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BOOK REVIEWS

OUR LIVES BEFORE THE LAW

JUDITH BAER

PRINCETON UNIVERSITY PRESS, 1999

*Reviewed by Jennifer Duncan Collier**

Despite advances in women's rights, both social and legal, as well as increased economic security, many women still struggle for equality, safety, and justice. The glass ceiling remains unbroken in many industries; domestic violence threatens numerous women and their families; and divorce and custody law support policies that work against women. Women and feminists have been writing about and organizing around these issues for over a century. In *Our Lives Before the Law* Judith Baer, Professor of Political Science at Texas A&M University, seeks "to make sense of women's condition and feminist responses to it."¹

In the first part of the book, Baer reviews and categorizes a range of feminist writers and thinkers and criticizes their responses to the condition of women's lives. She borrows from Catherine MacKinnon, a famous feminist thinker and legal scholar, two categories of feminist theory to help organize her critique: the categories of "difference" and "dominance." Difference theory emphasizes differences between men and women and "maintains that the law disadvantages women because it derives from male thought and experience."² Dominance theory, on the other hand, "asserts that male bias in law results from men's subjection of women."

* Executive Director of the Maryland Drug Treatment Task Force; Yale College, Yale University, B.A. 1993; University of Maryland School of Law, J.D., 1996.

¹ JUDITH BAER, *OUR LIVES BEFORE THE LAW* 3 (1999).

² *Id.* at 39.

Baer renames these theories and declares difference theory to be character jurisprudence, defining it as “women shar[ing] some distinctive features that make male-centered theory wrong for them.”³ Baer claims that this theory has been used to undermine women’s equality by spawning restrictive rather than expansive responses to women’s lives and rights due to differences between women and men. For example, Baer asserts that such theory has been used to keep women out of certain professions and jobs, and to steer girls into conventional female roles and occupations. Baer advises character jurists to think of women as human beings in their search for equality.

Baer renames dominance theory situation jurisprudence to help remove the debate raised by the idea of women’s lives being universally dominated by men and male society. Situation jurisprudence focuses on the power relations between men and women and the fact that the situation in which women frequently find themselves is a subjected or subordinate one.

While Baer agrees with this premise, she is not fully satisfied with the ability of situation jurisprudence to evolve feminist discourse. Baer claims that despite the truth stated by situation jurisprudence, critics are distracted by it and focus instead on personal responses to this theory which refute the state of subordination. For example, many responses to Catherine MacKinnon’s work, which promotes the idea of dominance theory/situation jurisprudence, are personal rebuttals of the state of sexual oppression in which women generally find themselves. Critics attempt to undercut MacKinnon by claiming that sex is sometimes voluntary and controlled by women. Baer also criticizes MacKinnon’s work, but for a different reason: for focusing on the sexual oppression of women and never fully discussing other aspects of subjection that are produced by the overbearing responsibilities women shoulder.

Baer concludes that both situation and character jurisprudence release men and societal institutions from responsibility because the discourse is still focused just on women. The conversations inspired by these theories either discuss women’s character or their state of oppression (or defensiveness about it), as opposed to revealing the positions and conditions into which law and society place women by virtue of male power and then recommending how to change these conditions. To achieve real change, Baer recommends increasing the responsibilities of institutions, such as corporations and government, instead of overloading responsibility on individual women.

In the next section of the book, Baer begins to analyze how the law itself views women and how it “. . . constructs and interprets women’s lives.”⁴ To accomplish this task, Baer explores three issues: equal protection, reproductive rights, and fetal protection policies. In her discussion of fetal protection policies, Baer demonstrates that such laws are used to treat women less favorably because they are different from men in that they are able to bear children. An example of this practice is the incarceration of Cornelia Whitner, a woman who used drugs during

³ *Id.* at 41.

⁴ *Id.* at 94.

her pregnancy and was prosecuted for child neglect after she gave birth to her son, who tested positive for cocaine. Baer posits that the law uses fetal protection policy to coerce women as opposed to protecting fetuses. Instead of requiring adequate access to pre-natal care and drug treatment during pregnancy as a way to protect fetuses, law and society choose to coerce women not to use drugs by incarcerating addicted women after the birth of their drug-exposed children. To similarly prosecute a drug-using man is simply not possible. As a result, women bear a disproportionate amount of scrutiny and responsibility under the law in the case of fetal protection laws.

