

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

THE FEMALE BODY IN THE WORKPLACE: JUDGES AND THE COMMON LAW

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“When a person’s physical existence troubles other people simply by taking up space, her negative liberty suffers.”

—Anita Bernstein[†]

INTRODUCTION

Professor Anita Bernstein’s book, *The Common Law Inside the Female Body*, begins: “Quietly, faithfully, and without any overt agenda, the common law serves to liberate women. Years of drawing surprise or polite skepticism when I’ve said so led me to write this book-length defense of that contention.”¹ On reading these first two sentences, I immediately thought about who gets to decide the common law—judges—and how their positions of privilege and power allow them to impact the experiences of female bodies in many spaces, including the workplace. Because of this reality, I

* Associate Professor of Law, Florida A&M University College of Law. I thank Professor Bridget J. Crawford for inviting me to contribute this Essay and providing initial review and comments. I also thank Professor Anita Bernstein for doing this work and, through it, inspiring this Essay. Finally, I thank the editors of the *Northwestern Law Review Online* for selecting my Essay for publication. I specifically acknowledge Danielle Berkowsky, Amanda Wells, Alex Kuske, Sophie Frishberg, Olivia Vega, Conor Bindner, Elizabeth Lebens, Conor McDonough, Caroline McHugh, Emily Penkowski, Gabriel Pugel, Mingyuan Song, and Christopher Zimmerman for their editorial assistance.

[†] ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 207 (2019).

¹ *Id.* at 1.

have a difficult time “[t]reating the common law as if it were a person,” as Bernstein does.² I see the common law more as a marionette that is manipulated by the ideas and commitments of the individuals who control it.

I must admit, I am a bit skeptical about how much judges, through the common law, have done to liberate women. I looked forward to reading Bernstein’s defense. I was not disappointed. Her conceptualization of “negative liberty” as it applies to the female body is powerful. The historical background and the list of affronts that remain remind us that there is much work to be done to advance gender justice. We must complain even if our complaints are not well-received.³

Bernstein advocates that the common law in the United States provides “negative liberty to persons of all genders.”⁴ By negative liberty, she means the “right to say no to what [human beings] do not want.”⁵ This right provides what Bernstein terms “condoned self-regard,” the right to “put ourselves first.”⁶ However, I agree with Bernstein that, in many societies, including ours, a female body gets less condoned self-regard than a male body.⁷ Condoned self-regard is therefore gendered. Bernstein’s book made me think of the lack of negative liberty as a right, for employees who have female

² *Id.* at 6. The considerations behind the choice between referring to the author of the book as Anita, Bernstein, or Professor Bernstein are worthy of an essay. Initially, from my own feminist perspective, I thought I could acknowledge sisterhood (as women, feminists, and law professors) by referring to her by her first name. However, I was reminded that perhaps it is better to acknowledge and note the distance—I do not know her personally. I also thought that once a professional woman achieves a certain status and notoriety within her field, reference to her by her first name, in an Essay like this one (about her book), is a sign of admiration and respect. *See e.g.*, Charlotte Bunch, *Rhonda Copelon: A Celebration of a Life Fully Lived*, 15 CUNY L. REV. 225 (2012). However, some may view it as a sign of disrespect (the opposite of my intention). Therefore, I decided to use a formal reference, which includes her academic title and last name, rather than just her last name. *See* Maritza I. Reyes, Angela Mae Kupenda, Angela Onwuachi-Willig, Stephanie M. Wildman & Adrien Katherine Wing, *Reflections on Presumed Incompetent: The Intersections of Race and Class for Women in Academia Symposium—The Plenary Panel*, 29 BERKELEY J. GENDER L. & JUST. 195, 198 n.2 (2014) (explaining why the panelists and co-authors decided to refer to each other by first name at the conference but used academic titles in the publication that followed). The editors suggested that I delete the professional title after the first reference, as an editorial preference. I agreed.

³ From the book:

Assertions about negative liberty as held by possessors of female bodies, in short, catch figurative fire when spoken. No matter how a woman articulates her protest about an experience of invasion, she can count on drawing criticism about procedure, or substance, or doing it wrong. Formal routes to redress are built to make accusations costly for the accuser.

