

Fixing Feminist Jurisprudence

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Our Lives Before the Law: Constructing a Feminist Jurisprudence

Judith A. Baer

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[Judith A. Baer](#) describes *Our Lives Before the Law* as a "contrarian book" "born out of anger and hope." (i) Though the hope is thin, despite her concluding chapter's assertions to the contrary, the anger is palpable and simmering. Baer is angry at the law's failure to give women what we need to have – the same quality of life that men have – and she is angry at feminist jurisprudence for its failure to grasp how that should be done. Baer's intelligence and passion, as well as her formidable command of feminist scholarship and liberal jurisprudence, shine throughout her work. Her readers will get a clear and broad-based introduction to feminist jurisprudence.

Unfortunately, Baer often falls prey to the sound-bite. For readers schooled in the layered thought of feminist jurisprudence, her representations of feminist scholars may seem more like caricatures than portraits. Her pithy technique will work best for students and lay readers who can use the book as an introduction to feminist legal theories. Yet, Baer sounds like she is talking to feminist jurists, urging us to revise our feminist theories and take a new approach to our work that will not be subject to the flaws plaguing current feminist legal scholarship.

In Part I, "Using Women's Lives to Interpret Law," Baer answers the questions of whether law is male, what makes law male, and how law is male, by explaining feminism's critiques of law and patriarchy and illustrating why feminist jurisprudence to date has been far too unsuccessful. In Part II, "Women's Lives Through Law," she focuses on constitutional and public law issues like equality, reproductive freedom, and fetal protection policies to show how the law inaccurately interprets women's lives and needs. Then, in her last chapter, Baer proposes a revised feminist postliberalism, which she calls imperative jurisprudence, when it is applied to law. The great power of this book is Baer's concrete proposal, constructed from years of thinking about feminism and conventional public law theory. Whether or not one agrees with her, she ought to be credited for going beyond pure critique to designing a jurisprudential approach. This review contains a sketch of a few of her arguments, but I encourage scholars to read her interesting book to learn the subtleties of her reasoning and hear the force of her critique.

Fixing Sexual Equality & Equality Law

The crux of her argument is that for feminist critiques of law to succeed, they must presume sexual equality as their organizing principle and "extirpate, 'root and branch,' the male supremacy of conventional theory." (189) No doubt all feminist jurists think that is what they are doing. Baer finds their understanding of what sexual equality requires

inadequate to the task. Feminism has too readily bought into the rhetoric of liberalism that explicitly debates about equal rights, while implicitly and without question imposing asymmetrical gender responsibilities. Challenging what is unsaid about responsibilities must be a focal point of an effective feminist legal analysis. And if men, acting in their own self-interest, give themselves rights, use an ethic of justice, and practice abstract reasoning, these must be desirable things. After all, if they were undesirable, men would have assigned them to women.

Feminists who reject rights as alienating or inadequate – or seek to switch to an ethic of care and a more detailed, particularized reasoning – are taking the wrong approach. She argues that sexual equality requires *more* rights for women (positive rights derived from needs, as well as negative freedoms from coercion and interference), and gender symmetry in the allocation of responsibilities for tasks such as care-giving, child-rearing, domestic work, and reproduction. Applying Rawlsian-like principles of equality and justice to this "maintenance" work in our society will impose more of these responsibilities on men and on collective institutions (governments, corporations, employers, communities). (194) A rule of strict sexual equality will begin to undermine the male supremacy in law.

Disappointingly, Baer doesn't adequately translate this theoretical approach into her separate chapter critiquing equality in law. For instance, Baer's challenges to the intent and state action requirements under 14th Amendment equal protection clause analysis reflect her critiques of liberalism's "free will" and "public-private distinction" (explained below) and restate familiar critical race and feminist critiques of equal protection. But, they do not incorporate her work on sexual equality. Given her powerful arguments about sexual equality, one would hope that her critique of legal equality would reconcile her theoretical position with an interpretation of 14th Amendment equal protection.

Fixing Liberalism

Despite its promise, the symmetrical reallocation of rights and responsibilities will not create sexual equality in law by itself. Law must also reject fundamental liberal assumptions about voluntariness, free will and choice, and abolish the public-private distinction. In Baer's view, conventional legal theory's parents are capitalism and liberalism, and capitalism and liberalism are direct heirs of male supremacy – making male supremacy the grandfather and genetic source-code for law. Free-will assumptions, written from liberalism onto law, often are not true for women, when one examines the contexts and conditions of their lives; yet, they are used to individualize responsibility and impose it on women. Baer supports her claims with examples of criminal prosecutions of pregnant women, attempts to limit women's reproductive freedom, evidence of women's vulnerabilities to male violence, evidence of women's economic destitution, and rhetoric about female sexuality in general. Discussions of women's free choices divert attention from male aggressiveness and irresponsibility, and from structural, societal, collective responsibilities.

Likewise, the public-private distinction of liberalism hurts women and makes us unequal. Essential functions typically assigned to women (e.g., maintenance or "imperative" work like reproduction, housework, and child care) have been devalued and

exempted from principles of justice through their relegation to the private realm. The public-private distinction must be abolished, so that these essential functions will be treated the same as other societal work and elevated to the same system of rewards and just distribution. Women cannot achieve sexual equality unless the public-private distinction becomes obsolete.

