

Symposium on Anita Bernstein's *The Common Law Inside the Female Body*

WOMEN ARE (ALLEGEDLY) PEOPLE, TOO

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INTRODUCTION

Professor Anita Bernstein opens her book, *The Common Law Inside the Female Body*, with a startling “strange bedfellows” argument: William Blackstone and modern American feminists want the same thing. “The common law,” she argues “contains precepts and doctrines that strengthen the freedom of individuals; the feminist struggle against the subjugation of women pursues liberty.”¹ Can this be the same Blackstone who articulated the doctrine of coverture and the severe impediments it imposed on the liberty of married women? His pronouncement that “the husband and wife are one person in law”—and that one is the husband—is the centerpiece of a doctrine that deprived married women of a panoply of civil rights like buying property, entering into contracts, and owning their own wages.² These disabilities were lifted by statutes known as the “Married Women’s Property Acts,” but some impediments persisted into the twentieth century.³ But by

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

² 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442 (Callaghan & Co. 1899).

³ The disabilities of coverture were lifted in waves by states beginning around 1850. See Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 *GEO. L.J.* 1359, 1359, 1398 (1983). The right to own one’s own wages was the last one secured by women. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *YALE L.J.* 1073,

the end of the book, Bernstein has made a compelling argument that common law principles, despite an inauspicious start, can “liberate women.”⁴ Indeed, there is little if anything in those principles that deprives women of the same rights as men. The common law may have “proceeded as if only men could enjoy its opportunities,” but that, she argues, is due to a “historical condition now supplanted.”⁵

Once women became equal participants in civil society as well as in the justice system, there ceased to exist any basis for restricting the benefit of common-law principles to men.⁶ And, oh boy, the common law contains some juicy stuff that really could be deployed to advance the cause of gender equality. This Essay will consider and evaluate Bernstein’s argument that the common law supports a virtually unfettered right to terminate a pregnancy. It will situate her argument against the backdrop of the constitutional right of abortion, which has been the primary lens through which women’s reproductive rights have been viewed. The Essay will then consider the newly composed Supreme Court and the threat it portends to reproductive rights. It concludes by suggesting that the common law, as Bernstein understands it, could come to the rescue of women and their full humanity.

I. THE RIGHT TO FAVOR ONESELF

Bernstein’s overarching point is that while the common law embraces a belief in negative liberty that does not guarantee individuals receive anything “to give them the freedom *to* flourish,” it empowers them to “reject invasion and intrusion.”⁷ What this amounts to, in Bernstein’s words, is a right of “condoned self-regard.”⁸ She further explains:

We may put ourselves first, in other words. Individuals may favor themselves and what they think are their own interests over the demands that another person makes. Only if they have done something that forces them to subordinate what they want for themselves must they yield to the wishes of another individual. In this design, found pervasively in the common law, condoned self-regard is the rule and compelled self-abnegation the exception.⁹

Chapter Five is devoted to unwanted pregnancy—specifically, the application of indisputable common law principles to abortion. At the risk of

1083 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2138 (1994).

⁴ BERNSTEIN, *supra* note 1, at 1.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.* at 7.

⁸ *Id.* at 8.

⁹ *Id.*

causing Blackstone to turn over in his grave, let's consider Bernstein's bottom line: The common law clearly supports a woman's unfettered access to abortion for no reason other than that she does not desire to be pregnant.¹⁰ The chapter revolves around the unwanted "Zef," her shorthand for an *in utero* zygote-embryo-fetus, a life form that changes identity as it develops from blastocyst to baby.¹¹ Does a woman have the right to forcefully remove the Zef from her body? If the answer is no, she is forced to give birth and forced, unless and until she relinquishes the child for adoption, to become a mother. The harm of forced birth should be obvious—the pain and risk of pregnancy and childbirth to her life and health, the invasive medical monitoring, and the many costs and potential harms of becoming a mother against one's will.¹² The consequences of forced birth take a variety of forms—from precipitating intimate partner violence to costing one her job—and can last a lifetime (or shorten it).¹³ Abortion, on the other hand, is safe and effective in most cases¹⁴—a woman is fourteen times more likely to die from giving birth than from having an abortion.¹⁵ The question, then, is whether the pregnant woman has the right to avoid this harm by terminating the pregnancy and evicting the Zef from the inside of her body. Without the protective housing of the uterus, and the biological support the pregnant woman provides, the Zef cannot survive.

