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SEEKING LIBERTY, FINDING PATRIARCHY: THE COMMON LAW'S HISTORICAL LEGACY

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Abstract: Anita Bernstein's important new book argues that the common law might be used to advance women's liberation. In this short essay, I analyze Bernstein's three modes of historical analysis: redeeming the common law where it enforced oppression, recovering it when it promoted women's rights, and facilitating its evolution toward a feminist future. I argue that Bernstein's account, though learned and compelling, sidelines the centrality of patriarchy to the common law. Adopting the liberty of the patriarch cannot realize true freedom for women. By appropriating common law doctrines, feminists risk forging a conceptual alliance with the very ideologies that enforced gender, race, and class subordination. Women's freedom must be realized not through patriarchy's tools but through legal theories that stress relationship, vulnerability, and social welfare obligations.

INTRODUCTION

In her erudite new book, Anita Bernstein makes the provocative argument that the common law liberates women.[1] *The Common Law Inside the Female Body* argues that women might exercise their property, contract, and tort rights to advance their freedom. In this account, exclusion, consent, and autonomy emerge as feminist tools. Bernstein thus poses a dramatic challenge to the conventional wisdom that the common law oppressed women historically and holds minimal relevance for women's liberation today.

The Common Law Inside the Female Body is primarily a work of feminist jurisprudence and not legal history. It does, however, use history in three ways. First, Bernstein analyzes historical texts in an effort to redeem the common law. She identifies instances in which the common law departed in practice from its true tenets and seeks to recover its inherent meaning. Second, she engages historical scholarship, arguing that in other instances, the common law has always served women's interests. Third, the book itself advances the historical evolution of the common law. Bernstein makes novel legal arguments that, if realized in court, would enable women to enjoy liberties that the law

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[1] *See generally* ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY (2019).

has long guaranteed (white, propertied) men.[2] In this brief essay, I suggest that distinguishing among these three modes of historical argument, and analyzing the relationship between them, enables us to better understand and evaluate Bernstein's important thesis.

I. Seeking Liberty: Three Uses of History in *The Common Law Inside the Female Body*

Bernstein's analysis of the common law necessarily begins with the status of married white women and slaves. Bernstein argues that the common law betrayed its commitments by condoning slavery. Criminal and tort law, for example, were rendered incoherent by slave owners' rights to beat their slaves.[3] This is primarily a philosophical and aspirational point—a claim about what the common law might have been and not what it was. Bernstein makes a more historically contextualized claim regarding coverture. Although it imposed status-based detriments on married women, it nonetheless protected women's "entitlement to be free from unwanted incursions or invasions."[4] The common law in the United States, Bernstein contends, took a tragic historical turn that made it more oppressive of women than it needed to be. This happened because American legal thinkers interpreted William Blackstone's *Commentaries on the Law of England* to imply a more totalizing subjugation of married women than Blackstone had himself intended. Americans also overlooked the significance of equity and ecclesiastical courts as counterpoints to common law authority.[5] In an evolution that continued to the late twentieth century, Bernstein argues, the common law came to recognize that women, too, have a right "to say no to what they don't want."[6]

Bernstein's initial use of history is thus a redemptive one. She seeks to isolate the moments at which the common law strayed and then to regenerate it in a purer state. Her approach provides a valuable account of how political context shapes the reception of legal texts and how legal pluralism gives rise to monopolistic legal regimes. Yet Bernstein underemphasizes the fact that the domestic law of master and servant determined the status of slaves and married white women alike. This well documented historical insight explains what might otherwise appear to be a paradox. How could the common law deny individual rights to slaves and subjugate married white women under the legal identities of their husbands if it was purportedly committed to negative liberty? Bernstein argues that the common law somehow went afoul. But the historical

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[2] *Id.*
[3] *Id.* at 26–27.
[4] *Id.* at 25.
[5] *Id.* at 90–95.
[6] *Id.* at 75–112.

