DRUCILLA CORNELL, *The Imaginary Domain* (New York: Routledge, 1995)

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Formal v. Substantive Equality

In an overall sense, feminist legal theory can be seen as being comprised of two theoretical models that are seemingly irreconcilable. In their appeal to equality through legal reform, many legal feminists passionately identify with either formal or substantive equality.

Initially, the feminist appeal to equality involved the claim that men and women are essentially the same. This is known as formal equality.[1] This appeal to likeness between men and women as the basis for a feminist model for equality is primarily due to two things: 1) to a commitment to the idea that men and women have similar potentialities, and 2) to the nature of progressive legal reform in this country that attempts to equalize members of society as each deserving of the same set of rights. All people in a democratic society are created equal and thus all can expect the law to ensure that they be equal. For discrimination on the basis of gender to have *legal* meaning within this model, a woman claiming gender discrimination must define that characteristic of her gender that is being affected by the discrmination via a comparison with men. And in order for there to be a basis for this comparison with men, the characteristic must be

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[1] See e.g., Wendy Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 NYU Rev. Law & Social Change 325 (1984-85); Wendy Williams, The Equality Crisis: Some Reflections of Culture, Courts and Feminism, 7 Women's Rts. L. Rep. 175 (1983); Sylvia Law, Rethinking Sex and the Constitution, 132 U. Penn. L. Rev. 955 (1984).

universal to women. Otherwise, the comparison would only be made within the class of women—an intraclass claim.

The problem with this approach to gender equality became apparent: it can not address those aspects of a struggle for feminist equality that are specific to women. This problem has arisen primarily in the context of pregnancy. Theoretically, the formal equality model cannot adequately address pregnancy because pregnancy is a capacity specific to women, thus defeating the formalist claim that women are equal to, in the sense of similar to, men. Practically, this model has had its limitations as well. The most glaring example of this was in the 1974 Supreme Court case *Geduldig v. Aeillo* where Justice Rehnquist determined that it was not gender discrimination for an insurance policy to exclude medical coverage for pregnancy since pregnancy is 1) a possibility only for women, that 2) is not experienced by all women.[2] The Court determined that the appropriate distinction was not that of men and women, but of pregnant and nonpregnant persons; thus, the medical coverage in question could not be challenged under the rubric of gender discrimination.

The limitations of a program for feminist legal reform based on the formal equality model had potentially far-reaching effects. Even a situation such as sexual harassment could be challenged as inoperative under a gender discrimination analysis, since this type of harassment is not universal to women. Therefore, like in the context of pregnancy, in the context of sexual harassment, courts could compare those who have been harassed with those who have not, rendering a sexual harassment claim inoperative under a gender discrimination analysis.

This led to the formulation of a competing model for gender discrimination analysis under the law, the substantive equality model, for which feminist law professor Catharine MacKinnon is the primary spokesperson. This model insists that an appeal to equality must be based on an acknowledgement that gender difference is constructed as a system of subordination.[3] Catharine MacKinnon developed this substantive theory of equality in the context of sexual harassment to demonstrate that sexual harassment was in fact gender discrimination, in that it is a manifestation of the systemic social construction of women as the objects of male desire.[4]

Another area of law where these competing models have generated great division within legal feminism is pornography. The formal equality model, in the way it has been construed in the courts, cannot likely address

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[2] 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 256 (1974).

[3] See generally, C. MacKinnon, Toward a Feminist Theory of the State (1989).

[4] See generally, MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

the potential harm that arises as a result of the pornography industry. This is because pornography cannot be said to affect all women in that not all women are involved in its production. Catharine MacKinnon extends her substantive equality analysis to pornography, arguing that pornography is a product that literally subordinates women.[5] Pornography is harmful to the women who participate in its production in that they are depicted as objects of male sexual desire. But MacKinnon goes further, arguing that in its very existence as a representative image, it is discriminatory toward *all* women. Every viewing of pornography by a man is part of a system of discrimination against women that has a direct result in his behavior towards women. It is the example *par excellence* of the social construction of all women as the objects of male desire. As MacKinnon puts it, "Man fucks woman, subject verb object."[6] Proliferating images of women as objects is bad in itself, but MacKinnon also sees pornography as directly implicated in systemic violence towards women. Thus, pornography according to MacKinnon's analysis can be considered gender discrimination from a legal standpoint in that it is universally harmful to women. As a result, MacKinnon's substantive model of equality necessitates the strict regulation of pornography.

