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BOOK REVIEW

LEGITIMIZING MALE DOMINANCE: GENDERING THE NONGENDERED EQUAL PROTECTION DOCTRINE A CRITIQUE OF JUDITH BAER'S *OUR LIVES BEFORE THE LAW*

Hillary Hunt Holmes*

ABSTRACT

In this Book Review, the author presents a thoughtful critique of Judith Baer's *Our Lives Before the Law*. The author challenges the notion that men are the true beneficiaries of the Supreme Court's application of equal protection principles. First, the author suggests that Ms. Baer incorrectly reviews outcomes of the gender-based equal protection decisions of the Court. The results of this misunderstanding, the author contends, results in Ms. Baer's proposing a new form of equal protection jurisprudence *based* upon classifications, instead of seeking to remove such classifications from the law. Next, the author questions Ms. Baer's proposal for the recognition of gendered roles, arguing that by recognizing gendered roles and responsibilities, society would be perpetuating the very stereotypes that our equal protection doctrine has sought to eliminate. The author then generates examples of Baer's misstep, including the errors of labeling wives as financially dependent and forcing women to be caregivers. While recognizing that there may be societal value in providing additional benefits in the *short term* to remedy longstanding discrimination, the author concludes that Ms. Baer's misapplication of the equal protection doctrine would, in the long term, be detrimental to women.

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I. INTRODUCTION

In *Our Lives Before the Law*, feminist scholar Judith Baer seeks to “[show] how the law legitimizes and reinforces male supremacy.”¹ Baer is bold in her jurisprudential ambition; she seeks “to redistribute rights and responsibilities among women, men, institutions, and government.”² Part II of the book is devoted to explaining “how [the] law constructs and interprets women’s lives.”³ In Chapter Five, “Reconstructing Equality: *Feminist Constitutional Doctrine*,” Baer focuses on constitutional interpretation—a topic she considers “crucial to the inequality, vulnerability, and responsibility which are at the core of women’s situation.”⁴ The lynchpin of her argument is that men have been the primary beneficiaries of the Supreme Court’s inclusion of sex discrimination within the scope of the Equal Protection clause of the Fourteenth Amendment, and that reforming the judicial doctrine will remedy sexual inequality.

While Baer’s work represents a significant advance in the area of feminist constitutional jurisprudence, ultimately she falls short of proving her claim that sex discrimination claims under

1. JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 15 (1999).

2. *Id.*

3. *Id.* at 94.

4. *Id.*

the Fourteenth Amendment have benefited men. Indeed, in light of Baer's belief that law constructs reality, the alternative approach she presents has the effect of reinforcing inequality, not eliminating it. Baer's methodology fails to achieve its goal because it does not address the practical problems of change, and in application, her methodology would reinforce and legitimize sexual inequality.

This article explores three major flaws in Baer's analysis. First, Baer has a one-sided view on how to remedy inequality under the Equal Protection clause. She argues that the courts "make law male" by excluding certain constituencies (i.e., women),⁵ but, she fails to recognize that law also can be made "more male" by *inclusion* of certain constituencies (i.e., women). In her efforts to "include" women in the law, Baer advocates a legally assigned role of economically dependent wife/mother to married and divorced women.⁶ Second, Baer's proposals employ the law to legitimize male dominance. Inexplicably, she fails to explain how the legal assignment of caretaking and financial dependency to married women will remedy male dominance. She ignores the basic feminist principle that legally recognizing certain roles only validates the notion that women and men have different, defined, and inflexible rights and responsibilities. Third, Baer assigns excessive blame for the past subordination of women to the development and application of the equal protection doctrine, and she relies almost exclusively on a reinterpretation of the doctrine as a tool for social change. The allocation of responsibility can lead to dangerous results. In her effort to cure what she views as the past harm done by the application of the neutrality principle of the equal protection doctrine, she ultimately advocates for the codification of women's roles as wife and mother. In so limiting her remedies, Baer fails to recognize that other methods, such as private claims in the courts and legislative initiatives, are more readily available for dramatic legal and social reform of women's lives and their value to society.⁷

5. *Id.* at 14.

6. Although Baer acknowledges the inferior status of these roles, it is clear that this remedy (1) reinforces the societal subordination of women in the form of assigned roles, and (2) contradicts elements of her criticism of other areas of law.

7. Despite her complaint about the "oversimplification" and use of "linear, categorical statements," *id.* at 69, Baer's use of the term "the law" is overly narrow. *See, e.g., id.* at 112 ("The law's language does not even allow us to say what it is about pornography that many feminists believe is terribly wrong. If we cannot use the law's language to describe the injury, we can not use the law to begin to correct

The weaknesses of Baer's arguments are most evident in her criticism of the application of the equal protection doctrine to sex discrimination claims. She focuses solely upon legal results, to the exclusion of legal reasoning, in explaining the equal protection doctrine's paradigm in general, advocating results such as women-only alimony laws and proposing gender-neutral custody laws. In failing to provide reliable and relevant empirical support for her claims and any analysis of the long-term impact of her proposed alternatives, Baer presents a myopic view of the law. Yet despite these flaws, analyzing Baer's approach highlights for feminist scholars the importance of using the law to affect reality, while at the same time remaining conscious of the long-term impact of proposed solutions.

II. BAER'S MISUNDERSTANDING OF AND MISTAKEN RELIANCE ON THE EQUAL PROTECTION DOCTRINE

Baer's claim that the equal protection doctrine creates sexual inequality demonstrates her misunderstanding of the purpose of the doctrine and the proper role of the courts in remedying sexual inequality in society.

By way of background, Baer raises concerns about the Supreme Court's formal application of the Fourteenth Amendment to sex discrimination claims. In particular, she asserts that the sex discrimination neutrality principle (which regards discrimination against either sex as a violation of the Equal Protection clause) favors men. She claims that the neutrality principle is a legal fiction that was "the choice of judges alone."⁸ Yet this criticism flies in the face of recognized constitutional jurisprudential methods: a constitutional doctrine is generally the result of the judicial interpretation of the text, history and purpose of the Constitution.⁹ Any alternative doctrine to the neutrality principle must observe the necessary conventions. Unfortunately Baer

the wrong."). At least semantically then, Baer falls into "the trap[] into which feminist critiques of conventional theory have fallen." *Id.* at 69.

