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### Re-Reading Anita Bernstein's *The Common Law Inside the Female Body* from the Bottom of the Well: Analysis of the Central Park Five, Border Drownings, the Kavanaugh Confirmation, and the Coronavirus

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# RE-READING ANITA BERNSTEIN'S *THE COMMON LAW INSIDE THE FEMALE BODY* FROM THE BOTTOM OF THE WELL: ANALYSIS OF THE CENTRAL PARK FIVE, BORDER DROWNINGS, THE KAVANAUGH CONFIRMATION, AND THE CORONAVIRUS

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**Abstract:** This Article provides a critique of the common law based on its impact on “the legal other” or what the late Professor Derrick Bell viewed as the faces from the bottom of the well. Professor Anita Bernstein notes common law’s liberatory capacity. While this interpretation of the common law is true to a certain extent, this reading can lead to an underestimation of the common law’s limitations. In looking at the case involving the Central Park Five, I argue that feminist jurisprudence can have an unintended disparate impact on vulnerable populations. Examples of migrant detention facilities and precarious border crossings also illustrate how inhumane conditions emerge in response to the desire to protect white female spaces. In other words, the law functions to protect white women as an extension of white male property and privilege. This Article argues that law enforcement arms and the judicial system operate in hegemonic unison to protect the interests of elite institutions and those in power by using all tools at their disposal, including the common law inside the female body. Meanwhile, even white women are disempowered when their interests do not align with the goals of white male heteropatriarchy as evidenced by the confirmation hearings of Justice Kavanaugh. The coronavirus pandemic accentuates these disparities in the feminist jurisprudence.

## INTRODUCTION

The common law arises from and presently dominates the Anglo-American legal tradition. At the same time, the common law applies to many non-Anglo people in America, and to non-Anglo, non-American people across the globe. In *The Common Law Inside the Female Body*, Professor Bernstein proposes that attorneys hoping to move toward gender equality with primary

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legal materials can begin with the common law. Bernstein, who aims to reinvigorate both the common law and female jurisprudence, says the common law has a liberatory capacity.<sup>1</sup>

To a certain extent that is true, but this reading can lead to an underestimation of the common law's downsides. One problematic aspect of the common law, as perceived by critical legal theorists and critical race scholars, is that it lacks the ability in many circumstances to take into account identity, including race, language, religion, gender, sexual orientation, ethnicity, and nationality. Lady Justice is sculpted as blind, but her essence is a tiered system of laws, applied successfully for those in power and with means and misapplied for those on the lower totem poles of society, i.e. those whom the late law professor Derrick Bell calls "the faces at the bottom of the well."<sup>2</sup> Historically, men and women have not received equal treatment—examples include previous regulations in the tax code, current property rights for inheritance and divorce, and the stagnant issues of equal pay.<sup>3</sup> Further, the Anglo-American legal tradition accommodated laws and propped up a system that permitted and perpetrated enslavement (*Plessy v. Ferguson*) and segregation (*Virgil Hawkins v. The Florida Board of Control*).<sup>4</sup> Today common law legal systems tolerate engaging humans, apartheid, and discrimination, all in the name of serving broader societal and financial goals.<sup>5</sup> This essay examines Bernstein's *The Common Law Inside the Female Body* from the perspective of the legally marginalized "other." I analyze the Case of the Central Park Five, recent drownings at the U.S. Mexico Border, the confirmation hearing of Justice Kavanaugh, and the ongoing coronavirus pandemic to demonstrate the shortcomings of the common law and the blind spots in feminist jurisprudence.

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<sup>1</sup> ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 1 (2019).

<sup>2</sup> See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>3</sup> See generally Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAMILY L. 347 (1971).

<sup>4</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. U. L. REV. 59 (1984). See generally JENNY BOURNE WAHL, *THE BONDSMAN BURDEN* (1998).

<sup>5</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (chronicling mass incarceration and its effect on African Americans); IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016) (arguing that racism in America has evolved into a form that is more sophisticated and insidious and that almost every prominent American intellectual has contributed to the pervasiveness of racist ideas); Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 LAW & SOCIAL INQUIRY 681, 681 (1998) (noting that female attorneys are involved in various major changes to society: 1) the influx of women into careers that were traditionally male dominated, 2) organizational changes in how services are provided and firm structure, and 3) the evolution of law as a tool for addressing social inequity).

