

## Symposium on Anita Bernstein's *The Common Law Inside the Female Body*

### THE PROMISE AND PERIL OF A COMMON LAW RIGHT TO ABORTION

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#### INTRODUCTION

One of the competing narratives about *Roe v. Wade*<sup>1</sup> is that the Supreme Court invented the constitutional right to abortion out of whole cloth. Nothing in the Constitution or American history or law, so the narrative goes, supports this right. Rather, seven unelected lawyers who are unaccountable to the American public inscribed it into the United States Reporter simply because they thought it was the right thing to do.<sup>2</sup>

Not so, says Professor Anita Bernstein in her intriguing new book, *The Common Law Inside the Female Body*. As Bernstein argues, the common law, a source of law usually associated with the interests of conservative, propertied, old white men, is actually a powerful source of liberty for women. In particular, the common law's central command—that people are free to say “Do Not Want” with respect to their bodies, property, and money—applies to women. Bernstein's application of this central command in two different legal contexts arising “inside the female body” means that the common law protects a right for women to say no to penetration and

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937–40 (1973) (describing *Lochner v. New York*, 198 U.S. 45 (1905), as a case that “had simply manufactured a constitutional right out of whole cloth” and then arguing that *Roe* and *Lochner* are “twins”).

unwanted pregnancy. It is this latter right that directly challenges the notion that the Supreme Court invented the right to abortion in *Roe*.

In this short review of Bernstein's book, I will first lay out her basic argument about the common law's protection for the right to abortion. From there, I will discuss both the promise and the peril of rooting the abortion right in the common law.

### I. THE COMMON LAW RIGHT TO ABORTION

According to Bernstein, the common law's basic command is that everyone has a right to say no to what they Do Not Want (her capitalization).<sup>3</sup> Tracing the origin of this right through the common law of tort, property, contract, and criminal law, Bernstein calls this concept "condoned self-regard."<sup>4</sup> In other words, the law recognizes that people have the right to act in their own self-interest, without concern for others, when denying others use of their own body, property, and money. Using easily accessible examples, she develops the basis for this right across many different contexts.<sup>5</sup>

Throughout her book, Bernstein calls this condoned self-regard a form of negative liberty. Violations of this concept of negative liberty are "boundary-crossings" . . . a sense of having been hurt, threatened, entered, used, confined, exposed, stolen from, or put to wrongful orders through the overt action of another person or persons."<sup>6</sup> Other than the exceptions she explains in detail (and I discuss below), the ability to seek recourse in law for these boundary-crossings is absolute. Despite the common law's history of limiting or ignoring women's rights in various ways, in a post-coverture world where women's equality is an almost universally recognized principle of law, Bernstein concludes that women receive all the benefits of the common law as men.

Bernstein then looks at how this principle of recognizing the right to say Do Not Want applies inside the female body, specifically regarding unwanted penetration and unwanted pregnancies, the latter being the focus of this review. Bernstein argues that state prohibitions on abortion are direct violations of the common law right to say Do Not Want.<sup>7</sup> Pregnancy, which is risky and has lifelong consequences, is something many people decide they Do Not Want because they Do Not Want, what Bernstein calls, an unwelcome "occupant" in their body. This occupant causes the pregnant

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<sup>3</sup> See ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 33–55 (2019).

<sup>4</sup> *Id.* at 8, 33–34.

<sup>5</sup> *Id.* at 36–53.

<sup>6</sup> *Id.* at 55.

<sup>7</sup> *Id.* at 142–43.

person unwanted physical pain and trauma and invades her private spaces. Moreover, the occupant “receives beneficence” from the pregnant body, something the woman does not have to give to the occupant unless she wants to.<sup>8</sup> Grounding these arguments in common law principles of self-defense, defense of property, and unjust enrichment, Bernstein argues that even if you consider this occupant a living human being with the same moral and legal rights as any other living human being, the pregnant person has a right to use deadly force to protect herself and her property. Stated more plainly, the common law gives the pregnant woman a right to kill the living being inside her when she does not want it there.

In the most powerful section of this chapter on unwanted pregnancy, Bernstein explains how far this common law right goes by deeply probing the common law right of self-defense. She says that this right against such a “ruthless invader” applies even more powerfully when the invasion is “from the inside.”<sup>9</sup> Moreover, because the common law right of self-defense applies regardless of whether the intruder is blameworthy or has a strong reason to invade someone’s property or body, the common law abortion right applies regardless of whether the pregnancy threatens the pregnant woman.<sup>10</sup> The common law right also protects the medical professionals who perform the abortion because the common law allows deadly force in the defense of others. Finally, because the common law considers self-defense a “justif[ication]” rather than an “excuse[],” the common law right of abortion gives the stamp of approval to abortion instead of saying that it is a wrongful action that is somehow excused in this instance.<sup>11</sup> Together, these common law principles add up to a strong abortion right rooted in the liberty to say no and unbounded by any rights of the fetus.

