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THE FEMALE LEGAL REALIST INSIDE THE COMMON LAW

ANN BARTOW*

Abstract: This essay, a response piece to Anita Bernstein’s thought-provoking book *The Common Law Inside the Female Body*, examines the powerful tool of the common law and the role that judges play in wielding it. I begin by drawing on my twenty-four years of teaching and looking at the questions that I, and my students, grapple with every year while studying the common law: Do the uncoordinated actions of individual judges, juries, and lawyers and parties generate an efficient legal system? And does that system result in some version of justice for most of the parties, most of the time, including women? Bernstein’s book answers these questions in the affirmative and I agree. Utilizing the lens of legal realism, this essay argues that judges, wielding the common law, ultimately strive to, and in fact their fundamental role is to promote fairness. I examine why the “human” element of judges is so important to the promotion of fairness and elimination of bias, as evidenced by recent failures by Google and Amazon to eliminate bias from their algorithms. Although both Bernstein and I acknowledge that judges have sometimes failed to promote the common law’s true purpose, one can find, even in those “failings” the creation of negative liberties for women. Used creatively and appropriately, the common law is a critical tool for promoting justice.

INTRODUCTION

Anita Bernstein’s brilliant new book *The Common Law Inside the Female Body* is a truly unique contribution to both feminist jurisprudence and the law of torts. It is written in Bernstein’s distinctive, engaging voice, and it pulls a wide range of topics together into an illuminating extended work of legal scholarship. It is a book that smart law students should consider tackling after completing at least an introductory torts course to help them process the residual uncomfortable feelings they often have about how inconsistently the common law treats people who have been injured.

Reading Bernstein’s wry, often gripping, and occasionally amusing observations about the slow slog towards gender justice of the common law made

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me reflect fairly extensively upon my teaching. Here are some foundational generalizations I have constructed during twenty-four years of teaching law, particularly as applied to torts: Motivated first-semester law students usually start off wanting the law they learn to make sense. They want two cases with essentially the same facts to be decided the same way. They want coherent, stable, easily ascertainable rules. They want all the state courts to follow the most recent Restatement, which they would like to contain a guide to the correct answers. All of these are completely appropriate desires. Learning that almost every tort-based legal dispute will usually have at least two distinct outcomes that can be defined and justified with existing case law is deeply unsettling to most students. They begin to recognize that whether a client obtains a “positive outcome” largely depends on the level of preparation and persuasiveness of their lawyers. That realization can be frightening.

I find that I can usually guess the course of study any given student pursued as an undergraduate based on how they react to the first couple of weeks of torts classes. Liberal arts majors want to discuss how they feel about the cases they read. STEM majors desire data, formulas, and clear answers. Business majors focus on how the common law affects commerce. Political science majors want to expand discussions beyond the courts, incorporating acts, and omissions by the other two branches of government. The ones who have studied Latin like to show it off.¹ And almost everybody hopes that if they do enough rote memorization, they will be able to disguise how confused they are.

Though a good memory is always useful, it will not help anyone fully decipher the common law and how it functions. That requires a lot of reading and thoughtful analysis, and if Bernstein’s book teaches us nothing else it is that the common law is an ongoing project of significant proportions.

I. IT DEPENDS

I enjoy telling new law students that no matter what query is thrown at them in a common law course, answering “it depends” is usually correct. The challenge I pose for them is to explain competently on what exactly the answer depends. This is a nicer way of ascertaining if they can read a case and find its holding using both hands and a map. Students do not like it when I respond to their questions with questions of my own, so I usually reserve doing that for situations in which the assigned reading has provided a clear answer, and even then I aim for a tone of helpful guidance rather than shaming. But part of becoming a lawyer is learning to answer your own questions because once one enters the practice of law, answering the questions posed by clients, judges, and/or employers is a huge part of the job.

¹ The correct Latin pronunciation of the word “subpoena” is often a source of startled amusement for law students.

When I started out as a law professor I wanted to be an effective classroom teacher, and that is still my greatest professional desire. What has changed, though, is my conception of what effective classroom teaching is. In a way, I guess my teaching practices have evolved in a common law sort of manner. My goals remain static, but I slightly shift the means I use to reach them every time I teach a subject. I am eternally in search of the elusive perfect balance between motivational toughness and clarity of comprehension, which perhaps can be characterized as classroom justice.