## I. CRITIQUE OF THE COMMON LAW

When common (or other) law is absent, society descends into chaos and incoherence. Legal systems generally, and the common law in particular, do not guarantee a just society. The common law imposes structural and institutional inequalities in ways that the absence of the law does not. Changes to the common law over time have been minimal at best and stalled at worst.<sup>6</sup> To be sure, the common law does have its benefits. Legal scholars praise the efficiency of common law.<sup>7</sup> But in this short essay, I suggest that efficiency is one of the reasons that the common law has an anemic ability to effectuate social change and dismantle structural inequality. Common law is rooted in precedent as well as British and Roman legal constructs, which have fostered prejudice on the basis of sex, race, and religion. I critique the common law because of its systemic and also disaggregated reinforcement of societal and legal norms that marginalize “the legal other.” To that extent, I take a less optimistic view of common law than Bernstein does. My analysis considers the Central Park Five case as well as concerns of immigrant caging and migrant deaths. I also consider how the common law also fails to protect the interests of white women when they do not align with those of the white male ruling elite.

Bernstein makes a major contribution to the discussion of reproductive rights by linking a woman’s right to control access to her body with familiar common law doctrines. She writes, for example, that:

The possessor of a female body who resists invasions and incursions of her daily life through the common law builds her freedom. She starts with the negative kind of liberty and then gains affirmative goods and pleasures when she may say no as she pleases. The wealth of nations—by which I mean wealth in the most capacious

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<sup>6</sup> See Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 757 (2001) (critiquing the United States Supreme Court’s jurisprudence). Law professor Cass Sunstein observed that the Rehnquist Court was “generally . . . minimalist, in the sense that it has attempted to say no more than is necessary to decide the case at hand, without venturing anything large or ambitious.” *Id.* Tanya Marsh, *The Stagnation of the Common Law of Property(?)*, PROPERTYPROF BLOG (Mar. 14, 2010), <https://lawprofessors.typepad.com/property/2010/03/the-stagnation-of-the-common-law-of-property.html> [https://perma.cc/M5NK-6YDR] (noting that the most recent decisions in Indiana property law date back to the 1980s or as far back as the late 1800s); see also Ben Barros, Comment to *The Stagnation of the Common Law of Property(?)*, PROPERTYPROF BLOG (Mar. 15, 2010, 10:49 AM), <https://lawprofessors.typepad.com/property/2010/03/the-stagnation-of-the-common-law-of-property.html> [https://perma.cc/DUQ7-LQFL] (“I think that property law is particularly resistant to change by the courts. Courts often want to defer to legislatures, and this is particularly true in the property context, where long-term reliance interests counsel against making changes to ‘settled’ law. I’ve recently been exploring statutory reform of property law, but that presents its own set of issues, including the need to factor in interest group politics and the general lethargy of state legislatures.”).

<sup>7</sup> Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL EDUC. 51, 51 (1977).

sense of the word—gets bigger when every person can maintain the boundary around herself.<sup>8</sup>

Notably, Bernstein omits the word “white” from her book title. Given that the Anglo-American legal system has historic roots in structures created by and for white men, adding the adjectives would be redundant. But consider for a moment if the book’s title had been “The White Common Law Inside the Female Body,” or “The Common Law Inside the White Female Body.” That would illuminate the perspective of the legal “other”—people of color—to whom a separate common law applies, especially in criminal cases where victims are white women. Legal scholars unintentionally essentialize both “the common law” and “women.” Bernstein writes, for example, that “[t]he common law supports beneficial transactions and relationships not by initiative but by maintaining safeguards against threats to them.”<sup>9</sup> Bernstein recognizes the limits of the common law by referencing the work of Jeremy Bentham, who, as she describes, “published thoroughgoing criticism of the common law and fought its reach more passionately and effectively than anyone else in history.”<sup>10</sup> Bentham denounced the common law as “sham law,” but law professor Xiaobo Zhai reads Bentham’s denunciation as “an evaluative censure, not a descriptive account.”<sup>11</sup> But Bentham understood the limits of the common law’s ability to achieve certain outcomes.<sup>12</sup> Like Bentham and Zhai, and unlike Bernstein, I view the common law as bounded and restrictive.