Fixing Feminism

Feminist jurisprudence has some arguments right – particularly those advocating the abolition of the public-private distinction – but has gone seriously awry on other points, including its acknowledgement of gender difference, its singular focus on women, and its conflation of the situation of women with its understanding of who women are.

Feminism started out on the right foot, but lost its way in the 1980s and 1990s. Having once served to liberate women from their socially constructed roles, feminism today reinscribes women in those roles, if not by intention, certainly by effect. Baer reserves her harshest criticism for difference-feminism, which she labels "character jurisprudence," but she also calls to account dominance-feminism, which she entitles "situation jurisprudence."

Baer praises "character" feminists for their contributions in valuing women's assigned work, but simultaneously chastises them for attaching these tasks to women, often in essentialist ways, and leaving women with primary responsibility for them, even though they are "imperative" for society to continue. Difference-feminism, when applied to law, replicates pre-feminist, protectionist legal arguments, and ends up being regressive. Baer prefers dominance-feminism, which she praises for recognizing women's vulnerabilities to male violence and law's role in supporting male power and domination; but, she concedes that this gender-power theory is regularly criticized by feminists and others, who blur descriptions of the "situation" of women (subjection to male dominance) with the "situated" (descriptions of women themselves). (62) People confuse male aggression with female passivity. Baer decides that this erroneous critique of situation jurisprudence is inevitable in a society that focuses on individuals rather than systems, structures, and institutions. If situation jurisprudence is going to be read as insulting to women and taking away our "agency," another approach must be adopted. So a feminist theory is needed that attacks gender-power dynamics and male supremacy, and does so in a way that places responsibility on men and institutions, not on women. The way to avoid the critique of situation jurisprudence is to theorize about human beings, not women or men.

Paradoxically, after extensively discussing the ideas of many different feminist scholars, Baer ends up reducing them into this simple, dichotomous approach. I find the neat separation of feminism into these two schools of thought misleading, but acknowledge that this dichotomy is an accepted analysis of feminism. Nonetheless, she errs by labeling these two approaches for their "flaws," rather than their strengths.

What I find interesting about Baer is that she is both right and wrong in her critiques of feminist jurisprudence. She misreads character jurisprudence in the same way she claims critics misread situation jurisprudence. Maybe her misinterpretations of character jurisprudence are as inevitable as critics' misinterpretations of situation jurisprudence. If so, then she is right that something else is needed. Baer insists that we start theorizing

about human beings rather than women. "A liberalism that includes women as rights-bearing human beings is a necessary component of feminist jurisprudence." (174)

Fixing Abortion Law

Baer's anger at law is exacerbated by the flawed decision in *Roe v. Wade* (1973) and the continuous assault on legalized abortion. She devotes much of her book to advocating for abortion rights. On the subject of reproductive freedom and choice within *Roe's* framework, she argues that the pregnant woman ought to be the party who decides whether her fetus is a human being or person, not the State, the Constitution, experts, or vocal groups. (135) She challenges legal theorists and anti-choice (or pro-life) "feminists" who impose more responsibilities and restrictions on women, but do not impose comparable additional responsibilities on society and men (e.g., granting women positive rights to support, health care, childcare, addiction treatment, job advantages). Anti-choice feminists are not feminists to Baer, because their positions are incompatible with sexual equality. They create single-sex burdens on women.

As with her equality law argument, where she inadequately applies her theoretical sexual equality critique to law, here Baer inadequately applies her liberalism critique to her abortion law analysis. Like most of us who attempt to reconcile structural critiques with the individualism of liberal legal systems, Baer confronts the dilemma of calling for a theory that deals with structures and institutions, while at the same time emphasizing individual women's own free choices and rights. Reconciling these two positions for the benefit of women is the difficult theoretical problem she hasn't yet solved for feminist jurisprudence.

Fixing Feminist Jurisprudence with Imperative Jurisprudence

Baer calls her solution "imperative jurisprudence," because she demands strict sexual equality in all the imperative, maintenance work that is necessary to sustain society and is a precondition for all the kinds of activities law seems to value. Our opening question should be: "What can people and society not do without?" Society cannot do without cleaning, cooking, child rearing, caregiving, or reproduction. Strict sexual equality must apply in the assignment of these essential functions that keep society going. Childbearing is the only exception, because the imperative function of reproduction cannot be reassigned. In the case of reproduction, "[i]nequalities can benefit the disadvantaged if those who are burdened with the necessary work can say no, and are rewarded rather than punished for doing the work." (195)

'Feminist jurisprudence must liberate women from performing assigned roles and reward them for performing assigned activities,' like caregiving. (197) And, "[t]he right to the means of meeting human needs, at the very least, must join the traditional rights of liberal theory. Positive and negative rights must be envisioned as interdependent." (199) A focus on human beings, rather than women, a symmetrical reallocation of rights and responsibilities, elimination of conventional legal theory's concepts of "free will" and "the public-private distinction," and the addition of positive rights will set feminist jurisprudence on the correct course.

Baer is right to be angry about how women have fared under law. I do not doubt that Baer's vision would greatly improve the quality of women's lives. Feminist jurists must attend to her concerns and consider whether her proposed solutions give us the hope we need for a feminist future.

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