The substantive theory of equality has come under a great deal of attack by legal feminists. In insisting that women are produced in order to be the objects of male desire, and in calling for a system of legal reform that acknowledges that systemic subordination, the substantive model of equality, it is argued, "re-encode[s] the unconscious structures of gender hierarchy as the basis of a theory of equality."[7] It thus limits the possibilities for what women can be to this described gender hierarchy and circumscribes the possibilities for feminist reform within a comparison of women with men. Further, defining women within the confines of a single, substantive conception of femininity has been particularly troubling to many lesbians, women of color, and other feminists who do not see themselves as defined in the version of femininity described in the substantive equality model. These critics resist having this single version of femininity "legalized" in the context of being the terms by which gender discrimination is challenged in court systems.[8] And in the context of pornography, the regulation MacKinnon calls for has serious First Amendment implications.

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[5] See generally, MacKinnon, Toward a Feminist Theory of State.

[6] Id. at 124.

[7] Cornell, The Imaginary Domain: Abortion, Pornography, and Sexual Harassment 21 (New York, Routledge, 1995).

[8] Id. at 6.

The critics of the substantive model, however, have not been able to respond to the inadequacies of the formal equality model—the substantive model does directly address one of these inadequacies by grappling with how women are subordinated in society in a general sense. It has long been consider time for someone to develop a model of equality that can implement the positive aspects of each model.

The Imaginary Domain

Drucilla Cornell's book *The Imaginary Domain* provides an approach to these issues that attempts to deal with the actual differences that arise between men and women, but that strives not to limit gender discrimination claims to those things that adversely affect women universally and could but don't affect men. At the same time, she seeks to limit these differences to the specific incidents in which they arise: she does not attempt to describe them as relevant to all women, nor as part of a universal gender dynamic that is implicated in all aspects of all women's and men's lives and that always involves a hierarchy of domination of women. She is careful to note, in this light, that it is not the place of the law to promote or enforce a universal gender dynamic. As she puts it in her introductory chapter:

> I do not deny that feminism needs a theoretical account of the asymmetry of the masculine and feminine. But . . . this asymmetry should not be identified in any simplistic manner with those who are actually identified as men and women. In other words, it is perfectly possible for a woman to take up the place of the masculine as well as for a man to take the place of the side of the feminine. But this ability to move between positions in a field of significance does not deny that there exists parameters of that field of significance which produce powerful social and political effects.[9]

So though feminism to Cornell needs an "account of the asymmetry of the masculine and feminine," her argument is that this account should not be directly incorporated into an ideal of equality via the law. In order for feminism to change the social world, it must undergo an "endless process of contesting the imposed definitions of what it means to be a woman."[10] It is not the place of law to do this, however, as the law ought not strive to impose rational coherence in society. Rather, it is the responsibility of law to recognize competing rights and conflicts while guaranteeing certain values of individual freedom. Indeed, Cornell looks beyond gender to try to discern

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[9] Id. at 25–26.

[10] Id. at 27.

what factors of individual freedom the public in general would agree ought to be guaranteed in the public sphere. Allowing for the everpresent disagreement between and competing rights claims among different groupings of people, Cornell looks for the more basic political values which would be embraced by anyone committed to a notion of equality. In determining what such values might be, Cornell creates the possibility for legal alliances between feminists and groups that do not identify as such, and also recognizes that a legal project is profoundly limited.

