

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

## IN SEARCH OF THE COMMON LAW INSIDE THE BLACK FEMALE BODY

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### INTRODUCTION

Mississippi and Louisiana plantation master Haller Nutt was a shrewd manager of his acquired property. The owner of over one hundred enslaved persons by 1843,<sup>1</sup> Nutt was meticulous in his management of their health through various medical directives that he created, compiled, and issued to his overseers. One such tome, “Directions to in Treatment of the Sick,” instructed overseers on how to treat various ailments the enslaved suffered, including those related to enslaved women’s reproductive health.<sup>2</sup> Nutt instructed:

If a woman miscarries, which should never be the case in a well organized plantation, they should be treated as one that had given birth to a mature child, but allowed a longer time to stay in the house – kept longer in bed and nursed more carefully. – When women miscarry there is something wrong – she has

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<sup>1</sup> *1843 List of Negroes on Araby Plantation*, in RECORDS OF SOUTHERN ANTEBELLUM PLANTATIONS, *microformed on ser. F*, pt. I, reel 1, no. 00801, 204–05 (Kenneth Stamp ed., Univ. Publ’ns of Am. 1986).

<sup>2</sup> *Directions to in Treatment of the Sick*, in RECORDS OF SOUTHERN ANTEBELLUM PLANTATIONS, *microformed on ser. F*, pt. I, reel 1, no. 00792, 195 (Kenneth Stamp ed., Univ. Publ’ns of Am. 1986).

been badly managed – worked improperly – or she has been to blame herself and should be seriously punished for it when she gets well.

Women should be carefully attended to – and such as are in the family way should avoid ploughing– and such heavy work as fit only for men – women in [sic]family way are generally more free from disease than others, and when they are sick require particular attention – and all that is generally necessary is to keep their bowels open with castor oil – and sometimes require bleeding, which is shown by their pulse.

When women complain of too much bleeding, you must attend to them – the regular and healthy courses [menses] last about one week – Enquire how long it has continued on her . . .<sup>3</sup>

The women who were the subject of Nutt’s prescribed care were his property. They were valuable for both their physical and reproductive labor, the latter more valuable as indicated by his admonition that enslaved women avoid plowing and other labor-intensive “men’s work” when they were “in the family way.” Nutt’s directives pertain directly to “female sexual and reproductive anatomy as it relates to what individuals experience, focusing on liberties and prerogatives recognized by the law”<sup>4</sup>—the very definition of autonomy that is the subject of Professor Anita Bernstein’s impressive and expansive book, *The Common Law Inside the Female Body*.<sup>5</sup>

Bernstein is aware of the legacy of slavery in this country, but her present account does not consider the different ways in which the common law historically resided (and continues to reside) in the Black female body. In slavery, the Black female body had no liberty or prerogatives recognized by the law. Bernstein writes:

Overall I find myself struck more by the differences, the disanalogy as it were, between oppression of persons brought to the American continent in chains from Africa and their descendants, on one hand, and oppression of women in the United States on the other, than the similarities. Unjust deprivations of fundamental rights—to vote, sue, own property, enter into contracts, and choose one’s employer and employment—certainly did connect otherwise different antebellum experiences, but this book has enough to report and assess without turning the enormity of slavery into a collateral topic.<sup>6</sup>

Bernstein goes on to briefly explore, in about two and a half pages, some “parallels between slavery and [the doctrine of] coverture as they relate

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<sup>3</sup> *Id.*

<sup>4</sup> ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 22 (2019).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 25.

to the common law inside the female body.”<sup>7</sup> She makes clear that her work will grapple almost exclusively with the contradiction of coverture and the concept of “condoned self-regard,” the ability to put oneself first, as a foundational tenet of common law.<sup>8</sup> A key problem with this approach, however, is that enslaved persons were not genderless. Populations of enslaved women resided in the United States under the oppression of brutal slave regimes. Enslaved women, Black women, were deprived of the fundamental right to possess themselves because they were the property of slave mistresses and masters. Perhaps most importantly, the doctrine of coverture (espoused by William Blackstone and interpreted and expanded by judges)<sup>9</sup> was part of a larger common law paradigm for family governance of which the plantation was necessarily a part.

