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# Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships

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# STRENGTH IN DIVERSITY: FEMINIST THEORETICAL APPROACHES TO CHILD CUSTODY AND SAME-SEX RELATIONSHIPS

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In the early years of the contemporary women's movement, feminists interested in changing the legal system assumed that formal equality was the appropriate approach: Similarly situated women and men should be treated identically by governmental laws, rules, and practices. Since the publication of Catharine MacKinnon's first book in 1979, a rich variety of feminist theories have both criticized this approach and suggested alternatives. Since then, most participants in the protracted debate about how to approach inequality between the sexes have argued that their favored approach is *right* and others *wrong* for specified reasons.

This Essay suggests that rather than looking to one approach to solve all problems in all circumstances, we should regard the variety of approaches available today as a set of tools to be used as appropriate. Each has its strengths and weaknesses and is more useful in some settings than in others. As feminists, we should look at this variety as a strength, a much-needed array of weapons at our disposal, rather than as evidence of irreconcilable differences between us. To make this point is to take a particular approach in some sense, of course, and the following discussion argues for a pragmatic feminism.

This Essay explores formal equality and three alternative approaches in the context of two concrete legal issues: child custody and same-sex relationships. The three alternatives to formal equality are: MacKinnon's dominance approach,[1] West's hedonic approach,[2] and Radin's pragmatic approach.[3]

The first three of these alternative approaches are similar in that each suggests a single goal which could or should be pursued

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1. *See infra* notes 20–27 and accompanying text.
2. *See infra* notes 28–40 and accompanying text.
3. *See infra* notes 41–42 and accompanying text.

in seeking to better the status of women. The goal of formal equality is the elimination of rules that force individuals to behave in ways consistent with traditional sex roles, thus giving individual women and men a greater range of choices. Formal equality focuses on whether laws classify by sex and demands that similarly situated women and men be treated the same. Under this standard, a judge should strike as impermissible sex discrimination laws that treat women one way and men another, since such laws treat similarly situated individuals differently on the basis of sex.[4]

The goal of the dominance approach is to equalize power, as it has traditionally been defined, between women and men. The dominance approach therefore focuses on power inequities and demands legal rules that increase women's power relative to men. Under this standard, a judge should strike a law if it contributes to the systemic subordination of women to men by turning a difference, real or perceived, into an advantage for men and a disadvantage for women.[5]

The goal of a hedonic approach is to improve the quality of contemporary women's lives: to increase women's pleasures and decrease women's pains. The hedonic approach therefore focuses on women's own narratives about their pleasures and pains. This standard is not intended to be used by judges in reviewing legislation, so that laws would be stricken if, in the judge's view, harmful to women emotionally. Rather, the point of the hedonic approach is to encourage feminist legal academics to spend more time describing contemporary women's emotional lives and grappling with the consequences of such narratives in terms of proposals for change, such as regulation of pornography or child custody.[6] From a hedonic

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4. *See* Honorable Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9; Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975) [hereinafter Ginsburg, *Gender*]; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984–85); Wendy W. Williams, *The Equality Crises: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

5. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 1-12 (1989) [hereinafter MACKINNON, FEMINIST THEORY]; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 46-62 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 101–41 (1979) [hereinafter MACKINNON, WORKING WOMEN].

6. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 84–90 (1987). *See also* Mary

perspective, judicial review under any abstract standard might be inappropriate, since none of the standards articulated to date directly consider women's hedonic lives, nor would a feminist be likely to trust (mostly male) judges operating within a system of precedent to do so.

Like the hedonic approach, the final alternative, pragmatic feminism, is not a standard to be applied by judges reviewing legislation. Indeed, like hedonic feminists, pragmatic feminists would likely argue against binding judicial review striking statutes on sexual equality grounds but unlike any of the three approaches mentioned thus far, a pragmatic approach has no single goal or focus. Indeed, its strength lies precisely therein. It is premised on an understanding of the limits of theorizing by humans: our inability to see from an armchair and in the abstract what will work in the real world, particularly in light of the many double binds facing those who would use legal change to foster social change.[7]

Thus, a pragmatic feminist would not subscribe to any general approach to be applied in any and all circumstances. Rather, a pragmatist would pick that approach which would seem likely to work best in a concrete situation, given the advantages and disadvantages of the various approaches in that situation. Additionally, a pragmatist would often see experimentation as useful, even necessary, to understand what will work best for complex issues in a complex world. For this reason, a pragmatic feminist would be likely to regard judicial review of legislation under a sexual equality standard as undesirable, since it might preclude needed experimentation.[8]

Section I describes each of the four feminist approaches used in this Essay. In section II, each approach is applied to the question of custody standards for children at divorce, and in section III, to arguments for legal recognition and protection of same-sex relationships. In a concluding section, this Essay identifies strengths and

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E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) [hereinafter Becker, *Maternal Feelings*].

7. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). "Double binds" refers to the fact that any approach to ending sexual inequality may backfire, reinforcing traditional stereotypes and patterns of subordination, though the strategy was intended to end inequality.

8. *See* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 990–92 (1993) (discussing judicial review under a sex equality standard as a problem given the need to experiment with what equality between the sexes might mean).

weaknesses of each approach and suggests some context in which each is especially powerful.

## *I. FOUR FEMINIST THEORIES*

This section describes four feminist theoretical approaches to inequality in the order in which they appeared in the contemporary feminist movement. The section begins with a discussion of formal equality, the only clearly articulated approach to law during the movement's early years and the approach that dominates judicial thinking and popular culture to this day. This section will then describe MacKinnon's dominance approach, West's hedonic approach, and Radin's pragmatic approach.

### A. Liberal Feminism

Formal equality requires that similarly situated individuals be treated similarly regardless of their sex or gender.[9] Formal equality was modeled after the approach developed by the National Association for the Advancement of Colored People (NAACP) in the early racial discrimination cases, which culminated in *Brown v. Board of Education*.[10] In these cases, the NAACP argued that the state could not treat members of different races differently by requiring their segregation; to do so would be to discriminate on the

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9. In this Essay, the terms sex and gender are used interchangeably, though often sex is used to refer to some biologic reality whereas gender refers to social construction of differences. With MacKinnon, the author thinks that "[s]ince . . . the importance of biology to the condition of women is the social meaning attributed to it, biology *is* its social meaning for purposes of analyzing the inequality of the sexes, a political condition." MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 263 n.50. Given this reality, the attempt to create a distinction seems both strained and inaccurate.

With Eve Sedgwick, the author believes that it is impossible to make "a crisp distinction" between sex and gender. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 29 (1990). Part of the problem in trying to create a clear distinction is "the intimacy of the association between several of the most signal forms of gender oppression and 'the facts' of women's bodies and women's reproductive activity," a point much like MacKinnon's. *Id.* at 28. But Sedgwick goes on to note, "[i]t may be, as well, that a damaging bias toward heterosocial or heterosexist assumptions inheres unavoidably in the very concept of gender." *Id.* at 31. For this reason, the author prefers the word sex in many contexts. For a general discussion of Sedgwick's views on the subtle sex-gender question, see *id.* at 27–35.

10. 347 U.S. 483, *supplemented by* 349 U.S. 294 (1954). For a discussion of the historical background of the feminist movement, see MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 17-49 (1993) [hereinafter BECKER ET AL., TAKING WOMEN SERIOUSLY].

basis of race.[11] By the time the feminist movement began to push seriously for change in the legal system, this standard of racial equality had succeeded in making Jim Crow segregation in the South unconstitutional.[12]

Like the many Southern laws that mandated separation of the races in places of public accommodation, such as parks, swimming pools, buses, and restaurants, there were many state and federal statutes mandating differential treatment of individuals on the basis of sex. Unlike Jim Crow legislation, however, which always and only contributed to African American powerlessness, sex-specific legislation took a variety of forms, some harmful to women but much of it helpful, especially in the short term.[13]

Protectionist legislation applied only to women employees and "protected" them from certain jobs and conditions of employment. Some state statutes limited the number of hours women could work in a day or week, mandated lunch and rest periods, or limited the number of pounds women could be required to lift. Such legislation, at least when applicable only to jobs held primarily by women, helped women combine wage, work, and domestic obligations in the short term, though also reinforcing harmful stereotypes, such as that women were weaker than men and could not lift as much and that women had greater domestic responsibilities and therefore could not work as many hours as men. But for jobs held only or primarily by women, such regulations often improved working conditions for women with no loss of jobs, since employers would be reluctant to switch to male workers (even to avoid regulation) because men are able to demand higher pay than women.[14] Other protective laws, such as laws forbidding women to hold certain jobs or to work on certain shifts (such as night work in factories) more often hurt women, even in the short term. Such regulations closed

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11. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 493–94 (1991).

12. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking Virginia's ban on interracial marriage as part of state-enforced racial segregation); Brown v. Board of Educ., 347 U.S. 483, *supplemented by* 349 U.S. 294 (1954). For discussions of this standard by proponents, see, e.g., the articles cited in note 4, *supra*.

13. The discussion in the text relies on the thorough descriptions of sex-specific laws in LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969); Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971).

14. *See* JUDITH A. BAER, THE CHAINS OF PROTECTION 33 (1978).

jobs, often higher paying jobs, to women, limiting women's economic opportunities.[15]

Other laws set a lower age of majority for women (often eighteen) than for men (often twenty-one); established differential minimum ages for marriage; criminalized only intercourse for men with girls below some statutory age, such as sixteen or eighteen; criminalized only the conduct of women prostitutes but not their customers; and provided for differential inclusion of women and men on juror rolls. Some state statutes limited women's employment as bartenders or more generally limited women's access to bars and certain kinds of public events, such as wrestling matches. A number of state-run educational institutions admitted only women or only men. Many states had differential sentencing provisions for women and men, and often harsher penalties were imposed on female defendants. Women were "exempt," as they are today, from both the draft and combat and were (and are) allowed to serve in the military in only limited numbers and positions. Many states and the federal government nevertheless gave and still give veterans powerful preferences in governmental employment.[16] Often state employers fired pregnant workers and refused full benefits for pregnancy related "disabilities" and medical expenses. These various sex-specific laws sometimes helped and sometimes hurt women, and sometimes did both. For example, the exemption from the draft both helps women in some ways and hurts women in other ways. Under the exemption, women are not forced to serve in a masculinist institution with high levels of sexual harassment. But as a result of the exemption, women are less likely to hold high positions in state government because women are less likely than men to qualify for veterans' preferences, and as political candidates are less likely than men to have the qualification of having served in the military.