## II. THE PROMISE OF A COMMON LAW RIGHT TO ABORTION

Bernstein’s common law right to abortion has much promise. First, grounding abortion in the common law could help if the Supreme Court were to ever revisit *Roe v. Wade* now that Justice Kavanaugh has replaced Justice Kennedy. The Court showed no interest in doing so during Kavanaugh’s first term, but that could change at any moment. If that happens, the common law’s support for negative liberty generally and the specific right to abortion could help persuade the Court’s conservative Justices that the right to abortion is properly grounded in the Constitution. Regardless of whether they solely use originalist methodology or rely on history and original

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<sup>8</sup> *Id.* at 143.

<sup>9</sup> *Id.* at 152–53.

<sup>10</sup> *Id.* at 153.

<sup>11</sup> *Id.* at 154–55.

understanding as one of many ways to approach the issue, Justices who might otherwise be hostile to the notion of a constitutional right to abortion could be nudged in the direction of reaffirming *Roe* because of Bernstein's argument about its solid historical footing.

This is not a guarantee, of course. Bernstein recognizes throughout her book that the common law did not fully cover women until long after the Fourteenth Amendment was ratified, which calls into question whether the original understanding at the time of its ratification would include women's rights to negative liberty.<sup>12</sup> Moreover, nowhere does Bernstein claim that common law judges specifically recognized a right to terminate a pregnancy, as opposed to a more general idea of negative liberty that, Bernstein argues, *should* include the right to abortion. However, if one or more of the conservative Justices adopt a more generalized approach to originalism, they could find Bernstein's argument helpful.

Second, key to Bernstein's argument is that the "condoned self-regard" of the common law means that people can exercise their negative liberty rights for any reason, whether it be good or bad, rational or absurd. As Bernstein explains, when people exercise their rights to say Do Not Want, "[t]hey do not need a good reason, or any reason at all, to support their rejection decisions. Their not wanting suffices."<sup>13</sup> Applied to the right to abortion, this means that "questionable origins [can] lie behind the choice to end one's pregnancy, and that result is fine with the common law."<sup>14</sup>

This argument about ignoring the reasons behind abortion decisions would be very useful to combat some of the recent developments in abortion restrictions. Even though studies consistently show that most women make abortion decisions for reasons related to family and financial responsibility,<sup>15</sup> laws that attempt to restrict women's reasons for having an abortion are proliferating. Currently, nine states ban abortions based on the sex of the pregnancy, two states ban abortions based on race, and two states ban abortion based on genetic anomaly (with three states having a genetic anomaly law temporarily enjoined while being actively litigated).<sup>16</sup> The debate over these types of reason-bans has intensified in recent years, with Justice Thomas addressing the issue in a lengthy 2019 concurrence in a

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<sup>12</sup> See *id.* at 84–85.

<sup>13</sup> *Id.* at 40.

<sup>14</sup> *Id.* at 170.

<sup>15</sup> M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 1 (2013); Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005).

<sup>16</sup> GUTTMACHER INST., ABORTION BANS IN CASES OF SEX OR RACE SELECTION OR GENETIC ANOMALY (Nov. 1, 2019), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [<https://perma.cc/3HY4-DB67>].

denial of certiorari in a case striking down Indiana's reason-ban.<sup>17</sup> In that concurrence, Justice Thomas argued that women who choose an abortion based on these reasons are part of the long history of eugenics because they are selecting their offspring based on perceived desired characteristics.<sup>18</sup>

Bernstein's common law right to abortion answers Justice Thomas and others who urge there to be limits on the reasons women choose abortion. To these people, Bernstein's common law right says, "none of your business." In other words, under Bernstein's common law right, the law should not care whether women choose to have an abortion because they want to choose the sex of their future children or because they want to avoid bringing a child into the world who has a genetic anomaly. In this powerful way, the common law right that Bernstein advocates for agrees with the abortion-rights rallying cry, "Trust Women."<sup>19</sup>

Third and finally, Bernstein's common law right to abortion provides a powerful answer to the growing trend to prohibit abortion at various stages of pregnancy. In 2019, states like Ohio and Georgia passed laws prohibiting abortions at six weeks. Less extreme but still burdensome, various states have prohibitions at twelve, fifteen, eighteen, twenty, twenty-two, and twenty-four weeks of pregnancy.<sup>20</sup> So far, all bans earlier than twenty weeks have been enjoined by courts, including all of the laws enacted in 2019, but extant bans in the weeks after that are common.<sup>21</sup>

The common law right identified by Bernstein would find that all of these bans violate the woman's right to terminate. Bernstein's analysis does not depend, as many abortion rights arguments do, on the fetus being anything less than a full human being with personhood rights.<sup>22</sup> Under her analysis, even if the fetus is a fully legal person, the pregnant woman has a right to say Do Not Want, just as a land owner can use deadly force to remove another person from her property. Bernstein recognizes that this is where the "common law diverges most sharply from *Roe*,"<sup>23</sup> since *Roe* and its progeny

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<sup>17</sup> *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (Thomas, J., concurring).