8. *Id.* at 115 ("The sexual equality cases, starting with *Kahn v. Shevin* [, 416 U.S. 351 (1974),] in 1974, had already made the . . . assumption that discrimination against men was no better or worse than discrimination against women. The neutral principle has been firmly in place, then, since 1978.").

9. See GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 2-27 (13th ed. 1997) ("Viewing a constitution as a species of 'law,' then, becomes the vital link between constitutional issues. That link, hardly a prominent feature in the political theory of the Revolutionary era, is central to the *Marbury* opinion."). See generally 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

neither recognizes the legitimacy or necessity of this process nor proposes an alternative; and in failing to do so, she cripples her work as theory that could never be put into practice.

Baer's solution to the so-called favoritism of men under the equal protection doctrine is to frame the threshold issue in sex discrimination claims as whether the state action discriminates against women, not whether it creates a classification based on sex. According to Baer, laws that are neutral as to sex, such as neutral custody and divorce laws, should be evaluated based on whether, in application, they may allocate benefits to men and deny benefits to women. She thus advocates a pragmatic, but dangerously subjective, approach.

She grounds her theory in four foundational, but faulty, assertions. First, any constitutional doctrine that requires elements of classification, intent, and state action is constraining. However, such prerequisites are properly seen as the court's setting parameters around what types of harms will be considered a violation of the Constitution. Necessarily, the Equal Protection clause is not meant, by itself, to provide a judicial remedy for all instances of inequality. That the equal protection doctrine may be available to some victims of discrimination and not others is not a problem of neutrality *per se*. Instead, it is the result of the failure of any plaintiff, male or female, to meet the threshold requirements for a *prima facie* claim of discrimination under the clause. A plaintiff must belong to a suspect class or claim a violation of a fundamental right before the courts can label the discrimination suffered a violation of the Fourteenth Amendment.¹⁰ Yet, it is important to remember that the Equal Protection clause was not intended to provide a private right of action for any individual who feels that she suffered some discriminatory treatment. This type of *individual* action is not the function of the Equal Protection clause; it was included in the Constitution to provide protection for classified minorities against *state* discrimination.¹¹

Moreover, as in other areas of the law, threshold requirements properly limit the Court from excessive involvement in private life. This justification rests on the assumption that there

10. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that the plaintiff had a claim for violation of the Equal Protection clause because a state law forbidding interracial marriage perpetuated the "racial discrimination which it was the object of the Fourteen Amendment to eliminate").

11. U.S. CONST. amend. XIV, § 1 (stating "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws"). See generally, Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

is a sphere of private behavior in which individuals may act free from government involvement.¹² Were every person who experiences private harm to have a constitutional claim, as Baer would have it, then the courts would be the sole protector and mediator of all social injustices, regardless of whether the harm was attributable to state action, societal systems, or simple human nature.

Second, Baer asserts that the "law has 'difficulty grasping harm that is not linearly caused in the "John hit Mary" sense.'"¹³ She contends that this is problematic for equal protection because the harm of discrimination against women is not always linear. Often it involves instances of "unfairness, disadvantage, or exploitation."¹⁴ Much of what is discriminatory is invisible, because the unequal distribution of benefits is a normalized aspect of the operation of our male-dominated society.¹⁵ However correct this observation, it does not support Baer's contention that the equal protection doctrine has failed to promote equality. Instead, it reminds feminist legal advocates that when using the courts to redress social systems built on inequality, we must find a way to make the invisible unfairness visible.

Third, Baer claims that "legal concepts influence the ways we perceive the reality."¹⁶ If a causal link in fact exists, then it is not possible, as she also claims, that the "Fourteenth Amendment . . . does not reach what happens outside the law."¹⁷ In other words, under Baer's own theoretical framework, application of the Fourteenth Amendment's equal protection doctrine influences reality and has effect beyond the law. If this latter statement is true, then the proper task of feminist jurisprudence is to ensure that the courts utilize this power in a way that does not legitimize societal systems and their mechanisms that estab-

12. Even cases interpreting the state action requirement broadly have recognized a limit for freedom in the private sector. *See, e.g.,* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (holding that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations'").

13. BAER, *supra* note 1, at 111-12 (quoting CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 206 (1989)).

14. *Id.* at 112.

15. For example, it is difficult for a female law student to articulate that she has experienced sex discrimination when a male law professor does not acknowledge her argument in class as readily as the identical argument made by a male student. *See* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

16. BAER, *supra* note 1, at 103.

17. *Id.* at 122.

lish male dominance and sexual inequality. This effort has the potential both to limit and to expand the role of the courts.¹⁸

Fourth, Baer asserts that the doctrine's inclusion of some harms and exclusion of others is synonymous with a "ranking" of these harms. This extrapolation epitomizes Baer's mischaracterization of the purpose of the Equal Protection clause and the Court's application of it. She compares two such instances of discrimination: a state university's use of racially biased admittance criteria in *Regents of the University of California v. Bakke*¹⁹ and a minority child's being subjected to racial name-calling in her story about the Steele family.²⁰ Since the former violates the Equal Protection clause, but the latter does not, "[e]qual protection law ranks the harm done to Allen Bakke, whose opportunity to get into medical school was reduced because he was white, . . . implicitly, as more important than the harm done to . . . the Steele children."²¹

Baer's analysis of the Bakke and Steele stories is flawed insofar as it assumes that because the doctrine does not recognize every individual act of discrimination as a violation of the Equal Protection clause, the harm done by a private individual is less important than the harm done by a state actor. While it is true that the remedy for a plaintiff who suffers discrimination by an individual is not provided for in the Constitution directly, the fundamental principle that all individuals should be free from discrimination is embodied in the articulated values of the Constitution, such as those contained in the Preamble, the Due Process clause, and the Equal Protection clause.²² A constitutional

18. Specifically, courts would refuse to assign gendered roles and consider equal protection claims in contexts that reach beyond current categories of race and gender. Although in society, categories may exist that assign "subordinate" and "dominant" roles to each sex, the court should not legitimize or reproduce these assignments. By freeing the law from the male bias of society, jurisprudence would be framed in such a way as to maximize the potential for a society based on gender equality. Equality within the law would lay the foundation for application of an equality outside the law.

19. 438 U.S. 265 (1978) (holding that a state school's admissions policy involved unlawful use of an explicit racial classification, which, although relevant to state interests, could not be used to insulate a candidate from comparison with other applicants).

20. BAER, *supra* note 1, at 103 ("Shelby Steele generalizes: his children have endured racism but not racial discrimination. He implies that calling people names or generally mistreating them is not discriminating against them.").