A number of sex-specific rules applied to women and men in families. Family law rules arguably favoring women included a preference for divorced mothers as custodians of children of tender years and a duty of family support during marriage and after divorce which rested primarily, though not very effectively, on the

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15. *Id.* at 9.

16. Consider, for example, the Veterans' preference scheme at issue in *Personnel Administrator of Massachusetts v. Feeney*, under which virtually all high-level jobs in the Massachusetts state government were held by men. 442 U.S. 256, 285 (1979) (Marshall & Brennan, J.J., dissenting).

husband or father. In many states, there was a presumption that when a married couple committed certain crimes together, the wife had been coerced by the husband. Family law rules favoring men included domicile rules, i.e., the domicile of the husband was also the domicile of the wife; rules automatically changing the woman's last name to the man's on marriage and giving the husband's last name to their children; rules giving the husband control of community property during marriage in community property states; rules giving the husband a greater share of a deceased spouse's assets; and rules allowing only husbands to sue for loss of consortium, i.e., to seek damages in tort for injuries sustained indirectly as a result of injury to one's spouse. Despite the married women's property rights acts, some states retained limits on the ability of married women to contract or to convey their own real property. Grounds for divorce were often different for women and men as well. For example, some states allowed a husband to divorce his wife if she was not a virgin at the time of marriage. Other laws made divorce for adultery available to men but not to women.

Despite the arguments, even feminist arguments, that might be made in support of some of these sex-specific rules,[17] the contemporary women's movement (at least to the extent that it was focused on law reform) was dominated during its early years by liberal feminists advocating formal equality and arguing, without exception, that these statutes discriminated inappropriately on the basis of sex by treating similarly situated individuals differently depending on whether they were women or men.[18] Throughout the 1960s and 1970s, there was little in the way of theory behind this approach beyond the important insight that rules treating individual women and men differently on the basis of their sex contribute to and reinforce rigid stereotypes and sex roles.[19]

### B. Dominance Feminism

Since 1979, when Catharine A. MacKinnon published her first book,[20] a number of criticisms have been leveled against formal equality. Indeed, an understanding of the problems with this ap-

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17. *See, e.g.*, Becker, *Maternal Feelings*, *supra* note 6 (making feminist arguments for a sex-specific standard for child custody at divorce).

18. *See, e.g.*, BECKER ET AL., TAKING WOMEN SERIOUSLY, *supra* note 10, at 17–27.

19. *See, e.g.*, Ginsburg, *Gender*, *supra* note 4.

20. MACKINNON, WORKING WOMEN, *supra* note 5.

proach is the starting place for understanding MacKinnon's alternative, the dominance approach. MacKinnon notes that the liberal approach to inequality only applies when women and men are similarly situated. When women and men are *not* similarly situated — because some difference seems relevant — the standard is inapplicable, i.e., the liberal feminism approach to sexual equality permits distinctions on the basis of any difference perceived as relevant. But the more unequal women and men are, the more differences there will be between them. Thus, the greater the sexual inequality in a society, the less the liberal equality standard can do about it.[21]

MacKinnon also notes that formal equality may look gender-neutral, but in application it is androcentric, centered on male needs and male-defined standards because it only applies when women look like men (thus similarly situated) and even then only entitles these women to the rules and practices worked out by men for men. Formal equality gives women workers the right to compete with married male colleagues under the rules and requirements worked out by and for married men. Thus, women attorneys working in a firm requiring 2400 billable hours per year are entitled only to equal treatment under that requirement, regardless of the differences between their domestic responsibilities and those of their male colleagues.[22]

But, as MacKinnon notes, the core of discrimination has never been the differential treatment of women and men who are similarly situated, though to be sure that has often been a problem for elite women. The core of discrimination is the systemic translation of differences between women and men, especially ordinary women and ordinary men, into advantages for men and disadvantages for women so that those at the top within each class and race — socially, politically, economically, and sexually — are almost entirely men.[23] Thus, discrimination on the basis of sex — the systematic disadvantaging of women — is most likely to be operating when women and men do *not* seem similarly situated.

Consider, for example, the differences in the treatment and valuation of the public and private spheres. The public sphere is associated with men: the market, government, bread-winning. The

21. *Id.* at 108.
22. MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 37.
23. MACKINNON, WORKING WOMEN, *supra* note 5, at 117–18.

private sphere is associated with women: home, family, caretaking. The problem these different spheres pose for women is not simply that women with résumés and domestic responsibilities like men's are treated differently, though that is a problem, particularly for elite women. But the bigger, more common, and pervasive problem is that women's caretaking is underpaid or unpaid and translates into economic, sexual, and political subordination to men. This subordination is socially constructed, not the inevitable or natural result of the division of human labor into separate spheres. Caretaking could be valued as much as or even more than activities in the public sphere. Those who have taken time out of the labor force to be primary caretakers of young children could be regarded as uniquely qualified for, or specially entitled to hold, government jobs and public office, as are veterans. And, caretakers could be paid as much as other workers for their efforts.

Thus, MacKinnon identifies as the core of sex discrimination, not that women and men who caretake are treated differently or that women and men who work for wages with equivalent backgrounds and skills are treated differently, but that so many women do different things with their time than men and what women do is valued so much less than what men do.[24] Part of the problem is that the basic division and subsequent differential evaluation seems natural and just, the differences justifying the resulting, socially-constructed inequality. Formal equality is blind to this key problem, since it allows differences between individual women and men to justify subordination of women to men. Formal equality allows differences to justify discrimination, rendering irrelevant what should be most relevant: the ways in which differences are turned into advantages for the dominant group and disadvantages for the subordinate group.

MacKinnon sees the eroticization of women's subordinate status as *the* major cause of women's inequality: the linchpin of male supremacy.[25] Thus, her theory focuses on how men's power over women is exercised through the construction — for women as well as men — of a sexuality in which what is erotic is what subordi-

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24. MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 32–45.

25. *See, e.g., id.* at 5 ("[T]he mainspring of sex inequality is misogyny and the mainspring of misogyny is sexual sadism."). *See also* MACKINNON, FEMINIST THEORY, *supra* note 5, at 3–12 (discussing parallels between sexuality for feminism and work for Marxism). MacKinnon begins by stating, "[s]exuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away." *Id.* at 3.

nates women to men. By making women's subordination sexy for women as well as men, patriarchy creates an incredibly powerful payback for women themselves in their own subordination. As MacKinnon notes: "Sex feeling good may mean that one is enjoying one's subordination; it would not be the first time."[26]

For MacKinnon, the bottom line, the prize we need to keep our eyes on, is power.[27] We need to continuously look for subtle and not-so-subtle ways in which differences between women and men are turned time after time into more power for men and less power for women.

### C. Hedonic Feminism

An alternative approach to both formal equality and MacKinnon's dominance approach has been sketched by Robin West in her article on women's hedonic lives.[28] West begins by observing that women's suffering (and pleasure) is dismissed or trivialized by the legal system. Part of the problem is that women have difficulty describing and communicating their pleasures and pains because they are often different from men's. For example, "date rape" and "sexual harassment" are oxymorons capturing women and men's conflicting experiences of the same event. For him, it was a date, for her it was rape. For him it was sexual, for her it was harassment.

West notes that MacKinnon's dominance approach and liberal equality share an important assumption about human nature. Both assume that women's well-being can and should be pursued indirectly, by seeking other ends. For MacKinnon, the end is more power, with the assumption that if women have more power, women will be better off. For liberals, the end is more choices, with the assumption that if individual women are free to make choices, women will be better off.[29] Both these assumptions accept "the Kantian assumption that *to be human* is to be in some sense autonomous — meaning, minimally, to be differentiated, or individuated, from the rest of social life."[30] But women might be less autonomous and more relational than men. Physical and social experienc-

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26. MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 218.

27. *See id.* at 32–45. For example, MacKinnon says: "I say, give women equal power in social life." *Id.* at 45.

28. West, *supra* note 6.

29. *Id.* at 140–41.

30. *Id.* at 140.

es of heterosexual intercourse, pregnancy, and mothering tend to make women less autonomous and more interdependent than men.[31] Each of these experiences connects women to others in a way without a precise parallel for men. Even heterosexual intercourse, an experience shared by women and men, differs on a physical level and also in terms of social meaning. Women, as the penetrated, may more palpably feel the connection to the other as the essence of the experience.[32] Thus both liberal and dominance feminism are "assimilationist" in an important sense: Both assume that human nature is the same for women and men and that greater autonomy, as men have defined it, will make women better off.[33] The ends sought by both the liberal and the dominance approaches to inequality between the sexes — choice (sought by liberals to further autonomy) and power (sought by dominance theorists to further autonomy) — may be more appropriate for men than for women.[34]

West agrees with MacKinnon that power is important. Indeed, West sees increased power as generally beneficial for women and consistent with improved hedonic lives.[35] West argues, however, that power should not be the only focus, particularly when there is a conflict between seeking power and seeking pleasure or the avoidance of pain in women's lives as actually lived.[36] West proposes that we adopt:

> [A] critical legal method which aims directly for women's subjective well-being, rather than indirectly through a gauze of definitional presuppositions about the nature of human life which almost invariably exclude women's lives. We should aim, simply, to increase women's happiness, joy and pleasure, and to lessen women's suffering, misery and pain.[37]

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31. *Id.* at 140–41.

32. Although West does not make this point, part of the difference may be that for men it seems likely that orgasm and ejaculation (rather than connection) may be key aspects of heterosexual intercourse whereas women do not ejaculate and tend not to experience orgasm as the result of heterosexual intercourse alone. *See, e.g.*, Alix Shulman, *Organs and Orgasms*, *in* WOMAN IN SEXIST SOCIETY 198, 200–04 (Vivian Gornick & Barbara K. Moran eds., 1971).

33. West, *supra* note 6, at 87–89.

34. *Id.* at 141.