¹⁰ See *id.* at 152–55.

¹¹ *Id.* at 142–43.

¹² Some of these harms, and their disproportionate impact on poor women and women of color, are explored in Joanna L. Grossman, *The Seeds of Early Childhood*, 71 FLA. L. REV. F. 117, 127–28 (2019); see also GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (Jan. 2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> [<https://perma.cc/K9ER-GR5J>].

¹³ BERNSTEIN, *supra* note 1, at 144–45.

¹⁴ See, e.g., NAT'L ACADS. SCI., ENG'G, & MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES (2018), <https://doi.org/10.17226/24950> [<https://perma.cc/G238-U24H>]; PLANNED PARENTHOOD, *How Safe Is the Abortion Pill?*, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-safe-is-the-abortion-pill> [<https://perma.cc/28TA-XT8K>] (“Medication abortion is very safe. Serious problems are rare, but like all medical procedures, there can be some risks.”). Safety and legality are highly interrelated. See Bela Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from a Bayesian Hierarchical Model*, 390 LANCET 2372, 2372 (2017), [https://doi.org/10.1016/S0140-6736\(17\)31794-4](https://doi.org/10.1016/S0140-6736(17)31794-4) [<https://perma.cc/Y7FL-9XX6>] (concluding that abortion is performed safely in nine out of ten cases in countries where it is legal, but only one out of four cases where it is banned or severely restricted).

¹⁵ BERNSTEIN, *supra* note 1, at 144; see also Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 217 (2012); Warren M. Hern, Opinion, *Pregnancy Kills. Abortion Saves Lives.*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/opinion/alabama-law-abortion.html> [<https://perma.cc/BPQ6-HD4H>].

II. THE CONSTITUTIONAL RIGHT TO SEEK AN ABORTION

The Constitution has been the primary framework through which abortion rights have been developed in the U.S. Since 1973, when the Supreme Court decided in *Roe v. Wade*¹⁶ that a woman has the right to terminate a pre-viability pregnancy, most debates about abortion have hung on *Roe* and its ability to withstand relentless attacks in the courts. At the time *Roe* was decided, abortion was criminalized by a majority of U.S. states.¹⁷ Those bans were not age-old. Many were enacted in the middle of the nineteenth century, replacing a common law standard followed both in England and in U.S. states that permitted abortions before “quickening”—the moment when the pregnant woman can first feel fetal movement (around sixteen to eighteen weeks gestation).¹⁸ The criminal bans that took hold typically prohibited all abortions, but punished those on farther along pregnancies more severely than earlier ones; the only standard exception was for abortions necessary to save the life of the pregnant woman.¹⁹ And under these laws, it was the doctors who were criminalized, not the pregnant women.²⁰

A move to liberalize abortion laws had begun prior to the decision in *Roe*. In 1962, the American Law Institute recommended that states loosen abortion restrictions by creating a category of justifiable abortions.²¹ Between 1966 and 1972, a third of the states changed their laws to create at least a small category for legal abortion.²² When *Roe* was decided, four states had repealed their bans completely.²³ Writing for the majority, Justice Blackmun declared that the right to privacy under the Fourteenth Amendment’s Due Process Clause encompassed the right to terminate a

¹⁶ 410 U.S. 113, 164–65 (1973).

¹⁷ *Id.* at 118.

¹⁸ JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253–54 (1994); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 8 (1978).

¹⁹ ROSEMARY NOSSIFF, BEFORE *ROE*: ABORTION POLICY IN THE STATES 31–33 (2001).

²⁰ On this complex history of abortion and punishment, see Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 740 (2018) (noting that although some laws technically permitted pregnant women to be prosecuted for soliciting or conspiring with the abortion provider, “few women went to prison for having an abortion”).

²¹ Model Penal Code § 230.3 (AM. LAW INST. 1962); *Roe*, 410 U.S. at 139–40; see also LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 220–22 (1997).

²² *Roe*, 410 U.S. at 139–40.