Baer uses the example of the failure of fetal protection law to demonstrate the overemphasis of individual rights and responsibilities in liberal theory and how this emphasis facilitates the subjection of women. In the case of Whitner, liberal rights theory envisions Whitner making an individual free choice to get pregnant, to use drugs, and to give birth to a drug-exposed infant. It also assumes that Whitner was responsible for avoiding this situation. Liberal rights theory does not take into consideration the fact that Whitner was addicted to drugs and may not have made many conscious, deliberate decisions about getting pregnant and using drugs.

Baer also posits that liberal theory does not hold anyone else responsible for this situation other than Whitner. For example, it does not hold the government or society accountable for failing to protect women, such as Whitner, from the sale and availability of drugs or for failing to provide them with drug treatment. The State in this case is off the hook because it is not required to help prevent the birth of drug-exposed infants, only to punish it after-the-fact.

According to Baer, feminist jurisprudence does not refute fetal protection laws because both situation and character jurisprudence only focus on women and do not require the State and other members of society to share responsibility for protecting fetuses or preventing the birth of drug-exposed infants. Baer states that "[a] crucial task of feminist theory is to redistribute responsibility: to assign it upward rather than downward, to relinquish it on behalf of women."⁵ In Baer's estimation, feminist jurisprudence has not helped to accomplish this task. In the case of fetal protection laws, rights and responsibilities are still only assigned to Whitner and other addicted women.

To evolve feminist discourse so that it effectively addresses the issue of redistributing responsibility, Baer builds on feminist and liberal theory to create a new theory, feminist postliberalism.⁶ This new theory would help "women . . . redistribute responsibility from individuals to institutions."⁷ This task would result in the prioritization of human needs as well as individual rights. For example, government, corporations, and others would provide services such as real access to job training, health care, and child care so that women would have a better chance to achieve economic equality. Because institutions would be providing for some

⁵ *Id.* at 173-74.

⁶ *See id.* at 175.

⁷ JUDITH BAER, *OUR LIVES BEFORE THE LAW* 197 (1999).

human needs, women would no longer be solely responsible for acquiring these things on their own.

In *Our Lives Before the Law* Baer challenges feminist thinkers, the presumed audience of the book, to engage the ideas of feminist postliberalism to improve the conditions of women. While this goal is laudable and the need for improving the situation of women apparent, Baer fails to articulate how this change in feminist discourse will facilitate actual change. More importantly, Baer does not illustrate how the law can be used to produce these improved conditions for women. She does not set forth a legal agenda, leaving the reader feeling dissatisfied. What is supposed to happen now that Baer has introduced the theory of feminist postliberalism? Does it function simply as a call to action for feminists to stop talking just about women and to cry for institutional change and responsibility? Or does it serve as the first step to creating an agenda for change?

The book's biggest shortfall is Baer's discussion of the law, which is confusing. Cases are frequently referenced without adequate background information, causing many of Baer's points to be missed or delivered unclearly. While Baer's ideas are bold, their often needlessly complex delivery and explication significantly weakens their power. The reader struggles through the text, attempting to remember jargon, to realize key points. Baer frequently summarizes these points in a succinct fashion at the end of each chapter, leaving the reader wondering why she does not make such direct assertions in the first place.

The greatest strength of the book is Baer's review and explication of feminist theory. Throughout the book she effectively discusses various theories and thinkers and their historical significance. Baer demonstrates how these theories and thinkers have contributed to the evolution of feminist discourse, clearly differentiating between theories that have improved the condition and status of women's lives with those that support forces to maintain the status quo. Baer also touches on the disagreements between feminist thinkers. She raises feminist critiques about the exclusion of minority and gay women from "mainstream, white" feminism at appropriate points throughout the book to help support her arguments.

In *Our Lives Before the Law* Judith Baer seeks to redirect feminist discourse, to make it more responsive and helpful to women by calling for radical change: redistribution of responsibility from individual women to institutions and the creation of a "right" to need. While this project is both necessary and praiseworthy, and certainly serves the public interest, Judith Baer still seems to be working from passionate generalizations. Details coupled with careful explication of the law would improve both the reader's understanding of the problem and the opportunity for others to hear her call and help achieve her goals.