35. *Id.* at 116.

36. *Id.*

37. *Id.* at 142.

It is true that, as individuals, we do not only and always seek power first and foremost. Sometimes, we wholeheartedly want and seek more power. Often, however, we want and seek other good things — connection, sharing, happiness. But any direct focus on women's felt pleasures and pains requires, as West herself notes, that we distinguish between accurate reports and "lies," because "women have a seemingly endless capacity to lie, both to ourselves and others, about what gives us pain and what gives us pleasure."[38] Indeed, under conditions of inequality, it often makes sense for women to define themselves as those who enjoy giving what others would otherwise take.[39] A direct focus on women's felt experience is, therefore, inherently dangerous. West sees, however, no viable alternative to learning to get to the bottom of women's lies to others and themselves: "Women will come to recognize the truth about our inner lives only when we start to speak it."[40]

### D. Pragmatic Feminism

The final approach discussed in this Essay is Margaret Radin's pragmatic feminism. Radin begins with the observation that there are problems with any grand theory developed by human beings. Pragmatists see "truth" as "hammered out piecemeal in the crucible of life and our situatedness;" "truth is provisional and ever changing," rather than some constant a great thinker can "discover" for all times and all situations through abstract thought processes.[41] For any group in a subordinate position, thinking about how to approach a legal issue presents a double bind. There are no safe strategies. Any resolution will have downsides and risks, can be co-opted, or in some other way used against the subordinate group or a vulnerable subset of the group. We need therefore, as feminists, to make pragmatic decisions based on our best guess (we can do no more) of what is likely to work best.

This point can be made with respect to which goals to seek as well as how to further a chosen goal, though Radin does not discuss this aspect of her point. For example, there are downsides as well as advantages associated with the hedonic approach described by West, which directly seeks to increase women's felt pleasures and

38. West, *supra* note 6, at 144.
39. *Id.* at 108–11.
40. *Id.* at 144.
41. Radin, *supra* note 7, at 1706–07.

decrease women's felt pains. Similarly, there are advantages and risks associated with the alternatives described earlier: formal equality and dominance theory.

One advantage of hedonic feminism is that it does not choose goals in the abstract (more choice or power) but rather makes each particular choice on the basis of the concrete reality of women's daily lives. Hedonic feminism is consistent with a recognition that we cannot easily figure out in the abstract what approach is best for women. There is also the danger, as noted by West, that women often lie, often even to themselves, about their pleasures and pains. There may also be serious disadvantages in doing what makes women comfortable, given women's socialization to be giving beings, perhaps especially in the short term. And we have little access to how we will feel at a distant time and place. If, for example, women are socialized to be most comfortable in nurturing and supportive roles, women may be most comfortable in such roles and find developing public speaking and leadership skills and experience discomforting and even painful. Yet, in the end, women might be happier if they developed the public speaking and leadership skills necessary to hold a challenging job held by few women before, though that too might be uncomfortable and painful at times. To some extent, pleasures in expanding one's skills and abilities will offset some or all of the discomfort and pain. But there may well be situations in which, particularly in the short term (and to what else can we refer in considering our hedonic lives), the costs of gaining more power outweigh the hedonic benefits because of sexist socialization. A hedonic focus might be inconsistent with the social change necessary if we are ever to see sexual equality.

From a pragmatic perspective, there are also advantages and disadvantages associated with the goals sought by liberal and dominance feminism. Dominance feminism has the advantage of exposing the creation of power differentials in customs and activities that seem natural, private, and chosen. Thus, MacKinnon's analysis of the eroticization of male dominance in contemporary heterosexuality[42] is capable of revealing ways in which women's subordination feels good, even to many women, yet generates male dominance over women. Liberal feminism has the advantage of a standard that

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42. MacKinnon sees dominance as eroticized in all sexuality in our culture, but she never actually examines lesbian or even gay sexuality. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989).

judges feel capable of applying and of a goal that resonates with the liberal and individualistic traditions so powerful in our culture. When a liberal argument is available, such as when a woman is denied an employment opportunity available to a similarly situated man, the liberal argument can be exceedingly powerful.

There are also a number of disadvantages associated with liberal and dominance feminism. Both assume that women will be better off seeking a goal chosen by theorists in the abstract (choice for liberal theorists and power for dominance theorists) regardless of concrete situations and the real world costs associated with that goal when it is fought for in a particular setting. Both ignore that any approach to any issue presents a double bind, costs and benefits associated with every alternative approach. Both ignore that an approach that works reasonably well on one issue may be ineffective or even counter-productive, hurting women or a particularly vulnerable subgroup of women when applied to another issue.

Pragmatic feminism offers no single metric for measuring motion towards sexual equality. Nor does it help one determine what goal should be seen as most important in a particular setting. Instead, pragmatism suggests that we need to be concerned primarily with real world consequences, and that only on a case-by-case basis is it useful to try to determine what goals and strategies are likely to be particularly important or effective or dangerous.

In the next two sections, each of these four approaches, liberal, dominance, hedonic, and pragmatic, is applied to two issues: child custody standards at divorce and arguments for recognizing and respecting same-sex relationships. The strengths and weaknesses of these approaches are more apparent when applied to particular issues. Applying the approaches to two issues allows one to see that an approach effective in one setting may not be as effective in another. In addition, in the context of same-sex relationships, each approach adds to the arguments that can be made for according respect and legitimacy to such relationships whereas for custody, different approaches suggest different (incompatible) standards. Looking at more than one issue is, therefore, necessary to show that although different feminist approaches sometimes argue for different outcomes, sometimes they support the same outcome with different arguments.

## *II. CHILD CUSTODY*

The issue discussed in this section is the appropriate standard for child custody at divorce in a dispute between a mother and father who have been living with the child. Traditionally, at common law, the father had an absolute right to control over and custody of his children, both during marriage and at divorce. During the nineteenth century, this rule was replaced by a rule that allowed either parent to receive custody consistent with the child's best interests, with a presumption that children of "tender years" belonged with their mother.[43] This standard still prevailed in American jurisdictions at the end of the 1960s, when, as a result of the contemporary women's movement, sex equality notions made the maternal preference suspect. Today, in most jurisdictions, the traditional maternal preference has been replaced by a discretionary, forward-looking, and open-ended "best interests" standard for children of all ages: The judge is to award custody according to the best interests of the child.[44]

In West Virginia, a less discretionary backwards-looking standard is used: the primary caretaker standard. Under this standard, judges are to consider,

> *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming, and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. baby-sitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.[45]

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43. *See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 584–91 (1968). The extent of "tender years" varied from jurisdiction to jurisdiction and from judge to judge. A six-year old would likely have been a child of "tender years" everywhere; and a fourteen-year old would likely have been beyond her "tender years" everywhere.

44. *See* Becker, *Maternal Feelings*, *supra* note 6, at 168–69. Only West Virginia, and perhaps Minnesota, have a less discretionary standard: the so-called primary caretaker standard. *See infra* notes 45–47 and accompanying text.

45. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

Under this standard, the primary caretaker, as defined above, should receive custody provided only that she or he is a fit parent, i.e., as long as the children have not been so neglected or abused as to justify the state's removal of the children from the home to foster care. Because this standard directs judges to determine specific facts that have already occurred in the real world, the standard is far less discretionary than the best interest standard,[46] which asks judges to guess which placement will be best for the child in the future.[47]

In each subsection below, a particular feminist approach is applied to the question of what custody standard is appropriate at divorce. Additionally, the strengths and weaknesses of each approach to this issue are discussed.

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46. *See, e.g.*, ILL. ANN. STAT. ch. 750 ¶ 5/602 (Smith-Hurd Supp. 1993):

§ 602 Best Interest of Child.

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person; and

(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

(c) Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. However, such presumption shall not be construed as a presumption that an order awarding joint custody is in the best interests of the child.

*Id.*

47. Becker, *Maternal Feelings*, *supra* note 6, at 172–202. If the parents were equal caretakers during marriage, then West Virginia judges use the discretionary best interest standard used by judges elsewhere in all cases.

### A. Liberal Feminism

Formal equality requires that similarly situated individual women and men be treated similarly.[48] Thus, a custody standard cannot explicitly be based on sex, since an individual mother and father may have been equally involved in parenting a child. Formal equality demands, therefore, a legal rule that does not draw lines on the basis of sex. The traditional maternal preference violates this standard, since it treats individual women and men differently even if they have behaved identically as parents and have the same relationship with the child.

Beyond eliminating the maternal preference standard, however, formal equality does not offer any guidance as to the appropriate standard. Both the best interests standard and the primary caretaker standard are facially neutral, since both purport to treat individual women and men the same. Both may, of course, affect women as a group and men as a group differently.[49] However, the requirements of formal equality are satisfied by either rule. Another shortcoming of formal equality is that it is entirely indifferent to the effect of eliminating the traditional sex-specific rule in terms of children's needs or, for that matter, the needs of women as mothers and, in most families, primary caretakers.

### B. Dominance Feminism

Dominance feminism requires that legal rules maximize women's power but gives little guidance as to how to determine which rule will have that effect. Indeed, one can often make power-

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48. *See supra* notes 9–19 and accompanying text.

49. For example, both might have a disparate impact (disproportionately negative effect) on either men as a group or women as a group. One needs a baseline to determine such effects, and the baseline is not obvious. Would any rule have a disparate impact if, under it, less than 50% of *settled* (not litigated) custody decisions result in maternal custody? Or should one look at whether 50% of litigated cases result in maternal custody? What if the standard (such as best interests) values those things men as a group tend to contribute and do as parents more than those things women as a group tend to contribute and do as parents, should such a rule be regarded as having a disparate impact on women? Conversely, what if the standard (such as primary caretaker) values those things women as a group tend to contribute and do as parents more than those things men as a group tend to contribute and do as parents, would it follow that the primary caretaker standard has a disparate impact on men? What if one group does tend to do the more important (from the child's perspective) parenting? Would a requirement that the rule not have disparate impact mean that women and men must be treated similarly regardless of how well and how much they parented prior to divorce?

based arguments for more than one result. One could, for example, argue that a rule awarding custody automatically to mothers in disputed cases would maximize the power of individual women in negotiations at divorce over custody and division of economic assets. On the other hand, one could argue that a such a rule would decrease women's power as a group over the long term because it assumes and reinforces women's commitments to and responsibilities for their children, which are major obstacles to women attaining power in other arenas, particularly politics and employment since these responsibilities necessarily limit the time, energy, and money women can dedicate to other activities. In addition, caretaking tends to make women economically dependent on others, usually men, and thus subordinate to individual men sexually, socially, and economically. Were women less confident of obtaining custody of their children at divorce, they might be less willing to act as primary caretakers during marriage. Hence, one could argue that awarding custody automatically to fathers in disputed cases might maximize women's power as a group and over the long term by breaking the connection between women and children. Thus, although it seems most unlikely that MacKinnon would support a *paternal* preference standard, it is possible to frame an argument for such a standard in terms of dominance feminism.