BERNSTEIN, *supra* note †, at 203.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 13 (“Self-regard is not entirely condoned in many societies, including mine, when the self in question is female.”).

bodies. I also thought about judges, employers, and fellow employees who basically tell women that we should accept treatment we do not want if we want to be in the workplace.⁸

In the footnotes of this Essay, I primarily reference Bernstein's book because her book is the focus of the invited contributions.⁹ As part of my contribution, I supplement the list of unaddressed affronts that Bernstein provides.¹⁰ It is an effort to advance "[f]ull negative liberty for women."¹¹ Sometimes, people do not even want to hear what we Do Not Want. This Essay gives me an opportunity to publish some of what I Do Not Want to experience in the workplace.

I also talk about judges and to judges. If the common law serves to liberate women, everybody, including judges, should understand the role they do play and should play in the development of the common law. As a career law clerk in the federal courts, I witnessed the decision-making process inside the chambers of federal judges and in the courtrooms.¹² I came to the conclusion that judges, more than statutory law, influence what happens to female bodies in the workplace.¹³ Litigants initially drive the common law by filing complaints.¹⁴ However, judicial decisions affect not only the litigants in their individual cases, they also serve as precedent for future conduct, and they influence plaintiffs and their attorneys to file or forego litigation.¹⁵

I. SOME OF WHAT I DO NOT WANT IN THE WORKPLACE

I Do Not Want judges to minimize, disregard, or entirely dismiss the types of "Do Not Wants" I state here. These are representative samples of

⁸ See JULIE BEREBITSKY, *SEX AND THE OFFICE: A HISTORY OF GENDER, POWER, AND DESIRE* 269 (2012); see, e.g., *Lockwood v. McMillan*, 237 F. Supp. 3d 840, 863 (S.D. Ind. 2017); *Wynn-Mason v. Levas Commc'ns, LLC*, No. 09-1235, 2011 WL 1599238, at *6 (E.D. Pa. Apr. 28, 2011).

⁹ I also need to stay within the word count limit.

¹⁰ See BERNSTEIN, *supra* note †, at 207.

¹¹ *Id.* at 204. ("Full negative liberty for women—as a real entitlement in fact, honored and enforceable by the law—would mean that we would hear more about all the genres of Do Not Want simply because women suffer gender-specific invasions and boundary-crossings").

¹² In the United States, state employment laws closely follow federal law. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 720–24 (2016). In some jurisdictions, state law may provide employees with more protections than federal law. *Id.* at 721. In this Essay, assumptions and arguments are made based on the application of federal law in the federal courts.

¹³ "An upheaval for nothing less than full human status impelled the Civil Rights Act of 1964, Title VII," but the discrimination continues. CATHARINE A. MACKINNON, *SEX EQUALITY* 93 (Robert C. Clark et al. eds., 2d ed. 2007).

¹⁴ BERNSTEIN, *supra* note †, at 12.

¹⁵ See Jack A. Raisner & Wayne N. Outten, *Employment Discrimination in the Second Circuit District Courts 1993–94*, 14 QLR 707, 713–14 (1994).

the daily injuries that some female bodies face at work. Some judges may find them to be *de minimis*; however, like constant drips of water that wear away stone, daily assaults on our dignity take their toll on individuals, on the workplace, and on society.¹⁶ Judges should not expect women to put up with these indignities just because we accepted a job. So long as federal judges basically tell employees, “if you do not like it, leave,”¹⁷ employers will continue to allow abuse that makes it hostile for female bodies to be in the workplace.¹⁸ We should not be subjected to injury at work.¹⁹

I Do Not Want to be hired only to be silenced, subjugated, and chastised because I do not stay within the limits that a patriarchal system places on someone in a female body; especially as someone in a Latina body.²⁰ I Do Not Want my contributions to be labeled as “interruptions” during meetings when my raised hand is ignored. I Do Not Want to be given time limits to make my points when others get to talk as much as they want.²¹ I Do Not Want what I say or write to be demeaned because it runs counter to the status quo or the perspective of members of the dominant group. I Do Not Want to smile *all the time* just to make other people feel comfortable around me. I Do Not Want to be labeled a “troublemaker” because I ask the questions that need to be asked.

