

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

## NEGATIVE LIBERTY MEETS POSITIVE SOCIAL CHANGE

Anita Bernstein\*

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### INTRODUCTION

What an honor to be read by the authors who came together here. Their achievements are profuse and varied, but one trait they all share is commitment to social progress. Allotting them just one writing apiece in the footnote that's attached to this sentence understates their achievements, but even a glance this fleeting suggests the grandeur of what they have written to make the world better and what they will continue to write.<sup>1</sup> With fullest

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\* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. Thanks to Ben Black for research assistance and to the Symposium participants for their insights and willingness to strengthen my ideas by joining them with their expertise.

<sup>1</sup> JOANNA L. GROSSMAN, NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE (2016); Margaret Chon, *Remembering and Repairing: The Error Before Us, in Our Presence*, 8 SEATTLE J. FOR SOC. JUST. 643 (2010); Cyra Akila Choudhury, *In the Shadow of Gaslight: Reflections on Identity, Diversity, and the Distribution of Power in the Academy*, 20 CUNY L. REV. 467 (2017); David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509 (2010); Teri A. McMurtry-Chubb, *The Chronicle of the Disappeared White Law Professors: The Real Meaning of Diversity and Affirmative Action in Legal Education and an Exercise in Critical Race Theory*, in 2 CONTROVERSIES IN AFFIRMATIVE ACTION: CONTEMPORARY DEBATES (James A. Beckman ed., 2014); Maritza I. Reyes,

esteem for the eminences invited to this gathering, I pause to single out Bridget Crawford, leader of the Symposium, and say thanks for this most recent of her many inspired works.<sup>2</sup>

Reading the Essays, I kept nodding in vigorous agreement with the ideas in them. Because what the authors brought to this Symposium said so much and so well, I want to use my space not for rebuttal or a defense of what I wrote in the book but to take one big topic in it a step further. Articulated overtly in some of the Essays and (at least in the eyes of this reader) present in them all, this reaction asks: *Is Bernstein's thesis really progressive?*<sup>3</sup> Up front in the book, I asserted that it is.<sup>4</sup> I still think so, but the political commitments I find in this Symposium offer an occasion to expand on this belief of mine, and so I shall consider how my thesis can advance racial progress.

*The Common Law Inside the Female Body* had occasions to do so. In my view, any American book-length study of status-detriment necessarily deals with race, no matter its author's intention.<sup>5</sup> My focus on the common law category of coverture—legal disabilities that befell women when they married—made an explicit connection to the historically overlapping (and more profound) oppression of slavery. But while I do not think I neglected race, I did not make a race-related point I now want to broach: Negative liberty matters with respect to women of color in particular.

Honoring negative liberty makes lives better for all persons, but especially for those who are subordinated. Its force and strength against group-based oppression might be obscured by the priorities that stem from material disadvantage. Women in general, and women of color in particular,

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*Opening Borders: African Americans and Latinos Through the Lens of Immigration*, 17 HARV. LATINO L. REV. 1 (2014).

<sup>2</sup> Allotting Professor Crawford just one project, I would mention the Feminist Judgment volumes that she has edited and those that continue. FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

<sup>3</sup> Margaret Chon, *Intellectual Property Infringement and the Right to Say No*, 114 NW. U. L. REV. ONLINE 169, 170–72 (2019); Cyra Akila Choudhury, *The Common Law as a Terrain of Feminist Struggle*, 114 NW. U. L. REV. ONLINE 160, 163, 165, 167–68 (2019); David S. Cohen, *The Promise and Peril of a Common Law Right to Abortion*, 114 NW. U. L. REV. ONLINE 140, 145–48 (2019); Joanna L. Grossman, *Women Are (Allegedly) People, Too*, 114 NW. U. L. REV. ONLINE 149, 157–59 (2019); Teri McMurtry-Chubb, *In Search of the Common Law Inside the Black Female Body*, 114 NW. U. L. REV. ONLINE 187, 188–89 (2019); Maritza I. Reyes, *The Female Body in the Workplace: Judges and the Common Law*, 114 NW. U. L. REV. ONLINE 177, 177–79 (2019).

<sup>4</sup> ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 1 (2019).