²³ See *id.* at 140 n.37 (citing ALASKA STAT. § 11.15.060 (1970); HAW. REV. STAT. § 453-16 (Supp. 1971); N.Y. PENAL L. § 125.05, subd. 3 (McKinney Supp. 1972–1973); WASH. REV. CODE §§ 9.02.060 to 9.02.080 (Supp. 1972)); see also NOSSIFF, *supra* note 19, at 41.

pregnancy before a certain point.²⁴ The Court held specifically that a fetus is not a person for constitutional purposes and does not have rights that need to be balanced against the woman's own rights.²⁵ The state, according to the Court, has no interest in protecting fetal life during the first trimester, but acquires one when the fetus reaches viability.²⁶ This ruling effectively invalidated most abortion laws in the United States, even in states that had liberalized their laws, but fell short of legalizing abortion regardless of circumstance.

In the decades that followed *Roe*, the Supreme Court revisited and reframed the right of abortion as the right to terminate a pre-viability pregnancy without undue burden from the government.²⁷ The anti-abortion movement went through different strategies—violence, attacks on funding, and indirect attacks on providers and facilities that made it hard for many women to access abortions.²⁸ There were wins and losses for each side—for example, the Supreme Court upheld restrictions on government funding for abortions but invalidated many regulations that forced clinics to close with no offsetting benefit to women's health.²⁹ Throughout decades of battle, abortion rights remained entirely contingent on the Supreme Court's willingness to toe the line.

Today, constitutional abortion rights hang by a thread, as newly appointed Justices Neil Gorsuch and Brett Kavanaugh portend a stark

²⁴ *Roe*, 410 U.S. at 164–65.

²⁵ *Id.* at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

²⁶ *Id.* at 163–64.

²⁷ See *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1313 (1994) (considering the constitutionality of a wide range of abortion restrictions). For a comprehensive history, see MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

²⁸ On clinic violence, see Mireille Jacobson & Heather Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services* (Nat'l Bureau of Econ. Research, Working Paper No. 16603, 2010), <https://www.nber.org/papers/w16603> [<https://perma.cc/VE6L-YP7V>] (noting that between 1973 and 2003, abortion providers in the United States were the targets of over 300 acts of extreme violence, including arson, bombings, murders, and butyric acid attacks); David A. Grimes et al., *An Epidemic of Antiabortion Violence in the United States*, 165 AM. J. OBSTETRICS & GYNECOLOGY 1263 (1991), <https://www.sciencedirect.com/science/article/abs/pii/S000293789190346S?via%3Dihub> [<https://perma.cc/6C4S-VD27>] (noting that during the study period, 1977–1988, the National Abortion Federation reported the following violent acts against clinics: 222 clinic invasions, 220 acts of clinic vandalism, 216 bomb threats, 65 death threats, 46 assault and batteries, 20 burglaries, and 2 kidnappings). On the shift toward indirect regulation and funding cuts, see Mary Ziegler, *After Life: Governmental Interests and the New Antiabortion Incrementalism*, 73 U. MIAMI L. REV. 78, 85–86 (2018).

²⁹ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (striking down two provisions of a Texas law that imposed an undue burden on the right to abortion by forcing clinics to close); *Harris v. McRae*, 448 U.S. 297, 311 (1980) (rejecting a constitutional challenge to the Hyde Amendment, which withdrew federal funding even for “medically necessary abortions”).

rightward shift.³⁰ This has created opportunities for states to restrict abortion—multiple states have passed near or total bans in the last few months in the hopes of bringing about a post-*Roe* world.³¹ But at the same time, other states have done the exact opposite—they have passed strong statutory protections for abortions that will maintain or even expand women’s reproductive rights when and if the constitutional bottom falls out.³² The question is not whether abortion rights will be protected, but when, how severely, and by what means they will be curtailed, at least as a constitutional matter. The records of the new Justices on sexual and reproductive rights support this prediction.³³ The battle over abortion has become more divisive, and the polar movements have drifted further apart.

