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Bridget J. Crawford
Pace University Elisabeth Haub School of Law

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THE COMMON LAW AS A FORCE FOR WOMEN

BRIDGET J. CRAWFORD*

Abstract: This essay introduces a collection of Symposium Essays examining Anita Bernstein’s book, *The Common Law Inside the Female Body* (Cambridge University Press, 2019). Professor Bernstein explores the common law’s recognition of both rights and liberties, highlighting in particular negative liberties such as the right to be left undisturbed. The Symposium Essays test and explore Professor Bernstein’s thesis as applied to the right to be free from rape and unwanted pregnancies. Grounded in perspectives informed by the study of tort law, legal history, intellectual property, constitutional law, and critical race theory, these Essays—together with Professor Bernstein’s book—suggest that the common law has been underutilized as a legal strategy to protect women’s rights.

*For my ally is the Force, and a powerful ally it is.*¹

*Close your eyes. Feel it. The light . . . it’s always been there. It will guide you.*²

In the final sequence of *Star Wars: Episode III—Revenge of the Sith*, after a brutal battle with Jedi master Obi-Wan Kenobi, Darth Vader learns that his beloved wife, Padmé Amidala, has died.³ A bootleg Chinese version of the film translated Vader’s mournful cry, “Nooooooo!” as “Do not want!” and an internet meme was born.⁴ Used mostly with comic effect, the phrase “Do not want”

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* Professor of Law, Elisabeth Haub School of Law at Pace University. A companion set of essays appears in a Symposium on Anita Bernstein’s *The Common Law Inside the Female Body*, 114 NW. U.L. REV. ONLINE 131 (2019), <https://northwesternlawreview.org/nulr-online/all-content/> [<https://perma.cc/9ZYE-C44X>]. We had more colleagues eager to participate in the conversation about the book than could be accommodated by one journal. Thanks to the student editors at the Nw. U. L. Rev. Colloquy (especially Danielle Berkowsky) and the B.C.L. Rev. E. Supp. (especially Emma Coffey and Dan Brutti) for collaborating to bring this cross-journal project to fruition.

¹ STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm 1980) (Yoda explaining the Force to Luke).

² STAR WARS: EPISODE VII—THE FORCE AWAKENS (Lucasfilm 2015) (Maz Kanata explaining the Force to Rey).

³ STAR WARS: EPISODE III—REVENGE OF THE SITH (Lucasfilm 2005).

⁴ See *Memes/Revenge of the Sith*, TVTROPES.ORG, <https://tvtropes.org/pmwiki/pmwiki.php/Memes/RevengeOfTheSith> [<https://perma.cc/B9DD-8MA3>] (describing the scene as having been adopted in culture “as a way (mostly in jest) to show great disapproval over things on forums and message boards”); Robert Quigley, *The Origin of “Do Not Want,”* THE MARY SUE (May 4, 2011, 2:16 PM), <https://www.themarysue.com/do-not-want-origin/> [<https://perma.cc/4PYB-MCSP>].

expresses clear disapproval or dislike.⁵ In *The Common Law Inside the Female Body*, Anita Bernstein uses the phrase with all seriousness to argue convincingly that the common law is a rich source of women's rights.⁶ Bernstein explores the common law's recognition of both rights and liberties, highlighting in particular *negative liberties* such as the rights to "withdraw and repel; to refuse invitations and offers and orders; and to separate oneself from external claims."⁷ In Bernstein's powerful analysis, the common law right to "reject invasion and intrusion" translates into a right to be free from rape and the right to terminate a pregnancy.⁸ Quite simply, a woman has complete dominion over her own body, including robust rights to "say no to invasions she deems unwelcome."⁹

To explore Professor Bernstein's outstanding contribution to a nuanced understanding of women's rights, I invited colleagues with diverse interests, backgrounds and experiences to contribute to a collection of reflective essays.¹⁰ The authors include full-time faculty members with academic specialties in Torts, Intellectual Property, Legal History, Environmental Law, Property, Family Law and Constitutional Law. Scholars with different scholarly perspectives ask where (and whether) the common law can be understood as a strong ground for asserting women's rights.

The first essay in the collection is Professor Nadia Ahmad's *Re-Reading Anita Bernstein's The Common Law Inside the Female Body from the Perspective of the Central Park Five*. Her analysis is inspired by the coincidence of her reading Bernstein's book at the same time that she watched Ava DuVernay's Netflix documentary, "When They See Us."¹¹ That film explores the wrongful conviction of five Black and Latino teenagers for the assault and rape of a white female jogger who was left for dead in Manhattan's Central Park.¹² The five boys, now men, had fully served their sentences before the police identified the crime's real perpetrator and those who were wrongfully accused, convicted, and imprisoned were exonerated.¹³ Bernstein describes criminal

⁵ *Do Want/Do Not Want*, KNOWYOURMEME.COM, <https://knowyourmeme.com/memes/do-want-do-not-want> [<https://perma.cc/WQ6G-4WXN>].