Through the lens of “the other,” one can critique Bernstein’s insistence on the benefits of negative liberty. Bernstein argues that negative liberty “shields an individual from interference,” and therefore “necessarily pervades any jurisprudence that starts with complaints rather than the distribution of something good.”<sup>13</sup> No doubt, Bernstein is exceptionally careful and provides an extraordinary level of detail in analyzing common law’s origins and its impact. But where Blackstone saw the common law’s creation of “crimes” as a category of law that will “install security as a public good,”<sup>14</sup> it is important to highlight how people of color experience criminal law differently than the white men by and for whom the common law system was created.

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<sup>8</sup> BERNSTEIN, *supra* note 1, at 214.

<sup>9</sup> *Id.* at 33.

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

<sup>11</sup> Xiaobo Zhai, *Bentham’s Exposition of the Common Law*, 36 LAW & PHIL. 525, 525 (2017).

<sup>12</sup> *Id.* at 526.

<sup>13</sup> BERNSTEIN, *supra* note 1, at 33.

<sup>14</sup> *Id.* at 37.

## II. FLAWS OF THE COMMON LAW VIEWED FROM THE PERSPECTIVE OF THE CENTRAL PARK FIVE

Watching the 2019 Netflix film, “When They See Us,” on the case of the Central Park Five, while also reading *The Common Law Inside the Female Body*, I was struck by the contrast between the film’s presentation of larger issues of law and justice and Bernstein’s treatment of the same topics.

For readers who may be unfamiliar with the Central Park Five case, the History Channel provides a synopsis, focusing on the rape victim first:

When Trisha Meili’s body was discovered in New York City’s Central Park early in the morning on April 20, 1989, she had been so badly beaten and repeatedly raped that she remained in a coma for nearly two weeks and retained no memory of the attack.

The brutal assault of the 28-year-old white investment banker, who had been out for a jog the night before, led to widespread public outcry and the quick arrest and subsequent conviction of five black and Latino teens—Antron McCray, 15, Kevin Richardson, 15, Yusef Salaam, 15, Raymond Santana, 14, and Korey Wise, 16—who came to be known as the Central Park Five.

But, in 2002, after serving sentences that ranged from six to 13 years for what then-New York City Mayor Ed Koch called “the crime of the century,” new DNA evidence and a confession proved convicted rapist Matias Reyes was the true, lone culprit. The charges against the five men were vacated and they eventually received a \$41 million settlement.<sup>15</sup>

Some scholars argue that “dominance theory and intersectionality share a critique of conceptions of equality structured around sameness and difference.”<sup>16</sup> “When They See Us” effectively makes those critiques by showing how five young black and Latino men experienced the criminal justice system. Although constitutional law scholars Devon Carbado and Cheryl Harris propose that legal scholars should “avoid essentialism to achieve normative commitments to social transformation,”<sup>17</sup> Bernstein is more comfortable making broad characterizations about the operation of the system. She is able to envision a reinvigoration of the common law through a focus on crimes, contracts, torts, and property law regimes along with feminist jurisprudence to achieve more just

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<sup>15</sup> *The Central Park Five*, HISTORY.COM (Sept. 23, 2019), <https://www.history.com/topics/1980s/central-park-five> [<https://perma.cc/XX46-Q2LW>].

<sup>16</sup> Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2196 (2019).

<sup>17</sup> *Id.*

outcomes in the future.<sup>18</sup> Bernstein's book provides an optimistic assessment of the common law's potential to advance rights claims, especially by women, while the documentary portrays the grimness of the criminal justice system in operation, especially for people of color. Having that level of optimism for the liberatory capacity of the law is essential to change the law. From housing rights to abortion rights, the ability to see the potential for change in the law is only way to change it. To do otherwise would be to waive a white flag of surrender. What I argue is that to have that optimism may be excruciatingly difficult for those at the bottom of the well. The success of "When They See Us," nominated for sixteen Emmy Awards, demonstrates the narrative's resonance and the desire for a fresh perspective on the case.<sup>19</sup> More specifically, the criminal justice system needs to recognize the point of view of the "legal other." From that angle, it appears that the legal system protects women's honor and dignity most fervently when they are victims and the alleged wrongdoers are people of color, particularly black men.<sup>20</sup> It might be possible to conceive of the common law as concerned with not "justice," per se, but with maintenance of an orderly society in which white people are safe. In a case involving a violent crime like rape, the lesson of the Central Park Five case seems to be that the actual guilt of the alleged perpetrators is merely ancillary. Further, the media and the legal discourse at the time focused on the victim of the crime, an elite white woman who was raped, bludgeoned, and left for dead. Finding the perpetrators to make the streets of New York City "feel safe" as well bring "justice to the victim" were paramount concerns. The case focused on the victim and "brought together real and imagined fears of a collapsing New York City into an unholy cocktail of outrage, blame, and recrimination."<sup>21</sup> A focus on those at the "bottom of the well"—the five young people entrapped by police officers and wrongfully accused and convicted—leads to a critique of mass incarceration in service of protecting the white female body. Reports show that the NYPD may have misconstrued the suspects' statements to piece together false confessions, unconcerned with the actual reality of the events.<sup>22</sup>

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<sup>18</sup> BERNSTEIN, *supra* note 1.