Torts is a challenging subject that requires students to learn how the common law works and to do so quickly. Bernstein's book is ultimately a reward for those who have conquered the basics and are ready to have their newly formed assumptions both supported and challenged. Part of writing a book about the common law is identifying and articulating a thesis and then defending it. A couple of the fundamental questions that Bernstein addresses in her fabulous book: Do the uncoordinated actions of individual judges, juries, lawyers, and parties generate an efficient legal system? And does that system result in some version of justice for most of the parties, most of the time, including women? Bernstein's answer is yes to both queries, and I think she is correct. By convincing me to be more optimistic about the judiciary, she has given me fresh insights about the history and functioning of the common law that will infuse and improve my teaching in the future. My favorite part of the book is its final paragraph, which I reproduce in part here:

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 sense of the word—gets bigger when every person can maintain the boundary around herself.²

Identifying the positive powers of the common law is a new way to frame the way I teach torts. Though I will not assign this book to my first-year students, I will describe more than a few of her observations and conclusions. Because she cites and quotes William Blackstone so frequently I am tempted to intentionally misstate the author's name when I lecture as "Anita Bernstone" and refer to her book as "Bernstone on Torts," but only when I am certain my students have studied enough English law to get the joke.

² ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 214 (2019).

II. PRACTICAL LEGAL REALISM, HANDWAVING, AND THE EQUITY SHUFFLE

I consider myself a legal realist. I think 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. Some of this is done consciously, but many outcome determinations are driven by an unexamined but intense internal, personal sense of fairness. Bernstein suggests that is a reason for optimism: Judges can be persuaded to be fair to women. Sometimes the common law will guide them to fairness with little friction. Other times, though, they have to engage in what Bernstein charmingly refers to as “handwaving.” The judges know the outcome they think fairness requires, but struggle to explain it as the natural consequence of extant common law in the area. As a result, they resort to deflection: “Look over here at my holding, isn’t it great? Don’t worry so much about how I reached it!” During my first semester of law school, this phenomenon was trenchantly explained somewhat differently (though equally vividly) by my contracts professor, who, rather than invoking handwaving, would suggest that a deflecting judge or panel was “doing the equity shuffle” and then perform an awkward but memorable little dance at the front of the classroom.³

Almost as soon as my law students absorb the concept of *stare decisis*, I ask them to basically ignore it once the existence of binding or close to binding precedent has been ruled out, hopefully through fastidious research, unless it is expressly raised in an opinion. Principles of *stare decisis* rarely decide a common law legal dispute because similar cases can almost always be distinguished one way or another. Unless a statute directly addresses the merits of a dispute, “the law” as drafted and enacted by a legislature may have little impact. For judges with integrity, their job is to filter out bias toward any party or legal representative and then promulgate fairness and equity.

III. THE COMMON LAW IS TOO COMPLICATED FOR ROBOTS

The common law is, as Bernstein describes it, a “living jurisprudential system that changes over time.”⁴ If precedent were really as important and binding as formalists like to pretend it is, it might seem feasible to replace human lawyers and judges with robots. Robots might facially appear to be neutral jurists, but the real justice (or lack thereof) they administered would be a function of algorithmic computer programs written by technologists with little comprehension of the common law as Bernstein understands and explains it. As a growing body of literature demonstrates, algorithms can be riddled with

³ The professor who taught me contracts law and all about the “equity shuffle” was Elizabeth Warren. Yes, that Elizabeth Warren, U. S. Senator Elizabeth Warren, and unfortunately it appears we have missed out on the Equity Shuffle becoming the official dance of the federal government.

⁴ BERNSTEIN, *supra* note 2, at 17.

biases that are difficult to control for and recognize. Artificial intelligence (“AI”) programs are usually based on the category of algorithms known as deep learning, which find patterns in data.⁵ Bias can affect the framing of a problem, the collection of data, and the preparation of data.⁶ Even if bias is identified, “it’s hard to retroactively identify where that bias came from and then figure out how to get rid of it.”⁷

For example: “In 2004, when Google had a problem with neo-Nazi sites showing up as high-ranked outputs for searches on ‘Jew,’” the company eventually learned that this occurred because “[i]n a nutshell, legitimate queries and pages tended to say ‘Judaism’ or ‘Jewish;’ bigots used ‘Jew’ more.”⁸ When Amazon.com engineers discovered that an AI internal recruitment tool was penalizing female job candidates, they realized it was because their AI had been “trained” by past hiring decisions that favored men.⁹ Essentially, “Amazon’s system taught itself that male candidates were preferable. It penalized resumes that included the word ‘women’s,’ as in ‘women’s chess club captain.’ And it downgraded graduates of two all-women’s colleges.”¹⁰ Even after Amazon engineers reprogrammed the tool to disregard gendered words, “[t]hey soon discovered that the revised [AI] was still picking up on *implicitly* gendered words—verbs that were highly correlated with men over women, such as ‘executed’ and ‘captured’—and using that to make its decisions.”¹¹

Testing will not uncover AI bias if the data is split into two parts—data for training and data for post training validation—because the data used to test the performance of the AI will have the same biases as the data used to train it.¹² In addition, AI will not be very good at fairness. One commentator observed:

It’s also not clear what the absence of bias should look like. This isn’t true just in computer science—this question has a long history of debate in philosophy, social science, and law. What’s different

⁵ Karen Hao, *This Is How AI Bias Really Happens—And Why It’s So Hard to Fix*, MIT TECH. REV. (Feb. 4, 2019), <https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/> [<https://perma.cc/QC2F-PDJ7>].