21. *Id.*

22. U.S. CONST. pmb. ("We the people of the United States, in order to form a more perfect Union, establish justice . . ."); U.S. CONST. amend. V ("[N]or shall any

claim in the federal courts provides no more of a remedy than to invalidate the discriminatory action and perhaps require a rewriting of the statute or policy at issue. In contrast, a private or state civil right of action for a discriminatory harm can provide a monetary remedy or criminal punishment. It can directly address and provide retribution for discriminatory action by both the state and an individual. Arguably, then, the law ranks discrimination by an individual that violates a legislative statute as more important (i.e., more deserving of punishment or financial restitution) than discrimination by the state that violates the Constitution.²³

Further, Baer ignores that the equal protection doctrine is not intended to rank harms. The Constitution creates both powers and limitations within which the state and the population must operate. Either an act is a violation of these rules or it is not. For the Court to legally determine the social importance of certain harms to certain groups relative to each other is to allow the Court to assume a role which it does not and should not have the power to do.²⁴ The real purpose of the equal protection doctrine (prohibiting the state from discriminatory treatment of persons based on an imposed classification) in fact is accomplished without the subjective valuation and ranking of various groups suggested by Baer.²⁵

person . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

23. The foundational value of equality can most directly impact women's lives through anti-discrimination laws enacted by the representative governmental bodies. These laws can more specifically address private experiences and provide a more effective remedy than that available from the Supreme Court. In fact, if the legislatures are the true law-making bodies, it could be argued that the relative rank of a harm is determined by the magnitude of its corresponding statutory remedy or punishment. The greater the penalty or the larger the damages, the more import society places on that harm.

24. Following Baer's logic, can we assume that harms done to blacks should likewise be ranked greater than harms done to whites? Would harms done to black women be ranked higher than harms done to white women? And would harms done to black men or white women be ranked higher? How would this ranking change as relative power increased or decreased? Who would determine the power structure in various factual settings? How would it be evaluated?

25. It is interesting to note a paradox in Baer's assertion. If we assume that the Court does rank harms based on inclusion in the equal protection doctrine, then the Court ranks the harm in the VMI case, *United States v. Virginia*, 518 U.S. 515 (1996), (i.e., sexual discrimination against women) as more important than the harm to the Steele children (i.e., racial discrimination against blacks). This conclusion directly contradicts holdings of the Court that routinely find racial discrimination unconstitutional at a greater frequency than sex discrimination. Perhaps we should use an

III. SEXUAL INEQUALITY AND THE EQUAL PROTECTION DOCTRINE

Another important component of Baer's thesis is that responsibility is gendered, and gendered responsibilities are valued differently by the law. "The differences between the ways society treats male and female responsibilities supports my thesis that responsibility is gendered [W]omen's work is trivialized; men's work is valorized. And constitutional law is silent."²⁶ While the former two statements are hard to disagree with, the "silence" of constitutional law about these societal values need not be an insurmountable obstacle to achieving sexual equality. Baer would seemingly prefer the Court to engage in evaluating the relative social values given to men's traditional roles and women's traditional roles before determining whether an act of discrimination based on sex violates the Equal Protection clause. This approach is problematic because the gendering of responsibility that Baer identifies originates not with the law, but with the larger male-dominated society. Society already values the roles reserved for men more than the roles assigned to women. The normalization of the inequality between gendered roles is beyond the scope of the problems to which the Equal Protection clause can provide an effective remedy.

Baer criticizes the Court's application of the equal protection doctrine for its silence regarding societal valuation of gendered work, and she misinterprets this silence as "indifference." But the doctrine's neutrality approach to sex discrimination is not synonymous with silence or indifference about sexual inequality, but instead represents a refusal to entangle and limit the Court's decision making within contemporary societal norms.²⁷ In viewing a man as a person and a woman as a person, both of whom are not to be the subject of discrimination based

alternative to Baer's approach and assume instead that the level of scrutiny with which the Court examines an action reflects the rank of importance it gives that harm. The equal protection doctrine requires that the Court evaluate a claim based on race discrimination using the highest level of three possible levels of scrutiny, under which, the action will most likely be found unconstitutional. But a claim based on sex discrimination will be evaluated based on the middle level of scrutiny. Thus, any racial discrimination seems to be ranked higher than any sex discrimination.

26. BAER, *supra* note 1, at 109.

27. See Hon. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, reprinted in MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 119, 120 (2d ed. 2001) ("The litigation of the 1970s helped unsettle previously accepted conceptions of men's and women's separate spheres . . .").

on their sex, the Court raises the constitutional doctrine above the categorical limitations society places on men and women.

The Court is leading by example, rather than directly intervening as a remedial actor, as Baer would have it do. In fact, the Court may be going a step further than Baer proposes by separating the outside world and the Constitution. The formal equality or neutrality principle requires looking beyond the judgments of society and ensuring that every individual has an equal opportunity to access all realms of society. Once this access is guaranteed and legitimized by the law, what Baer terms "women's work" and "men's work" can begin to blend together. If work is not assigned along gender lines, then valuations of work are more difficult to divide on gender lines. In ensuring that all persons have equal access to all spheres of work, the Court can eradicate the concept that a person's sex automatically determines his or her work (and corresponding value) in society.

For example, by requiring the use of neutral standards in custody and alimony law, the Court is in fact ignoring what society outside the law would do (i.e., categorize women/wives as financially-dependent sole caretakers of children). Under the current doctrine, instead of accepting society's assignment and valuation of sphere based on gender, a court must conduct a factually based analysis based on the characteristics and relationship of the particular individuals involved in the specific case. In being a neutral, objective third party, a court can evaluate the situation and distribute responsibilities based on the merits of the persons involved, not based on their sex. (Yet the impact of the structure of the outside world is still evident in the results of these decisions, e.g., the high rate of custody cases that are granted in favor of women and the common perception that alimony is granted mostly to women.²⁸) Neutrality and equality are not synonymous, but neutrality requires ignoring the world outside the law and its discriminatory value system, instead valuing all individuals equally under the law.