#### I. THE CONTRADICTION OF ENSLAVEMENT AND CONDONED SELF-REGARD

Sir William Blackstone, Bernstein’s appointed spokesman for the common law in *The Common Law Inside the Female Body*,<sup>10</sup> posited the existence of three overarching categories of private relationships: master and servant; husband and wife; and parent and child (inclusive of guardian and ward).<sup>11</sup> In his chapter on the relationship between master and servant, Blackstone explained that a slave becomes free the moment he arrives in England with the protections of the law, except when a master has already acquired the slave by contract.<sup>12</sup>

Blackstone’s descriptions of master and servant make any condoned self-regard an enslaved person possessed subservient to her master’s by virtue of the “contract” between them. Although Blackstone’s language generated enough ambiguity about the nature of slavery and freedom to support litigation in English and colonial courts, judges would not stop the institution of slavery, even as Blackstone’s words arguably incubated the seeds of abolitionism to grow.<sup>13</sup> Capitalism, it seems, was the organizing

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<sup>7</sup> *Id.* at 25–27.

<sup>8</sup> *Id.* at 8, 21, 27.

<sup>9</sup> *Id.* at 19.

<sup>10</sup> *Id.* at 81.

<sup>11</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 272 (Wilfrid Prest ed., Oxford Univ. Press 2016).

<sup>12</sup> *Id.* at 273 (“Yet, with regard to any right which the master [] may have acquired, by contract or the like, to the perpetual service of John or Thomas, this will remain exactly in the same state as before . . .”).

<sup>13</sup> See, e.g., William M. Wiecek, Somerset: *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 87–88 (1974) (arguing that the Court’s decision in *Somerset v. Stewart*, which questioned the legality of slavery in England and its colonies, highlights the tension between the common law of slavery and the promise of liberty).

structure for the operation of the common law, a force that devoured England's abhorrence of slavery at home and in its colonies. A common law of slavery, judicially made and socially condoned—law common to the inhabitants of what would become the United States and cobbled together by custom and judges—did evolve to protect an economy dependent on the physical and reproductive labor of the African enslaved.<sup>14</sup>

Bernstein's focus on individualist ideals makes condoned self-regard the centerpiece for how she understands the common law in the female body. Individualism historically links to capitalist principles. As law and economics scholar Svetozar Pejovich argues in *Capitalism and the Rule of Law: The Case for Common Law*, elevating the individual above the group (for what else is condoned self-regard?) encourages the individual to take responsibility for themselves, and to act in their own interests with autonomy.<sup>15</sup> This "culture of individualism" is the lynchpin of a free market economy.<sup>16</sup> Capitalism "require[s] a set of formal institutions strong enough to secure individual liberties, enforce private property rights, create incentives to reduce the transaction costs of exchange and maintain competitive markets."<sup>17</sup> The common law, as a part of the constellation of formal institutions and rules that maintain the culture of individualism, protects "individual freedom, free exchange, and private property rights."<sup>18</sup> The common law is effective because it responds to changing economic conditions.<sup>19</sup> Capitalism materializes in the common law of slavery—law that was responsive to the labor needs of an imperialist nation. "Fellow-feeling,"<sup>20</sup> a way to understand another person's harm, an understanding integral to Bernstein's operation of the common law, cannot redeem it. Capitalism wrapped its common law arms around slave masters' and mistresses' condoned self-regard. Leaving the Black female body vulnerable, capitalism created for them a property interest in her person.

## II. BLACK WOMEN AND THE ENDLESS QUEST FOR NEGATIVE LIBERTY

Bernstein's understanding of the common law "inside the female body" includes the concept of negative liberty: "a right to refuse and reject"

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<sup>14</sup> William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CARDOZO L. REV.* 1711, 1776–80 (1996).