In defining the fundamental political values necessary to and relevant for a feminist struggle for equality, Cornell embraces a complex notion of justice that is based on standards of reasonableness and on psychoanalytic conceptions of the development of personhood. Cornell turns to John Rawls to define a standard of reasonableness. Rawls writes of the constructivist project of Kant in which actors in political and legal institutions are asked to guide their behavior in light of with what values they imagine free and equal citizens in their society would agree. According to Rawls, in doing so, these actors must use the two moral powers of free persons—a sense of justice and a capacity for good.[11] It is only through this process that just political and legal institutions can be produced.

Although Cornell agrees with this vision of producing just institutions, she challenges the Rawlsian presumption that humans are inherently free persons imbued with moral powers. Instead, Cornell asks, what are the conditions that are necessary for humans to become free persons in this Rawlsian sense. Thus, in Cornell's analysis, one's personhood is never assumed as a given, but rather is part of an ongoing project throughout one's life. The idea of a person is actually an aspiration, she claims, a working through of possibilities. Cornell bases this claim in the psychoanalytic notion of the development of the self that was developed by Lacan.[12] According to Lacanian theory, an infant learns that (s)he is a unique individual by looking at his/her reflection. The infant sees a whole body, but, because (s)he has no capacity to exert control over that body, his/her understanding of his/herself as a person involves a projection into the future of a self as whole. Personhood and self-identity, then, are characterized as a state in the future and are thus *ab initia* a fiction. Cornell does not view the fictional and projected element of the development of personhood as a stage in human development, but rather as involving a process that never ends.

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[11] Id. at 17.

[12] See Jacques Lacan, "Le stade miroir comme formateur de la function Je," in Ecrits (1966).

To Cornell, implicit in the life-long project of becoming a person is having control over one's unconscious, over what she calls one's imaginary domain. This project ought to be one that each member of society can participate in on an equal basis and is crucial for a person if (s)he is to participate equally in public and political life. Cornell says that there are fundamental conditions on which the development of personhood depends. She calls these minimum conditions of individuation. The three minimum conditions of individuation that Cornell sees as necessary in the context of her appeal to equality are "1) bodily integrity, 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and 3) the protection of the imaginary domain itself."[13] These, she claims, are the fundamental conditions for individual freedom which would be embraced by anyone commited to the notion of equality and thus are conditions that the law can guarantee while still recognizing competing rights and conflicts.

A foundational part of becoming of person that is heavily implicated in the concept of minimum conditions of individuation is one's knowledge of oneself as a sexuate being. This is because every human at the basis of his/her unconscious has a sex in the context that human beings are sexual creatures and also that they have an internalized identity that is at its core implicated in the gender divide. As Cornell puts it, "As sexuate beings, we can not mark out an identity without implicating who we are through a set of culturally encoded fantasies about what it means to be a creature with a 'sex.'"[14]

As sexuate beings, each citizen ought to be treated as worthy of the right to pursue sexual happiness, a necessary condition for the development of self-respect. Rawls defines self-respect as a primary good in society.[15] The denial of this primary good leads to shame. Rawls writes: "Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism."[16]

According to Cornell, this self-respect is necessary to the formation of personhood and is thus of great relevance to one's image of oneself as a sexuate being.[17] When *sexual* shame is imposed in the public sphere, one is cut off from the ability to freely develop one's sexuality in one's psyche. In a sense, one is prevented from asserting control over one's imaginary

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[13] Cornell at 4.

[14] Id. at 6.

[15] Cornell at 184 (citing John Rawls, Political Liberalism 179 (1993)).

[16] Id. at 9 (citing John Rawls, A Theory of Justice 440 (1971)).

