated being (not that one will die). Thus, one woman writes, ‘I was like any other woman who had an unintended pregnancy, I was terrified and felt as though my life was out of my control.’

This danger, and the fear of it, is gender specific. It is a fear which grips women, distinctively, and it is a fear about which men, apparently, know practically nothing. Another woman writes:

I was furiously angry, dismayed, dismal, by turns. I could not justify an abortion on economic grounds, on grounds of insufficient competence or on any other of a multitude of what might be perceived as ‘legitimate’ reasons. But I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden, and additional ‘fatherly’ chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before.

Conversely, women who had abortions felt able to form their own destiny. One woman wrote: ‘Personally legal abortion allowed me the choice as a teenager living on a very poor Indian Reservation to finish growing up and make something of my life.’ And another:

I was not glad that I was faced with an unwanted, unplanned pregnancy, however I am glad that I made the decision to have an abortion. The experience was a very positive one for me. It helped me learn that I am a person and I can make independent decisions. Had I not had the abortion I would have probably ended up a single mother struggling for survival and dealing with a child that I was not ready for.

As noted above, radical feminism of the 1980s has focused more on intercourse than on pregnancy. But this may represent less of a divergence than it first appears. From the point of view of the connection thesis, what the radical feminists of the 1980s find objectionable, invasive, and oppressive about heterosexual intercourse, is precisely what the radical feminists of the 1960s found objectionable, invasive, and oppressive about pregnancy and motherhood. According to the 1980s radical critique, intercourse, like pregnancy, blurs the physical boundary between self and other, and that blurring of boundaries between self and other constitutes a profound invasion of the self's physical integrity. That invasion – the 'dissolving of boundaries' – is something to condemn, not celebrate. Andrea Dworkin explains:

A human being has a body that is inviolate; and when it is violated, it is abused. A woman has a body that is penetrated in intercourse: permeable, its corporeal solidness a lie. The discourse of male truth – literature, science, philosophy, pornography – calls that penetration violation. This it does with some consistency and some confidence. Violation is a synonym for intercourse. At the same time, the penetration is taken to be a use, not an abuse; a normal use; it is appropriate to enter her, to push into ('violate') the boundaries of her body. She is human, of course, but by a standard that does not include physical privacy. She is, in fact, human by a standard that precludes physical privacy, since to keep a man out altogether and for a lifetime is deviant in the extreme, a psychopathology, a repudiation of the way in which she is expected to manifest her humanity.¹⁸³

Although Dworkin herself does not draw the parallel, for both Dworkin and Firestone, women's potential for material connection with the other – whether through intercourse or pregnancy – constitutes an invasion upon our physical bodies, an intrusion upon our lives, and consequently an assault upon our existential freedom, whether or not it is also the root of our moral distinctiveness (the claim cultural feminism makes on behalf of pregnancy) or the hope of our liberation (the claim sexual liberationists make on behalf of sex). Both intercourse and pregnancy are literal, physical, material invasions and occupations of the body. The foetus, like the penis, literally occupies my body. In their extremes, of course, both unwanted heterosexual intercourse and unwanted pregnancy can be life threatening experiences of physical invasion. An unwanted foetus, no less than an unwanted penis, invades my body, violates my physical boundaries, occupies my body, and can potentially destroy my sense of self. Although the culture does not recognise them as such, the physical and existential invasions occasioned by unwanted pregnancy and intercourse are real harms. They are events we should fear. They are events which any sane person should protect herself against. What unifies the radical feminism of the 1960s and 1980s is the argument that women's potential for material, physical connection with the other constitutes an invasion which is a very real harm causing very real damage and which society ought to recognise as such.

The material, sporadic violation of a woman's body occasioned by pregnancy and intercourse implies an existential and pervasive violation of her privacy, integrity, and life projects. According to radical feminists, women's longings for individuation, physical privacy, and independence go well beyond the desire to avoid the dangers of rape or unwanted pregnancy. Women also long for

183 Andrea Dworkin, *Intercourse*, pp 141–42.

liberation from the oppression of intimacy (and its attendant values) which both cultural feminism and most women officially, and wrongly, overvalue. Intimacy, in short, is intrusive, even when it isn't life threatening (perhaps especially when it isn't life threatening). An unwanted pregnancy is disastrous, but even a wanted pregnancy and motherhood are intrusive. The child intrudes, just as the foetus invades.