⁶ See generally ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* (2019).

⁷ *Id.* at 7.

⁸ *Id.* at 7, 28–29.

⁹ *Id.* at 28.

¹⁰ See also *Symposium on Anita Bernstein's The Common Law Inside the Female Body*, 114 NW. L. REV. ONLINE 131 (2019), https://scholarlycommons.law.northwestern.edu/nulr_online/275/ [<https://perma.cc/BT75-RLAT>].

¹¹ Nadia B. Ahmad, *Re-Reading Anita Bernstein's The Common Law Inside the Female Body from the Perspective of the Central Park Five*, 61 B.C.L. REV. E. SUPP. I.-73.

¹² *Id.* at I.-73–74.

¹³ See, e.g., Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for \$40 Million*, N.Y. TIMES (June 19, 2014), <https://nyti.ms/TcaJr> [<https://perma.cc/4VG2-KTN2>] (not-

punishment as one of the exceptions to condoned self-regard, as it is based on a prior voluntary (and wrongful) act.¹⁴ Although Ahmad recognizes that state and federal criminal laws are largely codified, her focus on the Central Park Five case reminds the reader that the operation of the criminal law system is deeply flawed. The five men suffered immediate losses of liberty as well as lifetime repercussions for the voluntary (and wrongful) acts of others—the actual perpetrator of the crimes and the prosecutors and others who brought about and facilitated the wrongful convictions and incarceration.

Professor Ann Bartow takes up Bernstein’s analysis through the lens of legal realism in *The Female Legal Realist Inside the Common Law*.¹⁵ Bartow situates herself squarely within that tradition, explaining that judges “consider not only abstract rules, but also social interests, public policy, the personal characteristics of the parties, and a personal theory of justice when deciding a case.”¹⁶ This realist perspective is shared by contributors to various *Feminist Judgments* projects, a loose collective of global scholars working on rewriting judicial opinions from a feminist perspective.¹⁷ These projects seek to show that by using the same facts and legal precedent in effect at the time of the original decision, a judge informed by a feminist perspective could have reached a different result or employed different reasoning (or both).¹⁸ In *The Female Legal Realist Inside the Common Law*, Bartow, an early contributor to the U.S. Feminist Judgments project,¹⁹ explains how she understood as a law student (and now understands as a law professor) just how important a judge’s unarticulated notions of fairness can be to any judicial decision.²⁰ Bartow then turns to consider limitations of artificial intelligence systems. Some of their known weaknesses arise from the fact that any system’s “knowledge” depends on repetition and training. If not carefully designed, that training unintentional-

ing that four of the wrongfully accused men each served approximately seven years in prison, and that one wrongfully accused man spent approximately thirteen years in prison).

¹⁴ BERNSTEIN, *supra* note 6, at 56–74.

¹⁵ Ann Bartow, *The Female Legal Realist Inside the Common Law*, 61 B.C.L. REV. E. SUPP. I.-82–88 (2020).

¹⁶ *Id.* at I.-85.

¹⁷ See U.S. *Feminist Judgments Project*, U. NEV. WILLIAM S. BOYD L. SCH. (2020), <https://law.unlv.edu/us-feminist-judgments/series-projects> [<https://perma.cc/4EJL-C3L4>].

¹⁸ See, e.g., Bridget J. Crawford et al., *Teaching with Feminist Judgments: A Global Conversation*, 38 L. & INEQ. 1, 3 n.2 (2019) (describing feminist judgments projects overall and the various projects completed or ongoing in Canada, England, the United States, Ireland, Australia, New Zealand, Scotland, India, Africa, and Mexico, along with a pan-European project).

¹⁹ See Ann Bartow, *Gebser v. Lago Vista Independent School District*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 430–46 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds. 2016).

²⁰ Bartow, *supra* note 15, at I.-85. Bartow’s essay incidentally includes a wonderful description of presidential candidate—then law professor—Elizabeth Warren illustrating this point during the Contracts class in which Bartow was a student. Warren famously performed a dance move that Warren called the “equity shuffle.” *Id.* at I.-85 & n.3.

ly may cause the AI system to replicate gender bias in evaluating job candidates, to give just one example.²¹ This weakness in artificial intelligence contrasts with the “human instinct for fairness, as ephemeral as it might be” that motivates the common law, in both Bartow’s and Bernstein’s readings.²²

Consider next Professor Deborah Dinner’s essay, *Seeking Liberty, Finding Patriarchy: The Common Law’s Historical Legacy*.²³ Dinner begins with the observation that Bernstein’s book “poses a dramatic challenge to the conventional wisdom that the common law oppressed women historically and holds minimal relevance for women’s liberation today.”²⁴ Dinner reads Bernstein as using history in three different ways: first, to demonstrate that the common law’s past failures are due to exogenous interpretations or applications, rather than the common law tradition itself; second, to illustrate that the common law has always served women’s interests in some way; and third, to cite the common law’s past commitments as evidence that it can further women’s equality in the present (and future).²⁵ Dinner then pushes the conversation further. Even if the reader assumes that Bernstein’s assessment of the common law is entirely accurate, Dinner asks how understanding patriarchy as one of the central features of the common law might lead to a different result or framework.²⁶ Dinner points out that individual negative liberties—such as a right to not have one’s body invaded against one’s will—are quite different from group rights such as human rights to housing and healthcare.²⁷ For Dinner, Bernstein’s work serves as a starting point for thinking carefully about in whom (or what) the range of possible liberties, rights, and responsibilities may reside, along with the common law inside the female body.