[17] Cornell at 10.

domain. Thus, Cornell argues that there is a requisite level of action that should be undertaken in the legal realm in order to prevent the imposition of sexual shame. But this legal action should be limited to this role and not form a comprehensive theory of sexual meaning so as not to inscribe into the law a single version of sexual difference. Cornell terms this limit the degradation prohibition.[18] It involves the determination of whether a challenged activity degrades a person in the sense of grading him/her as less worthy of personhood than any other person. In the context of sexuate beings, the degradation prohibition asks if the person challenging discriminatory activity was reduced to stereotypes of his or her "sex" or has had an objectified fantasy of "sex" imposed on him/her. This standard allows for the free expression of sexuality, as long as one's activity does not control the sex of another. Cornell develops this notion of the degradation prohibition through a reading of Kant's notion of freedom under the law. She seems particularly sensitive to the need to restrain law from its oppressive potential, and thus seeks to balance the values of preventing sexual shame and encouraging free expression. Thus she defines the degradation prohibition very carefully in light of the wisdom of Kant. According to Kant, the law must allow an individual to "seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of everyone else within a workable general law—i.e., he must accord to others the same rights as he enjoys himself."[19]

The Application of the Model

Cornell applies her model of equality to three issues of great importance to contemporary feminism that have illuminated the limits of both the formal and substantive models for equality: abortion, pornography, and sexual harassment. In her assertions regarding each of these issues, one sees the usefulness of the notion of minimum conditions of individuation and the importance of the assertion that the imaginary domain of all sexuate beings is a psychic space that must be protected by the law.

Abortion

Cornell's argument in favor of the protection of the right to have an abortion is premised on the fact that without such a right, women are denied

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[18] Id. and passim.

[19] Id. at 11 (citing Kant, Political Writings, ed. Hans Reiss, trans. H.B. Nisbet 74 (1970)).

bodily integrity. This is a denial of a minimum condition of individuation. If all people are equally valued as worthy of personhood, according to Cornell, then "there is no *reasonable* justification for denying a woman's right to bodily integrity. It is only on the basis of some account of women's lesser worth that one could allow the state to regulate our bodies."[20]

The claim that the denial of the right to an abortion does in fact deny women the right to bodily integrity is based on the assertion that the denial of this right is a symbolic assault on a woman's ability to have free reign in her imaginary domain to envision her future self. Due to the very fact that the self is a project that is forward looking, women who both are and are not pregnant have a stake in this claim to a right to an abortion. According to Cornell, it "thwarts the projection of bodily integrity and places the woman's body in the hands and imaginings of others who would deny her coherence by separating her womb from herself."[21] Positing that the womb is a container for life that is separate from a woman's body is a fictive construction of gender. Legally validating this construction prevents women from giving their own meaning to their capacity for creating life and thus makes it impossible for women to anticipate a wholeness of self in the future.

Thus, Cornell disagrees with any analysis of abortion that claims that it is possible to restrict a woman's right to an abortion in some circumstances in order to respect the sanctity of human life.[22] Denying women a full right to bodily integrity, she counters, treats women as if they are not capable of giving meaning to the question of whether or not they should abort. This, she argues, disrespects the sanctity of human life.

In the context of abortion, Cornell's argument concerning minimum conditions of individuation avoids the limitations of both the formal and substantive models of feminist equality. Cornell argues that the prohibition of a right to pregnancy adversely affects *all* women by taking from them full control over the ability to envision themselves in the future, even if that future never does involve bearing children. Thus, Cornell's model challenges the notion that the only comparison in the context of pregnancy that is valid before the law is pregnant and nonpregnant persons.[23] The right to abortion is fundamental to all women's bodily integrity and thus a crucial part of their own imaginary that ought be protected by the law.

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[20] Id. at 34.

[21] Id. at 38.

[22] See e.g., Planned Parenthood of Eastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) (allowing for restrictions on the right to an abortion that do not impose an undue burden on women, in order to respect the sanctity of human life).

[23] Gedulgig v. Aeillo, 417 U.S. 484 (1974).

Yet, limiting pregnancy's reach to the fact that it is a potentiality for women in general does not reduce all women to a child bearing function. The right to pregnancy is necessary for bodily integrity, but not because all women will physically have children. Instead, it is because pregnancy is a potentiality exclusive to women that belongs in the imaginary domain of women.

Pornography

Cornell seems to be ambivalent about the capacity for law to intervene in the field of pornography. She calls for a full program of civil rights for workers in the pornography industry, including minimum wage, health care, and the possibility for enjoining the circulation of particular films when women on the sets of those films have been abused. This latter requirement is in order for such a woman to have the right to re-imagine herself beyond the abuse.

