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THE COMMON LAW INSIDE A SOCIAL HIERARCHY: POWER OR REASON?

KATHARINE SILBAUGH*

Abstract: Anita Bernstein argues that the common law gives women, too, the right to say no to what they do not want. She demonstrates that the common law is a far-reaching defense of condoned self-regard, a system that allows individuals to place their own interests above the interests of others, particularly when seeking to exclude others. She, therefore, places in the common law a right to protection from rape and a near-absolute right to expel a pregnancy. Bernstein reasons that women's exclusion from the common law right to say no was a mistake produced by their absence from the judiciary. This review argues an alternative explanation for the gap between reality and faithful reasoning: the common law is an elegant tool in the pantheon of tools used to create and defend social, economic, and civic hierarchy. The common law, precisely because it is undemocratic, has been a useful instrument to test-drive rationalizations for the status quo, including the status quo of identity hierarchies.

INTRODUCTION

Anita Bernstein's *The Common Law Inside the Female Body* is an amazing book. It is as learned as any organization of the common law, and even better for combining the kind of painstaking detail one loves about the common law with the perspectives of the excluded. Her analysis is multi-disciplinary, drawing on popular culture and contemporary statutes, ancient medical knowledge and practices, and the giant thinkers about the common law of yore, from Blackstone to Bentham. Her method is itself the message: how rich is the common law? Bernstein shows, with texture and force, that the common law is so rich as to include the negative rights of the female body. Her thoroughness, depth, and care are themselves in the best traditions of common law thinking, in that, so many of her ideas are carefully qualified, going as far as they go only, with generous room for debate explicitly set out at all turns.¹ I admire her methodology, knowledge, intellectual temperament, humor, and most of all, the story she is telling about the common law. This is a must read.

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

I. REASONING THAT NO MEANS NO

Bernstein's thesis, in its simplest form, is that the common law gives women, too, the right to say no to what they do not want. She demonstrates that the common law is a far-reaching defense of condoned self-regard, a system that allows individuals to place their own interests above the interests of others, particularly when seeking to exclude others. Keep Off of real property, the castle doctrine in defense of a home, the requirements of agreement and consideration in contract law before obligations can be imposed, the Good Samaritan rule's refusal to impose un-consenting obligations, and even more obscure claims such as trover, are some of the many well-understood doctrines that restate this right to say no to what we do not want. Taken as a whole, the common law is dedicated to negative liberty: you cannot cross a boundary into the personal space or identity of another person. From this premise, Bernstein finds first a right to avoid rape, and second, a near absolute right to expel a pregnancy from the female body.²

Bernstein boldly sets out an essentialist understanding of negative liberties expressed in the common law, citing animal studies about aversions to intrusion as freely as she cites the political history of the *Magna Carta*. She locates condoned self-regard at the center of the common law and proves its centrality to legal doctrine in seven particular essences: the right to avoid physical trauma at the hands of another; the right to avoid invasions of interests in land and the spaces we possess or live in; the right to avoid bodily confinement; the right to avoid encounters that are hurtful to our dignity and tranquility; protection from losses or takings of chattels; and the right not to do something in furtherance of an agenda we do not share. Taken together, these are our negative rights embedded in the common law, and she demonstrates each with support from the common law of property, crime, tort, and contract. She knows how negative rights are stingy when compared to their counterpart, positive rights, and she is fine seeing positive rights appear in constitutions or in statutes. She knows that the protection of common law rights can give way to statutes. Her argument is only that the common law states a fundamental set of basic negative claims, and her mission is to turn our focus as common law critics away from disappointing common law doctrines such as coverture.³ Coverture was a problem, perhaps not as big as we thought (it disadvantaged wives, not women, she notes), but it is not the heart of the common law for the female body, says Bernstein.⁴ After finding each of the seven negative rights within the common law as well as within human nature, she creates her defense of protection from rape and a near absolute right to expel a pregnancy, and claims that

² *Id.* at 115, 142.

³ *Id.* at 76–79.