I Do Not Want to have to remind colleagues that what the man said is what I previously said, and I should get credit for it. I Do Not Want to be expected not to defend myself when I am attacked. I also Do Not Want to be

¹⁶ In the academy, for example, “[t]he resulting assaults to the dignity of tenure-track faculty, based on obvious and inherent characteristics as gender and race, cause them significant harm and inhibit their academic contributions post-tenure.” Angela Mae Kupenda & Tamara F. Lawson, *Truth and Reconciliation: A Critical Step Toward Eliminating Race and Gender Violations in Tenure Wars*, 31 COLUM. J. GENDER & L. 87, 91 (2015).

¹⁷ Of course, judges do not explicitly state it this way; they often imply it in some of the cases in which they grant summary judgment in favor of employers. See e.g., *Byrne v. Ala. Alcoholic Beverage Control Bd.*, 635 F. Supp. 2d 1281, 1295–96 (M.D. Ala. 2009).

¹⁸ At the ABA Annual Meeting in 2018, a panel discussed why women are leaving legal practice. The panelists focused on a study conducted by the American Bar Association which found that most of the aspects of the legal profession women lawyers do not like have to do with discrimination. A.B.A., ANNUAL 2018: WHY WOMEN LEAVE THE LAW—AND WHAT WE CAN DO ABOUT IT (July 31, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/07/annual_2018_why_wom [<https://perma.cc/7BSD-XH8R>].

¹⁹ “Endowed with a zone of safety and dignity into which we can take shelter, we become abler to figure out which affirmative ends we wish to pursue.” BERNSTEIN, *supra* note †, at 196.

²⁰ See Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 64 (2004) (“Latinas have unique vulnerabilities and are more likely to experience multiple forms of discrimination because they have multiple identities, which in turn shape their experience of discrimination.”).

²¹ Phrases like “get to the point” and “what is the question?” are used selectively to intimidate, ridicule, and, ultimately, silence female bodies when we seek to provide context or background for our contributions and questions.

punished for defending myself from bullying, discrimination, and harassment.²² I Do Not Want to have to explain to a man why I am declining his advances or why what he said to me is clearly abusive. I Do Not Want other women to pressure me to conform to the more submissive personality or “lady-like” style that some women are comfortable adopting as their own. I Do Not Want to be sabotaged from reaching my full potential as a professional woman. I Do Not Want the same or usually heavier workload for less pay.²³ These negative liberties are not enforced by judges in the common law, as it exists today. Therefore, we should examine why.

II. JUDGES

Even judges who convince themselves that they are applying the law in a neutral, unbiased manner are susceptible to allowing their unexamined biases to permeate into their consideration of cases.²⁴ Therefore, judges are not neutral arbiters. Some try to be; however, the reality is that they are human beings who bring their biases and personal experiences into their decision-making.²⁵ If the common law is going to help to liberate women, judges must hear and read this truth over and over again until they understand that they must examine how their biases and experiences affect their decisions pre-trial, post-trial, and on appeal.²⁶ One potential bias that most judges do not seem to consider is that they are employers and this may cause them to identify with the positions and arguments of employer-defendants.²⁷

²² Reyes et al., *supra* note 2, at 247–49.

²³ See e.g., Elizabeth Hernandez, *DU Law School’s “Fix” for Its Gender-Pay Gap Revealed a Female Professor Makes \$30,000 Less Than Her Peers*, DENV. POST (June 6, 2019, 8:57 AM), <https://www.denverpost.com/2019/06/05/du-sturm-college-of-law-pay-gap> [<https://perma.cc/V2DA-R68A>].

²⁴ Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 525 (2007) (recognizing that judges, even when trying to be conscientious, may not be able to appreciate their own biases).

²⁵ See Maritza I. Reyes, *Latina Experience and Wisdom Welcomed*, HARV. CRIMSON (July 8, 2009), <https://www.thecrimson.com/article/2009/7/8/latina-experience-and-wisdom-welcomed-as> [<https://perma.cc/PH8R-AZ5C>].

²⁶ See Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 4–6 (2006); see also Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 522–23 (2007) (“Instead of neutral and detached jurists who fairly and impartially apply the law, a significant number of judges are ‘bad judges’ whose strong biases and prejudices usually control their decisionmaking. Consequently, I believe it is biased judging, not misjudging, that poses a major obstacle to the fair administration of justice.”).