Similarly, while unwanted heterosexual intercourse is disastrous, even wanted heterosexual intercourse is intrusive. The penis occupies the body and 'divides the woman' internally, to use Andrea Dworkin's language, in consensual intercourse no less than in rape. It pre-empts, challenges, negates, and renders impossible the maintenance of physical integrity and the formation of a unified self. The deepest unofficial story of radical feminism may be that intimacy – the official value of cultural feminism – is itself oppressive. Women secretly, unofficially, and surreptitiously long for the very individuation that cultural feminism insists women fear: the freedom, the independence, the individuality, the sense of wholeness, the confidence, the self-esteem, and the security of identity which can only come from a life, a history, a path, a voice, a sexuality, a womb, and a body of one's own. Dworkin explains:

In the experience of intercourse, she loses the capacity for integrity because her body – the basis of privacy and freedom in the material world for all human beings – is entered and occupied; the boundaries of her physical body are – neutrally speaking – violated. What is taken from her in that act is not recoverable, and she spends her life – wanting, after all to have something – pretending that pleasure is in being reduced through intercourse to insignificance ... She learns to eroticise powerlessness and self-annihilation. The very boundaries of her own body become meaningless to her, and even worse, useless to her. The transgression of those boundaries comes to signify a sexually charged degradation into which she throws herself, having been told, convinced, that identity, for a female, is there – somewhere beyond privacy and self-respect.

Radical feminism, then, is unified by a particular description of the subjectivity of the material state of connection. According to that description, women dread intrusion and invasion and long for an independent, individualised, separate identity. While women may indeed 'officially' value intimacy, what women unofficially crave is physical privacy, physical integrity, and sexual celibacy – in a word, physical exclusivity. In the moral realm, women officially value contextual, relational, caring, moral thinking but secretly wish that everyone would get the hell out of our lives so that we could pursue our own projects – we loathe the intrusion that intimacy entails. In the epistemological and moral realms, while women officially value community, the web, the spinning wheel, and the weave, we privately crave solitude, self-regard, self-esteem, linear thinking, legal rights, and principled thought.

Finally, then, we can schematise the contrast between the description of the human being that emerges from modern legal theory and the description of women that emerges from modern feminism.

The Official Story
(Liberal legalism and
cultural feminism)

The Unofficial Story
(Critical legalism and
radical feminism)

	Value	Harm		Longing	Dread
Legal Theory (Human beings)	Autonomy	Annihilation; frustration		Attachment; connection	Alienation
Feminist Theory (Women)	Intimacy	Separation		Individuation	Invasion; Intrusion

As the diagram reveals, the descriptions of the subjectivity of human existence told by feminist theory and legal theory contrast at every point. First, and most obviously, the 'official' descriptions of human beings' subjectivity and women's subjectivity contrast rather than compare. According to liberal theory, human beings respond aggressively to their natural state of relative physical equality. In response to the great dangers posed by their natural aggression, they abide by a sharply anti-naturalist morality of autonomy, rights, and individual spheres of freedom, which is intended to and to some extent does curb their natural aggression. They respect a civil state that enforces those rights against the most egregious breaches, the description of women's subjectivity told by cultural feminism is much the opposite. According to cultural feminism, women inhabit a realm of natural inequality; they are physically stronger than the foetus and the infant. Women respond to their natural inequality over the foetus and infant not with aggression but with nurturance and care. That natural and nurturant response evolves into a naturalist moral ethic of care which is consistent with women's natural response. The substantive moralities consequent to these two stories, then, unsurprisingly, are also diametrically opposed. The autonomy that human beings value and the rights they need as a restriction on their natural hostility to the equal and separate other are in sharp contrast to the intimacy that women value, and the ethic of care that represents not a limitation upon, but an extension of, women's natural nurturant response to the dependent, connected other ...

Feminist jurisprudence

By the claim that modern jurisprudence is 'masculine,' I mean two things. First, I mean that the values, the dangers, and what I have called the fundamental contradiction that characterise women's lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine. The values that flow from women's material potential for physical connection are not recognised as values by the Rule of Law, and the dangers attendant to that state are not recognised as dangers by the Rule of Law.

First, the Rule of Law does not value intimacy – its official value is autonomy. The material consequence of this theoretical undervaluation of women's values in the material world is that women are economically impoverished. The value women place on intimacy reflects our existential and material circumstance; women will act on that value whether it is compensated or not. But it is not. Nurturant, intimate labour is neither valued by liberal legalism nor compensated by the market economy. It is not compensated in the home, and it is not compensated in the workplace – wherever intimacy is, there is no compensation.

Similarly, separation of the individual from his or her family, community, or children is not understood to be a harm, and we are not protected against it. The Rule of Law generally and legal doctrine in its particularity are coherent reactions to the existential dilemma that follows from the liberal's description of the male experience of material separation from the other: The Rule of Law acknowledges the danger of annihilation, and the Rule of Law protects the value of autonomy. Just as assuredly, the Rule of Law is not a coherent reaction to the existential dilemma that follows from the material state of being connected to others, and the values and dangers attendant to that condition. It neither recognises nor values intimacy and neither recognises nor protects against separation.