In any event, the focus on the effects on women's power to the exclusion of all other considerations is inappropriate even assuming that, from women's perspective, women's power is the only relevant concern and yields a single outcome. Others besides women have legitimate interests that deserve some consideration in choosing a custody standard; children especially have such interests. Perhaps a rule awarding custody to fathers at divorce would be a giant leap towards equality between the sexes but would make future generations worse off in countless ways (girls and women as well as boys and men). There are considerations other than the effects on women's power vis-á-vis men's power that should be taken into account in choosing a custody standard. Nor is it at all clear that, from women's perspective, power is what women should be primarily seeking in a child custody standard at divorce. Power is not likely to be the primary concern of most of women at divorce, which is when the standard would apply. Moreover, it is unlikely that power is what most women would think should be of prime importance in choosing a custody standard.

True, a dominance theorist would likely respond, but that is because women have been socialized to be children's caretakers and

to put the needs of others over their own, and in particular their need for power. Until women have power, how can we know what women want or are?[50] But it is dangerous, as West has noted, and elitist, to choose a standard *solely* on the basis of its effect on women's power (even assuming we could determine those effects) without any regard to women's felt or expressed desires and needs. There is considerable tension between such an approach and the basic methodology of feminism, which requires listening to women.[51]

### C. Hedonic Feminism

If one listens to the expressed pleasures and pains of women, relationships with children are extremely important. In the vast majority of mother-father families, women are "mothers", i.e., women are the primary caretakers and nurturers of the children regardless of whether they also work outside the home for wages. Indeed, recent empirical studies report that fathers with wives who "stay home" spend more time with their children than fathers whose wives work for wages.[52]

For most women who are mothers, in the sense of being primary caretakers and nurturers, their feelings of love, identity, connection, frustration, concern, worry, even anger and resentment, for

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50. *See, e.g.*, MACKINNON, FEMINISM UNMODIFIED, *supra* note 5, at 45: "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."; *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11, 74 (Isabel Marcus & Paul J. Spiegelman moderators, 1985) (MacKinnon describes the traditional feminine, caring voice as a voice created by male dominance rather than being "women's.").

51. *See, e.g.*, MACKINNON, FEMINIST THEORY, *supra* note 5, at 83–105 (discussing consciousness raising as the feminist methodology).

52. John P. Robinson, *Caring for Kids*, AM. DEMOGRAPHICS, July 1989, at 52 (reporting on 1985–1987 Americans' Use of Time Project, conducted by the Survey Research Center at the University of Maryland). Fathers who are unemployed care for children an average of 3 hours per week (13 hours for such mothers). Fathers who are employed 0 to 9 hours per week care for children 1 hour per week (10 for such mothers). Fathers who are employed 10 to 29 hours per week care for children 3 hours per week (9 for such mothers). Fathers who are employed 30 to 39 hours per week care for children 1 hour per week (7 for such mothers). Men who are employed 40 to 49 hours per week care for children 4 hours per week (5 for such mothers). These results may seem, at first glance, odd. But women who are full-time caretakers need a break when the father gets home from "work," whereas women who have also been working outside the home are likely to arrive home from work more determined (than the father) to spend time with their children.

their children are the most powerful emotions in their lives.[53] They see their relationships with their children as much more nurturing and intense than the children's relationships with their fathers.[54] Additionally, fathers who have fathered and then mothered agree that mothering is a different activity from fathering and results in a more intense connection between mother and child than father and child.[55]

In a study of mothering mothers and mothering fathers,[56] both the fathers and mothers reported that the mothers were more emotionally involved in their children's lives and felt the connection between self and child as sharper and more unconscious.[57] These women worried more about the child when separated and found separation more distracting than did fathers.[58] Being a mother was more central to the identity of the mothers than even to the mothering fathers in these families,[59] and the mothers tended to be the emotional caregivers as well as organizers even in the dual-caretaker families.[60]

A hedonic approach would require a custody rule that adequately protects women's emotional relationships with children, which at divorce are often the most important relationships in their lives. Such a standard is also likely to serve the interests of children, who are likely to be better off after divorce in the custody of the parent who has been the caretaker, particularly the emotional caretaker, i.e., in almost all families, the mother. Such a standard would not, of course, serve the interests of men well, but a hedonic analysis would consider this appropriate in light of men's lesser emotional involvement with children.

The best interests standard used in most American jurisdictions does not serve the interests of primary caretakers well. Although judges in best interests jurisdictions are typically free to

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53. *See* DIANE EHRENSAFT, PARENTING TOGETHER (1987); LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS (1987).

54. GENEVIE & MARGOLIES, *supra* note 53, at 353–58.

55. EHRENSAFT, *supra* note 53, at 93–96.

56. In Ehrensaft's non-random study, couples were included only if each parent identified themselves as primary caretaker and performed at least 35% of the child care. *Id.* at 16–17.

57. *Id.* at 16–17, 93–96.

58. *Id.* at 97–102.

59. *Id.* at 70–75, 96–102, 229–31.

60. EHRENSAFT, *supra* note 53, at 70–75, 229–31.

take into account who has been the primary caretaker, they are also free to ignore that factor or consider it outweighed by anything else they choose to consider more important: That the father is remarried and the step-mother "stays home;" that the father has higher income and can offer the children better living conditions and better educational opportunities; that the father will provide stronger religious education; that the mother has been sexually active outside of marriage, particularly if she has been sexually active with a woman; or that the father has done more than the average father.[61] In Illinois appellate cases, courts seem especially likely to take into account primary caretaking when someone *other than* the mother has assumed this role.[62] Thus, a hedonic feminist would reject the best interests standard as incompatible with women's (and children's) emotional lives and needs.[63]

The problems with the best interests standard arise not only for families who litigate custody. The broader problem is that for all families, most of whom reach a settlement on custody and economic consequences of divorce, best interests sets a vague standard against which the settlement is negotiated. Because results under it are so unpredictable, the parent with the stronger connection to the children (mostly mothers) is likely to agree to less in the way of money (division of property, maintenance, child support) in order to avoid risking losing custody in a judicial determination. Thus, for those who are primarily emotionally committed to the child, the best interests standard contributes to, not only loss of custody in some litigated cases, but more broadly to greater poverty for mothers and children after divorce.

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61. *See* Becker, *Maternal Feelings*, *supra* note 6, at 172–90.

62. *See, e.g.*, *In re* Marriage of Quindry, 585 N.E.2d 1312 (Ill. App. Ct. 1992) (awarding father custody when grandparents had been primary caretakers); *In re* Marriage of Diehl, 582 N.E.2d 281 (Ill. App. Ct. 1991) (awarding father custody over lesbian mother because, among other things, father had been primary caretaker for a period of time), *appeal denied*, 591 N.E.2d 20 (Ill. 1992). For a case in which primary caretaking by the mother was taken into account, see *In re* Marriage of Wiley, 556 N.E.2d 809 (Ill. App. Ct. 1990) (holding that primary caretaking by mother supported trial court's award of custody to her; trial court also found credible allegations that father had been physically and psychologically abusive to mother).

63. Joint custody is not discussed in the text because of space limitations in an essay of this type and the fact that true joint physical custody is not a viable option for most families. In addition, there is growing evidence that joint custody is not good for children in families with high levels of post-divorce conflict, though in families in which joint custody occurs only because judges order it, such conflict seems more likely than in other post-divorce families. *See* Becker, *Maternal Feelings*, *supra* note 6, at 184–88.

The primary caretaker standard sounds good in theory, but in practice in West Virginia it seems to have failed to adequately protect the emotional needs of children and their primary caretakers. A study of how this standard has worked in practice during the first ten years in which it was effective (1981–1991) indicates that even it is too discretionary in light of judicial bias. Mothers who have been primary caretakers are too likely to lose custody even in West Virginia, especially at the trial court level (and few mothers can afford a trial, let alone an appeal) (1) when the father has done more caretaking than the average father, though less than the mother; (2) when the mother "voluntarily" separated from her child at some point for some reason; or (3) when the mother has been sexually active outside marriage.[64]

Since most mothers, even of young children, work,[65] the judicial tendency to be too easily impressed by caretaking done by men (and conclude that there is no primary caretaker when in fact the mother has been one) is a major problem for a hedonic feminist. In addition, the primary caretaker standard focuses on those caretaking activities most likely to be undertaken by fathers and gives little weight or attention to the kind of caretaking that should be *most* important when determining custody: the emotional caretaking done mostly by mothers even in families in which fathers caretake more than most. Attention to women's emotions is, of course, the crux of hedonic feminism. A hedonic feminist might, therefore, favor something like the traditional maternal preference for children of all ages, not just those of tender years.[66]

### D. Pragmatic Feminism

There are costs and benefits to any approach to child custody at divorce; like other issues, women face a double bind. The best interests standard has the disadvantages of not protecting well the relationships of children and their caretakers at divorce in litigated and in settled cases. However, it does have the advantage of being gender neutral and not reinforcing traditional stereotypes connecting

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64. *See id.* at 190–203.

65. THE AMERICAN WOMAN 1992–1993: A STATUS REPORT 321 fig. 6-4 (Paula Ries & Anne J. Stone eds., 1992) (1990 data on mothers with children under six; 58.2% of such women work outside the home).

