

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

### THE COMMON LAW AS A TERRAIN OF FEMINIST STRUGGLE

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#### INTRODUCTION

For the better part of two decades, feminists have been questioning the usefulness of the law in advancing gender justice.<sup>1</sup> Early feminist struggles, particularly those of what is commonly understood as second-wave feminism, focused on achieving formal equality and giving teeth to constitutional guarantees of equal protection.<sup>2</sup> The big cases are easily recognizable landmark changes to constitutional law.<sup>3</sup> Common law has received comparatively less attention as a source of and, indeed, as a locus of gender justice. Professor Anita Bernstein's book *The Common Law Inside the Female Body* makes a powerful argument that we need to consider. The common law is often derogatorily dismissed as "judge-made law" in the United States, possibly because we have come to believe (erroneously) that the province of lawmaking is that of the legislature alone and that judges ought to stick to interpreting and applying that which is legislated or

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<sup>1</sup> See CAROL SMART, FEMINISM AND THE POWER OF LAW 5 (1989).

<sup>2</sup> ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 89–90 (2019).

<sup>3</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (finding exclusion of women from a state educational institution a violation of equal protection under the Fourteenth Amendment); *Roe v. Wade*, 410 U.S. 113 (1973) (decriminalizing abortion); *Reed v. Reed*, 404 U.S. 71 (1971) (finding preference for male executors of estates a violation of the Fourteenth Amendment).

recognized clearly as common law precedent. This is likely a peculiarity of the American legal tradition with its preoccupation with separation of powers and constitutional law. Yet the common law has never been simply about following precedent.<sup>4</sup> Lawyers trained in the United States have to make their peace with the fact that this judicial lawmaking tradition is foundational to our legal system whether we believe unelected (and elected) judges are capable of doing so well or not.

Many feminists have written off the common law because, as Bernstein acknowledges, it is slow moving and tends to be conservative.<sup>5</sup> It does not yield the kind of dramatic outcomes and reversals of precedent that federal or state constitutional cases do. Nevertheless, at the heart of it, the common law protects vital negative liberties which prevent the state from intruding into the lives of women. A negative right merely prevents states from obstructing citizens from their pursuit of life, liberty, and happiness. And these liberties, or as Bernstein puts it, “Do Not Wants,” are of critical importance to women.<sup>6</sup>

I found compelling Bernstein’s description of the common law as a tool for feminist reform. Her argument that the common law gives women as much right to say no as men is important. However, there are weaknesses in the common law that make it less than ideal for feminist law reform. Bernstein acknowledges these and so the following observations are less criticisms of her work than they are attempts to focus in on some of the difficulties Bernstein raises in her book.

In this Essay, I focus on three specific points. First, I examine the scope of the common law’s protection to underscore the point that this protection is not uniformly available. It is predicated on legal personhood and by

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<sup>4</sup> A number of scholars have written about judicial lawmaking. Some of the classics in the field are Wolfgang Friedman, *Limits of Judicial Lawmaking and Prospective Overruling*, 29 MOD. L. REV. 593 (1966); Jack G. Day, *Why Judges Must Make Law*, 26 CASE WESTERN RES. L. REV. 563 (1976); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); see also Arthur Eisenberg, *Dear Brett Kavanaugh, Justices Do Make Law*, AM. C.L. UNION (July 13, 2018, 1:15 PM), <https://www.aclu.org/blog/free-speech/dear-brett-kavanaugh-justices-do-make-law> [<https://perma.cc/S36D-GW78>].

<sup>5</sup> BERNSTEIN, *supra* note 2, at 1.

<sup>6</sup> *Id.* at 75.

Negative liberty is the absence of obstacles, barriers or constraints. One has negative liberty to the extent that actions are available to one in this negative sense. Positive liberty is the possibility of acting — or the fact of acting — in such a way as to take control of one’s life and realize one’s fundamental purposes. While negative liberty is usually attributed to individual agents, positive liberty is sometimes attributed to collectivities, or to individuals considered primarily as members of given collectivities.

*Positive and Negative Liberty*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 2, 2016), <https://plato.stanford.edu/entries/liberty-positive-negative> [<https://perma.cc/AZ9A-V6CK>].

bracketing that threshold requirement, many people, mostly minorities, are left without recourse to the law. Second, I take up the uses and limits of property as an analogy to women's bodies. I argue that property law is far less helpful when the violator is the state as opposed to a private actor. Finally, I suggest that there are important linkages that require further inquiry. Economic changes and imperialism had indelible effects on the common law. Thus, a purely legal examination of the United States' experience with the common law misses how capitalism and imperialism shaped its ideas about property, family, and personhood.