³⁰ See, e.g., Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017, 9:02 AM), <https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade> [https://perma.cc/6YLB-Y8NM]; Mark Joseph Stern, *Brett Kavanaugh Just Declared War on Roe v. Wade*, SLATE (Feb. 7, 2019, 11:15 PM), <https://slate.com/news-and-politics/2019/02/brett-kavanaugh-june-medical-services-louisiana-john-roberts.html> [https://perma.cc/Q5G6-KTJL].

³¹ See, e.g., Michelle Goldberg, Opinion, *The Abortion Divide Gets Deeper*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/opinion/abortion-heartbeat-ban-georgia.html> [https://perma.cc/LPT6-8AS9]; Sabrina Tavernise, *‘The Time Is Now’: States are Rushing to Restrict Abortion, or to Protect It*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html> [https://perma.cc/AY34-2FR8].

³² See Quoc Trung Bui et al., *Where Roe v. Wade Has the Biggest Effect*, N.Y. TIMES (July 18, 2019), <https://www.nytimes.com/interactive/2019/07/18/upshot/roe-v-wade-abortion-maps-planned-parenthood.html> [https://perma.cc/VG8P-8DXR] (noting that West Coast and Northeastern states would still protect abortion without *Roe*).

³³ Justice Gorsuch wrote a concurring opinion in the lower court opinion in *Hobby Lobby*, in which he argued for a position that would have permitted even greater incursions into the contraceptive mandate than ultimately permitted by the Supreme Court. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156–57 (10th Cir. 2013) (Gorsuch, J., concurring). As a D.C. Circuit judge, Justice Kavanaugh issued a decision that would have permitted the federal government to obstruct a detained immigrant minor’s access to abortion even after a Texas court had granted her permission to proceed. He was reversed by the D.C. Circuit en banc. *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc); see also Dahlia Lithwick & Jed Shugerman, *Kavanaugh Already Has One of the Clearest Records Against Roe of Any Recent Supreme Court Nominee*, SLATE (July 18, 2018, 2:43 PM), <https://slate.com/news-and-politics/2018/07/brett-kavanaugh-has-a-clear-record-against-roe-v-wade.html> [https://perma.cc/9SD7-EADB] (outlining and discussing Justice Kavanaugh’s prior decisions in cases that implicated *Roe v. Wade*). In *June Medical Services, L.L.C. v. Gee*, Justice Kavanaugh dissented from an order staying enforcement of a set of abortion restrictions in Louisiana pending review on the merits and, in an unusual move, wrote a dissenting opinion. 139 S. Ct. 663 (2019) (Kavanaugh, J., dissenting) (order granting stay). Even though the restrictions are virtually identical to those struck down by the Supreme Court in 2016 in *Whole Woman’s Health v. Hellerstadt*, 136 S. Ct. 2292 (2016), Justice Kavanaugh would have permitted the restrictions to take effect pending review, despite significant evidence in the record that the restrictions would cause all but one doctor in the State of Louisiana to cease providing abortion care. This action was widely understood as Justice Kavanaugh’s declaration of war on abortion rights. See, e.g., Stern, *supra* note 30. The Supreme Court has just agreed to review the Fifth Circuit’s ruling in *June Medical*. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019) (consolidating cases).

The shifting terrain presents new challenges, making it the perfect time to consider Bernstein’s call of the common law to arms.

III. THE ROLE OF THE COMMON LAW IN PROTECTING ABORTION RIGHTS

From the perspective of a pregnant woman, an unwanted pregnancy causes harm, and termination of that pregnancy can be accomplished safely and effectively. Those are the (entirely provable) premises from which Bernstein begins her argument that the common law protects a woman’s right to terminate an unwanted pregnancy.³⁴ Remaining pregnant is worth the immense physical, emotional, financial, and social costs “only if one wishes the first-time parenthood or the larger family that will follow this pregnancy—or, for the minority of pregnancies that involve surrogacy, if the pregnant person is receiving acceptable compensation.”³⁵ The Supreme Court has recognized that the deprivation of access to abortion “amounts to a real injury,”³⁶ but does the common law?