66. *See generally* Becker, *Maternal Feelings*, *supra* note 6 (arguing for a maternal-deference standard for child custody at divorce, under which judges would defer to mothers' decisions about what custodial arrangement would be best for children).

women and children, stereotypes that are often damaging to women. These stereotypes make it more difficult for mothers to do well as wage workers and reinforce the norm that mothers are entirely responsible for every aspect of a child's life. This norm is internalized by many women and leads to many problems, such as guilt and being too willing to sacrifice one's own needs and development if any conflict is seen with a child's needs or development. In the long term, such a strategy may be self-defeating for women from every perspective: gaining more social power, gaining more freedom to choose nontraditional roles, and gaining more pleasure in self-development and avoiding the pain of living too much through the lives of others. Thus, a sex-specific rule like the traditional maternal preference may be inconsistent with the sorts of long-term social change needed if women and men are ever to be equal.

On the other hand, the best interest standard, and even the primary caretaker standard as seen in the West Virginia appellate cases, fails to adequately protect the needs of women who have already invested much of their time and energy, emotional and otherwise, in their relationships with their children. Further, the legal custody standard may have little effect on primary behavior in an area as emotionally-charged as caretaking of children. It seems likely that when a father receives custody, in most or many families, the caretaking continues to be done by a woman, by either his mother or a new wife. Further, it is hard to believe that many women will, during marriage, actually take less care of their children because they are less likely to get custody at divorce. If legal standards at divorce do affect caretaking during marriage, a maternal preference or deference standard (deferring to mothers' decisions on custody) might actually produce more change in fathers' behavior *during* marriage than the more politically-correct gender neutral standards (best interests and primary caretaker) have done to date.[67] Fathers concerned about remaining close to their children might do more caretaking (a change desired by most mothers)

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67. *Id.* at 215–17. Regardless of whether they work outside the home, mothers still do most of the childcare in most families. *See, e.g.*, ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989); KATHRYN E. WALKER & MARGARET E. WOODS, TIME USE: A MEASURE OF HOUSEHOLD PRODUCTION OF FAMILY GOODS AND SERVICES 254–57, 270 tbl. 7 (1976); Steven L. Nock & Paul W. Kingston, *Time With Children: The Impact of Couples' Work-Time Commitments*, 67 SOC. FORCES 59 (1988); Joseph H. Pleck, *Men's Family Work: Three Perspectives and Some New Data*, 28 FAM. COORDINATOR 481, 487 (1979); Robinson, *supra* note 52, at 52.

if they knew that were a divorce to occur because of their wives' unhappiness with the division of labor, they (the fathers) would risk losing close contact with their children. In order to avoid divorce, such a father might caretake more during marriage, as desired by his wife.[68]

For a pragmatist, these many uncertainties are not surprising. The selection of a custody standard is not a question of high theory, but one to be answered in terms of real world problems, including the biases of judges who seem to have difficulty giving appropriate weight to women's caretaking even when using the primary caretaker standard. A pragmatist might think some experimentation particularly appropriate in an area full of such uncertainty.

In addition to the uncertainties discussed thus far about the costs and benefits of various approaches, there is an overriding uncertainty about what equality between the sexes would look like, particularly with respect to caretaking of children. There is no consensus about what equality between the sexes would look like in general. Would sexual equality require an androgynous world, in which there are no differences between women and men, as liberals often seem to assume? Or could it be consistent with a world in which differences continued to be observed between women as a group and men as group, perhaps with women continuing to do more than half of the caretaking, though such women in a sexually-equal world would have to be respected and compensated much more for such labor than in today's unequal world?

Given the uncertainty about what sexual equality means and the many unknowns about advantages and disadvantages of various approaches to custody, a pragmatist would likely favor experimentation. Different standards could be tried in different states so that we could see the proof in the pudding. Primary caretaker, perhaps with some refinements, could be tried in other jurisdictions besides West Virginia.[69] We could also experiment elsewhere with

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68. Becker, *Maternal Feelings*, *supra* note 6, at 215–17.

69. Three refinements seem immediately necessary. First, judges should not defer to the child's decision, even an older child, because of the many problems with asking a child to choose. Second, the fact that a mother "voluntarily" separates from a child for a short time should not make the parents equal caretakers, ignoring years of *her* primary caretaking. Third, when parents appear to be equal caregivers, the decisionmaker should consider who is the emotional caretaker, with a rebuttable presumption that it is the mother. Such a presumption is appropriate for two reasons: First, because it almost always is the mother and this presumption would offset judicial bias in assessing mothers and fathers; and second, because of the tendency of all of us to be easily impressed

maternal deference and preference standards. We would then be in a much better position to assess the advantages and disadvantages associated with each option and thus to choose an approach or approaches likely to work best.

## *III. LESBIAN AND GAY RIGHTS*

This section applies the various feminist approaches described in section I to same-sex relationships. Here, this Essay considers which arguments each strand of feminist theory suggests for lesbian and gay rights, referring to a whole constellation of rights taken for granted by other people: the right to marry one's lover; the right to dance or hold hands in public without fear; the right to speak of one's lover without fear; the right to secure family arrangements, including rights at the death or disability of one's partner; custodial rights over children one has helped raise; and the right to qualify as family for employment-related and many other benefits.

Two slightly different types of arguments are possible: (1) arguments based on the premise that discrimination against lesbians and gay men is a form of sex discrimination; and (2) independent arguments for lesbians and gay men in their own right. For each feminist approach other than West's hedonic approach, the following section suggests possible arguments under each of these strands.[70]

### A. Formal Equality

#### *1. Sexual Orientation Discrimination as a Form of Sex Discrimination*

Because sex-based classifications are accorded heightened scrutiny under existing constitutional doctrine,[71] there are significant advantages to viewing sexual orientation arguments as a form of sex discrimination.[72] Although no jurisdiction has as yet recog-

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by any caretaking men do and to take for granted everything women do. *See* Becker, *Maternal Feelings*, *supra* note 6, at 223.

70. With a hedonic approach, arguments do not seem to separate into these two forms.

71. *See* Craig v. Boren, 429 U.S. 190 (1976) (applying an intermediate level of scrutiny to sex-based classifications, a standard more demanding than the easily-met rational basis standard used for most legislation but less demanding than the strict scrutiny used for racial classifications).

72. For earlier works making such arguments, see, e.g., SUZANNE PHARR, HOMO-

nized sexual orientation classifications as a form of sex discrimination, and hence suspect and likely to be struck under the Federal Constitution,[73] one state supreme court found that sexual orienta-

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PHOBIA: A WEAPON OF SEXISM (1988); Mark A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 607–33 (1992); Andrew Koppelman, *Why Discrimination Against Lesbians and Gays is Sex Discrimination*, 68 N.Y.U. L. REV. (forthcoming 1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

73. Several decisions applying heightened scrutiny to classifications based on sexual orientation have been overruled. See, for example, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990), which held that the district court erred in applying heightened scrutiny to the Defense Department's (alleged) practice of refusing homosexuals security clearance because homosexuals are not a suspect or quasi-suspect class. *Id.* at 571. *High Tech Gays* abrogated an earlier case, Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981), which had applied intermediate scrutiny to classifications based on sexual preference. *Hatheway*, 641 F.2d at 1382. The Seventh Circuit, in BenShalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), reversed a district court opinion which had concluded that classifications based on homosexual orientation were suspect. *Id.* at 464. *See* BenShalom v. Marsh, 703 F. Supp. 1372, 1380 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). *See also* Jantz v. Muci, 976 F.2d 623, 630 n.3 (10th Cir. 1992), *rev'g* 759 F. Supp. 1543 (D. Kan. 1991), *cert. denied*, 113 S. Ct. 2445 (1993).

Other courts have intensified rational basis scrutiny by excluding irrational prejudice against homosexuals as a legitimate governmental justification. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (holding irrational private biases insufficient to deny zoning permit to home for mentally disabled persons); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that community prejudice is an insufficient reason to deny custody to inter-racial couple). *See also* Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993) (holding deprivation based "solely upon irrational and invidious prejudices against a class of people (whether or not a 'suspect class') . . . [are] unconstitutional, even under rational-basis review"), *reh'g en banc granted, vacated* (D.C. Cir. Jan. 7, 1994); Pruitt v. Cheney, 963 F.2d 1160, 1164–65 (9th Cir. 1991) (explaining that precedent upholding classification based on fact that other members of the military despise homosexuality was undermined by *Palmore* and *Cleburne*, and "should not be given unexamined effect today as a matter of law"), *cert. denied*, 113 S. Ct. 655 (1992). Some state courts have performed a similar analysis. In Commonwealth v. Wasson, 842 S.W.2d 487, 501–02 (Ky. 1992), the Kentucky Supreme Court held that, notwithstanding Bowers v. Hardwick, 478 U.S. 186 (1986), a statute criminalizing same-sex sodomy violated the state constitutional right to privacy. The court stated, "[t]he majority has no moral right to dictate how everyone else should live" and that "public indignation, while given due weight, should be subject to the overriding test of rational and critical analysis, drawing the line at harmful consequences to others." *Wasson*, 842 S.W.2d at 496. The court found no rational basis for criminalizing same-sex sodomy simply because the majority regarded it as offensive. *Id.* at 502. *See also* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 658–59 (Ct. App. 1991) (invalidating ordinance designed to promote bias against homosexuals and finding no rational basis supported attempt "to solve . . . perceived problems by driving away the perceived perpetrators as a class, 'guilty' and 'innocent' alike. All that is lacking is a sack of stones for throwing"),

tion discrimination is a form of sex discrimination under a state constitution: the Supreme Court of Hawaii in *Baehr v. Lewin*.[74]

*Loving v. Virginia*,[75] a successful race-discrimination challenge to a miscegenation statute, provides some support for viewing sexual orientation discrimination as a form of sex discrimination under the liberal, formal equality approach to discrimination used by the Supreme Court. In *Baehr*, the Hawaiian court placed considerable weight on the analogy to *Loving* in concluding that sex discrimination encompasses sexual orientation discrimination. The liberal argument that sexual orientation discrimination is a form of sex discrimination begins by noting that a ban on same-sex marriage requires private individuals to marry only those of a certain sex. Thus, it is equivalent to a sex-specific classification: women can only marry men and men can only marry women. Because it is sex-specific, such a classification discriminates on the basis of sex.[76] It can be argued, however, that there is a sense in which such a statute is *not* sex-specific: both men and women are required to marry people of another sex.[77] Such an argument can also be made in the context of an anti-miscegenation statute; such a statute treats African Americans and whites equally because members of both races are required to avoid marriage with a member of the other race.[78] Yet in *Loving v. Virginia,* the Supreme Court held that an anti-miscegenation statute is impermissible because it discriminates on the basis of race.