²⁷ Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 914, 957–64 (2015). If more law clerks could (or would) talk, I believe we would learn more about judges as employers. However, law clerks are effectively silenced by a duty of confidentiality and by professional norms. See Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VAL. U. L. REV. 1, 29 (2008). “Law clerks, who depend on the judges they serve to

Statutory laws, such as Title VII, prohibit discrimination in workplaces because we are women and because some of us are also of color.²⁸ Therefore, why is it that judges do not apply statutory law to protect more negative liberty in our workplaces? Why is it that they interpret Title VII to give employers every benefit of the doubt about their alleged non-discriminatory reasons for engaging in abusive and hostile conduct? Why do they grant so many summary judgments in favor of employers and thereby take the decision away from juries, which are better positioned to assess how discrimination rears its ugly head in the workplace? Bernstein posits that “[a] common law court will give nothing to a person who feels invaded whenever this court deems what [s]he complains about too slight to warrant a remedy.”²⁹ This is a category of detriment where the common law says “there is no injury”; consequently, Bernstein calls it “*non fit injuria*.”³⁰ However, she qualifies that she is skeptical about this in civil rights cases, where statutory law says nothing about a minimum size for the injury.³¹ I agree.

Despite codified positive law, judges use common law adjudication to reduce the negative liberty provided by statutes like Title VII. Judges often preclude these cases from moving forward to a jury decision; most discrimination cases rarely survive summary judgment in the federal courts.³² Federal judges mostly rule in favor of employers.³³ Justice Ruth Bader Ginsburg, in a 2013 dissenting opinion, joined by Justices Sonia Sotomayor, Elena Kagan, and Stephen G. Breyer, called out the plurality’s “zeal” to protect employers.³⁴ Moreover, plaintiffs and their attorneys face

help them advance in their legal careers, have been concerned that reporting [misconduct] would violate strict confidentiality policies about case work in individual judges’ chambers.” Ann E. Marimow, *Federal Judiciary Leaders Approve New Rules to Protect Court Employees from Workplace Harassment*, WASH. POST (Mar. 12, 2019, 3:15 PM), https://www.washingtonpost.com/local/legal-issues/federal-judiciary-leaders-approve-new-rules-to-protect-court-employees-from-workplace-harassment/2019/03/12/588a7208-44c3-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.a2a31974e038 [https://perma.cc/66L5-UZ5Z]. After all the sexual misconduct allegations against federal appellate court judge Alex Kozinski, the federal judiciary recently announced a new disciplinary system that requires employees to report likely misconduct; however, the judges will continue to “police [their] own” by conducting their own investigations, a practice that has, understandably, garnered criticism. *Id.*

²⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991).

²⁹ BERNSTEIN *supra* note †, at 71.

³⁰ *Id.* (“[T]here is no injury.”).

³¹ *Id.* at 72.

³² Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case after Desert Palace, Inc. v. Costa into a “Mixed-Motives” Case*, 52 DRAKE L. REV. 71, 106 (2003).

³³ See generally Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (analyzing statistical and anecdotal information in discrimination cases and the judiciary’s attitude towards these claims).

³⁴ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 386 (2013) (Ginsburg J., dissenting).

disproportionate sanctions, which have a chilling effect in even the most meritorious cases.³⁵

Bernstein advances that “[p]erceiving *another* as harmed is also integral to life under the common law, a jurisprudence that expects individuals to learn from narratives of suffering and redress.”³⁶ In this way, the common law demands “fellow-feeling” from us.³⁷ “[J]udicial decisions call on the public to feel how someone else once felt thwarted.”³⁸ Does the common law demand “fellow-feeling” from judges? How many judges can relate to the suffering that many women endure at work and the redress that could or should be provided?³⁹ Do judges understand that we need judicial redress, and when we do not get it, employers are emboldened to turn a blind eye to, condone, or even encourage abuse of female bodies in our workplaces?

III. WHAT JUDGES DECIDE GREATLY INFLUENCES WHAT FEMALE BODIES ENDURE IN THE WORKPLACE

Judges have contributed to the negative ways in which women are treated in the workplace. “The workplace is an especially powerful locus of the [gender] gap,” where, as in other spaces, we “regularly witness the rendering of slights and insults to women more than men”⁴⁰ Judges’ common law has taken some of our negative liberty, even that which has been achieved through the community advocacy and political maneuvering it takes to finally get statutory law like Title VII. Federal judges have essentially told employers and employees that women deserve what we get for daring to step into workplaces expecting and demanding equal or equitable treatment.⁴¹ The injuries we suffer are rationalized and excused as

³⁵ See Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 553–58 (2011); Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress’ Attempt to Put Out “Frivolous” Lawsuits Burns a Hole Through the Constitution*, 30 SETON HALL LEGIS. J. 249, 310–11 (2006).