<sup>5</sup> *Id.* at 25.

are poorer than men.<sup>6</sup> Someone who needs money for food and rent and the like might be or feel too busy to reflect on intrusions and invasions. Not for nothing is the incoherent American school of thought known as libertarianism,<sup>7</sup> whose adherents resent oppressions like being forced to wear a helmet when they ride a motorcycle or not being permitted to buy a bag of marijuana without risking arrest, so heavily male and white in its membership: This ideology doesn't bloom without time and money on one's hands.

Negative liberty belongs to us all, not just those who talk a lot about it. Persons at multiple axes of oppression and those at only one are united in the freedom it gives us. What Chapter One of the book, titled "Saying No to What We Don't Want," examines is what we are freed from. Let's take a return journey through the seven experiences that *The Common Law Inside the Female Body* claimed are conditions that a person does not want. Here, differing from my path in the book, when I refer to "a person" who holds negative liberty, I will keep in mind and discuss a woman of color.

#### DO NOT WANT #1: PHYSICAL TRAUMA AT THE HANDS OF ANOTHER

Gathering materials for a seminar called *A Feminist Revisit to the First-Year Curriculum* that I created in the mid-1990s, I set out to educate myself on doctrinal topics related to feminism or gender that could be, but typically aren't, included in the first year of J.D. education in the United States.<sup>8</sup> I used decisional law and journal articles as teaching materials. In those days the literature on rape law, with a few exceptions, was unimpressive. But another candidate for my criminal law lesson plan, battered woman syndrome, had developed well: Lenore Walker, Evan Stark, Elizabeth Schneider, and other leaders who are still active in the field today had previously written major works.<sup>9</sup> Walker, the scholar who named the syndrome, commented on a race problem within the syndrome back in 1987.

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<sup>6</sup> Nancy E. Shurtz, *Tax, Class, Women, and Elder Care*, 43 SEATTLE U. L. REV. 223, 232 (2019) (noting poverty of all women compared to men); *id.* at 261 (noting higher poverty rate of African American and Hispanic women); *see also* Ariane Hegewisch & Heidi Hartmann, *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity*, INST. FOR WOMEN'S POL'Y RES. (Mar. 7, 2019), <https://iwpr.org/publications/gender-wage-gap-2018> [<https://perma.cc/F5WV-W74Q>]

<sup>7</sup> A meme website retells an old joke in the form of a cartoon drawing of a son and mother. Son: "Mom, when I grow up I'm gonna be a libertarian." Mother: "Well son, which is it? You can't do BOTH!" *See* MEME, <https://me.me/i/mom-wheni-grow-up-im-gonna-be-a-libertarian-well-c00be4f915f8491aafae53b898014e5d> [<https://perma.cc/J4FG-6TCY>].

<sup>8</sup> Its creation and developments occupy Anita Bernstein, *A Feminist Revisit to the First-Year Curriculum*, 46 J. LEGAL EDUC. 217 (1996).

<sup>9</sup> Writings available in 1993 included LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (Harper Perennial 1990); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Evan Stark, *Framing and Reframing Battered Women*,

One study that Walker noted in her book called *Terrifying Love* found that black women were about twice as likely as white women to be convicted of killing their abusive husbands.<sup>10</sup> Walker speculated that the route to acquittal for this crime demands that a female killer not seem “angry,” and “the ‘angry Black woman’ is a common stereotype in many white minds.”<sup>11</sup> The critical race scholar Linda Ammons agreed.<sup>12</sup> More than stereotyping has blocked justice and redress here, however. Activists starting in the 1980s chose to present domestic violence as universal, something that could happen to any woman regardless of her class or race.<sup>13</sup> That posture served funding and public acceptance well. Film brought forth the white victims Farrah Fawcett in her burning bed<sup>14</sup> and Julia Roberts in *Sleeping with the Enemy*.<sup>15</sup> In 1995, away from fiction, a white woman became an exceptionally famous domestic violence victim when her African American ex-husband was tried for the crime of killing her.<sup>16</sup>

The above-noted aphorism about domestic violence knowing no race or creed or class notwithstanding, Kimberlé Crenshaw has suggested it is likely that African American women are battered more often than white women.<sup>17</sup> Hard to know for sure, because white women in the United States are wealthier than African American women,<sup>18</sup> and poverty brings private violence into public view: if a victim of abuse has enough wealth not to need pro bono legal advice or accommodation at a shelter, her plight might escape official detection. For all we know large numbers of rich white women could be getting beaten at home out of sight.<sup>19</sup> Fatal battering is hard to conceal,

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in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 271 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

<sup>10</sup> WALKER, *supra* note 9, at 206.