Further, Cornell is in favor of zoning pornography shops so that women do not have to see images of themselves reduced to body parts. Such forced viewing, she argues, violates the degradation prohibition, and thus may impose a constraint on a woman's ability to control her imaginary domain. This zoning would seem to be limited to preventing stores that deal in sexually explicit material from exhibiting images in their windows or on signs that reduce women to body parts. A woman walking by such a store should not be forced to confront such images.

Beyond these requirements, however, Cornell believes that the regulation of pornography through the law is inappropriate. First of all, Cornell questions the wisdom of feminists outside of the pornography industry taking it upon themselves to dismantle or seriously regulate it when the very women who work in the industry often have differing ideas concerning how they can empower themselves politically to effect industry-wide change.

Further, unlike Catharine MacKinnon, Cornell sees pornography as a form of speech. MacKinnon claims that pornography, because it depicts actual sex and is not merely a representation of it, is not speech but is an act. Cornell, on the other hand, views pornography as playing a role in the communication of psychical fantasies about the development of individuals as sexuate beings, and thus is a form of speech. For this reason, she sees the regulation of pornography as suspect for First Amendment reasons. But further, Cornell disagrees with those who call for the regulation of pornography who claim that pornography inherently represents a hierarchy of gender. Cornell argues that prohibiting the production and distribution of pornography would serve the function of legally encoding a gender

hierarchy, preventing representations of sex and erotica from emerging that may challenge a hierarchy of gender.

Thus, Cornell argues strongly against the feminist substantive model developed by MacKinnon. In its determination that all pictoral representations of sex are necessarily and always will be invested in a heterosexual hierarchy of the specific domination of women, the substantive model asks for legal regulation of pornography. To Cornell, this would have as its effect the imposition of legal control over the imaginary domain through legally estopping all communication of unconscious sexual fantasies in film. Cornell challenges the notion that sex, and sex as represented in film, is inherently bound in this hierarchy of domination, and thus limits her regulation of pornography in a legal context to the degradation prohibition. This would assure that those who oppose the viewing of women as representations of unconscious fantasies and as stereotypes of their sex would not be forced to do so in the public arena. And, at the same time, it would not close off the imaginary domain of women by legally declaring both that women who partake of conventional pornography are implicatech they necessarily ought be wrested, or that there is no possibility for women to imagine represented sexuality in ways that challenge traditional hierarchies of gender.

Sexual Harrassment

In the context of sexual harassment claims in the workplace under Title VII, the standard used to determine discrimination is the one espoused by the Ninth Circuit in *Ellison v. Brady* and upheld by the Supreme Court in *Harris v. Forklift.*[24] Under *Ellison*, in order for language and action to cross the line between free expression and the unlawful creation of a hostile and abusive work environment, a plaintiff must show 1) subjection to verbal or physical contact of a sexual nature, 2) that the conduct was unwelcome, and 3) "that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment."[25] Justice Scalia, in his concurrence in *Harris*, questioned whether this was a standard at all or merely an appeal to "a reasonable person's notion of what the vague word [abusive] means."[26]

Cornell agrees with this concurrence and provides a standard that is based on an equality analysis consistent with her notion of minimum

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[24] Ellison v. Brady, 924 F.2d 872 (7th Cir. 1991); Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

[25] Cornell at 196 (citing Ellison, 924 F.2d at 875).

[26] Id. at 198 (citing Harris, 114 S.Ct. at 370 (Scalia, J., concurring)).