³⁶ BERNSTEIN, *supra* note †, at 34.

³⁷ *Id.* “Fellow-feeling,” as defined by Bernstein, is not exactly “sympathy” or “empathy.” *Id.*

³⁸ *Id.*

³⁹ The American Bar Association (ABA), in its 2019 ABA Profile of the Legal Profession, documented that “[t]he racial diversity of the federal judiciary has decreased slightly since 2016, while gender diversity has grown slightly, according to statistics from the Federal Judicial Center.” A.B.A., ABA PROFILE OF THE LEGAL PROFESSION 37 (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf> [https://perma.cc/MK44-P4S7]. As of July 1, 2019, 1,077 federal judges are White, 135 are African American, 90 are Hispanic, 33 are Asian American, 2 are American Indian, and 8 are of mixed race. As to gender, 982 federal judges are male and 363 are female. *Id.* at 87, 89.

⁴⁰ BERNSTEIN, *supra* note †, at 209.

⁴¹ See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012) (noting that motions to dismiss and for summary judgement account “for a full 86% of litigated outcomes” in employment discrimination cases);

assumed risks or voluntary relinquishment of our negative liberty and dignity. This is the message judges have sent and it is appropriate and professional for us to tell them so.

As Bernstein acknowledges, judges craft outcomes “to fit the dispute at hand and inform the larger population that receives guidance from published decisional law.”⁴² In employment cases, plaintiffs tell judges what they do not want and judges tell employees, their employers, and the public at large what employees are expected to put up with in the workplace. Judges decide the category of invasions they deem as “too slight to warrant a judicial remedy.”⁴³ Most judges do not experience the negative actions and circumstances women face at work, especially when the woman is in a position of less power as compared to her aggressor(s). Therefore, they do not fully appreciate the nature of the injury.

Some judges do not understand that the invasions to our bodies and our dignity cause more injury than invasions to chattel.⁴⁴ For example, in *Hernandez v. Valley View Hosp. Ass’n*, a district court judge told a Latina plaintiff that even though the evidence showed that her white male supervisors were “boorish, infantile, and unprofessional,” she had no case because she did not present evidence of a “steady barrage of opprobrious racial comments.”⁴⁵ In *Galloway v. General Motors Serv. Parts Operations*, another district court judge, and the three appellate judges who affirmed his decision, told a female plaintiff, her employer, and anyone who read or learned of the opinion that the act of a male employee repeatedly calling the woman a “sick bitch” was “not overtly sexual in nature” and, as such, the case was properly dismissed.⁴⁶ The district court judge also stated that the woman’s use of “coarse remarks” to defend against the attacks showed “that she probably wasn’t much upset by his allegedly harassing behavior.”⁴⁷

In *Franchina v. City of Providence*, a female firefighter’s case against her employer survived judgment as a matter of law and proceeded to a jury verdict in her favor under the following facts (as summarized by the court):

Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009, 11:59 PM), <http://online.wsj.com/news/articles/SB123500883048618747> [https://perma.cc/KS5M-725W] (discussing how difficult it is to make a prima facie case for employment discrimination and the increasing rates with which such cases are being dismissed by federal judges).

⁴² BERNSTEIN, *supra* note †, at 12.

⁴³ *Id.* at 72.

⁴⁴ *See id.* at 210.

⁴⁵ 684 F.3d 950, 956 (10th Cir. 2012).

⁴⁶ No. 92 C 5987, 1994 WL 673061, at *3 (N.D. Ill. Nov. 28, 1994), *aff’d*, 78 F.3d 1164, 1165, 1168 (7th Cir. 1996), *abrogated on other grounds by* Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 106 (2002).

⁴⁷ *Galloway*, 78 F.3d at 1165.