Professor Lolita Buckner Inniss draws on her wide-ranging and deep knowledge of legal history and philosophy in *(Un)Common Law and the Female Body*, adding layers to Bernstein’s common law framework.²⁸ Inniss notes the ways that Bernstein’s work “seeks to reduce or even eliminate some of the distance between formalist legal approaches that are at the foundation of most traditional common law approaches and legal realist approaches more typically found in feminist jurisprudence, critical race theory, and other critical approaches to the law.”²⁹ Although Inniss is careful not to situate Bernstein’s

²¹ *Id.* at I.-86.

²² *Id.* at I.-87.

²³ Deborah Dinner, *Seeking Liberty, Finding Patriarchy: The Common Law’s Historical Legacy*, 61 B.C.L. REV. E. SUPP. I.-89–94 (2020).

²⁴ *Id.* at I.-89.

²⁵ *Id.* at I.-89–92.

²⁶ *Id.* at I.-92–94.

²⁷ *Id.* at I.-93–94.

²⁸ Lolita Buckner Inniss, *(Un)Common Law and the Female Body*, 61 B.C.L. REV. E. SUPP. I.-95–104 (2020).

²⁹ *Id.* at I.-97.

book “squarely among the works of legal realists,” Inniss notes the monumental contribution that Bernstein makes to equality discourse through the simple assertion that “the common law serves to liberate women.”³⁰ Inniss complicates Bernstein’s historic account of the common law by noting that early American women’s freedom to terminate pregnancies was limited by self-reported “quickenings,” or perceptions of fetal movement.³¹ Inniss asks important questions about the relationship between women’s negative liberty rights in their own bodies and capitalism writ large. The common law, Inniss explains, has interceded to protect women against bodily intrusion most often in cases “either where women and their capacities were deemed the personal property of men, or where women’s bodies or capacities created undue, additional, or indeed any burden on the public fisc.”³² By adding these types of details (and the allusion in her Essay’s title to British humorist A.P. Herbert),³³ Inniss shores up Bernstein’s claim that there is nothing uncommon about using the common law to advance women’s interests; indeed the common law has had the ability to do so all along.

Professor Katharine Silbaugh’s contribution, *The Common Law Inside a Social Hierarchy: Power or Reason?*³⁴ likens Bernstein’s scholarly “thoroughness, depth and care” to the common law tradition itself, “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.”³⁵ Silbaugh illuminates Bernstein’s grounding of her theory of women’s rights to be free from intrusions or threats from others. Silbaugh is persuaded that this is an effective framework for women’s right to not be raped, but she wonders whether the common law’s consistent failure to protect women and its support for the “profound, transgressive violence of slavery” signal the system’s fundamental flaws, as opposed to representing aberrational examples of misinterpretation of the common law.³⁶ Bernstein herself notes the incompatibility of slavery with common law values.³⁷ But where Bernstein sees misapplication, Silbaugh asks whether there might lurk intentional design.³⁸

³⁰ *Id.* at I.-95.

³¹ *Id.* at I.-101.

³² *Id.* at I.-103.

³³ *Id.* at I.-95.

³⁴ Katharine Silbaugh, *The Common Law Inside a Social Hierarchy: Power or Reason?*, 61 B.C.L. REV. E. SUPP. I.-105–11 (2020).

³⁵ *Id.* at I.-105.

³⁶ *Id.* at I.-108–09.

³⁷ BERNSTEIN, *supra* note 6, at 27.

³⁸ Silbaugh, *supra* note 34, at I.-109 (“The alternative explanation . . . 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.”).

The five essays presented here take seriously that “do not want” is an important legal move. Common law principles such as the lack of a duty to rescue and the absence of a legal obligation to “perform what someone else thinks is an obligation without consideration” form the basis for recognizing women’s legal right to say no to bodily intrusions—whether rape or an unwanted pregnancy.³⁹ In this sense, the common law is like the Jedi Force, described by Maz Kanata in counseling Ren. Just as the Force has “always been there” within Ren, common law principles have “always been there” to ground women’s claims.⁴⁰ Yet like Ren, who must look within herself to discover the “light” that is the Force, women and their allies need to uncover the potential of the common law as a source of future strength. Like the Force, the common law may turn out to be a tremendous tool for good. Do want.

³⁹ BERNSTEIN, *supra* note 6, at 29.

⁴⁰ See *supra* note 2 and accompanying text.