There is a more significant difference between the cases, though ignored by both the majority and dissent in *Baehr*.[79] The *Loving* Court emphasized that the Virginia statute was not simply race-specific in some formal sense. In responding to the argument described in the preceding paragraph — that the miscegenation

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*rev. denied* (Ct. App. 1992).

74. 852 P.2d 44 (Haw. 1993).

75. 388 U.S. 1 (1967).

76. *See Baehr*, 852 P.2d at 60.

77. *See, e.g., id.* at 71 (Heen, J., dissenting).

78. The State of Virginia made precisely this argument in *Loving*. *See Loving*, 388 U.S. at 8.

79. The dissent focused on the essential meaning of marriage, which it saw as the "legal union of one man and one woman." *Baehr*, 852 P.2d at 71 (Heen, J., dissenting) (quoting Singer v. Hara, 522 P.2d 1187, 1191–92 (Wash.), *rev. denied*, 84 Wash. 2d 1008 (1974)). According to the *Baehr* dissent, "the statute's classification is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriages and bears a reasonable relationship to that purpose." *Id.* at 74 (Heen, J., dissenting).

statute treated both races the same, because neither could marry the other — the *Loving* Court noted that the statues were "measures designed to maintain white supremacy."[80] But if bans on marriages *between* African Americans and whites maintained white supremacy, wouldn't *requiring* inter-sexual marriage promote sexual equality? To understand why the *opposite* rule can contribute to systemic subordination of a group (women), one must understand at least some of the differences between the way racial and sexual subordination operate. One must speak of power and understand how it can be exercised in different ways with similar results. But formal equality ignores power.

Thus, formal equality does offer a formal argument for finding sexual orientation discrimination a form of sex discrimination. But formal equality does not explain why forced integration of the sexes is a problem for women. Indeed, given *Loving*, which finds forced segregation of the races integral to white supremacy, compulsory intimate integration would seem likely to further women's equality.

### 2. *Independent Liberal Arguments for Lesbian and Gay Rights*

Independent liberal arguments depend on the extent to which classifications based on sexual orientation are seen as problematic in similar ways to classifications based on race and sex, the paradigmatic suspect classifications. To date, the Supreme Court has failed to articulate the critical requirements for special judicial review of group-based classifications. This is a major obstacle to successful liberal arguments for lesbians and gay men as a suspect group.

Possibly relevant factors or requirements mentioned in Supreme Court opinions describing suspect groups are that the group be discrete, insular, and politically powerless;[81] have suffered a history of discrimination[82] on the basis of some highly-visible,[83]

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80. *Loving*, 388 U.S. at 11. As proof of this purpose, the Court noted that the statute "prohibited only interracial marriages involving white persons." *Id.*

81. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). For criticisms of these requirements, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

82. *See* Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (plurality opinion).

83. *See id.* at 686.

immutable[84] characteristic (as sex and race are ordinarily thought to be) bearing "no relation to ability to perform or contribute to society."[85] As Janet Halley has pointed out, the Supreme Court has never actually held that immutability is a sine qua non for heightened scrutiny as a suspect class. Rather, the Court has continued to list immutability as one in a series of *relevant* factors.[86]

Because the Court has repeatedly listed "immutability" as at least *a relevant* factor, pro-gay litigators have tended to argue that sexual orientation is immutable, a difficult and risky legal argument. Many lesbians and gay men feel that they were *always* lesbian or gay, but many others feel that they *chose* to be gay at some point. This suggests that sexual orientation is unlikely to be completely immutable for all lesbians and gay men. Indeed, it is clear that *some* lesbians and gay men have, at some time in their lives lived as heterosexuals. As long as *some* lesbians and gay men do, in some sense, "choose" their sexual orientation, conservatives can argue that differential treatment is appropriate and necessary to coerce such people into heterosexuality. The current focus on immutability by pro-gay litigators gives these conservatives a basis for arguing that equal protection is unavailable because sexual orientation is not completely immutable for all lesbians and gay men. Further, there is a sense in which same-sex sexuality is conduct and hence something one "chooses" within the ordinary ways of thinking about "choice." Recent empirical studies suggesting some genetic bases are not to the contrary.[87] These studies suggest, or are con-

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84. *Id.*

85. *Id.*

86. Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, STAN. L. REV. (forthcoming Spring 1994) [hereinafter Halley, *Politics of Biology*]. Halley cites Bowen v. Gilliard, 483 U.S. 587, 589–90 (1986), which upheld the Federal Aid to Families with Dependent Children's determination of eligibility based on the income of the 'filing unit,' which included all parents and siblings living in the same household. In concluding that the classification of a filing unit did not require 'heightened scrutiny,' the *Bowen* Court noted: "As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." *Id.* at 602.

87. Recent studies include: J. Michael Bailey & Richard C. Pillard, M.D., *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991) (finding evidence that identical male twins more likely to share sexual orientation than fraternal twins or other brothers); J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 ARCHIVES GEN. PSYCHIATRY 217 (1993) (finding similar evidence in lesbians); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 321 (July 16, 1993) (con-

sistent with, sexual orientation developing as a result of complex interactions of genetic, environmental, social, and personal factors.

As Janet Halley has noted, "immutability" should *not* be necessary for vulnerable groups to receive equal protection. Rather, the point should be that the group is discriminated against in arbitrary ways, because of biases, with deep historical roots in the culture, and having nothing to do with individuals' contributions to society.[88] At least to date, liberal pro-gay equality arguments have not succeeded in the courts in part because liberalism, with its emphasis on individualism, has failed to develop an adequate standard for determining what groups are entitled to judicial protection under the formal equality standard of the Equal Protection Clause.

## B. Dominance Feminism

### *1. Sexual Orientation Discrimination as a Form of Sex Discrimination*

Dominance feminism would begin with the premise that in our culture, what is erotic is what is subordinating for women. An essential part of this erotic system is keeping men and women distinct, different. Much discrimination against lesbians and gay men is based on their breaking out of these categories, lessening the difference between women and men and thereby destabilizing a dichotomy crucial to women's subordination.

One could, within a dominance framework, go on to note that biases against same-sex relationships are part of a system of compulsory heterosexuality,[89] a system which requires that if women

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cluding from study of male homosexual twins that sexual orientation is likely influenced by genes on the X chromosome); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034, 1035 (Aug. 20, 1991) (finding that heterosexual men have a larger hypothalamus than homosexual men). For an excellent discussion of the many flaws with the recent studies — chiefly their assumption of two essential and constant sexualities — see Halley, *Politics of Biology*, *supra* note 86. The problem mentioned in text — that immutability arguments are not very effective because other factors almost certainly have some role — is illustrated by the recent Colorado trial court decision in Evans v. Romer, No. 92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct., Dec. 14, 1993). There, the court struck the Colorado initiative banning laws protecting gay people from discrimination on the ground that the law limited the ability of an identifiable group to participate in the political system. The court declined to find gays a suspect class, noting that although there seems to be a genetic component to sexual orientation, there is also evidence that "sexual orientation is not completely genetic." *Id.* at *11.

88. *See* Halley, *Politics of Biology*, *supra* note 86.

89. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS:

want sexual intimacy, and the emotional and economic sharing and support that often accompany such intimacy, they must seek such intimacy only with men on the terms worked out by and for men. Bans on same-sex relationships are designed to ensure male access to women for sex and reproduction. Were women free to seek partnerships with women in a society which gave equal respect and equally favorable treatment to lesbian relationships, women would have the option to avoid the subordinating heterosexuality that pervades our culture and to find more equal relationships with women.

Lesbian relationships offer women a number of advantages, given the expectations of "husband" and "wife" and "father" and "mother" in our culture. In a lesbian relationship, sex will *not* mean, as it does in much of our culture and in most heterosexual relationships, that activity which culminates in and ends with male orgasm. Sex will necessarily be more focused on pleasure for women, because there is no penis present. In addition, in a lesbian relationship it is easier to experience a sexuality not built on the eroticization of women's subordination to men because there is no man present. Women in lesbian relationships are more likely to act as sexual agents than in heterosexual relationships. Women in lesbian relationships are more likely to share housework, child care, and money in more equitable ways and to be more equal than women in heterosexual relationships.[90] These points hold even when there is some role-playing within lesbian relationships.[91] Traditional heterosexual expectations and roles are necessarily disrupted by the presence of two women in a relationship because neither partner is a man with the accompanying internal and external privileges, such as relatively high wages, that go with being a man in our so-

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J. WOMEN, CULTURE & SOC'Y 631, 641–43 (1980). Although Rich, in this classic essay, cites MacKinnon in making this point, MacKinnon herself has never suggested that same-sex relationships offer women today significant advantages. Instead, MacKinnon emphasizes women's socialization in a culture which eroticizes male supremacy and butch-femme roles in lesbian relationships. *See, e.g.*, MACKINNON, FEMINIST THEORY, *supra* note 5, at 119, 141–42, 273 n.33. For a critical analysis of this aspect of MacKinnon's work, see Cain, *supra* note 42.

90. *See, e.g.*, PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 53–111 (1983) (stating lesbians are less likely than other couples to have relative power reflect relative income); ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD 191–230, 278–322 (1993) (stating even when butch-femme roles were very rigid, there were many differences between lesbian and heterosexual relationships in terms of power dynamics).

91. KENNEDY & DAVIS, *supra* note 90, at 278–322.

ciety.