⁶ *Id.*; see also Yael Eisenstat, *The Real Reason Tech Struggles with Algorithmic Bias*, WIRED (Feb. 12, 2019, 9:00 AM), <https://www.wired.com/story/the-real-reason-tech-struggles-with-algorithmic-bias/> [<https://perma.cc/7ZXX-S2TX>] (discussing the difficulties of identifying and measuring bias).

⁷ Hao, *supra* note 5.

⁸ Steven Bellovin, *Yes, “Algorithms” Can Be Biased. Here’s Why*, ARSTECHNICA.COM (Jan. 24, 2019, 4:50 PM), <https://arstechnica.com/tech-policy/2019/01/yes-algorithms-can-be-biased-heres-why/> [<https://perma.cc/MZW9-6ND2>].

⁹ Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS (Oct. 9, 2018, 11:12 PM), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> [<https://perma.cc/8YJE-U4YQ>].

¹⁰ *Id.*

¹¹ Hao, *supra* note 5.

¹² *Id.*

about computer science is that the concept of fairness has to be defined in mathematical terms, like balancing the false positive and false negative rates of a prediction system. But as researchers have discovered, there are many different mathematical definitions of fairness that are also mutually exclusive. Does fairness mean, for example, that the same proportion of black and white individuals should get high risk assessment scores? Or that the same level of risk should result in the same score regardless of race? It's impossible to fulfill both definitions at the same time . . . so at some point you have to pick one. But whereas in other fields this decision is understood to be something that can change over time, the computer science field has a notion that it should be fixed.¹³

As these experiences indicate, robots could be programmed to be more consistent than humans, if consistency was considered an important foundational goal of the common law. But robots might rule consistently badly. Rather than removing human biases from important decisions, artificial intelligence would simply automate them. The human instinct for fairness, as ephemeral as it might be, animates the common law in ways that machines may never be able to replicate.

IV. UNWANTED PENETRATION

Bernstein is tough on the common law at times, particularly when it is wielded against women by men. Given the dramatic new challenges to reproductive rights, some of what she relates about abortion rights is more anxiety producing than reassuring. I found Chapter Four, entitled “Unwanted Penetration,” to be the most intellectually arresting part of a book. Bernstein asserts that the common law unequivocally accords women “sole and despotic dominion” over our own bodies; we can refuse access to our bodies, and especially our vaginas, for good reasons, bad reasons, or no reason at all.¹⁴ She describes rape as unwanted touchings that are “exceptionally unwanted and exceptionally invasive.”¹⁵ She says that under the common law “[i]ndividuals are entitled to cash damages when they suffer unwanted sexual penetration, and they may also kill an invader to fend it off.”¹⁶ She walks the reader through various analogies of the body to real property, and explains that if the common law renders trespass to property an actionable tort, it surely has the capacity to appropriately sanction rape through civil law. She extolls the usefulness of criminal trespass to the common law response to rape, explaining that “[w]hen rape

¹³ *Id.*

¹⁴ BERNSTEIN, *supra* note 2, at 115 (internal quotation marks omitted).

¹⁵ *Id.* at 116.

¹⁶ *Id.*

is understood as trespass, the law protects individuals at risk of rape with civil recourse and the possibility of criminal prosecution.”¹⁷ Rape is a difficult topic to address, but you would not know that from the detailed mapping of the intersections of rape and common law doctrines that Bernstein courageously provides. It is here that both Bernstein’s fearlessness, the seemingly bottomless depth of her knowledge about the common law, and her capacity for truly original thinking are well showcased. It is a great follow up to Chapter Three, which is entitled: “Women Too May Say No to What They Don’t Want.”

CONCLUSION

I strongly recommend this book. The freshness of her writing voice and the intricacy with which Bernstein develops her arguments are wonderful. It is not a fast read, because it is filled with complicated observations about very intricate, thorny subjects. But anyone interested in a spirited defense of our common law system from a women-forward perspective will really appreciate the contributions it makes. It would also make a great addition to syllabi for courses like Advanced Torts and Feminist Legal Theory.

¹⁷ *Id.* at 134.