IN DEFENSE OF A POLITICAL COURT

TERRI JENNINGS PERETTI

PRINCETON UNIVERSITY PRESS, 1999

*Reviewed by Susan J. Krueger**

The struggle to define the role of the Supreme Court—an “undemocratic” institution—within a democracy has presented a challenge to legal scholars. Conventional legal scholars have traditionally reconciled the role of the Court with democratic principles by asserting that, even in a democracy, the majority view must be checked in certain situations. Because issues involving minority rights or fundamental constitutional rights, such as freedom of speech and the right to vote, are considered unlikely to receive fair treatment in the political arena, Court intervention is necessary. The Court, in order to protect such rights, must derive and apply constitutional principles in a neutral and coherent manner. Constitutional scholars believe that Supreme Court justices should possess certain attributes that suit them to the task of protecting such rights. These attributes include legal training and methods of reasoning, capacities for dealing with matters of principle, and insulation from political pressure. The special attributes of judges and the legal process give the Court a heightened capacity for serving as a principled check or restraint on ordinary political processes.

In *In Defense of a Political Court* Terri Jennings Peretti, a political scientist, argues that contemporary constitutional theory is wrong in nearly every regard. That is, it is not possible to discover objective moral truths or contemporary values and it is not feasible to suggest that judges alone possess the legitimacy and specialized capacity to discover and enforce them. Instead, she asserts that the Court is and should be a political institution; that the justices’s personal political preferences strongly influence their interpretations of the Constitution; and that an acknowledgment of that reality will lead to a more honest and efficient system. Political motivation on the part of the justices is critical to insuring that the Court

* Vassar College, B.A., 1984; New York University School of Law, J.D., 1989; Assistant Circuit Executive for Legal Affairs, First Circuit Executive’s Office.

exercises its power of judicial review in a responsible, legitimate, and democratic manner.

Peretti first summarizes the major prevailing approaches to constitutional theory. She begins with the "neutralist" assumption that there exists a neutral decision-making source allowing the justices to discern and apply general principles in a neutral manner while refraining from the expression of their personal values or biases. She describes three categories of neutralist theory: interpretivism, non-interpretivism, and the process-perfecting approach. Under an interpretivist approach (most notably expressed by Robert Bork), judges decide constitutional issues based upon norms that are stated or clearly implied in the written Constitution. The Court is to enforce only those principles that are discernible in the text of the Constitution (or through the Framers's intention). To interpretivists, judicial opinions that rely on a constitutional right of privacy, such as *Griswold v. Connecticut*¹ and *Roe v. Wade*,² lead only to judicial tyranny since they represent judges adding their own values to those embodied in the Constitution.

Non-interpretivists, in contrast, find the interpretivist approach too narrow. Rather than adhering to the precise language of the Constitution, non-interpretivists use the Constitution to lead them to correct "moral" judgments that uphold "society's fundamental values." The court must discover and apply core constitutional values that are fundamental to a just society. Non-interpretivists may thus defend judicial opinions such as *Roe* by employing a moral code that emphasizes privacy rights. As long as the Court pursues these values objectively and rationally it acts legitimately, even if the values are not directly promoted by the Constitutional text.

John Hart Ely, in the process-perfecting approach, proposes that neither democratic theory nor the Constitution itself grants the Court power to impose values. Instead, the Court simply reviews the political process to ensure that the ends have been reached "fairly." For example, the Court may scrutinize laws that create race-based distinctions, since such laws are likely to be the result of an inequitable legislative process. Ultimately, all neutralists agree that there exists an objective theory of constitutional interpretation that can and must be applied neutrally in order for the Court to retain its legitimacy.

Peretti then examines the critical legal studies movement and its attacks upon the neutralist perspective. Generally speaking, critical legal studies scholars find that constitutional truths cannot be defined in a value neutral manner. Judges's personal and political beliefs and social background necessarily color their opinions. True objectivity is not attainable. The sources upon which interpretivists rely—the Constitution, Framers's intent, democratic theory—can produce inconsistent decisions based upon the values or personal beliefs of the decision maker. Non-interpretivist approaches permit judges to impose their own elitist views upon society and process-based approaches are similarly based upon the goals or values political participation should promote. Peretti, while agreeing with

¹ 381 U.S. 479 (1965).

² 410 U.S. 113 (1973).

the fundamental points raised by critical legal studies scholars, in turn criticizes them for failing to suggest a viable alternative framework in which to understand the role of the Court in a democracy.