⁴ *Id.* at 80–81.

the common law does already encompass these rights for a woman to say no to what she does not want, and always has.⁵

She realizes that the case for avoiding rape is less controversial, and indeed is explicitly reflected in common law criminal doctrine in theory. Therefore, many readers will focus their attention on her more contentious claim that the common law guarantees a nearly absolute right of abortion:

Individuals hold—and as long as the common law has been in place, they have always held—a legal right to terminate their pregnancies. Their desire not to be pregnant is the only reason they need to exercise this common law right. Legal entitlement to end one’s pregnancy existed in the law of crimes, torts, property, contracts, and equity, read separately and together, long before the U.S. Supreme Court sited it in the Constitution.⁶

To arrive at her defense of abortion, Bernstein’s deploys a spatial essentialism in the human right to dominion over personal space, and defends her spatial theory with the common law property defenses such as the castle doctrine, as well as contemporary psychological studies of boundaryless bullpen workplaces, among other supports for her argument.⁷ Readers will debate whether she has adequately dispensed with the proposition that sexual conduct is an undertaking sufficient to give rise to an obligation to a fetus; I think she has, but abortion skeptics will focus on this fundamental aspect of her argument and find room to disagree with her characterization. Perhaps because this argument is the more controversial one, I admire the case she has made all the more, both for her courage and for how cogently she has marshaled the authority of the common law. If the common law is to be believed, if the common law is sincere, Bernstein has made the case that it must afford women the bodily right to say “keep off” to a fetus/Zef. She sets out her challenge to scholars: “I dare a foe of the common law inside the female body to say that women do not share in the right of self-defense.”⁸ There can be no balancing of interests, contrary to the constitutional framework set out by the United States Supreme Court in *Planned Parenthood v. Casey*⁹ and *Roe v. Wade*.¹⁰

II. THE POWER TO BE HEARD SAYING NO?

I admire deeply the defense Bernstein has made of the common law’s system of rights, but I am uncertain that I am convinced, even as convincing as she is.

⁵ *Id.* at 142–74.

⁶ *Id.* at 173.

⁷ *Id.* at 44.

⁸ *Id.* at 182 (Bernstein uses the term Zef, meaning zygote, embryo, fetus).

⁹ 505 U.S.C. § 833 (1992).

¹⁰ 410 U.S. 113 (1973).

As an aspiration, as an elaboration of the very best case for the proposition, I cannot imagine anything better. She has reasoned persuasively from the common law rationales. But whether she has started from the right premises about the common law, I am uncertain. If Bernstein is right that the common law is a good defender of all people from basic intrusions, and always has been, then she is right that it protects a woman from rape and gives her a nearly absolute right to expel a pregnancy. But an alternative conclusion could be drawn from her convincing work. One could conclude that because the common law, does not, in fact protect women in the way it protects men, a conclusion she herself details in the final pages of the book¹¹, that failure requires an explanation. She has shown that any sincere and faithful interpretation of the premises of the common law would do so. Indeed, Bernstein is caring and aware in the horror she feels over the brutality of the system of slavery, a system defended and supported by the very common law she seeks to elevate. She does not flinch from detailing its brutality and the common law's complicity in that violence. Bernstein is painstaking in her acknowledgment of the failures of the common law to protect enslaved people, as well as to protect women. She does, though, believe that the common law that enabled the institution of slavery was bastardized, not the true common law: "That the common law and slavery do not coherently coexist is clear, I hope: but less obvious is the power the common law would have had against the enslavement of American human beings if condoned self-regard, its hallmark, had been understood as something that all persons enjoy."¹²

Some explanation is needed for the gap between the operation of the common law to enable the profound, transgressive violence of slavery, as well as the minimization of sexual violence and the forced service to another if the other is a fetus, on the one hand, and the theory that Bernstein sets out, which asserts that the institution of slavery is diabolically contrary to the negative liberties defended by the common law, on the other.

Bernstein's explanation for the gap between reality and faithful reasoning is that a mistake has been made, a misunderstanding fueled by a lack of diverse representation among common law judges and litigators. Let's look at Bernstein's argument for why the common law missed labeling slavery an atrocity: "The common law went along with a pernicious 'accommodation process' because it was blinkered by skewed membership in its decision-making ranks. Misunderstanding about who counted obscured what it did and failed to do."¹³ These were misunderstandings, not a purpose. Judges were not weaponizing common law reasoning in order to exploit, they were deploying it sincerely,

¹¹ BERNSTEIN, *supra* note 1, at 204–13.

¹² *Id.* at 27.

¹³ *Id.*

albeit blinkered by their own white male propertied identity. In her words, “[e]xclusion generated more exclusion.”¹⁴ Her common law judges accidentally and mistakenly dehumanized enslaved people, just as they accidentally subordinate women’s personhood to their ability to nurture a fetus. They made a mistake about the personhood of women and enslaved people in their otherwise neutral application of the common law.