<sup>18</sup> *Id.* at 1783.

<sup>19</sup> Ed Pilkington, *Ten Years After Abortion Doctor's Murder, One Woman Carries the Fight for Reproductive Rights*, *GUARDIAN* (May 31, 2019), <https://www.theguardian.com/us-news/2019/may/30/he-gave-so-much-the-woman-fighting-the-abortion-wars-begun-by-george-tiller> [<https://perma.cc/XYK5-AK37>].

<sup>20</sup> GUTTMACHER INST., *STATE ABORTION BANS BY GESTATIONAL AGE* (June 15, 2019), [https://www.guttmacher.org/sites/default/files/images/381.state\\_trends\\_june\\_update.png](https://www.guttmacher.org/sites/default/files/images/381.state_trends_june_update.png) [<https://perma.cc/WQ4C-ZWSB>].

<sup>21</sup> *Id.*

<sup>22</sup> BERNSTEIN, *supra* note 3, at 173 ("[E]ven if termination of a pregnancy kills a person, which may or may not be the case, the common law supports this action at the election of the one who is pregnant.").

<sup>23</sup> *Id.* at 170.

tolerate abortion bans at viability (roughly twenty-four weeks of pregnancy) because of the value of protecting the state's interest in potential life.<sup>24</sup> The common law, on the other hand, permits abortion “at any stage of pregnancy.”<sup>25</sup> For women who face the prospects of choosing an abortion after twenty weeks, Bernstein's position would prohibit states from stopping them from exercising their liberty to say no. Although, as Bernstein recognizes, this position would depart dramatically from the doctrine of *Roe*, there are several states in the country that do in fact allow people to terminate their pregnancies after viability, implicitly recognizing the value of letting women decide—at any stage of pregnancy—what they Do Not Want in their bodies.<sup>26</sup>

### III. THE PERILS OF A COMMON LAW RIGHT TO ABORTION

As much promise as the common law right to abortion holds, there is also huge peril. First, in the hands of most anti-abortion activists, Bernstein's explanation of the common law exceptions to negative liberty would be dangerous to the interests she and I hold dear. As Bernstein explains, the right to negative liberty, including the right to terminate a pregnancy, does not apply when a person has consented to the incursion or voluntarily undertaken the activity that is part of it.<sup>27</sup> It would be easy to imagine someone opposed to abortion saying that a pregnant woman consented to becoming pregnant when she had consensual sex, because pregnancy is a known possible outcome to having sex.<sup>28</sup> Or, that same abortion opponent could argue that when someone engages in consensual sex, they begin an undertaking that does not end when sex ends, but rather ends when all of the known effects of sex end, which could include pregnancy. This abortion opponent would then be able to argue that, because of the common law exceptions of consent and undertaking, abortion could be banned as long as there are exceptions for rape and incest.

Bernstein takes up this issue in her book, but she does not adequately address it, particularly the consent issue. In discussing this exception, she

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<sup>24</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 860 (1992) (explaining that “viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions”).

<sup>25</sup> BERNSTEIN, *supra* note 3, at 171.

<sup>26</sup> KAISER FAMILY FOUND., STATES WITH GESTATIONAL LIMITS FOR ABORTION (June 1, 2019), <https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/53JX-GN9L>].

<sup>27</sup> BERNSTEIN, *supra* note 3, at 58–65.

<sup>28</sup> See generally Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997).

writes that “[i]f pregnancy of itself necessarily proves that the pregnant individual consented to anything, then a common law rationale to compel gestation and childbirth could take form. But pregnancy provides no such proof.”<sup>29</sup> That pregnancy does not prove consent is unquestionably true, but that is exactly the reason that rape and incest exceptions are included in most anti-abortion laws.<sup>30</sup> With an exception allowing a pregnant woman to say she was raped or the victim of incest, especially if liberally applied, a ban on abortion would, from the perspective of someone who believes that consent to sex includes consent to everything that might come with sex, still satisfy Bernstein’s common law principles.

Second, a common law justification for abortion is vulnerable to the same override every common law right is: legislation. Bernstein acknowledges as such in her book, recognizing what she calls “legislative supremacy” as the “least controversial weakness of the common law as a source of rights for individuals.”<sup>31</sup> In other words, even if there is a common law right to abortion, legislatures can change the common law through simple legislation, and these new laws would trump.