Under a dominance approach, it is easy to understand why bans on inter-racial marriage were part of white supremacy while requirements of inter-sexual marriage are part of male supremacy. True, both African Americans and women are the "other" beings, essentially different from, and inferior to, the dominant groups (whites and men). Another similarity is that, for both African Americans and women, a complex combination of intimacy and separation (integration and segregation) has been part of their subordination. While Jim Crow legislation required segregation in many places in the South, such as stores, trains, waiting rooms, buses, restaurants, swimming pools, washrooms, and drinking fountains, African Americans and whites interacted in many other areas. In white households, African Americans raised white children, cooked and cleaned for white mistresses, and were regarded as sexually available to white men of the household. Similarly, women and men have traditionally been segregated in many areas of life, such as many schools, much of the military, boy scouts (girl scouts), most athletic activities, and many religious organizations, while at the same time women have been regarded as sexually available to men.

Quite different traditions have, however, operated with respect to legal recognition of sexual unions. Between the races such unions were proscribed by Jim Crow legislation, while for the sexes such unions have been the only legitimate form of sexual intimacy. There are a number of reasons for this difference, though both approaches have been an effective part of the subordination of blacks and women to whites and men. First, men need women in order to have descendants, and heterosexual marriage has traditionally been organized (legally and socially) so as to enable men to pass property to those most likely to be their children: the children of their wives, whose lives have been circumscribed by rules designed to ensure that the wife's children were also the children of the husband. White men do not need to legally recognize their mixed-race children in order to be able to "have" any children at all. Refusing legal (and typically social) recognition to such children is a way of favoring white descendants over others, and thus supporting white supremacy.

Second, it is important to keep women less separatist than African Americans. Women are, after all, fifty-one percent of the

population,[92] while African Americans are only about twelve percent of the population.[93] If, for example, women were in separate churches and as segregated in housing and schools as African Americans are today, it is likely that it would be much more difficult to keep women subordinate to men. If women lived in different neighborhoods from men, electoral politics would be radically different given women's numerical edge.[94] Compulsory heterosexuality is an important aspect of the forced integration of women and men (or the subtle ban on separatism for women). By presenting sexual intimacy with men as women's only legitimate option for intimacy and economic security (in light of women's role as caretakers of young children), men hamper women's ability to use their majority numbers to achieve equality in countless ways. Emotionally, economically, politically, and sexually, compulsory heterosexuality maximizes women's incentives to see their well-being as bound up with and dependent on men's.

The forced integration of women and men in legally-sanctioned intimate relationships does not guarantee sexual equality, despite the effectiveness of forced segregation in such relationships in maintaining racial subordination. Rather, bans on same-sex marriage coerce women into emotional, economic, and sexual dependence on men, thereby making their use of their majority status to achieve equality in the political system less likely. Thus, dominance analysis offers a number of powerful arguments for understanding sexual orientation discrimination as a form of sex discrimination. The next subsection discusses the independent dominance arguments for full legitimacy and respect for same-sex relationships.

### 2. *Independent Dominance Arguments for Lesbian and Gay Rights*

Like liberalism, dominance feminism has developed no clear standards for when a group has been so systematically subordinat-

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92. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, STATISTICAL ABSTRACT OF THE UNITED STATES 16 tbl. 16 (1993) (using 1991 data).

93. *Id.* at 18 tbl. 19.

94. *See* BECKER ET AL., TAKING WOMEN SERIOUSLY, *supra* note 10, at 892–912 (raising questions about women's political ineffectiveness in light of our majority status); Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 183–88 (discussing ways in which intimate relationships with men interfere with women's political effectiveness).

ed that courts should invalidate legislation that fails to meet the dominance standard. MacKinnon herself views women and African Americans as belonging to such groups, but is less than clear about what other groups might qualify as well as what the general standard for qualification might be.[95]

Dominance theory focuses on power differentials in the systemic translation of differences between groups into advantages for one and disadvantages for another and suggests a standard which would protect any group that is socially subordinate as a result of such systemic practices. There might be groups for which the question would be close, but clearly lesbians and gay men would qualify as a group warranting judicial protection under such a standard. In countless ways, real or perceived differences between lesbians and gay men and heterosexuals are turned into advantages for heterosexuals and disadvantages for homosexuals. Same-sex lovers cannot marry; heterosexual lovers can, thus qualifying for many important social and legal advantages, including family health insurance coverage through employment of one spouse, default rules at death and divorce providing economic protection and protection of one's relationships with children, and social support for the relationship's continuance. Same-sex lovers cannot even hold hands, dance, or show affection in other ways without worrying about the consequences either in public or in many private settings. Members of heterosexual couples can talk about their families at work, at religious events, and elsewhere without fear of dire consequences. Members of same-sex relationships risk loss of jobs, friends, and family relationships when they talk about their lives.

The social subordination of lesbians and gay men is so ubiquitous and pernicious that most people in this group are still closeted in some settings for fear of the consequences. As a result of being in the closet, the ability of lesbians and gay men to use the political system is hampered, not just by homophobic biases and the fact that this group is a relatively small proportion of the voting population, but also by the closet itself, which inhibits the ability of lesbians and gay men to engage in political activities, particularly speech.[96]

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95. *See* MACKINNON, FEMINIST THEORY, *supra* note 5; MACKINNON, FEMINISM UNMODIFIED, *supra* note 5.

96. In Evans v. Romer, No. 92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct., Dec. 14, 1993), described *supra* note 87, the court also held that lesbians and gay men were not a suspect or quasi-suspect class because they are not politically powerless. To support

It is true that the closet allows members of this group to earn nondiscriminatory wages, an option not available to most women or members of racial minorities. This is especially advantageous for gay men since both partners earn men's higher wages, which can be used to magnify political voice. Further, these men are less likely than others to have children to support, resulting in unusually high discretionary incomes. But this benefit of the closet should not be regarded as eliminating the political problems of the closet for a number of reasons. Two are briefly noted here.

First, being in the closet will, for many people, affect their attitudes towards politics and the importance of an audible lesbian and gay political voice. The experience of being closeted tends to make people see invisibility as the best coping mechanism and it encourages people to believe that there are no real problems as long as one is discrete.[97] In other words, the closet itself affects political attitudes, and tends to discourage activism and even monetary contributions for political change.

Second, one of the most important political problems posed by the closet (perhaps the most important one) is the barrier it creates to heterosexuals empathizing with lesbians and gay men. Because of the closet, many, probably most, heterosexuals do not know that they actually know gay people as friends, co-workers, relatives. As a result, it is extremely easy to characterize lesbians and gay men

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this conclusion, the court noted that in coalitions with others, lesbians and gay men were often politically effective, as evidenced by the fact that "an increasing number of states and localities have adopted gay rights, protective statutes, and ordinances." *Id.* at *12. However, this explanation does not adequately distinguish between gays, and African Americans, and women, the classic suspect and quasi-suspect classes. Title VII bans employment discrimination against African Americans throughout the United States, yet the fact that Title VII was passed by a political branch has not been regarded as ending suspect class analysis for classification by race. Also, Title VII was passed in 1964, protecting women from employment discrimination, years before the Supreme Court first subjected classifications by sex to heightened scrutiny in Reed v. Reed, 404 U.S. 71 (1971). By the reasoning of the *Evans* court, the United States Supreme Court's decision in *Reed* was unnecessary since women, a *majority* group, had been so politically effective as to outlaw sex discrimination by employers with twenty-five or more employees *throughout* the United States, not just in a few states and localities. To date, bans on sexual orientation discrimination in employment have been adopted only in a few states and in 100 or so counties, cities, towns, or villages. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Work Force Diversity*, 11 YALE L. & POL'Y REV. 47, 63 (1993) ("Eight states . . . prohibit discrimination against lesbians and gay men in private employment, while more than one hundred municipalities have enacted antidiscrimination ordinances that include sexual orientation.").

97. *See* RANDY SHILTS, THE MAYOR OF CASTRO STREET (1982).

as wholly "other," and entirely different. The ability of closeted people to spend unusually high amounts of discretionary income politically does not eliminate the barrier the closet presents to heterosexuals' empathy (assuming the first problem noted above). There is no reason to think that, on balance, the political costs of the closet are significantly offset by the political benefits of higher incomes the closet can bring.

Dominance theory argues powerfully for lesbian and gay rights, both as necessary for equality between the sexes and as independently necessary for a just society. The arguments here strengthen the arguments from a formal equality perspective, and give additional reasons why sexual orientation discrimination should be seen as a form of sex discrimination and why lesbians and gay men should be seen as a group entitled to the protection of an equality standard in their own right.

### C. Hedonic Feminism

Hedonic feminism also adds arguments to the case for lesbian and gay equality, although from a hedonic perspective it does not seem helpful to categorize arguments as either premised on sexual orientation discrimination as a form of sex discrimination or as independent arguments. The additional arguments suggested by a hedonic perspective describe the emotional lives of lesbians and gay men in ways likely to foster the empathy so necessary if other groups are to see lesbians and gay men as people entitled to basic respect and human dignity. As described above, West noted that women's pleasures and pains are often different from men's because women have different experiences as (heterosexual) lovers, in reproduction, and in caretaking. Because of these differences, the legal system tends not to hear the pain in women's lives, with the result that often women themselves are less likely to see their own experiences as painful.

There are a number of parallels and differences for lesbians and gay men. To the extent that lesbians' and gay men's pleasures or pains are different from the pleasures or pains of heterosexuals, the problem appears much like the problem faced by women: there is a systemic trivialization or denial of emotional reality. Therefore, as with women, many lesbians and gay men do not even regard their difficulties as problems to which objection is appropriate. For example, many lesbian and gay people regard the closet as the way to avoid the problems of living in a heterosexist and homophobic

society, and would deny that there are serious problems within the closet.[98] Like many heterosexuals, they would agree that if one is discrete, tactful, sensitive to the sensibilities of others, one can do quite well; political activism, particularly in-your-face political activism, is regarded by many nonpolitical lesbians and gay people as both unnecessary and a breach of etiquette.[99] The closet leads to an internalization of homophobia inconsistent with effective political activism.[100]

Thus, as with women, a major problem is the difficulty of communicating the pain of lesbian and gay lives in a homophobic and heterosexist society, particularly the pain of the closet, to the extent that such pain is different from the pain of others. This inaudibility makes it difficult for lesbians and gay men to even recognize the pain as such and to realize that it is, unfortunately, an important part of their lives and a social injustice.