Finally, Peretti discusses the views of the skeptics. The skeptics advocate provisional review; that is, Supreme Court decisions would no longer serve as the final word on a given topic, but rather the Court would work in partnership with Congress. Congress would have the power to force the Court to reconsider its decisions. Peretti points out that the problem with provisional review is providing an objective, principled way for determining when the Court's judgments are final and when they are merely provisional and subject to congressional silencing or revision.

Peretti concludes that all of these theories center on the erroneous beliefs that judges can behave in a neutral, value-free manner and that judges possess certain qualities that permit them to make unbiased judgments. Permitting judges to make decisions based upon personal values or political beliefs would destroy the system. Peretti, however, argues that not only have judges made decisions based upon their personal and political beliefs since the inception of the republic, but that that is precisely what they should be doing. Peretti's model severely limits the role of the Constitution. The Constitution establishes a basic structural framework and serves to channel and limit political debate. It no longer serves as the objective source of our public values. Rather, those values are derived from current public sentiment and political factors.

Peretti points out that judges are selected through a political process which is infused with partisanship and ideology. The selection of judges itself is not based upon neutral criteria. Peretti argues that the President can and does accurately predict a justice's future decision-making course and in doing so, endorses the values upon which a judge bases his decisions. Peretti cites studies which show that partisanship, presidential strength and ideology primarily determine whether Senators vote to confirm or reject presidential nominees to the Court. Therefore, the Senate also endorses the justice's values.

Since Supreme Court justices are selected primarily because of their political beliefs, the values that the justices hold are most likely to reflect those dominant in society and in the government at that time. Democratic goals such as political representation and responsiveness are therefore met through "value-voting." Peretti cites numerous studies to establish that Supreme Court justices vote based upon their personal ideology. She finds that "[t]he empirical evidence strongly supports the conclusion that ideology and policy motivation influence all three stages of the decision-making process—case selection, the decision on the merits, and opinion assignment."³ Peretti argues that because elected officials consciously evaluate the justices' ideological and policy views, value-voting is not arbitrary or illegitimate. The justices' personal values become "a decision-making proxy that is representative or democratic in nature."⁴ "Contrary to the conventional view that it

³ TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 109 (1999).

⁴ *Id.* at 111.

is arbitrary, idiosyncratic, and illegitimate, value-voting may instead be regarded as a source of coherence, predictability, and democratic legitimacy: the personal ideology guiding the decisions of Supreme Court justices is simultaneously an ideological constraint imposed by the people and their elected representatives."⁵

Peretti then maintains that judges should not be criticized for political activities such as negotiating, strategizing, and lobbying. Rather, political activity to ensure that policy choices become operative is a necessary and appropriate endeavor for a judge. Political constraints—formal constraints embodied in the Constitution (such as impeachment, altering the Court size, controlling the Court's appellate jurisdiction, etc.) and informal constraints resulting from the structure of the American government (such as the influence of interest groups, Congress's legislative and budgetary powers)—serve to prevent the political activity of Supreme Court justices from becoming uncontrolled. Indeed, the justice who wishes to advance his policy concerns will do so within the constraints imposed by the system, precisely because he knows that is the most effective and efficient way to reach the goals he desires. "Only the policy-motivated justice will care about the willingness of other government officials to comply with the Court's decisions or carry them out effectively. And only the policy-motivated justice will care about avoiding the application of political sanctions against the Court that might foreclose all future policy options."⁶ Judges, under this model, essentially perform political activities—building political support, anticipating political reaction, and accommodating the demands of the opposition.

Peretti uses the *Brown v. Board of Education*⁷ decision and its aftermath as an example of justices making political accommodations appropriately and effectively. The *Brown* decision required broad-based political support and translation of that support by other government officials into highly effective compliance mechanisms. For example, ten years after the *Brown* decision, only 1.2 % of black school children attended school with whites in the South. However, desegregation occurred rapidly in the South after Congress and the Executive Branch became involved by threatening school districts not in compliance with *Brown* with a loss of federal education funds. By the end of 1967, 16.9 % of black children attended southern schools with whites; by the end of 1969, 32 % of black children attended southern schools with whites; and by 1972, 91.3 % of black children attended southern schools with whites.⁸ Peretti concludes that "[i]n short, policy motivation combined with political constraints lead the Court away from the type of selfish and arbitrary decision-making that legal scholars expect from a political court."⁹ According to Peretti, activities such as anticipating political reaction, building political support and accommodating the demands of the

⁵ *Id.* at 132.