The common law, Bernstein argues, protects a general right to refuse the things we “Do Not Want.”³⁷ There are exceptions to this rule—consent, undertaking of responsibility, and criminal punishment—but Bernstein argues persuasively that none are applicable to the condition of unwanted pregnancy.³⁸ Engaging in sex, she argues, cannot be equated with consent to pregnancy, given the possibility of rape, failed contraceptives, fraud about contraceptives or fertility, as well as the sheer unlikelihood that any one act of sex will so result. Likewise, for the same reason, a pregnant woman cannot be treated as having undertaken responsibility for the Zef, at least not in all circumstances. Moreover, the common law provides that “an obligor may abandon an undertaking when fulfilling it would demand too much of her.”³⁹ Pregnancy and birth surely fit that bill. Pregnancy can trigger or reveal life-altering or life-threatening situations that would make even a stoic wish to abandon course.⁴⁰ The final possibility is that she must remain pregnant as a form of criminal punishment, but the status of being pregnant does not itself prove a sufficient act or mental state to warrant criminal liability, and in most cases, the underlying sex is not a crime. And even if it was, Bernstein explains, “[f]orced gestation, parturition, and motherhood are incoherent

³⁴ BERNSTEIN, *supra* note 1, at 143–47.

³⁵ *Id.* at 147.

³⁶ *Id.*

³⁷ *Id.* at 33–35.

³⁸ *Id.* at 147–50.

³⁹ *Id.* at 149.

⁴⁰ *See, e.g., supra* notes 11–15 and accompanying text.

retribution for whatever misconduct the pregnancy is understood to manifest.”⁴¹

If the woman’s right to refuse things she Does Not Want is intact, then the remaining question is: with what means? In other words, can she enforce her right to refuse something she Does Not Want by terminating the Zef? It does not even seem like a close call under standard common law principles, and here’s the punchline: of course she can. Bernstein explains thoroughly why the common law precept that permits one to repel an invader with deadly force supports unfettered access to abortion.⁴² The principle gives people an “interest in the integrity and safety of not only their lives and health but also the physical space in which they live.”⁴³ As already discussed, the Zef poses a serious risk of bodily harm, which is sufficient under the common law standard to justify a lethal response. This is so even when the target of the force bears no blame for the invasion (the Zef), and when the response is carried out by someone other than the one threatened (the medical provider). The “castle doctrine,” which permits a person to take severe measures to protect her home from an invader, only reinforces the common law’s support for abortion to repel an invading Zef.⁴⁴ It is not an exaggeration to say that most readers will be completely convinced by the end of this section of the book that the common law supports a right to abortion far broader than the Constitution guarantees. And that this would be true whether you believe the Zef to be a person or not. After all, how could it be that a person can kill a living, breathing, fully grown human to protect his home, but another person cannot protect her own body from an unwanted invader?

Bernstein further examines a second precept of the common law—that a person may “withhold benevolence and favors” from others, even when they would require little effort and pose no risk.⁴⁵ As anyone who has completed first-year Torts will remember, there is no duty to rescue another person. You can discover a helpless baby on the train tracks and just leave it there, potential lethal harm be damned.⁴⁶

This all invites Bernstein’s observation: “If Ye Olde Common Law gives individuals a right to rid themselves of pregnancy, one would have expected to hear the news before now.”⁴⁷ While the common law has

⁴¹ BERNSTEIN, *supra* note 1, at 150.

⁴² *Id.* at 151–56.

⁴³ *Id.* at 151.

⁴⁴ *See id.* at 152–53.

⁴⁵ *Id.* at 156–60.

⁴⁶ On the lack of a duty to rescue under tort law, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247 (1980).

⁴⁷ BERNSTEIN, *supra* note 1, at 160.

“consistently had no trouble” recognizing the right of people to repel intruders or withhold favors, “it has been less able to perceive a pregnant individual as a holder of these common law rights.”⁴⁸ Bernstein explains that this is, in part, a reflection of science and technology: before safe and effective methods of abortion were perfected, which did not happen until the twentieth century, an abortion prohibition could have been justified under the common law as a sort of “harm reduction” principle.⁴⁹ This, she points out, was the focus of early feminists who opposed abortion and whose views have been twisted and co-opted by the modern anti-abortion movement.⁵⁰