<sup>11</sup> *Id.*

<sup>12</sup> Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003 (1995) (discussing stereotypes about black women).

<sup>13</sup> See Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 88 (2008) (describing this strategy as “[p]utting a white face on the battered woman problem”). In this discussion I use “domestic violence” and “intimate partner violence” interchangeably. The former term is the older of the two.

<sup>14</sup> THE BURNING BED (Tisch/Avnet Productions Inc. 1984).

<sup>15</sup> SLEEPING WITH THE ENEMY (Twentieth Century Fox 1991).

<sup>16</sup> Goodmark, *supra* note 13, at 88 n.61 (discussing media attention to O.J. Simpson on trial for “killing his beautiful, white ex-wife, Nicole Brown”).

<sup>17</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1259, 1259 n.56 (1991) (referencing evidence that “poor or minority communities” suffer disproportionately from domestic violence and suggesting that “assertions that the problem is the same across race and class” lack a foundation in “actual knowledge”).

<sup>18</sup> Shurtz, *supra* note 6, at 261.

<sup>19</sup> Anna Kastner, Comment, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1054 (2015).

however, and according to a 2014 review of death statistics, black women die as a result of intimate partner violence at almost three times the rate of white women: they are the deceased in 22% of intimate partner violence homicides, while numbering only 8% of the population.<sup>20</sup> Sociologist Beth Richie, a scholar of the intersection of race and battering, agrees that black women are “disproportionately represented” among victims of both fatal and nonfatal intimate partner violence.<sup>21</sup>

Related to the inaccurate belief that African American women lack the characteristics of a real victim of aggression—a misconception that impedes redress for and protection from the intimate partner violence they experience—is the notion that they do not feel pain keenly. Contemporary research that looks into this belief has not limited its inquiry to women.<sup>22</sup> One worrisome study, published just a couple of years ago, investigated beliefs about physical pain as felt by black people and white people. Respondents expressed significant agreement with (untrue) assertions like “Black people’s blood coagulates more quickly than whites” and “Blacks’ skin is thicker than whites’.”<sup>23</sup> From there, the study found an association between the extent to which respondents agreed with the false assertions and their inclination to dismiss or undervalue descriptions of pain.<sup>24</sup> Most disturbing about this finding, at least to me, was the population studied. Far from ignorant or ill-intentioned in any superficially obvious way, they were medical students and residents at the University of Virginia.

Authors of this study referenced earlier findings about the undertreatment of black people’s pain and the perception among physicians that black people suffer pain less.<sup>25</sup> This data set includes men and children as well as women. To bring “inside the female body” to this discussion before we move to the next Do Not Want, I’ll mention James Marion Sims,

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<sup>20</sup> Feminista Jones, *Why Black Women Struggle More with Domestic Violence*, TIME (Sept. 10, 2014), <https://time.com/3313343/ray-rice-black-women-domestic-violence> [<https://perma.cc/5V86-K97R>].

<sup>21</sup> BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 26–27 (2012).

<sup>22</sup> A news story gathers multiple of such studies. Sandhya Somashekhar, *The Disturbing Reason Some African American Patients May Be Undertreated for Pain*, WASH. POST (Apr. 4, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/04/04/do-blacks-feel-less-pain-than-whites-their-doctors-may-think-so> [<https://perma.cc/NCF5-MV9X>]. See also Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PNAS 4296 (2016).

<sup>23</sup> Hoffman et al., *supra* note 22, at 4298.

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

<sup>25</sup> *Id.* at 4296.

a man praised in 1968 by a Yale Medical School professor as “not only America’s first gynecologist but undoubtedly its most important one.”<sup>26</sup>

Sims is best known today for gynecological surgeries he performed in Alabama on enslaved women. He did his cutting in search of a surgical cure for vesico-vaginal fistula, tears in the vaginal wall caused most often by traumatic childbirth and a condition that frequently leads to incontinence. He used no anesthesia for these operations. At the surgical level he succeeded, and along the way he won credit for the invention of the speculum.<sup>27</sup> When he moved from Alabama (where he had owned slaves) to New York and began operating on white women, Sims used anesthesia.<sup>28</sup>

His two sets of patients led very different lives. The white ones Sims operated on later had an honored maternal status as a socially recognized relationship with the source of their insemination. These white patients also benefited from whatever skill Sims acquired from his early surgical experience.