### I. THE SCOPE OF THE COMMON LAW'S PROTECTION

First, there is the threshold question of whom the law protects. For much of history, the common law has acknowledged the existence of different kinds of legal persons (from the time of feudalism and serfs, villeins, and other bonded people to gender distinctions in the modern period).<sup>7</sup> In order to make the case that the common law now protects women, we have to make the same accommodation that Bernstein makes regarding legal personhood—we have to bracket out much of common law history and confine ourselves to the last two centuries.<sup>8</sup> As Bernstein tells us, judge-made law cannot confer legal statuses and the rights that attach. It can only vindicate the rights of those who already possess both.<sup>9</sup> This means that we must look to statutory laws to confer this recognition on both men and women who have historically been excluded from the group of those who had rights.<sup>10</sup>

The common law did not summarily exclude all women from protection. However, we know that it recognized an unequal status and maintained gender distinctions.<sup>11</sup> For example, in the United States, enslaved people were entirely excluded, and the common law could not free them. Thus, who could avail themselves of the negative liberties historically

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<sup>7</sup> Legal Personhood denotes an entity that carries the legal rights and duties of a subject in the law. A legal person may not always be a “natural person.” For example, corporations are considered legal persons. In this Essay, I point out that even before a natural person may appear before the law to vindicate their rights, they must be “seen” as a legal person having rights and being able to do so. For an introduction to the concept, see Lawrence Solum, *Legal Theory Lexicon: Persons and Personhood*, LEGAL THEORY BLOG (Dec. 31, 2017, 12:31 PM), <https://lsolum.typepad.com/legaltheory/2017/12/legal-theory-lexicon-persons-and-personhood.html> [<https://perma.cc/3JF2-KWR5>].

<sup>8</sup> BERNSTEIN, *supra* note 2, at 15–21.

<sup>9</sup> *Id.* at 24–27.

<sup>10</sup> Presumably, villeins, serfs, and other forms of bonded labor were not created by statute in the Middle Ages. Therefore, these statuses must arise from “something else” which forms the basis upon which the common law affords them recognition and legality. *See id.*

<sup>11</sup> *Id.* at 24–28.

protected by the common law? Those who were already viewed as fully human, fully legal persons, even if gender made them unequal.

The potential for equality exists only where legal persons do. Blackstone's remarkable observation that "this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, [] and with regard to all natural rights becomes *eo instanti* [from that instant] a freeman"<sup>12</sup> was made true not by the common law but by the abolition of slavery through legislative act.<sup>13</sup> In the United States, one might point out that not all Blacks were slaves. Did the common law protect with equal fervor the rights of free black men? At a time when freemen were constantly fearful of being enslaved regardless of their status, one would think not.

Neither legislation nor the common law were able to fully protect the free status of African descended peoples. In other words, the common law judges were able to justify withholding the protections of the law from people who were legal persons by simply refusing to give credence to the evidence they were free. So, while being unable to confer legal personhood, they were willing and able to aid in depriving free Blacks of that status through contract and property law.<sup>14</sup>

The inability of the common law to confer equal status is a serious weakness, and for feminists, this undermines the usefulness of the common law in substantively achieving the equality promised by formal laws. Legislative supremacy, therefore, obviously channels efforts at reform in that direction. Nevertheless, Bernstein's point that the common law is not necessarily antagonistic to women's rights does raise questions of possibilities and strategies that feminists would do well to consider.<sup>15</sup>

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<sup>12</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 86 (Oxford 2016) (alteration in original).

<sup>13</sup> The Act of 1807 abolished the slave trade in Great Britain. However, slavery continued in the colonies until 1833 and Britain continued to have ties to the trade for decades following the Act. See, e.g., MARIKA SHERWOOD, AFTER ABOLITION: BRITAIN AND THE SLAVE TRADE SINCE 1807 (2007).

<sup>14</sup> See Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105, 124–30 (Jean Allain ed., 2012). While Finkelman agrees with Bernstein that the common law cannot be read to condone or promote slavery, he also notes that it was used to give effect to contracts and property rights concerning slaves. Also, note the now widely known story of Solomon Northrup who was captured and enslaved for twelve years even though he was a free man. The story became the basis of the Oscar-winning film, *12 Years a Slave*, the title taken from Northrup's autobiography written in 1853.

<sup>15</sup> See BERNSTEIN, *supra* note 2, at 1–2. Indeed, feminists would do well to use the argument made by Bernstein that now that women are considered formally equal, the common law's protections once afforded to men are equally afforded to women. Thus, any argument based on tradition, which is so often relied on in substantive due process litigation, can be at least partially refuted as the gender unequal portion of tradition should no longer apply.