The more concerning explanation for the lack of recognition of the common law’s application to abortion, which Bernstein captures in a single sentence, is this: “Applying common law doctrines to abortion calls for willingness to consider the pregnant person a person.”⁵¹ Therein lies the rub. This is a general problem with the law, especially when it comes to sexual and reproductive health. The law is replete with instances in which the failure to recognize women’s full humanity relegates them to second-class citizens. One need only skim modern abortion case law to see that even when courts purport to be protecting a woman’s right to abortion, they do not treat her as a functioning, independent person—and certainly not as one who possesses the long-recognized right to repel invaders. The Supreme Court has upheld a wide variety of abortion restrictions that question a woman’s power to make decisions about her own body and healthcare, including mandatory ultrasounds, waiting periods, counseling with scientific misinformation, and so on.⁵²

In perhaps the most egregious example, the Supreme Court upheld a federal ban on a particular method of second-trimester abortions in order to

⁴⁸ *Id.* at 160–61.

⁴⁹ *Id.* at 165.

⁵⁰ *Id.* The Susan B. Anthony List, for example, is a pro-life advocacy group that operates under the name of a famous feminist and suffragist, even though many historians believe this is a misappropriation of women’s history and a misrepresentation of Anthony’s position on abortion. See SUSAN B. ANTHONY LIST, <https://www.sba-list.org> [<https://perma.cc/AL4S-UV7X>]; see also Tracy A. Thomas, *Misappropriating Women’s History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 2 (2012); Craig Medred, ‘Sarah Palin Is No Susan B. Anthony’, ANCHORAGE DAILY NEWS (July 6, 2016), <https://www.adn.com/politics/article/sarah-palin-no-susan-b-anthony/2010/05/18> [<https://perma.cc/J5KK-5HEP>] (describing a blog post, on a now-defunct blog, in which Ann Gordon and Lynn Sherr argue that the pro-life movement has distorted Anthony’s attitudes toward abortion to “bolster [its] own cause”).

⁵¹ BERNSTEIN, *supra* note 1, at 161.

⁵² See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1313 (1994).

protect women from their own regret (assumed, not proven).⁵³ As Justice Kennedy wrote,

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.⁵⁴

According to the Court, the woman here is a mother (without having given birth), she is bonded to an unborn child, and she is suffering.⁵⁵ Abortions seem only, in the eyes of the Supreme Court, to involve the “abortion doctor,” “the fetus,” and “the cervix.”⁵⁶ There is no fully human woman at the center, where she should be. Imagine what self-defense criminal cases would look like if we described men in such terms when they shoot an intruder who has dared penetrate their castle? Don’t bother, because judges never do. We do not deprive a man of his self-defense argument out of fear that he might regret or feel conflicted about shooting an unarmed, potentially harmless intruder. We just envision him standing up for his rights—strong, fearless, determined, and unfazed by the moral complexity of his act.

CONCLUSION

Will the common law come to the rescue of women as the Supreme Court falls away from them and their rights? One limitation of the common law, which Bernstein acknowledges, is that it can be abrogated by statute. It is thus not a force against the legislatures that have already demonstrated their antipathy to abortion rights and their plans for a post-*Roe* world. And perhaps it adds nothing in the states that have taken the initiative to use legislative power to protect and expand reproductive rights. The constitutional protection for a woman’s right to terminate a pregnancy has been the glue that keeps the opposing states from drifting too far away. The right to abortion cannot, of course, be abrogated by statute, state or federal.

⁵³ See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

⁵⁴ *Id.* at 159–60.

⁵⁵ On this treatment of women in abortion law, see Joanna L. Grossman & Linda McClain, *Gonzales v. Carhart: How the Supreme Court’s Validation of the Federal Partial-Birth Abortion Ban Act Affects Women’s Constitutional Liberty and Equality*, FINDLAW (May 7, 2007), <https://supreme.findlaw.com/legal-commentary/gonzales-v-carhart-how-the-supreme-courts-validation-of-the-federal-partial-birth-abortion-ban-act-affects-womens-constitutional-liberty-and-equality.html> [<https://perma.cc/U7D5-34DX>].

⁵⁶ *Id.*; see also *Gonzales*, 550 U.S. at 124.

But it can be abandoned by the Supreme Court, and it may well be in the near future. While it is not clear that the common law will be the backstop when this happens, it could be used to focus our attention on the most important question: Are women people, too?