Feminist scholar Martha Minow could present a caveat to this argument. Minow argues that despite efforts to be neutral, the male-dominated experience of judges influences the decision-

28. BAER, *supra* note 1, at 106 (citing Nancy Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, in *FAMILIES, POLITICS, AND PUBLIC POLICY* 183, 193 (Irene Diamond ed., 1983)); SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 23 (1991).

making of the Court.²⁹ According to Minow, they will not be able to recognize their non-neutrality until they step beyond their own experience and perception and consider the different ways in which others perceive reality.³⁰ Although the equal protection doctrine's use of the neutrality principle allows the Court to look at a situation through a new lens that is not limited by the male-centered perception that dominates society, Minow reminds us that, in advocating for equal treatment under the law, feminist scholars and practitioners must constantly work to ensure that the neutrality applied is truly free of male bias.

On a more pragmatic level, in focusing on redress by the Court through the equal protection doctrine, Baer fails to recognize other important venues for accomplishing her goal of remedying discriminatory treatment of women. Constitutional claims are not the most effective methods for eradicating the particularized sexual inequalities she mentions. The most effective and direct route of change in a democratic society is through the elected, governmental bodies.³¹ Legislation and regulatory schemes can address discriminatory action by both state and private actors. The flexibility of legislative and regulatory scheme allows them to evolve with changes in dominant-subordinate re-

29. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987). Compare *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (adopting a "reasonable woman" standard for assessing a hostile environment in a sexual harassment claim), with Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 846 (1991) ("In short, the 'reasonable woman' is very much a man.").

30. Minow, *supra* note 29, at 73-74.

31. See Ginsburg & Flagg, *supra* note 27, at 121 ("The logical progression from the 1970s litigation . . . is to another arena, not the courts with their distinctly limited capacity, but to the legislature."); see also, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment is a cause of action under Title VII); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (finding that the "Vermont Legislature has not only recognized this reality [that a significant number of children today are actually being raised by same-sex parents], but has acted affirmatively to remove legal barriers so that same-sex couples may adopt and rear children conceived through such efforts"); 29 C.F.R. § 1604.11(a) (July 1, 2002) ("Harassment on the basis of sex is a violation of section 703 of Title VII."). But see Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990). Sarah Burns argues that:

Given the exclusion from and subordination of women by the legislatures, we cannot avoid advocacy in the courts on some theory that courts are elitist and that elected branches, being majoritarian, are our proper venue. Indeed, suggestions that feminists should shy away from litigation reflect naiveté concerning how political outcomes are orchestrated by those with money and access to public opinion, who are generally not women.

Id. at 195.

relationships among various groups in the population and to address specific instances of inequality directly. Meanwhile, the Constitution provides only a baseline set of values and doctrines that ensure that these laws provide equal treatment to all people, protecting the minority from the majority.³²

IV. RECONSTRUCTING INEQUALITY: AN APPLICATION OF BAER'S ALTERNATIVE EQUAL PROTECTION DOCTRINE³³

An application of the methodology resulting from Baer's version of the equal protection doctrine clearly exposes the weaknesses in her proposal. Under such a doctrine, according to Baer, the issue in a sex-discrimination claim would not be "the classification of people by sex," but instead "the inferior status of women."³⁴ More specifically, based on her criticisms of the current doctrine's application, it seems that a court applying her doctrine would evaluate a sex-discrimination claim by asking the following questions.³⁵ First, which sex's power is subordinate to the other sex's power? The court would presuppose that, in the present society, the subordinate group is women and the dominant group is men.³⁶ Second, what are the consequences of the limitations or burdens of being in the subordinate group? The

32. In fact, the U.S. Constitution was designed such that its amendments would be given effect and implemented by legislative bodies. See GUNTHER & SULLIVAN, *supra* note 9, at 197-98 (noting the significance of the facts that "[t]he prohibition of § 1 of the 14th Amendment begins with 'No State shall' . . . [and] the final sections of the 13th, 14th, and 15th Amendments each give 'power to enforce' each amendment 'by appropriate legislation'").

33. In reviewing Baer's critique and proposals, it is significant to note two holes in her discussion. Throughout her argument, Baer seemingly equates woman with non-income-producing wife/mother, thus reinforcing the view of woman as having only one role in society. For instance, in her discussion she refers to Mary Becker's claim that the "ordinary mothers" have not been harmed by the no-fault divorce laws, without defining or questioning the use of the adjective "ordinary" to describe mothers who are non-working primary caregivers. BAER, *supra* note 1, at 104. Similarly, she fails to acknowledge the relationship between automatic custody and a need for alimony. Not only does the parent in custody of the child incur a greater financial burden, but the parent's ability to develop earning power, career, and education is limited by the responsibilities involved in raising a child alone. This myopic view of the woman in society is an important one we will accept for purposes of this analysis.

34. *Id.* at 112.

35. While Baer does not provide a clearly outlined methodology, the framework presented here can be deduced from her discussion in Chapter Five. *Id.* at 94.

36. This is a problematic presupposition to which I will return in my discussion of women-only alimony laws.

court would ask this question as a recognition that the dominant sex has the power to assign rights and responsibilities in their favor. Baer's court would find that women have been assigned the role of mother and wife;³⁷ they have less earning potential;³⁸ they are less likely to work outside the home after marriage; and they are more likely to be the primary caregivers of their children. Thus, they will have lower incomes than men; they most likely will have difficulty finding a job after the termination of a twenty-year marriage; they will develop unique relationships with their children that their male partner does not; and they will not be economically or legally compensated for the services they provide in these relationships. Having evaluated the current state of the relative power and value positions of the two sexes involved, the court would then ask the following about the challenged state action: has the state allocated a benefit or right or entitlement to both sexes when allocation to women exclusively would compensate for the harmful consequences of their subordinate position? If so, the law would be held to discriminate against women, and, thereby, violate the Equal Protection clause.

Outlining Baer's methodology reveals two problems in its application. On a fundamental level the Equal Protection clause must be reinterpreted to provide that no state shall deny to any person, *except members of the dominant group*, equal protection under the laws. Applying the Constitution to some citizens differently than others flies directly in the face of the premise behind a universal governing document for a democratic nation.³⁹ The Constitution is meant to provide a stable set of principles and regulations of government that are not burdened by the inequalities or irregularities of paradigmatic shifts in society. It forbids the state from discriminating against people based on characteristics not related to their own or others' right to enjoy

37. BAER, *supra* note 1, at 107 ("Mothers have cared for children because society expects them to.").

38. Although Baer does not provide statistical support for her claim that "women have less earning power than men," *id.* at 104, statistics from the U.S. Department of Labor show that female workers in 1998 earned 73 cents for every dollar earned by male workers. BECKER ET AL., *supra* note 27, at 970-71; INFOPLEASE.COM, WOMEN'S EARNINGS AS A PERCENTAGE OF MEN'S, 1951-2000, at <http://www.infoplease.com/ipa/A0193820.html> (last visited Dec. 22, 2000).