<sup>19</sup> Daniel Montgomery, *The Central Park 8: 'When They See Us' Is Tied for the 2nd Most Emmy Acting Nominations Ever for a Limited Series*, GOLDDERBY (Jul. 19, 2019, 2:00 PM), <https://www.goldderby.com/article/2019/when-they-see-us-emmy-nominations-history-acting-netflix-news/> [<https://perma.cc/YPA6-A5VP>].

<sup>20</sup> See generally Jennifer Wriggins, *Rape, Racism, and the Law*, 104 HARV. WOMEN'S L.J. 103 (1983) (discussing the history of rape in the United States as focused on the rape of white women by black men).

<sup>21</sup> Sarah Weinman, *Before, and After, the Jogger Survivors of the Real 'Central Park Five' Attacker Speak for the First Time*, THE CUT (Jun. 3, 2019), <https://www.thecut.com/2019/06/the-attackers-other-victims-in-the-central-park-five-case.html> [<https://perma.cc/UC5S-22Z3>].

<sup>22</sup> See Eric Shorey, *What Is Wilding and What Does It Have to Do the Central Park 5?*, OXYGEN (May 31, 2019, 6:19 PM), <https://www.oxygen.com/martinis-murder/what-is-wilding-central-park-5> [<https://perma.cc/RC4G-P28H>]. "A 2002 report from the *National Review* indicates that officers had

The Central Park Five case suggests that the forces of justice are swift and adept in protecting capitalist interests—to guard the interests of the female investment banker—but not the working-class black and Latino young men. By adopting the lens of “the other,” the focus shifts from the alleged crime to its aftermath, lives torn apart and uprooted by the criminal justice system. Law professor Aya Gruber argues for “abandon[ing] the conventional feminist wisdom, fight[ing] violence against women without reinforcing the American prison state, and us[ing] criminalization as a technique of last—not first—resort.”<sup>23</sup>

In contrast, Bernstein, in discussing criminal punishment in the context of the common law, minimizes the perspective of “the other.” Bernstein writes, “[c]riminal punishment is where detriments furnished by the common law resemble other law-backed impositions that individuals could well resent and that originate away from judicial decrees.”<sup>24</sup> She hides “the other” perspective by lumping in resentment against the criminal justice system with civic burdens, such as taxation, jury duty, and zoning to theorize the configurations of the common law.<sup>25</sup> However, the experience of the Central Park Five suggests that the problems with the criminal justice system have a pernicious racial aspect that none of the other “civic burdens” have. What the Central Park Five teaches us is the importance of recognizing that “the other” perspective is currently missing from common law, a point that Bernstein underexplores in her book.

Justice is not achieved equally through the common law. That pain of the lack of justice can be multigenerational. Thirty years later, the crime and its aftermath shake audiences, including me, to the core, because of innocence lost through a judicial system that betrayed five young people for what the press called “wilding.”<sup>26</sup> I remember the case vividly. It was a warning not only for women, but for those who might be wrongly accused based on their appearance and race. The “wilding” label seemingly described out-of-control, chaotic, and destructively violent behavior by non-whites. The New York Police reported that some of the accused youth said they were “wilding” that night in Central Park.<sup>27</sup> Many observers considered the press’s use of the term to be racist because the word “wilding” suggested that the accused youths were animalistic adults who deserved the full wrath of the criminal injustice and

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overheard the teenagers singing the lyrics to Tone Loc’s popular, ‘Wild Thing’ while they were in holding cells but couldn’t understand the context, thus spawning the neologism.” *Id.*

<sup>23</sup> AYA GRUBER, ABOUT THE BOOK: THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION (2020) (cover quote).

<sup>24</sup> BERNSTEIN, *supra* note 1, at 14.

<sup>25</sup> *Id.* at 25.