conditions of individuation and the imaginary domain. Here Cornell uses the notion of the primary good of self-respect and the degradation prohibition to determine that a cause of action for workplace discrimination must involve discrimination that is *enforced*, meaning that there is a "pattern and practice . . . [that] implicate[s] the authority structure of the workplace hierarchy that is being challenged."[27] This necessitates both a relationship of unequal power and that the harassment must be regular. Harassment of this sort imposes sexual shame and undermines the primary good of self-respect. It thus infringes upon one's autonomy over one's imaginary domain. Here Cornell introduces the notion of the Aristotelian Principle—that human beings prefer to carry out activities in life, including their employment, that allow them to exert agency and see the positive results of their efforts. This type of activity is contrasted with those that involve disengagement with oneself.[28] This principle she sees as consistent with her notion of self-respect and the imaginary domain. Workplace sexual harassment that is repetitive and that involves the exploitation of a power dyamic is inconsistent with the Aristotelian Principle, in that it impedes harassed individuals' ability to exert their agency in the workplace. This imposes sexual shame on these individuals that divests them of power to re-imagine themselves in the context of the Aristotelian Principle. The infringement upon workplace agency is an infringement upon the imaginary domain of the harassed and thus is an infringement upon an aspect of the development of personhood.

Cornell has developed an approach to sexual harassment that addresses the limits of the formal and substantive equality models by recognizing the limits of the positive use of law. The formal equality model seeks the legal enforcement of likeness of all humans, despite gender. Under this model, in order for a claim for sexual harassment to prevail, the claimant must demonstrate harassment that is specifically directed to women as women. Such a claim by a woman against a man runs the risk of allowing for a defense that the harassment was not of a nature specific to women and thus not actionable. Cornell's model, which seeks the protection of all sexuate beings, regardless of gender, in their process of becoming a person, corrects this problem by including all reductions of people to stereotypes and/or fantasies about their sex as actionable claims under sexual discrimination law. And in making this claim, Cornell does not fall into the trap of the substantive model in that she does not argue for the existence of a hierarchy of power between men and women that is inherent and unchangeable and thus only regulatable by law. She is opposed to the kinds of laws that

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[27] Id. at 206.

[28] Id. at 187.

proponents of the substantive model advocate that seek to impose a desexualized work environment. These laws sometimes go so far as to prohibit relationships of a sexual nature between co-workers. Cornell sees this type of legal coercion as a form of repression that denies people's existence as sexuate beings. It thus is an invasion into the imaginary domain. At the same time, however, she advocates for the legal protection of the imaginary domain by protecting the self-respect of workers in the context of the Aristotelian principle. Her model would look at each challenge to an activity that makes inroads upon the imaginary domain of a sexuate being using the same standard, potentionally including claims by men against men, African-American women against white women, etc.

The Usefulness of Minimum Conditions of Individuation and The Imaginary Domain

Cornell's appeal to minimum conditions of individuation challenges the limitations and makes use of the distinct values of the formal and substantive equality models. The conditions which Cornell determines are necessary in order to undergo the project of becoming a person do not rest on the uniqueness of sexual difference; rather they are the conditions necessary for all humans to be equivalently valued in society so that all persons are able to embark on the project of achieving personhood. Unlike the substantive model, this model does not rely on any fundamental division between classes of people, i.e. men and women, since it recognizes every individual as a sexuate being and thus insists that every form of sexuate being is worthy of personhood. And unlike the formal model, Cornell's appeal to using law to guarantee minimum conditions of individuation necessitates, by the very nature of the implication of sexual difference in the formation of an identity, an analysis of "the *devaluation* or *degradation* of the feminine" within the economy of sexual difference as it presently exists.[29] Because all forms of sexuate beings must be valued equivalently, the feminist *legal* project can ensure that feminine be legally recognized as of equivalent value to all other forms of sexual difference. It is not the existence of differences between men and women that have denied women equality and thus ought be erased, but rather the devaluation of these very differences. Her appeal discards the assumptions that men and women should strive to be equal in the sense of alike and that there is a single, irreducible and hierarchical axis of man/woman that applies to all men and

[29] Id. at 19.

women, regardless of race, class, sexuality, and any other identity characteristic. Cornell writes:

> This call for minimum conditions of individuation . . . does not turn on gender comparison between men and women. It argues for equality for each one of us as a sexuate, and thus as a phenomenal, creature. Correspondingly, it allows us to be inclusive of the demands of lesbian and gay activists, transsexuals, and any other form of sexuate being because it insists on returning gender discrimination to sex discrimination.[30]