39. See MARY ANN GLENDON, A NATION UNDER LAWYERS 48 (1994) ("Judge Constance Baker Motley . . . [said] 'Our Constitution is color-blind' . . . (from the first Justice Harlan) . . . 'became our basic legal creed.'") (citing WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 502-03 (1973)).

full participation in society. Viewing the Constitution in this light, any limitation on a person's choices through the legal assignment to or denial of a right or responsibility based on his or her sex violates the Constitution's governing principle of freedom. Thereby, the state's power is limited; laws cannot reflect the sexual and racial inequality of the society.

Second, on a more practical level, asking a Baer court to determine whether an action discriminates against women is problematic. Contrary to Baer's assumption, the Court could find that an automatic maternal-custody law,⁴⁰ which Baer supports, discriminates against women because it forces them to take on a responsibility and a role that limits their ability to participate in other parts of society, while allowing men the freedom to determine for themselves how much of this responsibility to accept. In light of Baer's view of law as male-biased, her promotion of different, subjective standards of constitutional protection for women and men could give the judiciary excessive latitude and discretionary power through which they would favor men.⁴¹

A. *Refusing to Reconstruct Inequality: The Current Equal Protection Doctrine*

Baer claims that constitutional doctrinal language fits the claims made by men better than it does those made by women. "Too often, 'you can't get there (to a constitutional resolution of a woman's claim) from here (a statement of the problem).'"⁴² Baer provides two main examples of cases in which the equal protection doctrine favors men by invalidating statutes that automatically allocated the "benefits" of alimony and child custody exclusively to women after divorce. In doing so, Baer argues that the Court delegitimizes the roles society forces women to assume—financially-dependent wife and mother—by not recognizing "the human needs arising from them."⁴³ However, the Court has not delegitimized the roles, but the *assignment* of these roles to women. In a broader sense, declaring these laws unconstitu-

40. This New York statute was overturned in *Caban v. Mohammed*, 441 U.S. 380 (1979), in which the Court held that "the distinction between unmarried mothers and unmarried fathers [did not bear] a substantial relation to the State's interest in providing adoptive homes for its illegitimate children . . . ' because the law erroneously presumed that single fathers were less close to their children than single mothers were.'" BAER, *supra* note 1, at 106 (quoting *Caban*, 441 U.S. at 391).

41. BAER, *supra* note 1, at 99; see also Minow, *supra* note 29.

42. BAER, *supra* note 1, at 103.

43. *Id.* at 107.

tional delegitimizes society's expectation that men—not women—will be the primary income earners in the marriage, and that women—not men—will assume responsibility for childcare. Using these two examples, I will demonstrate how, in her overzealous desire for the Constitution to provide a remedy for sexual inequality, Baer does not recognize that the current equal protection doctrine actually prevents the Court from recognizing and reinforcing the sexual inequalities in our society.

B. *Reconstructing Inequality: Legally Labeling Wives Financially Dependent*

Baer's criticism of no-fault divorce serves as an illustration of her failure to recognize the relationship between legal arrangements she would preserve and their contribution to the continued subordination of women. Baer contends that "[c]ontemporary divorce . . . law[s], as applied, work to the disadvantage of women. They reinforce male supremacy."⁴⁴ She makes her argument based on the idea that women-only alimony is part of a social context of male supremacy.⁴⁵ She justifies women's need for financial support during and after divorce by claiming that "marriage has often been necessary for their economic survival."⁴⁶ It has been necessary because women have less earning power than men and women tend to "'marry up'—marry men who are older and better educated than they . . ."⁴⁷ In arguing for continued financial dependency of women on men even after marriage, Baer ignores the main issue at the core of this inequality—why women tend to pursue less education and career development that results in their being financially dependent on another person.

Even though Baer argues that women have been forced to be economically dependent on their husbands and serve as the primary caretakers, it is not clear that she views these roles as "unnatural." Regardless, legal assignment of these roles through automatic alimony and custody reinforces the exact "gender distinctions rooted in sex-role stereotypes" that Justice Ginsburg referred to as the target of the feminist jurisprudence.⁴⁸ As Ginsburg observes, "law's differential treatment of women, typi-

44. *Id.*

45. *Id.* at 104.

46. *Id.*

47. *Id.*

48. Ginsburg & Flagg, *supra* note 27, at 120.

cally rationalized as reflecting 'natural' differences between the sexes, historically has tended to contribute to women's subordination."⁴⁹ The formal-equality approach holds that inequality consists of treating similarly situated women and men differently.⁵⁰ The current doctrine rejects gender distinctions rooted in sex-role stereotypes, as seen in *Reed v. Reed*⁵¹ and *Frontiero v. Richardson*.⁵² In both cases, the statutes presumed a wife's, but not a husband's, dependent status, thereby "embodying the 'separate spheres' mentality."⁵³

Baer's view that women-only alimony is "less a discrimination against men than it is an (inadequate) effort to protect disadvantaged partners when a partnership dissolves"⁵⁴ implies that alimony awards should be granted to whichever partner had fewer financial assets, which may be either partner, regardless of women's potential earning power. It seems, however, that Baer's doctrine would consider the relative positions of the sexes, not the individual parties involved. As long as women as a group have less earning power and a higher rate of not working in paid employment, her doctrine would validate only laws that provided alimony exclusively to women, regardless of the relative financial status of the two parties actually involved.

Alternatively, it could be argued that Baer is merely being pragmatic and proposing only a short-term solution. If her goal were remedying sexual inequality, then at first glance women-only alimony would generally serve that purpose by compensating women for the economically depressed position in which society has placed them. Yet a long-term application of this approach does not provide a solution to sexual inequality because the only element of inequality that it addresses is the financial status of women. Alimony does not address the source of the disparate financial status, namely the wage gap or the limited earning potential of a primary caregiver in the family.⁵⁵ These

49. *Id.* at 119.

50. *Id.* at 118.

51. 404 U.S. 71 (1971) (invalidating a statute that afforded men an automatic preference over women for estate administration purposes).

52. 411 U.S. 677 (1973) (holding unconstitutional the denial of spousal housing and medical benefits to female, but not male, military officers).