<sup>15</sup> Svetozar Pejovich, *Capitalism and the Rule of Law: The Case for Common Law*, XV *ENTREPRENEURIAL ECON.* 7, 8 (2008), [https://www.udg.edu.me/post/files/download/1279811417\\_9536.pdf#page=7](https://www.udg.edu.me/post/files/download/1279811417_9536.pdf#page=7) [<https://perma.cc/BB35-Q4WP>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.*

<sup>20</sup> BERNSTEIN, *supra* note 4 at 34.

unwanted intrusions.<sup>21</sup> She draws from philosopher John Locke's theories on how a person acquires property ownership, namely by combining labor with "an object" to make it his own.<sup>22</sup> Bernstein goes on to explain that property interests reside inside the female body, absent external exertions, in its reproductive organs and their abilities.<sup>23</sup> She uses this theory to support her claims that female and male personhood are equal.<sup>24</sup> In her words, "gender hierarchy is now external to the common law in the United States and so, in a legal system that treats women the same as men at a formal level, a person with a female body holds those rights to negative liberty that the common law furnishes to everyone."<sup>25</sup> However, enslaved women did not enjoy property rights inside of their female bodies. They did not have the legal authority to exclude slave masters' unwanted intrusions inside their person. Slave owners contributed their sperm to fertilize Black women's eggs and used Black women's labor to create a property interest in her children—a textbook application of Locke's theories on property. For this reason, Bernstein's assertion that Lockean property ownership theory is consistent with the premise that adult women are persons not subservient to men is complicated by the lived experiences of enslaved women. Gender hierarchy may be external to the common law, but patriarchy, white supremacy, capitalism, and imperialism are not.

With negative liberty comes a list of what Bernstein calls "Do Not Wants."<sup>26</sup> These negative liberties are: "Physical Trauma at the Hands of Another"<sup>27</sup>; "Invasions of the Interests We Think We Have in Land"<sup>28</sup>; "Confinement"<sup>29</sup>; "Encounters That We Perceive as Hurtful to Our Dignity or Tranquility"<sup>30</sup>; "Losses or Takings of Chattels"<sup>31</sup>; "Paying Money for Something That Does Not Please Us"<sup>32</sup>; "Being Told to Do Something in Furtherance of an Agenda We Don't Share"<sup>33</sup>; and "marital rape."<sup>34</sup> Women's

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<sup>21</sup> *Id.* at 22.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 23.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 33–55, 75–112.

<sup>27</sup> *Id.* at 36.

<sup>28</sup> *Id.* at 39.

<sup>29</sup> *Id.* at 42.

<sup>30</sup> *Id.* at 45.

<sup>31</sup> *Id.* at 47.

<sup>32</sup> *Id.* at 50.

<sup>33</sup> *Id.* at 52.

<sup>34</sup> *Id.* at 87.

right to say what they “Do Not Want” is nullified by voluntariness<sup>35</sup>; “consent”<sup>36</sup>; “undertaking”<sup>37</sup>; punishment for crimes<sup>38</sup>; and nominal injuries.<sup>39</sup> Each of these actions and abstentions are racialized and gendered in the common law.

Black women’s exercise of negative liberty is ever adapting to the evolving historical ripples caused by slavery and Jim Crow. Ask Sandra Bland if the violence she suffered by a police officer after he ordered her to exit her personal vehicle during a routine traffic stop was physical trauma.<sup>40</sup> Ask her if her response when the officer demanded she put down her phone—“I’m not on the phone. I have a right to record. This is my property”—entitled her to condoned self-regard as she asserted her property rights.<sup>41</sup> Ask Ida B. Wells if her removal from a public rail car in 1884 for daring to sit in the ladies car was an affront to her dignity and tranquility.<sup>42</sup> Ask the members of the Black women’s book club “Sistahs on the Reading Edge,” all of them removed from the Napa Valley Wine Train in 2015 for disturbing White passengers, the same.<sup>43</sup> Ask Ruby Bridges if her consent to integrate her New Orleans elementary school at six years old gave her White classmates and their parents permission to spit on her, throw things at her, and otherwise inflict her with harm.<sup>44</sup> Ask any Black woman whether they have been subject to the list of “Do Not Wants,” and the answer certainly will be yes. A nuanced picture of the obstacles to Black women’s exercise of negative liberties must take into account that their very bodies—encoded by race, class, gender, and sexuality—are often taken as evidence of consent to the “Do Not Wants,” as volunteering for abuse, and deserving criminalization. Black women’s injuries are not nominal; Bernstein would agree. Accordingly, the function, role, and value of the common law inside the female body may depend on the relationship of that body to white supremacy, capitalism, and imperialism in social and historical context.

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<sup>35</sup> *Id.* at 57.

<sup>36</sup> *Id.* at 58.