answer is not that the common law tripped up on its own logic. Rather, the oppression of slaves and the subordination of married white women was fundamental to the common law regime. The oppression of some was understood as a necessary predicate to the freedom enjoyed by others.[7]

In arenas beyond coverture, Bernstein does not find the need to redeem the common law. She recovers other arenas in which the common law gave women ways to defend against intrusions to their bodies. Her most persuasive example is abortion. Prior to the late nineteenth century, the common law did not make women culpable for terminating their pregnancies. Bernstein also emphasizes criminal prohibitions on abortion provision applied only after quickening—when women began to feel movement of the fetus. This, Bernstein argues, shows that the common law affirmed women's own experience of pregnancy.[8] Bernstein argues that the social derogation of women, rather than the common law, accounted for the subsequent rise of legislation interfering with women's rights to end unwanted pregnancies.[9]

Last, Bernstein acts as a historical agent herself when she occupies the role of a jurist. She harnesses the potential of the common law to take it in new directions. The most original parts of the book argue that the negative liberties enshrined in the common law might be coupled with formal sex equality to promote women's rights to bodily autonomy and integrity. Bernstein makes a persuasive argument drawing on property law. She analogizes women's possession of their bodies to property owners' possession of land and chattel.[10] Women are thereby entitled to cash damages when they endure unwanted sexual penetration, including compensation for emotional, physical, and economic harms.[11]

Bernstein's more startling arguments conclude that the common law gives women the right to kill in certain instances. Common law doctrines give individuals the right to kill in defense of life, health, and habitation. In particular, the "castle doctrine" gives individuals the right to use force to keep out intruders in their home and deadly force against someone who has invaded. Drawing on these doctrines, Bernstein argues that women have the right to kill persons who attempt to rape them.[12] Bernstein also argues that the common law similarly gives pregnant women the right to kill an unwanted fetus. Bernstein conceptualizes the zygote, embryo, and fetus as invaders within a woman's body.

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[7] *See generally* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975) (arguing that by offering a racialized class of exploited laborers, the institution of slavery enabled white Virginians in the eighteenth century to embrace a populist and republican politics).

[8] BERNSTEIN, *supra* note 1, at 165.

[9] *Id.* at 161.

[10] *Id.* at 115–17.

[11] *Id.* at 118–19.

[12] *Id.* at 119–25.

Common law self-defense doctrines thereby give women the right to use contraception and abortion (even when her life is not threatened by the pregnancy).[13] Bernstein thus concludes that the common law protects women's abortion rights to a greater extent than constitutional privacy does. In making these novel arguments about rape and abortion, Bernstein acts herself as a historical agent of legal change.

Bernstein thus makes three historical moves. Reconsidering the law of coverture, she argues that the common law might be redeemed from its oppressive tendencies. Analyzing the history of abortion, she argues that in some instances the common law protected women's liberty. Last, analyzing the cases of rape and abortion, Bernstein argues that the common law may be used to protect women from intrusions by both private individuals and the state. How might we reconcile these three forms of historical argument in *The Common Law Inside the Female Body*? My contention is that only by sidelining patriarchy can we render a conceptual transformation of the common law, from oppression to liberty.

II. Finding Patriarchy: The Common Law's Legacy for Contemporary Feminism

To understand the limits of the common law's potential to further women's liberation, we need to recognize the centrality of patriarchy to its history. The precepts of the common law that guaranteed negative liberty to propertied white men were inextricable from patriarchal authority in domestic and political governance. The organization of the household with a husband and father at the helm and wife, servants, slaves, and children as dependents produced coverture's ecology of support and dependence.[14] Though the common law gave women limited ability to control their reproductive capacities and to choose to consent (or not) to marriage, the common law did not protect them from bodily invasion. The husband's right to beat his wife was at the core and not the pe-

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[13] *Id.* at 151–56. Backing up her arguments regarding the common law of crime and property, Bernstein deploys the common law of torts and, specifically, its consistent rejection of any duty of benevolence or care to a stranger. She deftly dispatches of the arguments that abortion might fall within an exception to this default, either because of a special relationship between pregnant woman and fetus or because of a distinction between misfeasance and nonfeasance. *Id.* at 156–60.