<sup>26</sup> See Shorey, *supra* note 22.

<sup>27</sup> *Id.*



mass incarceration systems. But as “When They See Us” reveals, the young people themselves used the term to describe harmless mischief and joyful freedom. Moreover, other commentators suggest that the term had a different, non-racist meaning as street slang, without a violent connotation: “wilding” simply meant “acting crazy.”<sup>28</sup> Political analysts have noticed how the phrase fueled racial fears of minority youth.<sup>29</sup> English professor Stephen Mexal asserts that the ensuing cultural panic engendered by the phrase “wilding” contributed to the verdicts.<sup>30</sup> When the hands of justice are slow, the difficulty in questioning justice reverberates. In short, when justice is delayed, justice is denied.<sup>31</sup> A focus on criminal law reveals flaws in an essentialist understanding of the common law. Taxation and zoning are different creatures than incarceration. Losing money and losing land are on a different plane of injustice compared to the loss of personal liberty through imprisonment. Common law property doctrines of nuisance, for example, protect land owners’ interests, the majority of whom in the United States are white.<sup>32</sup> But that protection comes at a literal price, that is, attorney’s fees, court costs, and fines. These same principles apply to the common law’s support for contractual obligations. In contract law, Bernstein observes, “the common law decrees specific performance of contractual obligations sparingly.”<sup>33</sup> The common law of property and contracts primarily protect capitalist aspirations. Criminal punishment, does too by making the “haves” feel safe from the “have nots.” What the common law does not do is protect the interests of those accused of crimes.

The interests of the defendant go beyond just the accused and the criminal justice system to the broader community. Consider the mothers of the Central Park Five. These women gave birth to and raised their boys into adolescence. They then had to watch their black and brown sons be handcuffed, incarcerated, and stripped of their liberty and dignity. Furthermore, those same women faced greater morbidity and mortality than their white counterparts due to limited access to proper medical care, health insurance coverage, and abortion clinics.<sup>34</sup> In linking a women’s ability to resist “invasions and incursions” upon her reproductive rights with her ability to gain affirmative rights and protect herself from the state, Bernstein failed to take into account that all women do

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

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

<sup>30</sup> Stephen Mexal, *The Roots of “Wilding”: Black Literary Naturalism, the Language of Wilderness, and Hip Hop in the Central Park Jogger Rape*, 46 AFR. AM. REV. 101, 101 (2013).

<sup>31</sup> Tania Sourdin & Naomi Burstyer, *Justice Delayed Is Justice Denied*, 4 VICTORIA U.L. & JUST. J. 46, 46 (2014).

<sup>32</sup> Arthur Goldsmith, *Democracy, Property Rights, and Economic Growth*, 32 J. DEV. STUD. 157 (2007).

<sup>33</sup> BERNSTEIN, *supra* note 1, at 52.

<sup>34</sup> *See id.* (omitting this discussion).

not experience pregnancy and its consequences the same way.<sup>35</sup> In her discussion of women's right to control their own bodies, Bernstein uses the term "wealth," broadly conceived, to explain the spacial boundaries that women can maintain in service of their personal liberty.<sup>36</sup>

But the experience of the Central Part Five suggest that women of color and their children do not have the same ability to protect their bodies against incursions by the state. Non-white bodies are policed in service of protecting whites against perceived threats of violence.

### III. THE COMMON LAW'S TRAP

Common law's denial of the "other" perspective goes beyond the Central Park Five. The inability of black and brown women to place barriers around their bodies shows up in today's media. In reading Bernstein's book, I could not get out of my mind an image circulating in the popular press at the time. The picture was of the corpses of a twenty-three-month-old girl and her father, face down on the shores of the Rio Grande in the summer of 2019.<sup>37</sup> The girl must have been clutching her father's neck for life when strong waters carried them into the harsh currents and sucked their breath away. Refugees attempting to cross the southern border of the United States face lack of food and scorching temperatures, hardships taken for granted on the journey to an imagined new life in the United States.<sup>38</sup> But because it was all an "accident," not the product of a cruel anti-immigration system, there was no common law inside the female body of that girl swept away into the river. My mind spins. The crossing. The border. The camps. The cages. The tents. Trump. The executive in chief of the country. All a mistake.

No.