⁶ *Id.* at 152.

⁷ 347 U.S. 483 (1954).

⁸ See PERETTI, *supra* note 3, at 151.

⁹ *Id.* at 158.

opposition are important and necessary functions for a Supreme Court justice as they serve to build a political consensus behind the justice's policy goal.

Peretti asserts that a political Court's legitimacy is not threatened. She again uses the results of empirical research to defeat the assumption that the Court is respected because of its exalted and impartial nature or because of the nation's respect for the Constitution.¹⁰ In fact, research indicates that to the extent that the public has an interest at all, it is in the substance of the Court's decisions and not in the decision-making process. By voting based upon personal values, the Court would continue to act in accordance with public opinion, thus maintaining the Court's legitimacy.

Peretti then attacks the myth that American democracy is "majoritarian," that is, that the will of the majority is expressed through the electoral process and enforced through the legislature. This belief, she argues, leads to the need to search for a justification for judicial review, since, when the Supreme Court strikes down a statute as unconstitutional, it is thwarting the will of the majority and that majority has no recourse. Thus, the justification for judicial review must come from the availability of neutral grounds for the Court's decisions or from a belief that the justices are uniquely qualified for their task.

When the American system is understood correctly as a pluralist system, however, no extraordinary justification for the Court is needed. In a pluralist system, a variety of forms of political representation exist which are intended to impede the ability of the majority to effect its will. The Framers constructed a system that includes many protections against majority tyranny, such as the creation of a republic or indirect democracy, rather than a direct democracy, and the requirement that Senators be selected by state legislatures, Presidents by the Electoral College, and judges by the President and senate. Further, the Electoral College, indirect election of Senators, and staggered independent elections among the House, Senate, and Presidency are all intended to prevent a majority from directly and simultaneously electing the entire government leadership. Creating separate branches of government also limits the power of the majority; through a system of checks and balances, no single branch possesses unilateral power to enact the majority's will should a majority gain control of one branch. Further, the powers of the national government are specifically enumerated and limited.

In a pluralist system, redundancy serves an important purpose. Redundant systems use duplication of effort and overlap of function to achieve greater reliability and stability. Failure by one unit is not fatal to the achievement of the system's goals. "In a pluralist system, it is of *no* consequence that the Court is representative or responsive in a different – that is, nonelectoral—way [from the government's other branches]. Redundancy and diversity in the expression of citizen and group desires is intended and valued."¹¹ The Court then becomes a

¹⁰ For example, Peretti notes in 1989 the *Washington Post* conducted a national poll in which only 9 % could name William Rehnquist as the Chief Justice, while 54 % correctly named Judge Wapner as the judge on the television show *The People's Court*.

¹¹ PERETTI, *supra* note 4, at 219.

"normal" component of the process, with no need for a justification of its existence, function or power. Ultimately, Peretti concludes, "[T]he Court should be clear and honest about the fundamental value choices involved in its decisions . . . By dealing with those value conflicts clearly and honestly, the Court can bring a focus and energy to public debate and can thereby facilitate a dialogue and political response on the issues of the day."¹²

Peretti's book is a well-researched and well-documented account of current constitutional thought. It serves to expose some of the deficiencies which exist in the system as it now functions. Nonetheless, her conclusion that the acknowledgment and promotion of the Court as a political body will create a more open, honest and effective system is not necessarily justified. While describing the deficiencies in the Court's operation at length, Peretti does not acknowledge the many imperfections of the political process itself which would then presumably affect the Court. Indeed Peretti, a political scientist, has her own agenda.

The legal community . . . has a personal stake in developing and preserving a special reverence for the Court. There also exists a stake in preserving its mediating and guardianship role. If the public does and perhaps should evaluate the Court, like other institutions, in terms of the political acceptability of its decisions, then the appropriate mediators and guardians are political leaders rather than leaders in the law schools and organized bar.¹³

Peretti fails to acknowledge that the democratic process she describes may *benefit* by virtue of the fact that the Court is staffed and monitored by a different segment of our society than those that staff and monitor the political branches. Indeed, the standpoint from which the Court currently functions provides it with the ability to make decisions based upon a different set of considerations than those confronted by Congress or the President. Peretti similarly fails to acknowledge the myriad of additional, and potentially greater, complications that may arise once the Court is acknowledged as a political institution.

¹² *Id.* at 245.

¹³ *Id.* at 185.