Nor does the Rule of Law recognise, in any way whatsoever, muted or unmuted, occasionally or persistently, overtly or covertly, the contradiction which characterises women's, but not men's, lives: while we value the intimacy we find so natural, we are endangered by the invasion and dread the intrusion in our lives which intimacy entails, and we long for individuation and independence. Neither sexual nor foetal invasion of the self by the other is recognised as a harm worth bothering with. Sexual invasion through rape is understood to be a harm, and is criminalised as such, only when it involves some other harm: Today, when it is accompanied by violence that appears in a form men understand (meaning a plausible threat of annihilation); in earlier times, when it was understood as theft of another man's property. But marital rape, date rape, acquaintance rape, simple rape, unaggravated rape, or as Susan Estrich wants to say 'real rape'¹⁸⁴ are either not criminalised, or if they are, they are not punished – to do so would force a recognition of the concrete, experiential harm to identity formation that sexual invasion accomplishes.

Similarly, foetal invasion is not understood to be harmful, and therefore the claim that I ought to be able to protect myself against it is heard as nonsensical. The argument that the right to abortion mirrors the right of self-defence falls on deaf ears for a reason: The analogy is indeed flawed. The right of self-defence is the right to protect the body's security against annihilation literally understood, not invasion. But the danger an unwanted foetus poses is not to the body's security at all but, rather, to the body's integrity. Similarly, the woman's fear is not that she will die but that she will cease to be or never become a self. The danger of unwanted pregnancy is the danger of invasion by the other, not of annihilation by the other. In sum, the Rule of Law does not recognise the danger of invasion, nor does it recognise the individual's need for, much less entitlement to, individuation and independence from the intrusion which heterosexual penetration and foetal invasion entails. The material consequence of this lack of recognition in the real world is that women are objectified – regarded as creatures who can't be harmed.

The second thing I mean to imply by the phrase masculine jurisprudence is that both liberal and critical legal theory, which is about the relation between law and life, is about men and not women. The reason for this lack of parallelism, of course, is hardly benign neglect. Rather, the distinctive values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterise our inner lives are not reflected in legal theory because legal theory (whatever else it's about) is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law)

184 Susan Estrich, *Real Rape*.

protect, value, or seriously regard our experience. Jurisprudence is masculine because jurisprudence is about the relationship between human beings and the laws we actually have, and the laws we actually have are masculine both in terms of their intended beneficiary and in authorship. Women are absent from jurisprudence because women as human beings are absent from the law's protection: Jurisprudence does not recognise us because law does not protect us. The implication for this should be obvious. We will not have a genuinely ungendered jurisprudence (a jurisprudence 'unmodified,' so to speak) until we have legal doctrine that takes women's lives as seriously as it takes men's. We don't have such legal doctrine. The virtual abolition of patriarchy is the necessary political condition for the creation of nonmasculine feminist jurisprudence.

It does not follow, however, that there is no such thing as feminist legal theory. Rather, I believe what is now inaccurately called feminist jurisprudence consists of two discrete projects. The first project is the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory, or, put differently, the uncovering of what we might call patriarchal jurisprudence from under the protective covering of jurisprudence. The primary purpose of the critique of patriarchal jurisprudence is to show that jurisprudence and legal doctrine protect and define men, not women. Its second purpose is to show how women – that is, people who value intimacy, fear separation, dread invasion, and crave individuation – have fared under a legal system which fails to value intimacy, fails to protect against separation, refuses to define invasion as a harm, and refuses to acknowledge the aspirations of women for individuation and physical privacy.

The second project in which feminist legal theorists engage might be called reconstructive jurisprudence. The last twenty years have seen a substantial amount of feminist law reform, primarily in the areas of rape, sexual harassment, reproductive freedom, and pregnancy rights in the workplace. For strategic reasons, these reforms have often been won by characterising women's injuries as analogous to, if not identical with, injuries men suffer (sexual harassment as a form of 'discrimination'; rape as a crime of 'violence'), or by characterising women's longing as analogous to, if not identical with, men's official values (reproductive freedom – which ought to be grounded in a right to individuation – conceived instead as a 'right to privacy,' which is derivative of the autonomy right). This misconceptualisation may have once been a necessary price, but it is a high price and, as these victories accumulate, an increasingly unnecessary one. Reconstructive feminist jurisprudence should set itself the task of rearticulating these new rights in such a way as to reveal, rather than conceal, their origin in women's distinctive existential and material state of being ...

Reconstructive jurisprudence

The goal of reconstructive feminist jurisprudence is to render feminist reform rational. We must change the fact that from a mainstream point of view, arguments for feminist legal reform efforts are (or appear to be) invariably irrational. The moral questions feminist reforms pose are always incommensurable with dominant moral and legal categories. Let me put it this way: Given present moral categories, women's issues are crazy issues. Arguments for reproductive freedom, for example, are a little insane: Prochoice advocates can't explain the difference between reproductive freedom and infanticide, or how this right can possibly be grounded in the Constitution, or how it is that women can claim to be 'nurturant' and at the same time show blatant disregard for the rights and feelings of foetuses. In fact, my sense, drawn from anecdotal evidence only, is that the abortion issue is increasingly used in