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Four Feminist Theoretical Approaches and the Double Bind of Surrogacy

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FOUR FEMINIST THEORETICAL APPROACHES AND THE DOUBLE BIND OF SURROGACY

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INTRODUCTION

I have been asked to give a brief overview of modern feminist legal theory. It is going to be very difficult because this has become an incredibly rich body of work. The modern wave of the feminist movement began with an assumption that there was one way to approach sexism in law and that was to use formal equality to get rid of rules that treated women and men differently. There wasn't much in the way of real theory behind that approach, other than the important insight that if you do treat men and women differently, you are perpetuating traditional stereotypes and pushing people into traditional roles in ways that are not healthy for the human spirit.

Today, and increasingly since 1979, feminist legal theory is a diverse body of work with many people arguing for many approaches. The explosion began in 1979 with Catharine MacKinnon's *Sexual Harassment of Working Women* and MacKinnon began by critiquing formal equality. MacKinnon points out that formal equality sounds gender-neutral. It sounds fair. You treat men and women similarly, without any bias in favor of either group. But if you stop and think about it, it is androcentric. It gives women who look like men the right to the rules and practices men have worked out for themselves, so that if a woman is at a law firm she has the right, if she bills 2,700 hours a year, to be treated like the men who work that number of hours. But, of course, many women are not similarly situated to men. Many women who work at firms have quite different responsibilities when they go home at night than the men at those firms, and if all your equality standard gives you is the right to the rules developed by

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and for men with wives, it is not going to be gender-neutral, it is actually an androcentric standard.[1]

In addition, MacKinnon says, if you stop and think about it, the core of discrimination is not treating similarly situated men and women differently. The core of discrimination is not that men who are breadwinners are treated differently from women who are breadwinners, right? The core of discrimination is that systematically, time after time after time, differences between men and women, whether real or perceived, are turned, as a result of social practices, into advantages for men and disadvantages for women.[2] The problem is that breadwinners and homemakers are treated so differently, not that women who are breadwinners are treated so differently from men who are breadwinners, or that women who are homemakers are treated so differently from men who are homemakers.

Because of differences that seem to justify different treatment, we treat homemakers and breadwinners in ways that create hierarchy between women and men. It is the systemic creation of hierarchy—out of real or perceived differences—that forms the core of discrimination. To see discrimination, you must focus on differences between men and women, because that is often where social practices create inequality. Note the break from formal equality where differences justify differential treatment and, hence, inequality.

For MacKinnon, the bottom line, the thing that needs continuous attention if we are determined to eradicate the inequality between the sexes, is power. We need to scrutinize whatever systematically gives men a power-related advantage relative to women, whether it be via political power, economic resources, or whatever. And we need to look most especially for power inequities created when society perceives differences between the sexes.

Not all modern feminist legal theorists embrace MacKinnon's alternative to formal equality. In Part I of this overview I present two other alternatives: one by Robin West and one by Margaret Radin. In Part II I discuss all four approaches in the context of a specific legal question to illustrate their practical applications. I conclude with some observations on the advantages of having a variety of approaches available in arguing about equality between the sexes.

1. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 106-16 (1979) [hereinafter SEXUAL HARASSMENT]; *see also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 32-45 (1987).

2. SEXUAL HARASSMENT, *supra* note 1, at 117-18 (1979).

I. HEDONIC AND PRAGMATIC APPROACHES

One alternative to formal equality and MacKinnon's approach is Robin West's hedonic approach.[3] West says that MacKinnon surely is right in noting that power is important and that women need more power and men, less. But West says that another problem is that women's suffering is not heard by the legal system.[4] Women's suffering and pain are very hard to translate into legal arguments. In tort and criminal law, it is often hard to translate women's fear of rape into arguments that can be heard in a court of law. It is often hard to translate women's parental responsibilities and the importance of their relationships to their children and the texture of that relationship into ways that can be heard when you are arguing for the appropriate custody standard in a court of law. West says that feminists need to focus on translating women's pleasures and pains, which are often different from men's pleasures and pains, into words that are legally audible. And it may be that there are contexts in which improving the quality of women's hedonic lives—increasing women's felt pleasures and decreasing women's felt pains—is more important than power. As individuals, none of us seek only and always primarily power in our own lives. There are many things we put above power. Perhaps, in working for women's collective interests, we also need to consider, in some contexts, women's interests in other aspects of their lives.

The final alternative to formal equality is Margaret Radin's pragmatic feminism.[5] Radin says there are going to be problems with any single approach, any grand theory that you use to approach all legal questions. Human beings do not have the mental ability to sit in armchairs or look out of ivory towers and see what is going to work best for all women, for all time, in all contexts. Instead, we should realize that in approaching any legal question, there are advantages and disadvantages to each solution and our resolution of an issue should therefore be pragmatic. We should be looking not at grand theory, but at what are the real world advantages and disadvantages to solution A and to solution B in this particular context.[6]

One can make this point in the context of West's hedonic theory. If we only do what makes women comfortable—in a world where many women are not socialized to seek success, but are socialized to

3. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).
4. *Id.* at 82.
5. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).
6. *See generally id.*

think of caretaking as that for which they are particularly made—this approach might be self-defeating in the long term. This is true both for women in general and for the individual woman who may end up feeling that she has not developed herself and has too little of her own in her life after the children are gone. And, in general, women's status cannot change significantly unless significant numbers of women do things that they find challenging rather than comforting.