“Cunt,” “bitch,” “lesbo”: all are but a smattering of the vile verbal assaults the plaintiff in this gender discrimination case, Lori Franchina, a former lieutenant firefighter, was regularly subjected to by members of the Providence Fire Department She was also spit on, shoved, and—in one particularly horrifying incident—had the blood and brain matter of a suicide-attempt victim flung at her by a member of her own team.⁴⁸

Are these the types of facts required to take the injury from *de minimis* to actionable in the estimation of some federal judges? What message does this send to employees and their employers? What message does this send to society at large about what federal judges think it takes to allow a federal lawsuit to be decided by a jury?

The country’s current president, Donald Trump, admitted that he could “do anything” to women, including “grab them by the pussy” when women had to interact with him because of their jobs.⁴⁹ He allegedly did worse than that.⁵⁰ Many women put up with his abuse and remained silent. Why? Perhaps because they thought that judges may perceive his conduct as “boorish, infantile, and unprofessional,” but not a sufficient “barrage of opprobrious” conduct.⁵¹ How much injury must women tolerate? This boorish, infantile, unprofessional, and abusive president targeted U.S. Representatives Ilhan Omar, Alexandria Ocasio-Cortez, Ayanna Pressley, and Rashida Tlaib, four women of color, for doing *the job* their constituents elected them to do.⁵² And what about all the sexist attacks he made against women, especially former Senator and U.S. Secretary of State Hillary Clinton, during the 2016 presidential race?⁵³ These real life examples from our current president demonstrate the sheer abuse some women endure as we pursue professional goals.

⁴⁸ 881 F.3d 32, 37 (1st Cir. 2018).

⁴⁹ *US Election: Full Transcript of Donald Trump’s Obscene Videotape*, BBC NEWS (Oct. 9, 2016), <https://www.bbc.com/news/election-us-2016-37595321> [<https://perma.cc/R7BL-CFTU>].

⁵⁰ See, e.g., Chris Sommerfeldt, *Talk Show Host E. Jean Carroll Says Trump Raped Her in the 1990s*, L.A. TIMES (June 21, 2019, 2:06 PM), <https://www.latimes.com/nation/nationnow/la-na-e-jean-carroll-accusation-trump-manhattan-20190621-story.html> [<https://perma.cc/KD56-P2QF>] (“A veteran New York lifestyle journalist in a first-person essay published Friday says Donald Trump raped her . . .”).

⁵¹ See *supra* note 45 and accompanying text.

⁵² See Nisha Chittal, *Trump’s Latest Tweets Are About Silencing Women of Color in Congress*, VOX (July 15, 2019, 2:15 PM), <https://www.vox.com/policy-and-politics/2019/4/8/18272072/ilhan-omar-rashida-tlaib-alexandria-ocasio-cortez-racism-sexism> [<https://perma.cc/E8M6-V3KX>].

⁵³ Mel Robbins, *Hillary Clinton Lost Because of Sexism*, CNN (May 3, 2017, 10:03 AM), <https://www.cnn.com/2017/05/03/opinions/hillary-clinton-interview-sexism-robbins/index.html> [<https://perma.cc/JS44-NTZW>].

CONCLUSION

I respectfully request that federal judges accept responsibility for the failure to develop the common law to liberate women—and even more so, women of color—from oppression at work.⁵⁴ Through their decisions, some federal judges have sent the message that women should accept injuries to our bodies and dignity as the price for engaging in employment, similar to the loss of negative liberty caused by marriage, as described in *The Common Law Inside the Female Body*. However, we will not go back. We want federal judges to move forward with us.⁵⁵

⁵⁴ Women of color have female bodies and nonwhite bodies. We are subjected to discrimination because we are women, because we are of color, and because we are women of color. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139 (1989); *Open Letters to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177 (1991). Some women also experience and define “feminism” in a different way because we are women of color. See Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71, 71 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (“[W]omen of color—African American women, Latinas, Asian American women, Native women—have created feminism in their own image, a feminism of the real world largely obscured in academic feminism.”).

⁵⁵ In a prior article, I stated:

When we as a society, including judges, come to a place where we acknowledge that employers (acting through individuals) sometimes abuse, discriminate, and harass employees for unlawful reasons and that such actions should result in civil punishment, maybe more individuals will stop violating discrimination and harassment laws in American workplaces. The hope is that more federal judges will try to see cases from the perspective of employees and allow plaintiffs the opportunity to proceed to trial before juries.

Reyes, *Professional Women Silenced by Men-Made Norms*, *supra* note 27, at 963–64 (citations omitted).