These accidental drownings illustrate the Anglo-American common law operating at its peak efficiency, limiting access to borders without even having to use border patrol, forcing migrants to desperate water crossings.<sup>39</sup> Moreover, control of the border is accomplished by threatening those who provide humanitarian assistance to those trying to cross the border with arrests and in-

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<sup>35</sup> See *id.* at 144–45 (noting, however, that Bernstein does discuss the financial and health consequences of terminating a pregnancy).

<sup>36</sup> *Id.* at 214.

<sup>37</sup> Reynaldo Leanos, Jr., *Border Community Remembers a Father and Daughter Who Drowned Crossing the Rio Grande*, NPR (July 1, 2019, 6:19 AM), <https://www.npr.org/2019/07/01/737535965/border-community-remembers-a-father-and-daughter-who-drowned-crossing-the-rio-gr> [<https://perma.cc/XNU3-9BEE>].

<sup>38</sup> These same types of conditions manifest during the flood of migrants seeking to escape war from Syria—many of whose bodies float ashore in Europe's beaches.

<sup>39</sup> *US Immigration: Drowning Exposes Risks of Illegal Crossing*, BBC NEWS (June 26, 2019), <https://www.bbc.com/news/world-latin-america-48767529> [<https://perma.cc/4HHY-YGSZ>].

carceration.<sup>40</sup> The common law blocks entry to the United States by means of the “accident” of migrant deaths, not just detention and deportation. The accidental drownings are an incredibly efficient form of border control. Sending back dead bodies is easier than the process of granting asylum, dealing with the media backlash of family separation, and hearing the wails of children crying as they are ripped away from their parents’ arms. This chilling message is intended to discourage others from making the treacherous crossing.

Interviews with directors of migrant shelters suggest that eighty percent of Central American girls and women crossing Mexico en route to the United States are raped along the way.<sup>41</sup> Becoming a sexual violence victim thus seems part of the entrance fee for admission into the United States. The prevalence of rape has led smugglers to require women to have a contraceptive injection before the journey as a precautionary measure.<sup>42</sup>

Common law, on which Bernstein relies, does protect some. But this is of no comfort. As Author Rebecca Traister cautions, women who have succeeded within the existing system are less likely to dismantle it.<sup>43</sup> Traister observes that major political and civil rights movements in history have been propelled by women’s rage and anger.<sup>44</sup> Furthermore, the common law has proven insufficient to protect even those that the Anglo-American system should be benefiting: white women. Take for example the recent 2018 Senate confirmation hearings of Brett Kavanaugh on his nomination to the United States Supreme Court. Christine Blasey Ford spoke truth with force, yet the “alleged” perpetrator of the sexual violence against her now will take part in making unappealable judicial decisions under the common law, including what Bernstein calls the “law inside the female body.” Professor Cathren Page argues that the self-serving unreliable narrators have inaccurate narratives and engage in various forms of misdirection.<sup>45</sup> Unfortunately, the only person more powerful than the white female is the white male. The common law could not protect Ford or the

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<sup>40</sup> Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21, 2019, 2:59 PM), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona> [<https://perma.cc/P4E7-Q9K8>]. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (describing how immigration officers target and imprison Latinos are disproportionately); Felipe Hernandez, *Not a Matter of If, But “When”*: *Expanding the Immigration Caging Machine Regardless of Nielsen*, 22 HARV. LATINX L. REV. 87 (2019).

<sup>41</sup> Deborah Bonello & Erin Siegal McIntyre, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, SPLINTER (Sept. 10, 2014, 5:51 PM), <https://splinternews.com/is-rape-the-price-to-pay-for-migrant-women-chasing-the-1793842446> [<https://perma.cc/DV6B-MM7Y>].

<sup>42</sup> *Id.*

<sup>43</sup> See generally REBECCA TRAISTER, *GOOD AND MAD* (2018).

<sup>44</sup> *Id.*

<sup>45</sup> See Nancy Catalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1 (2019). See generally Cathren Page, *An Unusual Suspect? Unreliable Narrators in Fiction and Law*, BERKELEY ENT. & SPORTS L. J. (forthcoming 2020).

rest of the country as Judge Kavanaugh ascended to the top bench, demonstrating that it is a weak and impotent instrument of justice.