In its inclusiveness of lesbian, gay, transsexual, and transgendered people, via its use of the sexuate being and not "men" or "women" as the subject of its analysis, Cornell's model is of broad use and quite powerful. Both the formal and the substantive equality models have been accused of operating in a heterosexist context. The formal equality model has been incapable of theoretically addressing specific acts of discrimination towards lesbians and gay men, because it either unrealistically incorporates lesbians and gays into its model of likeness, or because it simply leaves lesbians and gay men out of the picture of equality. And the substantive model developed by Catharine MacKinnon is so theoretically invested in a hierarchy of heterosexual domination that pervades everyone's lives that it insists on using the terms of heterosexuality to discuss lesbian and gay concerns, condescendingly insisting that lesbians and gay men figure themselves as subjugated heterosexual women in order to have any claim of discrimination at all.[31]

Cornell's model on the other hand does not theoretically attempt to presume heterosexuality in that the subject of analysis under the law is the sexuate being. Anyone who has his/her imaginary domain invaded in the context of his/her sexuate being is deprived of a minimum condition of individuation and thus can seek redress in the arena of law.

Nevertheless, it must be with great care that lesbians and gay men attempt to argue for rights in this context. In locating the subject for certain claims of discrimination under the law as the sexuate being, gays, lesbians, and transsexuals run the risk of decentralizing the power they have under the law vis-a-vis heterosexuality.

For example, Cornell talks about the degradation prohibition in the context of zoning pornography. She determines that forcing women to view images of themselves reduced to body parts is enough of a violation of their imaginary domain that the negative aspects of the coercion of legal

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[30] Id. at 20.

[31] Id. at 107.

regulation through zoning are outweighed. This seems to be a valid conclusion, consistent with her opinion of reasonableness. However, when Cornell talks of the success of the zoning that has taken place in Greenwich Village, New York City, the neighborhood in which she lives, she mentions only in passing that these stores that have been zoned are primarily ones that deal in gay male pornography.[32] Given the excessive legal regulation of homosexuality in the United States, an analysis of zoning must acknowledge the possibility that gay porn shops—or even gay and lesbian bookstores for that matter—will be disproportionately regulated via zoning laws. The legislative or judicial process involved in such regulation may have a profound effect on the imaginary domain of gay men, especially given the moral justifications beyond the degradation prohibition that may be offered in furtherance of this process. Further, given the dearth of affirming images of gay men that exist in society, and the constraints, either based on their young age or their psychic or physical fear, that prevent many gay men from entering gay porn shops, "window shopping" for glimpses of a homosexual identity in front of these shops is not an uncommon practice among gay men. I am not suggesting that these factors necessarily outweigh Cornell's concerns, but I am saying that the sexuate being as an irreducible minimum of a subjectivity before the law may be used (in a manner Cornell may not support) to justify domination.

Further, the concept of the sexuate being and the imaginary domain as developed by Cornell is grounded in a psychoanalytic theory of sexuality developed by Freud and Lacan. Some lesbians and gays have questioned certain aspects of the story of the unconscious development of a sexual persona. The notion of the imaginary domain as a minimum condition of individuation protected by the law needs to be examined in light of the critique of that story as it emerges.

Cornell's argument includes space for these concerns. She embraces her notion of minimum conditions of individuation specifically because it strives to protect those basic conditions that *every* citizen concerned with equality would support. It remains to be seen whether these conditions she has suggested and the psycho-sexual construction of the imaginary domain she has described are in fact adopted generally, and not just by political groupings of white heterosexual feminists. One does not want to run the risk of that group continuing to control the liberatory discourse of sex and gender within the legal system, even if they are arguing on behalf of others.

But in that her model is powerful enough to incorporate the values and challenge the deficiencies of the substantive and formal equality models, and specifically can do so in terms of the nonwhite and nonheterosexual forms

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[32] Id. at 151.

of sexuate beings those models have so evidently left out, one hopes that this model will in fact be embraced or at the very least discussed in respect to its profundity.