Young African American women whose bodies taught Sims what he needed to know for his work as a surgeon, by contrast, suffered a racially delineated sequence of harmful physical contact. Fistulas that Sims cut into were just one stop on a brutal journey that started with enslavement and moved to coerced sexual intercourse, pregnancy that these patients could not choose, deliveries of babies that ripped the inside of their bodies, and repeated pelvic surgeries by a self-directed invader who could have lessened their pain with anesthetic technology but chose not to. One violation of their negative liberty led to another. We remember three of these women by names of theirs that Sims wrote in his notes: Anarcha, Betsy, and Lucy.<sup>29</sup>

#### DO NOT WANTS #2 AND #3: INTRUSION INTO POSSESSED SPACE AND CONFINEMENT

Possession and self-possession occupy *The Common Law Inside the Female Body* pervasively. I found close connections between the examples

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<sup>26</sup> Deleso Alford Washington, *Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of “Cultural Competency,”* 72 ALB. L. REV. 961, 972 (2009).

<sup>27</sup> DeNeen L. Brown, *A Surgeon Experimented on Slave Women Without Anesthesia. Now His Statues Are Under Attack.*, WASH. POST (Aug. 29, 2017, 7:00 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/08/29/a-surgeon-experimented-on-slave-women-without-anesthesia-now-his-statues-are-under-attack> [<https://perma.cc/CWY4-4MHL>].

<sup>28</sup> Washington, *supra* note 26, at 997.

<sup>29</sup> *Id.* at 973 (noting the names as Sims had written them). After listening to protests, last year the New York City government took down a statue of Sims that had stood in Central Park since 1934. William Neuman, *City Orders Sims Statue Removed from Central Park*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/nyregion/nyc-sims-statue-central-park-monument.html> [<http://perma.cc/59HZ-QM9Z>].

of rape and abortion, which each took up a separate chapter, and the common law's longstanding preoccupation with more literal geography: land, the home, a boundary that can be surveyed. Like every other issue taken up in this book, geographic land is replete with race.

As with physical pain, I'll relate only a couple of illustrations of this Do Not Want, stated more wordily in the book as "Invasions of the Interests We Think We Have in Land, Especially the Spaces We Possess or Live In" along with the simpler "Confinement."<sup>30</sup> These two separate applications of negative liberty to property complement each other. We simultaneously do not want our possessed space invaded or intruded upon and do not want other people to pen us into space that they decided will be our locus of confinement.

Race intertwines with geography and real property in numerous ways. Unjust distributions of wealth make women of color unjustly poor and this wealth gap compels them to live in more cramped spaces than they could occupy absent racism. Effects of this injustice multiply beyond the household. For example, smaller real property is a diminished asset to share with one's family members and convey to one's heirs. Malign inputs from external sources, including but not limited to redlining by mortgage lenders and the siting of environmental pollutants, have severe consequences for people of color in general and African American women in particular.<sup>31</sup>

For a pointed connection between these Do Not Wants related to geographic space on the one hand and harm to negative liberty that black women experience on the other, consider what local governments call chronic nuisance laws.<sup>32</sup> These statutes force municipal authorities to track complaints about disorderly conduct in rental units and hold landlords responsible for this disorder. Too many calls to the police about behaviors in an apartment and its tenants must be evicted. The author of a student Comment on the issue uses "How Nuisance Laws Perpetuate and Exacerbate the Effects of Domestic Violence for Poor Women and Women of Color" as a section heading.<sup>33</sup> Housing is unjustly precarious for these groups of women for reasons that include disorderly conduct around them that they did not commit. Men of color are more often convicted of crimes than women

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<sup>30</sup> BERNSTEIN, *supra* note 4, at 39, 42.