Because this is a basic principle of U.S. law, Bernstein does not dispute how statutory law interacts with the common law, but she does try to blunt it. She explains that courts often interpret ambiguous statutes to do the least amount of damage to the common law as possible, which makes common law rights still relevant.<sup>32</sup> Using abortion as an example, she says that courts faced with a forced ultrasound law, because of the common law right to abortion, should read such a statute to allow abdominal ultrasounds rather than requiring transvaginal ultrasounds.<sup>33</sup>

This example does indeed work to prove her point, but it is entirely too limited to quell the fear that legislatures will override abortion rights. Anti-abortion legislatures, like those that we saw were very active in the first half of 2019,<sup>34</sup> will not be deterred by a common law right and will, if the statutory construction principle Bernstein discusses becomes an issue, craft their laws with more specificity. Doing so would render the common law’s support for the abortion right irrelevant, and anti-abortion legislation could move forward with no concern.

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<sup>29</sup> BERNSTEIN, *supra* note 3, at 148.

<sup>30</sup> Loren G. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L. & CRIMINOLOGY 84, 94 (1968).

<sup>31</sup> BERNSTEIN, *supra* note 3, at 177.

<sup>32</sup> *Id.* at 177–80.

<sup>33</sup> *Id.* at 179–80.

<sup>34</sup> Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They Are Pregnant*, GUTTMACHER INST. (Mar. 30, 2019), <https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant> [https://perma.cc/98CZ-XN6T].

Third, the negative liberty right to abortion suffers from all the limitations of any negative right. In particular, as many scholars have argued, the constitutional right to abortion, which is likewise often rooted in notions of negative liberty, does not guarantee actual access to abortion services. As a result, women of color, poor women, and women who live outside major metropolitan areas, among others, may have the theoretical right to abortion but in reality, have a harder time actually accessing one.<sup>35</sup> Without an affirmative right to abortion, the law's response is that their troubles are of their own making, and all the law has to do is make sure that if they were able to get to an abortion clinic and have the money to pay for it, their actions would not be criminal.<sup>36</sup>

Bernstein acknowledges the limits of negative liberty throughout her book. She writes that “[t]o hold negative liberty is not to have anywhere near everything a person needs. Material supports that help a person to flourish, which sometimes get grouped under a rubric of affirmative liberty, are essential.”<sup>37</sup> This acknowledgment parallels the most trenchant critique of negative liberty in the context of abortion, which comes from the reproductive justice movement. Reproductive justice, a framework developed by women of color that centers their lived experiences, argues that there should be a positive right of reproductive autonomy grounded in basic human rights notions. With that framework, reproductive justice focuses on three rights: the right to not have a child (where abortion falls), the right to have a child, and the right to parent your children in a healthy and safe environment.<sup>38</sup>

Bernstein's common law right to terminate a pregnancy grounded in the Do Not Want principle barely scratches the surface of the practical needs that the reproductive justice framework identifies. Loretta J. Ross and Rickie Solinger explain that reproductive justice necessitates both negative and positive rights. Among those positive rights includes “access to specific, community-based resources including high-quality health care, housing and education, a living wage, a healthy environment, and a safety net for times when these resources fail.”<sup>39</sup> Without these resources, abortion access (as well as childbirth and parenting justice) is impossible for many. Yet, the common law negative right leaves people wanting to terminate their

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<sup>35</sup> Imani Gandy, *New Abortion Ban Lawsuit Places Black Georgians Squarely at the Center of the Fight*, REWIRE.NEWS (July 3, 2019), <https://rewire.news/ablc/2019/07/03/new-abortion-ban-lawsuit-places-black-georgians-squarely-at-the-center-of-the-fight> [<https://perma.cc/W78X-89AJ>].

<sup>36</sup> See *Harris v. McRae*, 448 U.S. 297, 310 (1980); *Maier v. Roe*, 432 U.S. 464, 469 (1977).

<sup>37</sup> BERNSTEIN, *supra* note 3, at 176.

<sup>38</sup> LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 9 (2017).

<sup>39</sup> *Id.*



pregnancies stranded in this regard because it says nothing about actually accessing abortion care.

#### CONCLUSION

To those of us who associate the common law with the policy preferences of propertied, conservative, old white men, Bernstein's account of the common law inside the female body is a novel and welcome interpretation of our negative liberty tradition. Given the current attacks on abortion rights from state legislatures and the federal judiciary, Bernstein's common law right to terminate an unwanted pregnancy could, if widely adopted, help protect abortion rights in the future. However, in the wrong hands, her grounding could play into the goals of the anti-abortion movement without helping protect actual access for people seeking abortions. Thus, her account of this right is a double-edged sword, with much promise, but also much peril.