Here are just a few other examples of pain that is different from heterosexuals' pain. People who grow up feeling queer experience tremendous pain in adolescence.[101] Particularly during this vulnerable period, one internalizes the condemnation one feels for one's conduct and identity. Often, violence in some form accompanies such condemnation. Suicide rates for lesbian and gay teens may be evidence of the overwhelming pain of these years; according to some, these rates are two to three times the rates of other teens.[102] Another estimate is that as many as one out of three lesbian or gay teens attempt suicide.[103]

People who grow up feeling or assuming that they are heterosexual but who, over time, become lesbians or gay, often experience less pain during adolescence, but are likely to feel enormous pain as they try to find satisfying intimacy in heterosexual relationships, often in marriages that end in divorce.[104] People in this category,

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98. *See generally id.*

99. *See, e.g., id.*

100. *See, e.g.*, PHARR, *supra* note 72, at 60–64 (discussing the internalization of homophobia, so that lesbians and gay men see their problems as the result of their own failings, rather than the result of unjust oppression).

101. *See generally* LESLIE FEINBERG, STONE BUTCH BLUES (1993); KENNEDY & DAVIS, *supra* note 90.

102. Chris Bull, *Suicidal Tendencies*, ADVOCATE, Apr. 5, 1994, at 35, 36–37 (citing governmental reports). The extent to which suicide rates are higher for young lesbians and gay youth is disputed, however. To date, we do not have definitive answers. *Id.*

103. GILBERT HERDT, *Introduction: Gay and Lesbian Youth, Emergent Identities, and Cultural Scenes at Home and Abroad, in* GAY AND LESBIAN YOUTH 1, 31 (Gilbert Herdt ed., 1989).

104. *See, e.g.*, BARBEE J. CASSINGHAM & SALLY M. O'NEIL, AND THEN I MET THIS

as a result of pressure to conform to dominant (heterosexual) norms, often spend years in relationships they find painful, uncomfortable, and alienating before realizing where precisely the problem is.

For all lesbians and gay men, once they enter into same-sex relationships, the lack of social support for their relationships causes much pain.[105] Such relationships are inevitably more fragile, given the combination of greater difficulties in relationships and less social support, both caused by homophobic and heterosexist biases. For example, family hostility to same-sex relationships puts great strain on these relationships. Being closeted places other stresses on such relationships by requiring that one live a lie for significant amounts of time, teaching one to suppress one's emotions (don't put your arm around your lover without thinking) as well as to lie automatically. Lying continuously to one's family, friends, and colleagues makes it harder to ever know what one feels and how to communicate it effectively to anyone, including one's lover.[106]

Not only are same-sex relationships subject to all these pressures; there is little in the way of social support to encourage troubled partners to work through their problems rather than separate and start over. Unstable, fragile relationships exact additional tolls on the human spirit and for many are inconsistent with working through emotional problems so as to ever be able to sustain a satisfying intimate relationship with another adult.

Thus far, this Essay has focused on the difficulty of communicating lesbian and gay pleasures and pains to the extent that they are different from the pleasures and pains of others. However, similar problems pertain when the pleasures and pains are similar to the pleasures and pains of other people. Because lesbians and gay

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WOMAN: PREVIOUSLY MARRIED WOMEN'S JOURNEYS INTO LESBIAN RELATIONSHIPS (1993); MARILYN MURPHY, ARE YOU GIRLS TRAVELING ALONE? (1991); OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK (Ginny Vida ed., 1978).

105. *See, e.g.*, FEINBERG, *supra* note 101; ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 190 (1979).

106. *See, e.g.*, RICH, *supra* note 105, at 190. Rich asks,

> Does a life "in the closet" — lying, perhaps of necessity, about ourselves to bosses, landlords, clients, colleagues, family, because the law and public opinion are founded on a lie — does this, can it, spread into private life, so that lying (described as *discretion*) becomes an easy way to avoid conflict or complication? [C]an it become a strategy so ingrained that it is used even with close friends and lovers?

*Id.*

men are so thoroughly demonized as the wholly different other, even when their pleasures (for example, the joy of emotional and sexual intimacy in a relationship with someone one loves) are much like the pleasures of equally-lucky others, their pleasures are seen as different, even disgusting.

In building empathy among non-gays, it is important for lesbians and gay men to speak of their pleasures and pains, as Robin West suggests for women. It is also important that lesbians and gay men be "out," so that their families, friends, and co-workers who hear these stories realize that they are likely to apply to individuals whom they know and often love. Both storytelling and being out of the closet are important prerequisites for fairness in the political system, which is controlled by non-gay people whose empathy is a necessary prerequisite for lesbian and gay rights.

Hedonic feminism thus offers another layer of arguments to support same-sex relationships, focusing on the emotional quality, the pains and pleasures, of gay and lesbian lives, and describing both the differences and the similarities in gay and straight lives. These arguments add a dimension missing from the more analytic liberal and dominance approaches, a dimension of critical importance in building the empathy which any minority group requires if it is to be protected adequately by democratic politics.

### D. Pragmatic Feminism

Pragmatic feminism does not suggest new kinds of arguments or new ways to convince others of the need for and the justice of equal rights for lesbians and gay men. The point of pragmatism is that in deciding which arguments to make, and what kinds of solutions to seek, one should consider the real-world, pragmatic advantages and disadvantages, and the costs and benefits, of various approaches rather than regarding the choice as an abstract, theoretical question of high theory.

In the context of the question considered in this section of the Essay (arguments for full recognition for and respect of same-sex relationships) various feminist approaches offer additional arguments for lesbian and gay rights. Recall the custody-standard issue, discussed earlier, in which different feminist approaches argued for inconsistent solutions.[107] In contrast, every feminist approach dis-

107. *See supra* notes 43–69 and accompanying text.

cussed here argues for according full legitimacy and respect to gay relationships. Each approach offers additional, but entirely compatible, arguments for the outcome.

Here, pragmatism would suggest that one pick and choose among these approaches, depending on the context and one's audience. Before courts, a stress on formal equality, particularly sexual-orientation discrimination as sex-discrimination, may be particularly effective. Also, formal equality augmented by a dominance analysis would provide the step missing in *Baehr*: why requiring integration of the sexes in marriage is part of male supremacy, though mandatory segregation of the races in marriage was part of white supremacy. Before legislative bodies and in other important social fora, such as television, hedonic arguments, designed to build a basis for empathy, might be most effective. Trial and error will likely be necessary.

## *IV. CONCLUSION*

In closing, four points should be emphasized. The first is that a solution that looks good in the abstract, in theory, may end up not working well in practice. For example, with respect to child custody at divorce, both the best interests and primary caretaker standards sound good in theory, but are problematic in practice given existing biases and mostly male judges in a society that values men more than women, expects mothers to be perfect, and regards mothers as responsible for all the problems of children. These problems suggest the need for a pragmatic approach; it is impossible to tell, from careful consideration of a theory or even a solution to a particular problem in the abstract, whether in fact a particular approach or solution is good for women.

Second, each of the three distinct feminist approaches discussed in this Essay (liberal, dominance, and hedonic feminism) has its strengths and weakness. There are situations in which each approach is likely to be an effective strategy. Again, this is an argument for pragmatic feminism, which alone allows one to experiment with different approaches in various contexts and use that approach which seems likely to work best in the area or for the issue with which one is concerned.

Formal equality works well to protest employment opportunities closed to women because this liberal approach resonates with strong currents in our culture, such as individualism and equal opportunity. Where this approach works, it is often very powerful

and more reliable than dominance or hedonic arguments. It would be foolish to discard for theoretical reasons so useful an approach.

Dominance analysis works well in revealing the operation of power in activities that seem "natural." Thus, dominance analysis is very effective in showing why sexual harassment at work is not a simple expression of sexual attraction but part of the systemic subordination of women. Other areas in which dominance analysis can be very effective include rape, pornography, and (hetero)sexuality in general.

A hedonic approach works well in areas in which emotional relationships are extremely important, such as child custody. There are many situations in which it would be inappropriate simply to do what makes women most comfortable on an emotional level, given women's socialization as caretakers of others. There may be situations in which it is important to adopt policies encouraging women to advance their own interests and careers rather than doing what feels good. However, at divorce, when the question is which parent should have custody of a child, the mother has already, in the vast majority of families, made a commitment to the caretaking of her children that should be recognized, respected, and given appropriate weight in deciding who should have custody. Change in parenting roles is not likely to be effected by changing custody standards at divorce and, even if such change could be effected in this manner, this is the wrong time. If we are willing to use the power of the state to coerce women to be less attached to children, we should do it earlier, when it will hurt less, rather than at divorce, when most mothers are emotionally vulnerable as a result of the divorce and have already made such overwhelming emotional commitments to their children.

Third, all else being equal, the goal of each of the three distinct approaches is good. All else being equal, the goal of formal equality is good: laws should not coerce or pressure people into traditional sexual roles by explicitly treating women and men differently. All else being equal, the goal of dominance, more power for women relative to men, is good. And all else being equal, greater satisfaction in women's hedonic lives is good, women should experience less pain and more pleasure.

Often, however, all else is not equal. Often, there are conflicts between these goals. Formally neutral rules may work to reinforce traditional male advantages and privileges. More hedonic satisfaction may mean less power as power has traditionally been defined. More power for women may come in the form of rules that draw

distinct lines between women and men.

Again, this is an argument for a pragmatic approach. Because each goal is good but may interfere with the achievement of another, each goal should be pursued only in the context of concrete issues and with an openness to the experimentation which will often be necessary if the advantages and disadvantages of various strategies in specific situations are to be understood. Feminists need to be more self-conscious of the inevitable double binds they face on the many issues for which there is a conflict between desirable goals of laws that do not draw lines by sex, that provide more power for women, and that provide greater hedonic satisfaction for women. When conflicts do arise, short-term pragmatic guestimates about what is likely to work and which goal is most important in this situation should be made. Feminists should also be open to experimentation.

Finally, there are often *no* conflicts between the three feminist approaches discussed in this Essay. Often, as in the case of same-sex relationships, each merely adds to the understanding of why a specific outcome is necessary from women's perspective, and provides additional arguments which, depending on the forum, may be more or less useful in arguing for a particular outcome.