<sup>37</sup> *Id.* at 61.

<sup>38</sup> *Id.* at 66.

<sup>39</sup> *Id.* at 71.

<sup>40</sup> Paul J. Weber & Clarice Silber, *Sandra Bland’s Own Video of 2015 Texas Traffic Stop Surfaces*, ASSOC. PRESS (May 7, 2019), <https://www.apnews.com/1a92859cc6d54b0bb23dc1b6a6e30e36> [<https://perma.cc/N8Q6-R9G3>].

<sup>41</sup> *Id.*

<sup>42</sup> *Chesapeake, Ohio & Sw. R.R. Co. v. Wells*, 85 Tenn. 613, 613 (1887).

<sup>43</sup> Complaint at ¶ 32–47, *Johnson v. Napa Valley Wine Train, Inc.*, 2015 WL 5768562 (N.D. Cal. Oct. 1, 2015) (No. 15-cv-04515).

<sup>44</sup> See generally RUBY BRIDGES, *THROUGH MY EYES* (1999).

### III. EQUAL RIGHTS UNDER THE LAW, BUT NOT IN THE BLACK FEMALE BODY

In *The Common Law Inside the Female Body*, Bernstein argues that formal equality for women began with racial equality for African Americans.<sup>45</sup> Yet the implicit timeline is confusing. The Author fixes the beginning of formal equality for women in the mid-nineteenth century push for married women to own and control their property—for such control is the centerpiece of legal personhood in the common law.<sup>46</sup> While married women’s ability to own property did give them increased wealth and autonomy,<sup>47</sup> much of this wealth and autonomy came at the expense of enslaved women. As a preliminary matter, marriage in the nineteenth century was not a choice or right for all, but a privilege primarily reserved for White people.<sup>48</sup> Slave marriages were not legally recognized, which left enslaved women, men, and children subject to separation or worse, depending on the economic needs of their masters and mistresses.<sup>49</sup> Slavery was alive and well in the antebellum Americas. As historian Stephanie E. Jones-Rogers argues in *They Were Her Property: White Women as Slave Owners in the American South*, White women were active participants in slavery and benefitted from it financially, as they were more likely to inherit enslaved persons than real property.<sup>50</sup> For many White, wealthy women, the centerpiece of their legal identity under the common law was the autonomy they received from owning and controlling Black female bodies. In the post-Emancipation and Jim Crow eras, in the Civil Rights Era, and in the age of #MeToo, the ownership rights to what lies inside the Black female body remain contested.

### CONCLUSION

As scholars engage Professor Bernstein and her perspective on the common law, they must continue to wrestle with its antithetical approaches to slavery and freedom—especially when the common law “freedom” is the

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<sup>45</sup> BERNSTEIN, *supra* note 4, at 89 (citing Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 CARDOZO WOMEN’S L.J. 501, 520 (2004)).

<sup>46</sup> BERNSTEIN, *supra* note 4, at 96–98.

<sup>47</sup> *Id.* at 98.

<sup>48</sup> Teri A. McMurtry-Chubb, “*Burn This Bitch Down!*”: *Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*, 17 NEV. L.J. 619, 622–24 (2017); Teri A. McMurtry-Chubb, *Loving v. Virginia*, 388 U.S. 1 (1967), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 119, 119–36 (Kathryn M. Stanchi et al. eds., 2016).

<sup>49</sup> McMurtry-Chubb, “*Burn This Bitch Down*,” *supra* note 48. See generally TERA W. HUNTER, *BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY* (2017).

<sup>50</sup> STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* xi–xvii (2019). The focus of Dr. Jones-Rogers’ study is on married women who owned slaves. *Id.*

right to put oneself first. If, as Bernstein argues, the common law inside the female body encompasses “freedom *from* much more than freedom *to*,”<sup>51</sup> then a change in perspective is warranted for the common law inside an enslaved Black female body held as property, raped, and bred at the whim of slave masters and mistresses, with no control over the children she birthed. This history invites inquiry into what common law can reside in the modern Black female body for which the promise of formal equality remains elusive. The search for the common law inside the Black female body begins a search for a fuller, deeper, richer understanding of the common law as it affects us all.

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<sup>51</sup> BERNSTEIN, *supra* note 4, at 7 (emphasis in original).