II. APPLICATION OF THE FOUR APPROACHES TO THE SURROGACY ISSUE

Thus far, I have suggested that we cannot apply any one theory to each and every question in a mechanical fashion without looking at the advantages and disadvantages to each approach. Now I apply each of the four approaches discussed above to a single legal issue. The four approaches are formal equality, MacKinnon's dominance approach, West's hedonic approach, and Radin's pragmatic approach. The issue I chose for illustration involves paid surrogacy: should specific performance be available when a surrogate mother, someone who has borne the child "using" her own ovum, decides, around the time of the birth of the child, that she does not want to go through with the contract? Should the father be able to come in and compel her to deliver the child in exchange for the agreed-upon sum?

I begin with formal equality. To apply formal equality you need similarly situated men and women. To make sex an equality issue, we must find similarly situated men. People who use formal equality tend to find analogies in one of two areas. Some find sperm donation to be an analogous event. Sperm donors are able to sign contracts, and those contracts are enforced.[7] The sperm donor cannot afterward try to retain parental rights after signing away all rights when the sperm is donated for fifty dollars. Formal-equality proponents often use another analogy in the surrogacy context: the sale of goods. We do give specific performance for the sale of unique finished goods. A child is a unique finished good; therefore, specific performance is appropriate.[8]

7. *See, e.g.*, Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW, MED., & HEALTH CARE 72 (1988).

8. *See, e.g.*, MARTHA A. FIELD, SURROGATE MOTHERHOOD 79-83 (1988) (discussing analogy to specific performance of finished goods). This is a somewhat awkward argument to make because to the extent the transaction is seen as delivery of a unique finished good for a price, it looks like the illegal sale of a baby.

There are obvious weaknesses with both analogies. Sperm donation for fifty dollars is hardly the same as carrying a child to term. To see as equivalent the situations of the mother who has just given birth to a child she has carried for nine months and the sperm donor who walks away with $50 in his pocket after depositing the sperm in the bank is to deny the reality of women's unique experiences during pregnancy and childbirth. The other analogy—the sale of finished goods—is also weak. A child is not simply a finished good. The relationship between a mother and a child at the end of pregnancy, regardless of whether she ever signed a surrogacy contract, is emotionally quite different from someone who has just finished producing, say, a watch or a ring or some other "good." It is surely far easier to turn one's back on the watch or ring and walk away without regrets or serious emotional consequences. Given the absence of any strong analogy, formal equality is indeterminate here; it cannot tell us how to solve this problem.

What about a dominance approach—MacKinnon's approach? Here, the focus is on power. Would legal enforcement or nonenforcement of the surrogate's promise to give the new born child to her father be more likely to redress power inequities between men and women? Which approach would be inappropriate because it is yet another translation of differences into advantages for men and disadvantages for women? And which approach would be appropriate because it is *not* the translation of differences into power inequities favoring men? MacKinnon herself is hostile to paid surrogacy and to the enforcement of paid surrogacy contracts.[9] She sees enforceable surrogacy contracts as another instance of male control over women's bodies. Such contracts, she argues, are analogous to prostitution in that women's bodies are taken and paid for, for the use of men.[10]

But nonenforcement of surrogacy contracts can also operate to translate differences into advantages for men. For many poor women with few economic options, surrogacy arrangements might be desirable. And, if such arrangements are legally enforceable, it might be easier for these women to enter into such contracts at a good price. Perhaps most women who signed such contracts would never regret having done so, despite the emotional cost, given the economic advantages and their needs.

9. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 246, 248 (1989).

10. *Id.*

Thus, at least some women might have more power were women able to enter into binding surrogacy contracts. After all, traditionally, the common law *dis*empowered women by refusing to give married women the ability to contract. It took the married women's property acts in the nineteenth century to change that. The ability to contract when other people in a market economy can contract often—always?—gives one power.

There are conflicting interests among women on this issue, particularly along the lines of class and race. Surrogacy is likely to increase the commodification of all women—that is, the extent to which we view all women as commodities with a market price linked to men's valuation of them.[11] From this perspective, surrogacy is almost entirely a negative for most women, particularly middle and upper class women, who would be uninterested in being surrogates and disadvantaged by the increased commodification of women. Similarly, women of color will be mostly hurt by enforceability of paid surrogacy because, though disproportionately working class or poor, women of color are less likely to be surrogates than white women because of both racial bias (white fathers will not usually want a surrogate of color) and the fact that men of color are less likely to be able to pay for a surrogacy contract than white men. Working-class white women is the group most likely to benefit from surrogacy. The dominance approach tells us nothing about how to resolve conflicts among women. More fundamentally, like formal equality, a power analysis is indeterminate. You can make power arguments both ways.