The common law is determined primarily, if not exclusively, by courts. Resources, special interests, and connections are essential tools for achieving justice. The ideas of right and wrong, truth and lies are superficial. In the civil justice system, having resources to bring claims and defend them is a perquisite. In the criminal system, defendants are able to obtain lawyers, but victims do not have access to attorneys. In considering women's rights (as Bernstein does), victims' rights are of paramount concern. Effective lawyering is a matter of access to resources, capital, and connections. For example, Katz Marshall and Banks represented Christine Blasey Ford *pro bono*.<sup>46</sup> People of color and women are poorer, due to economic and other forms of discrimination. If one cannot assert one's common law-based rights as a practical matter, what's the point?

#### IV. THE CORONAVIRUS AND DECISIONS ABOUT WOMEN'S BODIES

The COVID-19 outbreak has made women and those who they are responsible for, including children and elderly relatives, more vulnerable to the infection. In addition, female health care workers, particularly nurses, are on the front lines of the pandemic in terms of testing and treating patients.

According to figures from the census bureau, women in the United States have seventy-six percent of health-care jobs.<sup>47</sup> Eighty-five percent of nurses in this country are women.<sup>48</sup> Here, women are again disadvantaged from a health perspective, because they are dependent upon rules made by policymakers and politicians, who are primarily men. To have control of our bodies means to have control of the political decisions that impact our health. Now men, like President Trump, Governor Gavin Newsome, Governor Andrew Cuomo, Governor Mike DeWine and Governor Ron DeSantis are making the decisions on the responsive actions, whether they are quarantines, travel restrictions, work protocols, or abortion restrictions.<sup>49</sup> For example, dental hygienists, who also are primarily women, demanded that dental procedures only consist of emergency cases because of aerosols in dentistry that can spread the coronavirus.<sup>50</sup>

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<sup>46</sup> See generally JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019).

<sup>47</sup> Courtney Connley, *How Women Could Be Uniquely Impacted By the Coronavirus*, CNBC (Mar. 18, 2020, 4:44 PM), <https://www.cnn.com/2020/03/18/how-the-coronavirus-could-impact-women-in-health-care.html> [<https://perma.cc/89NX-K5H8>].

<sup>48</sup> *Id.*

<sup>49</sup> Dan Merica, *The Nation's Governors Take Different Approaches to Tackling the Coronavirus*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/politics/governors-coronavirus-strategy/index.html> [<https://perma.cc/X6QY-Y7CF>].

<sup>50</sup> Mike Luery, *Dental Hygienists Call for Ban on Nonemergency Dental Services Amid Coronavirus Outbreak*, KCRA (Mar. 19, 2020, 8:09 PM), <https://www.kcra.com/article/dental-hygienists->

Further, teachers and other educators are disproportionately women, and are dependent upon men who served on school boards, county commissions, and state education boards to determine their fate and outcomes for school closures, testing protocols, and safety inspections.<sup>51</sup> What the coronavirus pandemic has revealed is the lack of agency women experience in their health care decisions. A female governor such as Gretchen Whitmore is brandished as “The Woman in Michigan” by President Trump when seeking federal assistance for her state.<sup>52</sup> Women are vulnerable as their status as caretakers, health care workers, and educators, who are in contact with the risk population of young children.<sup>53</sup>

Even more consequentially to the law is how some states have sought to use the pandemic to push forward a conservative agenda to limit access to abortions and infringe upon a women’s freedom of choice. The pandemic has accentuated the lopsided decision-making authority of male governors and judges. Since the coronavirus outbreak in the United States, federal judges have issued orders that require Texas, Ohio, Alabama, and Oklahoma to allow abortion clinics to remain open and provide services in response to lawsuits filed by a coalition of reproductive rights groups to prevent state abortion bans during the pandemic.<sup>54</sup> Texas, Ohio, and Alabama appealed the court decisions in order to impose their bans on abortion during the outbreak.<sup>55</sup> In Texas, an appeals court reversed and allowed the ban to temporarily be in place, but in Ohio the appeals court took the opposite stance upholding the restraining order.<sup>56</sup> The issue has now reached the U.S. Supreme Court where Justice Kavanaugh will ultimately decide the fate of the constitutional right to abortion.

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call-ban-nonemergency-dental-services-amid-coronavirus-outbreak/31793338# [https://perma.cc/9JTJ-WGQY].