## II. PROPERTY LAW AND THE RIGHT TO EXCLUDE

Bernstein's reliance on property law in the argument that women have the right to exclude people from their bodies is both attractive and problematic. Its attractions are clearly articulated. To perhaps oversimplify her argument, she claims that if the common law acknowledges the right to exclude intruders from property with force, even deadly force, then surely such force is acceptable against any who intrude into the body of a self-possessing woman.<sup>16</sup> This argument is easily understood when it comes to repelling sexual assault, but is likely less palatable to some when applied to abortion. The body as property, the self-possessing individual, and the liberties that attach have long been subjects of philosophical and legal inquiry.<sup>17</sup> The actions in defense of self and property that will be condoned depend on who is doing the boundary-crossing.

Property and the law's singular regard for it is not as firm a ground when the state is involved, as when the boundary crosser is a private actor.<sup>18</sup> We may tend to think otherwise because much of our constitutional law, when it comes to personal rights, is about negative liberties asserted against the state. For instance, historically, in common law-abiding England, there was very little by way of *entirely* "private property."<sup>19</sup> Land was held largely by the Crown (even now the state is the largest landowner). Fee simple absolute was rare. Americans largely abandoned the byzantine feudal property titles preferring outright ownership.<sup>20</sup> But title is only as good as the state's willingness to recognize it and uphold it. Moreover, as we have seen, even if the law theoretically regards property rights as sacred, the state crosses boundaries and invades it with some frequency. Feminists have had to draw careful lines around private property, demanding that the state protect women from violence even in the inner sanctum of the marital bedchamber.<sup>21</sup> They have tried to both argue for privacy and also dismantle the public/private divide depending on context. For instance, the state has adopted some of these feminist arguments against privacy to prevent domestic violence and to ensure the wellbeing of children. And it has also

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<sup>16</sup> See *id.* at 115.

<sup>17</sup> See, e.g., ANNE PHILLIPS, OUR BODIES, WHOSE PROPERTY? 45–49, 135–137 (2013) (discussing Locke and Rousseau's conception of property and individual rights to liberty and arguing that they did not consider women to be included in the category of rights holders).

<sup>18</sup> See generally GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 44–71 (1997).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See e.g., JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009) (arguing that domestic violence law long advocated for by feminists has eroded privacy in the home, traditionally protected by the common law castle doctrine).

ignored feminist arguments for privacy to monitor the activities of those receiving state assistance.<sup>22</sup>

The point here is that while one might be able to repel the intrusions of a private individual as a trespasser, one may not be able to repel the state. And increasingly, we are seeing intrusions into the bodies of individuals from transvaginal ultrasound legislation to the state's ability to conduct cavity searches and to draw blood from those suspected of driving under the influence.<sup>23</sup> Of course, these invasions are justified by (statutory) exceptions. Nevertheless, the number and scope of exceptions seem to be expanding to the point of whittling away the firm ground of the right to exclude.

Rape is the easier case in the book. It is a criminal offense and the trespass by a private violator is easily recognizable *as long as consent is absent*.<sup>24</sup> And consent is the terrain on which battles about rape law are being fought.<sup>25</sup> But abortion and intrusions by the state are another matter entirely.

### III. HISTORICIZING THE COMMON LAW: ECONOMICS, POLITICS, AND EMPIRE AS INFLUENCES OF CHANGE

On a different note, Bernstein's book raised my curiosity about the effect of economic change on the development of the common law. Some of the changes in property law and many changes in the structure of the family coincide with the rise of capitalism and the advent of Liberalism.<sup>26</sup> Enclosure and the changing of public land into private land, the rise of the "rights bearing" individual and social contract theory, and the formation of the private nuclear family with a status separate from the market/public perhaps coincide with the evolution of negative liberty. Further elaboration on how these rights evolved with the inclusion of the economic drivers would be of interest.

Recent historical work on women slaveholders, for instance, suggests that coverture did not prevent married women from owning and managing

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<sup>22</sup> *Id.*

<sup>23</sup> The most recent Supreme Court decision in *Mitchell v. Wisconsin*, 139 U.S. 2525 (2019), upholds a Wisconsin law that holds an unconscious motorist has given tacit consent to blood drawing by the police, who can then ascertain if the driver is under the influence. It is of interest to note the assertion that someone who is unconscious has given consent is common in sexual assault cases.

<sup>24</sup> Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 446 (2016).

<sup>25</sup> *Id.*; see also Alexandra Brodsky, "Rape Adjacent": *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2016).