<sup>31</sup> The historian Keeanga-Yamahtta Taylor has posited a wrong of "predatory inclusion" that has severe consequences. See KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019). Differing in this sense from the older wrong of withholding mortgage money from African American loan applicants based on their race, predatory inclusion is an aggression. *Race for Profit* thus documents a racist violation of negative liberty related to geographic property.

<sup>32</sup> Kastner, *supra* note 19, at 1053.

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

of color,<sup>34</sup> but victims who are women of color are disproportionately impacted, for example, through interferences with housing that derive collaterally from those criminal convictions.<sup>35</sup>

Self-defense honors and supports multiple Do Not Wants. I'll repeat one anecdote told in the book to emphasize geographic space as urgently important to the life of one African American woman. Around the time that the killing of teenage Trayvon Martin drew national attention, another Stand Your Ground controversy occurred in Florida.

Marissa Alexander was in the house of her estranged husband when she received a text message from him that announced a threat to kill her.<sup>36</sup> She testified that she tried to escape but couldn't because the garage door would not open. To defend herself, as she testified without contradiction, she fired a shot near but not at her husband.<sup>37</sup> No prosecutor claimed that Alexander intended to inflict death or a serious injury, but she was convicted of aggravated assault and sentenced to twenty years in prison.<sup>38</sup> To numerous observers, including the activist Mariame Kaba (and me), this failure to honor self-defense on the same terms that white men enjoy the privilege exemplifies a larger problem of justice and equality and liberty.<sup>39</sup>

#### DO NOT WANT #4: HARM TO DIGNITY

*The Common Law Inside the Female Body* contended that dignity is simultaneously internally generated and shaped by society. So much could

<sup>34</sup> Charles Lane & Keith Humphreys, *Black Imprisonment Rates Are Down. It's Important to Know Why*, WASH. POST (Apr. 30, 2019, 1:50 PM), <https://www.washingtonpost.com/opinions/2019/04/30/weve-made-remarkable-progress-black-incarceration-now-we-need-know-why> [<https://perma.cc/FX5Y-MTQ8>] (providing data about incarceration rates with reference to gender and race).

<sup>35</sup> Gretchen Arnold & Megan Slusser, *Silencing Women's Voices: Nuisance Property Laws and Battered Women*, 40 L. & SOC. INQUIRY 1, 4–5 (2015).

<sup>36</sup> Sien Tienabeso, *Florida Woman Imprisoned for 'Warning Shot' Released from Prison Before Thanksgiving*, ABC News (Nov. 28, 2018, 11:13 AM), <https://abcnews.go.com/US/florida-woman-imprisoned-warning-shot-released-prison-thanksgiving/story?id=21042225> [<https://perma.cc/4KQ3-T5XT>]. For more information on this case and its aftermath, see MARISSA ALEXANDER JUSTICE PROJECT, <https://marissaalexander.org> [<https://perma.cc/DY4Z-5A7X>].

<sup>37</sup> Tienabeso, *supra* note 36.

<sup>38</sup> *Id.* For my read of this news story, see Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 691–92 (2013).

<sup>39</sup> See Mariame Kaba, *Black Women Punished for Self-Defense Must Be Freed from their Cages*, GUARDIAN (Jan. 3, 2019, 6:00 PM), <https://www.theguardian.com/commentisfree/2019/jan/03/cyntoia-brown-marissa-alexander-black-women-self-defense-prison> [<https://perma.cc/7LK8-ZEJM>]; see also Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25, 25 (2015) (relating Alexander's experience to "an exclusionary politics of protection whereby black women were not entitled to the law's protection, though they could not escape its punishment"); RICHIE, *supra* note 21, at 12–14 (analyzing a failure to honor self-defense as undertaken by a group of queer black teen women in New York).



be said about the connections among dignity, race, and gender. My couple of pages about the Do Not Want of “Encounters That We Perceive as Hurtful to Our Dignity or Tranquility”<sup>40</sup> was somewhat difficult to cabin: one might go on for pages. I tried to confine this element of negative liberty to the perception of an indignity rather than endeavor to identify (or, worse, litigate) specifics about what does or does not constitute an affront.

One major intersection of negative liberty and dignity that the law recognizes is sexual harassment in the workplace. The hostile-environment subdivision of sexual harassment holds particular importance. Here I would draw attention to the leadership by women of color on this front—a divergence from the path I took in the book, which barely mentions sexual harassment. Only six entries in the index and none of these references go into detail. The small handful of writings on the subject I published twenty-plus years ago said my piece,<sup>41</sup> or so I’ve thought.