The alternative explanation for that gap between reality and faithful reasoning is that the common law is an elegant tool in the pantheon of tools used to create and defend social, economic, and civic hierarchy. I am left feeling that despite her intentions, Bernstein has proved that common law reasoning is more rationalization for abuse of power and exploitation than it is a sincere defense of negative rights. If it were an accident of underrepresentation, would it retain its stickiness over centuries and to the present?

I offer up the question that stuck with me throughout my read: does Bernstein’s narrative place too much faith in reasoning and discount too much the instrumental role of reasoning in power and domination? A different theory of the common law is that the “haves” used and use the reasoning process of the common law to gather, organize, maintain, and deploy power over outgroups. I do not here pretend to ground this alternative theory in case law or treatises in the way that Bernstein has grounded its opposite. Its proof is only in the common law’s actual failure to extend negative rights to outgroups in practice, when they need it the most. I only raise questions about the extent to which Bernstein’s argument and analysis depend on minimizing power dynamics, on placing them outside of the common law itself, and on characterizing their occasional leaks into the common law as mistakes. I ask whether retaining power over outgroups is a feature of the common law, not a bug, its function, not a side-effect. I would characterize Bernstein’s beautiful treatise as an effort to prove that domination is a bug, not a feature, of the common law. The concept of power as such hardly appears in her analysis, though the brutality of improper uses of the common law are acknowledged throughout.

Bernstein sees the critics coming, conceding that “in the past women have arrived at the scene of largesse to find riches no longer there.”¹⁵ Her argument is designed to be counter-intuitive to this relatively obvious question I am asking—whether subordination is a feature or a bug of the common law. So my next question, given that she knows this question is coming, is why is her explanation for the gap necessary? Why is it necessary to characterize the justification of slavery as a misunderstanding? Because Bernstein’s project is to rehabilitate the uncorrupted core of the common law, the hallmark of condoned self-regard. If it were purpose and not misunderstanding, feature and not bug,

¹⁴ *Id.* at 26.

¹⁵ *See id.* at 181.

the entire loving analysis of the common law premise for women's ability to say no to what they do not want loses force. The foundation becomes shaky. This matters.

Why does it matter? The final pages of the book catalog all of the ways that the common law does, in fact, fail women's ability to exercise condoned self-regard, and Bernstein observes that "women, as I keep saying, have not shared in all the bounty of the common law that is rightfully theirs."¹⁶ One example will suffice: the common law right of self-defense against violent intruders has "been understood not to apply when threats originate in the defender's household," meaning that it does not apply when it would be most useful to women, who are most likely to be attacked by an intimate partner.¹⁷ Is this still a misunderstanding grounded in the identity of common law judges? My suspicion is that the common law, personified, never meant for us to take its protections this literally, this sincerely. Undoubtedly the common law allows change and consistency. But *domination arguments*, meaning sugar-coated justifications for domination, are shape shifters, adapting to the particular justificatory environment of their era, but ever reconstituting to get their work done. Bernstein makes her convincing proof. But that does not mean women gain the absolute rights the common law purportedly grants.

This makes one ask: can we analogize our way out of a power struggle? Can Bernstein's entirely persuasive case that abortion and avoiding rape fall easily within the common law's articulated conception of negative rights give rise to a concession by courts that women do in fact have a right grounded in the common law to expel a pregnancy? Could that right form the backdrop to any statute in derivation of that common law foundation? The common law, precisely because it is undemocratic, has been a useful instrument to test-drive rationalizations for the status quo, including the status quo of identity hierarchies. Power struggles, if that is what is really at stake, play out in legislatures, where action is grounded in popular power rather than in the kind of reasoning characteristic of the common law.

CONCLUSION

Taken on its own terms, this book is a treasure, and I am profoundly grateful to Bernstein. But I cannot help but read this extraordinary work as a compelling argument that the common law has been about inter-group power—almost exactly the opposite conclusion that Bernstein draws. Her case, once made, is so complete as to seem irrefutable. And yet the book ends with a walk through all of the ways that courts fail to implement her understanding. How can that be? How can the common law thoroughly protect, always have

¹⁶ See, e.g., *id.* at 180.

¹⁷ *Id.* at 197.

protected, women's ability to say no to what they do not want, yet fail to do so in common law courts? I find myself wondering whether Bernstein is bringing reasoning to a knife fight.