<sup>26</sup> I capitalize Liberalism here to denote the political and philosophical school of thought that emerged during the Enlightenment as opposed to the political distinctions made in U.S. electoral politics. See e.g., *Liberalism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 22, 2018), <https://plato.stanford.edu/entries/liberalism> [<https://perma.cc/E3ZC-EJLM>].

their own slaves without spousal interference.<sup>27</sup> Married and single women managed and disciplined their slaves as private property, and actively participated in the slave trade.<sup>28</sup> Families used trusts, prenuptial agreements, and other means to evade coverture even before the statutory enactment of married women's property rights.<sup>29</sup> Married women sued in chancery (even though in the United States, the distinction between law and equity has been blurred) for separation of property to make clear what property could not be reached by a husband's creditors.<sup>30</sup>

I raise this to suggest that it would be interesting to trace the development of the common law by taking into account the economic changes of the day and the ways in which some women's lived experiences did not coincide with the legal constraints to which they were formally subject. Feminists have become increasingly interested in the economic dimensions of law reform, which suggests future historical work to be done in this area.<sup>31</sup>

Relatedly, Bernstein starts her book with the intriguing statement that the "canvas is wider than one wide country."<sup>32</sup> Certainly, the history of the common law in England and the United States has relevance to other Commonwealth countries that share a legal heritage.<sup>33</sup> This book, however, does not (and perhaps cannot) draw those linkages. But those linkages are important. For instance, Brenna Bhandar's work on colonial property demonstrates that, in fact, changes in colonial property regimes were often imported back into Britain and changed the law.<sup>34</sup> An example of this is formal titling of property, which was not required in England but became prevalent (sometimes dispossessing those who could not show ownership) after it was introduced in the colonies.<sup>35</sup> Bhandar notes that common law property protections based on possession gave way to greater protection for

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<sup>27</sup> See generally STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* 29–30, 57–80 (2019).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010) (examining the distinction between market and family and theorizing the "economic family"). For an early exploration of the link between market and family in U.S. legal scholarship, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

<sup>32</sup> See BERNSTEIN, *supra* note 2, at 2.

<sup>33</sup> *Commonwealth Countries: Commonwealth*, INST. ADVANCED LEGAL STUD., <https://libguides.ials.sas.ac.uk/commonwealth> [<https://perma.cc/Z9DP-HL69>].

<sup>34</sup> BRENNA BHANDAR, *COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP* 82 (2018).

<sup>35</sup> *Id.*

formal title holders' rights.<sup>36</sup> Developments such as these have less to do with legal personhood or misreadings and misapplications of the law than they do with change driven by factors exogenous to the law.<sup>37</sup>

Bhandar's project is to excavate the co-construction of property laws and ownership and colonial/racial subjects. She asserts:

Thus not only was property law the primary means of appropriating land and resources, but property ownership was central to the formation of the proper legal subject in the political sphere. Analyzing the techniques of ownership that remain a primary mode of dispossession in settler colonies cuts across the economic, cultural, political, and psychic sphere of colonial and postcolonial life. Modernity ushered in a relationship between ownership and subjectivity, wherein the latter was defined through and on the basis of one's capacity to appropriate.<sup>38</sup>

This observation is in line with Bernstein's own project of showing how women came to be possessors and asserters of property rights through the expansion of recognition that they were legal persons. Bhandar's further claim, expanding on Frantz Fanon's theoretical work on (de)colonization, however, is that for racial minorities and colonial subjects, it is the very introduction of common law property that dispossesses them and, indeed, helps create the differential category.<sup>39</sup> And here, taking together this insight and that of Jones-Rogers, we come to the problem of whether the common law is racist and sexist because of the way it has developed and the contexts in which it has developed. Or has it been, as Bernstein argues, simply misapplied and misinterpreted by judges enacting their own biases.<sup>40</sup> If the latter, I worry that we fall into the *Plessy* trap in recognizing form over substance rather than something deeper and structural:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. *If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.*<sup>41</sup>

Or to paraphrase it: *If this be so, it is not by reason of anything found in the common law, but solely because judges choose to put that construction upon it.*

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4.

<sup>39</sup> *Id.* at 5.

<sup>40</sup> See BERNSTEIN, *supra* note 2, at 25–27.

<sup>41</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (emphasis added).



## CONCLUSION

Historicizing property law and the role of capitalism and Liberalism in its present formation helps to show that the direction of change in the common law, though slow moving, is not natural or predetermined. It is contingent on political and economic contexts and developments including the experience of slavery and colonialism. As such, the arguments that are available in the future may be shaped by other contextual changes—judges making judge-made law are, after all, people of their times. This is not a misreading of the common law as much as the inevitable result of its structure. One aspect of feminist theorizing then, is to imagine what these alternative futures might be. Bernstein's work is important in unapologetically asserting what rights we have and in justifying and undergirding legal arguments to protect those rights. Her meticulously researched book should revive feminists' interest in the common law as a basis for challenging the erosion of women's liberties. As part of our legal history, the arguments presented in the book are valuable in contesting what many judges and anti-feminists consider long standing tradition. Bernstein powerfully shows that now that women are (legal) individuals, we can demand the same negative liberties that have been and continue to be integral to our society. And as women increasingly become part of the judiciary, we may also be so bold as to try and shape the future direction that judge-made law takes as well.