53. Ginsburg & Flagg, *supra*, note 27, at 120.

54. BAER, *supra* note 1, at 105.

55. Interestingly, Rosalind Mills points out that the wage gap is not a twentieth-century phenomenon. "[W]herever records have survived of the pay of working people, women are shown to receive less than men, or to get nothing at all, so entrenched was the notion of the paterfamilias as provider." ROSALIND MILLS, WHO

latter two factors are the real evidence of sexual inequality, and they need to be addressed directly. Even if alimony were statutorily guaranteed for every woman for only a short term, such a law would validate and perpetuate the view of women as financially dependent upon men and marriage. Thus, alimony actually reinforces the societal views that are the source of sexual inequality, rather than challenging them.

Feminist theorist Catharine MacKinnon contends that sexuality is a process that creates the genders male and female. Relationships between men and women are defined within a sexual context that promotes dominance and submission.⁵⁶ Society is defined by this relationship based on a heterosexual system of subordination.⁵⁷ In such a society, legally conscribing married and divorced women as unemployed and unemployable, by instating women-only alimony, reinforces this subordinate, sexualized role. Moreover, MacKinnon would argue that this application of this “special benefits rule” is a double standard that “doesn’t give women the dignity of the single standard.”⁵⁸

In light of Baer’s statement that law influences our perception of reality, legally defining alimony as belonging only to women reinforces the perception of men as the sole possessors of economic power and women as dependent and helpless. When she states that “divorce has contributed to the ‘feminization of poverty,’ because ex-wives are not always awarded support,” she is mistaking the symptom for the disease.⁵⁹ The reason ex-wives’

COOKED THE LAST SUPPER? THE WOMEN’S HISTORY OF THE WORLD 154 (2001). Some of these records show that female laborers and reapers in seventeenth-century England were paid three-quarters of what men were paid, “exactly the percentage of male to female earnings still found worldwide today.” *Id.*

56. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 5-8 (1987) (“Dominance, principally by men, and submission, principally by women, will be the ruling code through which sexual pleasure is experienced.”).

57. *Id.* at 108 (“[H]eterosexuality, the predominant social arrangement that fuses this sexuality of abuse and objectification with gender in intercourse . . . organizes women’s pleasure so as to give us a stake in our own subordination.”). The implications of this hierarchical relationship between men and women extend beyond the two individuals, shaping the larger contexts in which they interact, notably the workplace. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998), reprinted in BECKER ET AL., *supra* note 27, at 920, 922. Kathryn Abrams argues, “Some forms of sexual harassment seek to enforce this gender hierarchy or gender confinement in the workplace, as they might in other spheres of life.” *Id.* at 1197. Abrams concludes that “These actions have little to do with workplace relations between the sexes and much to do with social struggles over normative hierarchy and gender conformity.” *Id.* at 1210.

58. MACKINNON, *supra* note 56, at 32-45.

59. MILLS, *supra* note 55, at 104-05.

economic status declines relative to ex-husbands' following divorce is that women earn less than men at the same jobs and many wives do not work outside the home while married. Women-only alimony simply validates these problems by giving them legal recognition.

C. *Reconstructing Inequality: Legally Forcing Women to be Caregivers*

Baer's support for automatic custody laws exemplifies the ineffectiveness of her attempt to include women in the law and her failure to recognize the essential function that the assignment of gender roles plays in creating sexual inequality.

Baer criticizes the Court's holding that laws that automatically grant custody to the mother are unconstitutional. She argues that neutral custody laws, in which the decision is based on the "best interests of the child," favors fathers over mothers and ignores the interests of the mother. Although she claims that "it would be difficult to find a clearer example of male bias in law," the link between the small number of paternal custody awards using the neutral standard and sexual inequality is not clear.⁶⁰

Baer's empirical evidence that courts "favor" men by granting custody to fathers more than mothers is weak. She states that 90 percent of custody cases are found in favor of the mother, and 35 to 70 percent of the remaining cases are found in favor of the father.⁶¹ This means, however, that only 3.5 to 7 percent of all custody cases are granted to the father—hardly a statistic that demonstrates a favoritism of men by the courts.⁶² She also claims that fathers are granted custody merely because of their financial positions, but provides no empirical evidence from the last twenty years. Beyond that, it seems reasonable that a parent's financial status should be a factor in the decision as to what is in the best interest of the child. A custody decision is properly made based on each parent's ability to support the child, rather than simply awarding custody to the parent with a greater income.

60. BAER, *supra* note 1, at 107.

61. *Id.* at 106.

62. *Id.* (citing Polikoff, *supra* note 28, at 183-202); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-43 (1982). Note that the statistics cited by Baer are from publications published more than fifteen years preceding her book.

Baer argues that women are primary caregivers because “society expects them to.”⁶³ “Women do what they must, and in doing it forge bonds with their children—but the law gives these bonds no status at all.”⁶⁴ Baer views the goal of custody laws to be the legal recognition of the interests of the mother. “In most instances . . . a mother has a continuing interest in custody of her children. The law has never recognized such an interest.”⁶⁵ She finds the failure of the law to be the result of the “best interests of the child” standard because, in application, it does not consider the interests of the mother.⁶⁶ However, the best-interest-of-the-child standard is meant to force consideration of all three parties’ interests, which is desirable. The decision involves an evaluation of the child’s relationship with each parent and each parent’s desire and ability to be the primary caregiver. In this sense, the neutral standard does consider the mother’s interests. But again, Baer implicitly contends that the law should only consider the interests of the woman.⁶⁷

63. BAER, *supra* note 1, at 107. Robin West would agree with Baer that women have a special interest in their children, but not because society expects them to. West argues that women have different experiences than men, because they have a different connectedness. 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). Feminists should highlight women’s differences and put a positive light on women’s attributes. *Id.* However, if custody is the exclusive property of women, it may legitimize the view that only women can experience connectedness. Justifying assignment of roles by claiming that it puts a positive light on women’s attributes only reinforces the idea that there are attributes that belong solely to women and attributes that belong solely to men. Admitting and codifying difference between the sexes allows the male-dominated society to label male qualities as more valuable than female qualities. As MacKinnon argues, different can never be equal. See generally MACKINNON, *supra* note 56.