<sup>51</sup> Marty Johnson, *Florida Gov. DeSantis Mulls Reopening Schools: Coronavirus ‘Doesn’t Seem to Threaten’ Kids*, THE HILL (Apr. 10, 2020), <https://thehill.com/homenews/state-watch/492152-florida-gov-desantis-says-coronavirus-doesnt-seem-to-threaten-kids-mulls> [https://perma.cc/RS9N-E9BC]. “About 77 percent of public school teachers were female and 23 percent were male in 2015–16, with a lower percentage of male teachers at the elementary school level (11 percent) than at the secondary school level (36 percent).” *Characteristics of Public School Teachers*, NAT’L CENT. FOR EDUC. STAT. (Apr. 2018), [https://nces.ed.gov/programs/coe/indicator\\_clr.asp](https://nces.ed.gov/programs/coe/indicator_clr.asp) [https://perma.cc/67D6-HR9Z].

<sup>52</sup> Tim Alberta, *‘The Woman in Michigan’ Goes National*, POLITICO (Apr. 9, 2020, 7:55 PM), <https://www.politico.com/news/magazine/2020/04/09/gretchen-whitmer-governor-michigan-profile-2020-coronavirus-biden-vp-177791> [https://perma.cc/6P3A-8FCW].

<sup>53</sup> Connley, *supra* note 47.

<sup>54</sup> “Three of the decisions came only hours after the lawsuits were filed on Monday March 30, though the decision about Oklahoma’s ban came a week later, on April 6, when a judge ordered a temporary restraining order preventing the ban from going into effect until April 20.” *Ema O’Conner, Judges Struck Down Four State Bans On Abortions During The Coronavirus Outbreak*, BUZZFEED (Apr. 6, 2020, 4:11 PM), <https://www.buzzfeednews.com/article/emaconnor/judge-struck-down-abortion-ban-texas-coronavirus> [https://perma.cc/7H2G-HEJ5].

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

<sup>56</sup> *Id.*

Attorneys from Planned Parenthood, the center for reproductive rights, filed an “Emergency Application to Justice Alito to Vacate Administrative Stay of Temporary Restraining Order Entered By the United States Court of Appeals for the Fifth Circuit.”<sup>57</sup> In their Supreme Court filing, the lawyers argued the health crisis should not serve as a basis to curtail abortion rights.<sup>58</sup> They argued at least medication abortions, using pills to induce abortions, should be allowed to continue.<sup>59</sup>

## CONCLUSION

Bernstein’s book is masterfully constructed and impeccably researched. In future work, I would be interested in learning more about the origins of the common law beyond the Anglo-American common law tradition. Entire continents (Africa and Asia), as well as pre-existing indigenous systems committed to fairness, liberty, and equality, undoubtedly contributed to the development of the common law. Even though this point may seem minor, until scholars integrate that history into the history of the common law, a reader may be left with the impression that the Anglo-American legal system is superior to all others. As at least one scholar noted, “Racial and ethnic minorities around the world—north and south, east and west alike—are disempowered, marginalized, and impoverished, illiterate, and innumerate in disproportionate numbers.”<sup>60</sup> Understanding how other legal systems have addressed and do address these inequalities may provide insight into the Anglo-American common law tradition.

Ultimately, Bernstein’s book is valuable because it expands our understanding of the common law and provokes important consideration of the common law’s limitations. Bernstein recognizes that “[c]onfinement in prison, counted on a lifetime basis, now trammels the liberty of about one in three African American men, and . . . the United States leads the world in its ratio of prison inmates to total population.”<sup>61</sup> While the book is a worthwhile read for all who are interested in thinking about law’s potential to reinterpret and reinvigorate women’s rights, one must commit to telling the story of the common law’s potential and its limitations. Adopting a perspective of those “at the bottom of the well” will help sustain that commitment.

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<sup>57</sup> Emergency Application to Justice Alito to Vacate Administrative Stay of Temporary Restraining Order Entered by the United States Court of Appeals for the Fifth Circuit, *In re Abbott*, No. 20-50296, 2020 U.S. App. LEXIS 11850 (5th Cir. April 7, 2020).

<sup>58</sup> Adam Liptak, *Fight Over Texas Abortion Ban Reaches Supreme Court*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/coronavirus-texas-abortion-ban-supreme-court.html> [<https://perma.cc/8KU6-FMRV>].

<sup>59</sup> *Id.*

<sup>60</sup> Berta Esperanza Hernández-Truyol, *Globally Speaking—Honoring the Victims’ Stories: Matsuda’s Human Rights Praxis*, 112 MICHIGAN L. REV. FIRST IMPRESSIONS 99, 108 (2014).

<sup>61</sup> BERNSTEIN, *supra* note 1, at 67.