[14] There is a vast literature on the subject of nineteenth-century patriarchy. *See, e.g.*, LAURA F. EDWARDS, GENDERED STRIFE & CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997) (showing how both white and African American lay claim to civil and political equality in postbellum North Carolina via a discourse that preserved elements of antebellum patriarchy and how this opened up a political space for the reestablishment of white supremacy in the state); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985) (analyzing the rise of a judicial patriarchy over the course of the nineteenth century, which substituted judges' authority over family relations for that of male household heads).

riphery of patriarchal household authority.[15] Even the liberal principles that many feminists now privilege were intertwined with patriarchy. Consent, for example, which Bernstein places at the heart of women's liberty, was tied in Enlightenment political authority to the rise of paternal custody rights.[16]

Centering patriarchy raises several questions about what it might mean to advance women's liberation via common law doctrines. To begin, it might require feminists to forge troubling ideological alliances. Bernstein foregrounds women's liberty to defend against bodily intrusion in property owners' rights to exclude. She thus diminishes a countervailing, progressive tradition of state limitation on property owners' sovereignty.[17] Reifying the most conservative strain of property law, however, harms efforts to develop an intersectional feminist analysis that takes account of race and class injustices as well as women's rights. Consider, for example, the argument that feminists might deploy the castle doctrine to protect women's bodily autonomy. This would buttress the same doctrine that has justified homeowners' violence against African Americans viewed as unwanted strangers in majority-white neighborhoods.[18] In addition, imagining women's liberation through the lens of the common law leads to a highly individualistic conception of freedom. Last, as Bernstein observes, the common law can only guarantee negative liberty and not affirmative material supports.[19] We might wonder whether women's freedom and liberation might ever be achieved by giving women the rights of the patriarch. Doing so would fail to challenge the fundamental principles—the privileging of private property, the isolation of the family from state interference, and the lack of duties of care—that have long underpinned racial and gender hierarchies.

When we instead focus on disrupting patriarchal common law doctrines, the problem of gender injustice and its solutions appear different. From this vantage, we see that feminist theorists might instead develop theories of property law that subordinate private ownership to communal interest or theories of tort that recognize higher duties of care. As scholars have argued, we need to develop legal jurisprudence that affirms human relationship and interdependence rather than autonomy.[20] To realize reproductive control, we need to advo-

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[15] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

[16] HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 230–87 (2005).

[17] *See* JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 2–18 (2000) (contrasting a model of property that stresses owners' rights with one that emphasizes owners' obligations).

[18] LaKerri R. Mack & Kristie Roberts-Lewis, *The Dangerous Intersection Between Race, Class and Stand Your Ground*, 23 J. PUB. MGMT. & SOC. POL'Y 47, 49–50 (2016).

[19] BERNSTEIN, *supra* note 1, at 7.

[20] MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (challenging the ideologies of self-sufficiency and autonomy and arguing that inevitable and universal dependency requires that the state support caretakers); JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2011) (arguing that individuals are constitut-

cate universal healthcare, and we must conceptualize the right to bodily integrity in light of the human need for safe and adequate housing. Bernstein does not endorse uncritically the common law's overlap with contemporary feminism. She states clearly that she is not always in agreement with its precepts. She may even agree with some of my concerns. But I remain skeptical that women might ever find real freedom by adopting the liberty of the patriarch.

CONCLUSION

Ultimately, I am deeply grateful to Anita Bernstein for writing a compelling and brilliant book. It made me think more deeply than any other single work of scholarship about the relationship between feminism and the common law. Moving forward, no legal theorist will be able to analyze women's rights, equality, rape law, or abortion without wrestling with Bernstein's thesis.

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ed by their relationships and that laws and rights should be reevaluated according to the relations they shape and the values within those relations that they foster); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 1–2 (2008) (arguing that the law should respond to human vulnerability by fostering the resilience of individuals and institutions).