64. BAER, *supra* note 1, at 107.

65. *Id.*

66. But Baer’s mother-centered view contradicts her interest in recognizing the special relationship of a mother and child, because automatic custody ignores the interests of the child. Taking an alternative, but potentially equally-harmful approach, theorist Kate Harrison encourages parenting parties to make out enforceable contracts for the placement of the child, regardless of genetic relationships. In doing so, the child may be viewed as an object of negotiated ownership rights whose interests are not considered. Katherine Harrison, *Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers*, reprinted in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha Albertson Fineman et al. eds., 1995).

67. An alternative view, but not one that I think Baer is presenting, is that advocating for the woman’s interests is merely in her best interest, because no one else will. In Trina Grillo’s view, a woman placed in a legal decision-making process should not be “encouraged to repeat exactly those behaviors that have proven hazardous to her in the past” such as submission to her husband. Trina Grillo, *The*

Feminist theorist Sara Ruddick would agree with Baer's view of maternal custody as a source of power. She argues that traditional mothering qualities are downplayed by feminists as degrading (i.e., a mother is a passive, silent mirror of her children).⁶⁸ She advocates for the celebration of women's qualities, specifically their pacifism.⁶⁹ Automatic maternal custody would bring public attention to the special, female qualities that justify granting custody to the mother.⁷⁰ However, Ruddick's and Baer's optimism misses an important step in increasing the value placed on woman's role as mother. Mothering qualities are currently devalued because men, as the dominant group, have conferred the greatest value and power on the traditional role occupied by men—income-earning employment outside the home. This system categorically denies value and power to a role traditionally occupied by women—non-income domestic management and childrearing.⁷¹ Legally assigning the role of sole

Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1604 (1991). In a divorce mediation setting, she finds that a woman will "reflexively put . . . her children before herself, even when she truly needs to take care of herself in order to take care of her children." *Id.*

68. SARA RUDDICK, *MATERNAL THINKING: TOWARDS A POLITICS OF PEACE* 28-40 (1989) ("In many societies, the ideology of motherhood is oppressive to women. It defines maternal work as a consuming identity requiring sacrifices of health, pleasure, and ambitions unnecessary for the well-being of children.").

69. *Id.* at 57.

70. It is significant to note that both Carol Gilligan and Robin West fail to inquire as to the source of the characteristics they revere as feminine. MacKinnon would argue that these characteristics do not truly belong to women, as they have only been assigned to us by men. See generally MACKINNON, *supra* note 56. Historian Rosalind Mills would agree. She finds that originally women's bodies were regarded as sources of sexual pleasure and goddess worship until the creation of male-centered monotheistic religions.

In the grand design of the monotheistic male, woman was no more than a machine to make babies, with neither the need nor the right to be anything else. . . . This reduction of the sex to one basic function of childbearing . . . downgraded [her] from human being The consequent campaign of hate against women's animal physicality, pursued from the dawn of Judaism to the birth of the early modern world, has now emerged as one of the most decisive historical facts in the story of women.

MILLS, *supra* note 55, at 102.

71. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-35 (1995), reprinted in BECKER ET AL., *supra* note 27, at 637 (arguing that determining caregiving relationships by contract law instead of by blood relation will place emphasis on equality and mutual dependency in familial relationships). But see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 25-29 (1982) (presenting a cultural feminist view that emphasizes the value of traditional feminine values, such as caretaking). But see generally West, *supra* note

caretaker to women will not change this value system. If mothering belongs to women alone, with or without the legal recognition, it will continue to be devalued. The better view is that breaking down this concept that each sex should occupy a certain sphere exclusive of the other will help eliminate the definition of the value of a sphere based upon the sex assigned to it. It will also eliminate associating each sex with the qualities required to perform its assigned roles. Thus, valuing one activity and its related qualities over another would no longer be equated with valuing one sex over another. In this sense, the function of the law is not legal legitimization of the current roles of each sex, but instead the legal prohibition of any predetermined roles based on sex. As Martha Fineman recognizes, if roles are not delineated based on sex, then value cannot be delineated based on the roles that belong to each sex.⁷²

In fact, as Catharine MacKinnon explains, difference is used to reinforce dominance.⁷³ As long as there are separate spheres for each sex, the male sphere will be the standard and the female sphere, being different than the male standard, will be deemed inferior by the male value system. In value there is power, and in power there is dominance. Things that are “different,” like women, mothers, and wives, are silenced by virtue of their relegation to this non-male realm because they do not have access to power. Breaking down differences between the two sexes breaks down the ability of one group to exercise power over the other group. Baer proposes that the law mandate the exclusive assignment of only women to the “different” sphere of mother and caretaker. This maintenance of different spheres and roles for men and women perpetuates male dominance.⁷⁴

Similarly, Baer does not consider how increasing men’s legal access to and responsibility for childcare may valorize and empower a traditionally female role. Although she contends that

63 (arguing that women must accept our “difference in suffering” and embrace our “relational” nature in order to be “autonomous” and equal).

72. FINEMAN, *supra* note 71.

73. MACKINNON, *supra* note 56, at 110 (“[O]n the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose.”).

74. The creation of difference is not a recent cultural development. For a historical perspective on the origin of these spheres, see MILLS, *supra* note 55, at 102 (“By denoting women as separate, different, inferior and therefore rightly subordinate, men made women the first and largest out-group in the history of the race.”).

these roles related to caretaking are not "ours, rather than those assigned to us by the male patriarchy for their own benefit,"⁷⁵ she fails to recognize that women should not only move beyond these assigned roles, but also bring men into those roles. Thereby, things that are considered different (i.e., female) are integrated into the experience of the people who define the standard (i.e., men and the law), so that difference is eliminated.

Professor Fineman would agree with this conclusion. She argues that the gendered life is the life of a woman as constructed by our culture and its institutions. "Most differences are socially manufactured."⁷⁶ Law is a system that allocates power, and the family is the most gendered institution.⁷⁷ The law should not grant what Baer views as privileges (e.g., alimony and custody) to women only. This approach will continue to manufacture difference between the sexes, to which power will be allocated using a male-defined standard. Instead, as MacKinnon argues, the law should be used to break down difference.⁷⁸

Even if Baer's only intent is to increase women's power in society by virtue of increased valuation of their role as mother, automatic custody is the wrong tool for promoting social recognition and appreciation of motherhood. Legal recognition of a position does not grant it status or value in our society where values are defined by a male standard. As discussed above, roles that belong to women and not men will not be valued as highly as those belonging to men. As much as mothering qualities should be valued more, maternal custody does not translate into power in the greater society, given that this society generally values income-producing activities based on their salary level over family-based activities that do not generate income. Alternatively, even

75. *Id.* at 115.

76. Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, in *GENDER AND AMERICAN LAW* 213, 214 (Karen J. Maschke ed., 1997).

77. *Id.* at 217.

78. See generally *MACKINNON*, *supra* note 56. But see *BECKER ET AL.*, *supra* note 27, at 144. Mary Becker writes:

One could ask courts to determine whether a challenged rule or policy contributes to inequality between women and men under a relational feminist analysis, just as MacKinnon asks judges to determine whether a rule or policy contributes to the inequitable distribution of power between women and men. But neither standard would be judicially manageable. The problem is never one rule or practice in isolation, but how it works and what it means within it surrounding social structures.

Id. at 147.

if Baer intends to increase women's power in the domestic sphere by guaranteeing them complete control over childrearing, complete responsibility for this sphere of society does nothing to improve the power position of women relative to men. Theorist Rivka Polatnick explains that childrearing does not produce power or status in society, or the family, because it is not an income-producing activity.⁷⁹ The family breadwinner is the greatest power position. As the dominant group, it is in men's best interest to continue to assign the role of sole caretaker to women because this role limits women's ability to be the primary breadwinner, and thereby forces them to remain less powerful than men.⁸⁰ Moreover, a maternal custody law assigns a role to women that is not only regarded as inferior but that further complicates attempts to achieve economic status (i.e., power).

It could be argued that Baer's proposal is merely pragmatic. It may be that she recognizes that there are only three choices for the law in child custody cases following divorce—automatic maternal custody, automatic paternal custody, or factual evaluation of each case. Perhaps she chooses to support the one option that guarantees maternal custody in all cases, rather than risk paternal custody in any case. Granting women this legal right validates the idea that only mothers, as opposed to fathers, have a special relationship and interest in their children. It legitimizes the view that the responsibility for childrearing rests solely with women. Thus, her proposal, even if it is meant as a short-term solution to society's failure to recognize women's role as mothers, would set the effort for sexual equality in the family unit back.

Even if a court were to accept Baer's argument that it should not invalidate automatic custody laws on equal protection grounds, it is significant to note that Baer's proposal may violate simple contract law, or at least the underlying policy. One parallel can be drawn between a premarital custody agreement and automatic custody for women. Essentially, when a court awards custody on an automatic basis to the mother, the effect of such a rule is similar to enforcement of a premarital contract granting custody in the event of divorce to the woman. A court will not enforce a premarital custody agreement on the premise that the

79. M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 23 (Joyce Trebilcot ed., 1983), reprinted in BECKER ET AL., *supra* note 27, at 704.

80. *Id.*

contracting parties cannot understand the value of the subject of the contract (i.e., the child or the relationship with the child) *ex ante*.⁸¹ In that same sense, the law's granting automatic custody to the mother disregards the subject matter of the legal arrangement—the child and each parent's relationship with that child.

A second parallel can be drawn between a surrogacy contract and automatic maternal custody. A court will not enforce a surrogacy contract, because it will not legally enforce an agreement through which a person contracts away a legal right, particularly one as fundamental as the right to be a parent.⁸² Similarly, if the law dictates that custody will always be awarded upon divorce to the mother, then the father may be contracting away his right to parent his future children when he enters the marriage contract.

But more importantly, as discussed earlier, Baer's view of the equal protection doctrine should be rejected because it results in upholding discriminatory laws such as women-only alimony and automatic maternal custody. These provisions entrench and legitimize the assignment of women to two of the roles that support the sexual inequality she aims to eliminate.

V. CONCLUSION: A SHORT-SIGHTED APPROACH TO A LONG-TERM GOAL⁸³

Baer's approach to the equal protection doctrine aims to label a legal arrangement discriminatory whenever it denies women access to anything (automatic maternal custody, women-only alimony), and not when it denies men access to these same things. She asserts that automatic and exclusive statutory assign-

81. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65 (1998).

82. See *In re Baby M.*, 537 A.2d 1227, 1248 (N.J. 1988) (finding a surrogacy contract to be like "the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father").

83. Baer labels her work feminist jurisprudence. While she shares in the "common goal of all branches of feminism . . . to right the wrongs of sex-based oppression and transform society so that women have full and equal share of resources and opportunities," her methods do not promote this goal. BAER, *supra* note 1, at 15. At least in the marital context, they assume and ensure that women have limited access to opportunities to refuse to be in a subordinate or dependent position. See Burns, *supra* note 31, at 194 (arguing that "[f]eminism is not necessarily an effort to make the world conform more to 'women's ways' of doing things . . . feminism is neither necessarily a celebration nor a rejection of women's subjugation").

ment of certain post-marriage benefits, such as alimony and child custody, to women will contribute to the elimination of sexual inequality by validating women's traditional relegation to the roles of wife and mother. This approach creates three fundamental problems. First, she fails to consider what that exclusive access actually denies to women, namely autonomy and equality. Second, she does not acknowledge that difference is inherently the cause of the sexual inequality. Legal assignment of a role to one sex promotes the labeling of that sex as the owner of the qualities associated with that role. Thus, her solution actually perpetuates a system based on difference. Third, the former two problems are compounded by the fact that she advocates for difference only in areas that are based on heterosexual relationships and the use of gendered and devalued roles. Thereby, women are legally assigned a devalued status in a central relationship in society (the marriage). In searching for a remedy to sexual inequality in the law, Baer grasps for a short-term treatment, rather than a long-term solution. She argues that a division between what happens within the law and what happens outside the law "may doom efforts to create . . . sexual equality."⁸⁴ In response, instead of using the law to redistribute rights and responsibilities, Baer's approach reconstructs and reinforces the sexual inequality found outside the law within the law.⁸⁵

84. BAER, *supra* note 1, at 121.

85. Mary Becker would argue that any one jurisprudence cannot be effective to eradicate inequality in society.

Nor is any judicially-manageable standard consistent with the experimentation needed to discover what a world of equality between women and men might look like and what sorts of policies and approaches are appropriate in moving towards that world. We don't—and can't—know what the ideal approach to inequality between all women and men in all variations of class, race, and culture in the United States. Given the difficulty of figuring out the proper approach to a particular issue in this very complicated world, any approach to eliminating oppressions of . . . sex . . . must necessarily be experimental and tentative.

BECKER ET AL., *supra* note 27, at 147.