A hedonic focus might require that we actually go out to the real world and talk to real women. The question would be: what advantages and disadvantages do women who are considering or who have entered into these relationships feel about the various approaches? What approach would best serve their felt needs, especially, perhaps, the needs of the most vulnerable women? How many women do change their minds either at or after the birth of the child? How many more end up sorry they entered into the arrangement, although they do go through with it?[12] How many feel torn and hurt for life as a result of going into the contract? How many, on the other hand, feel content with their choice and glad they were able to choose this economic opportunity? Again, I think there is likely to be no clear an-

11. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928-36 (1987).

12. *See, e.g.*, ELIZABETH KANE, BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER (1988).

swer. And, again, we will not know how to resolve conflicting interests among different women, if our interviews do reveal such conflicts. Perhaps we should be especially concerned to improve the lives of the most vulnerable women.[13]

Pragmatism can help us to understand why it is that these grand theories often actually provide us with very little in the way of concrete guidance for how to resolve a specific issue. Surrogacy is a double bind; like most legal issues there will be advantages and disadvantages to whatever we do.[14] There are advantages and disadvantages both to nonenforcement and specific enforcement. If we do not enforce these contracts at all,[15] it means women cannot choose to market their reproductive labor via specifically enforceable contracts. Poor women will have fewer choices, and inevitably, all women will continue to face the undervaluation of reproductive labor in a culture which values things in terms of market prices.

On the other hand, enforcement means increased commodification of women's bodies. It means that we are willing to treat what is an essential aspect of a woman's being, her relationship with a child at the end of pregnancy, as something that is fungible and traded on a market. Women without much money will be tempted, because they have so few other options, to sign contracts that might ultimately be extremely painful for them to go through with. There are problems with all solutions to surrogacy; that is one reason why none of the four theoretical approaches suggests a clear resolution of the question.

From a pragmatic perspective all we can do is make our best guess about what is likely to be best for women in this situation today. Maybe what we need is some experimentation. Maybe we can't be very sure. In any event, whatever we do we need to watch how things work out in the real world and make continuous reassessments, considering whether in fact this is working out to be good for women or

13. *See* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990) (in context of pragmatism, making point that pragmatic approach should have first-principle of "anti-subordination.").

14. For a more complete discussion of the double bind in the context of surrogacy, see Radin, *supra* note 11, at 1928-36.

15. Intermediate approaches are also imaginable. For example, specific performance might not be an available remedy but damages could be available when the mother reneges. Under ordinary contract rules, only nonspeculative damages would, however, be available. It is therefore likely that, under this approach, the father would only be able to recover out-of-pocket costs, such as any money paid to the mother for expenses and money paid to others, such as lawyers and medical-service providers. In any event, the discussion in the text is limited to the two extreme solutions: specific enforcement or total nonenforcement (leaving the parties as they stand when the transaction falls apart).

bad for women. More generally, there is no pat formula that yields an ideal solution on all issues for all women in all circumstances and for all time. We need continuously to reassess and to experiment with how to approach inequality between women and men rather than thinking that we have one grand theory that will give us all the answers.

CONCLUSION

I close by emphasizing that there are strengths and weaknesses to the four approaches. Think of these various approaches as an arsenal. You should bring out the best weapon depending on the context, depending on what will work best in the particular situation you face. For example, formal equality works very well when employment opportunities are closed to women who are similarly situated to men. It is a very powerful weapon in that situation because it resonates very strongly with powerful currents in our culture, such as individualism and the right to equal opportunity. MacKinnon's dominance approach is especially powerful in the context of sexuality. Issues such as sexual harassment, rape, and pornography all can be very effectively analyzed with this approach. Her analysis helps one to see how a sexual hierarchy is created in practices that seem natural and neutral to somebody who has been raised in our culture. I think Robin West's hedonic approach is very important in areas where women's emotional lives are particularly important, as illustrated by the Tennessee case discussed by Martha Craig Dantry and Leslie Bender.[16] A hedonic approach is also important in thinking about custody standards at divorce, where women's emotional ties to their children need to be recognized and protected by the legal system because they are so important in the lives of so many women.[17]

All else being equal, the goal of each of these theoretical approaches is good. All else being equal, it is good to have rules that treat similarly situated men and women similarly. All else being equal, you do not want to force women to be one way and men to be another way or to assume that all women have certain characteristics and interests and all men have others. All else being equal, women need more power. Women should have more power and men less power. And all else being equal, it is good to increase women's felt

16. *See* Leslie Bender, *Is Tort Law Male? Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

17. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

pleasures and decrease women's felt pains. But often there are conflicts amongst these various goals and we have to recognize these in a very pragmatic way, remaining conscious of the inevitable double binds we face in balancing these goals in any specific context. As feminists, we need to seek to improve the quality of women's felt lives as well as seeking both more power and rules treating individuals as such rather than as members of monolithic groups of women and men.