Still true enough, but I would like to return to an old footnote from the article that advocated a respectful person standard for hostile-environment sexual harassment claims: “The switch from reason to respect implicitly acknowledges numerous African-American women whose workplace experiences built such a great share of hostile environment law. . . . Disrespect, not unreason, drove these plaintiffs to the courts.”<sup>42</sup> *Treating Sexual Harassment with Respect* also cited *Rogers v. EEOC*, a 1971 decision from the Fifth Circuit in which a worker named Josephine Chavez protested that her employer, an optometry practice, discriminated against her by segregating patients by ethnicity.<sup>43</sup>

A bold claim at the time, and the court accepted it. Judge Irving Goldberg found a “distinct possibility that an employer’s patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees.”<sup>44</sup> He continued with a prescient observation about the difficulty of using positive law against subordination, adding: “[a]s patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will

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<sup>40</sup> BERNSTEIN, *supra* note 4, at 45.

<sup>41</sup> Anita Bernstein, *Precaution and Respect*, in *PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE* 148 (Carolyn Raffensperger & Joel Tickner eds., 1999); Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 *CORNELL L. REV.* 1231 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *HARV. L. REV.* 445 (1997) [hereinafter Bernstein, *Treating Sexual Harassment*].

<sup>42</sup> Bernstein, *Treating Sexual Harassment*, *supra* note 41, at 454–55 n.49.

<sup>43</sup> 454 F.2d 234, 236 (5th Cir. 1971).

<sup>44</sup> *Id.* at 239.

undoubtedly devise more sophisticated methods to perpetuate discrimination among employees.”<sup>45</sup>

Josephine Chavez thought of herself as what would now be called Latina.<sup>46</sup> Mechelle Vinson, the plaintiff in 1986 who won the big nine-zip United States Supreme Court victory that said sexual harassment violates Title VII of the Civil Rights Act of 1964,<sup>47</sup> was an African American civil rights pioneer (and still is: she spoke out last year about Brett Kavanaugh<sup>48</sup>). Marguerite Hicks, Helen Brooms, and Paulette Barnes, the African American women in the cases I put in the *Treating Sexual Harassment* footnote, brought more accounts of hostile work environments to case law.<sup>49</sup> While credit is amply due to the white scholar-activists Catharine MacKinnon and Lin Farley for the doctrine that sexual harassment at work is sex discrimination,<sup>50</sup> women of color were equally necessary to bringing about this result. These plaintiffs knew the indignity of their workplace experience for what it really was. They melded what happened to them with strategies for redress; they bore and resisted the adversities that litigation imposes even on courtroom winners. They were witnesses, negotiators, and advocates for protests of a phenomenon that in *Treating Sexual Harassment* I characterized as a failure of respect.

In my home city, the death of a great African American artist last year prompted the Metropolitan Transportation Authority to put up signs saying “Respect” in the Franklin Street and Franklin Avenue subway stations. The MTA got this idea from tribute-minded riders.<sup>51</sup> Women less famous and accomplished than Aretha Franklin, I argued in *The Common Law Inside the Female Body*, also have respect coming to them.

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

<sup>46</sup> *Id.* at 236 (noting that Chavez had characterized her national origin as “Spanish surnamed American,” in contrast to “Caucasian” co-workers).

<sup>47</sup> Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 57 (1986).

<sup>48</sup> Sheila Weller, *Feminist Hero Mechelle Vinson on the Ford-Kavanaugh Hearings*, NEXTTRIBE (Oct. 19, 2018), <https://nexttribe.com/mechelle-vinson> [<https://perma.cc/AW54-THTJ>].

<sup>49</sup> Bernstein, *Treating Sexual Harassment*, *supra* note 41, at 454–55 n.49.

<sup>50</sup> Lin Farley, Opinion, *I Coined the Term ‘Sexual Harassment.’ Corporations Stole It*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html> [<https://perma.cc/6SRV-T28A>]. MacKinnon has emphasized the contributions of African American women to sexual harassment law. See Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 15 (1991).

<sup>51</sup> Ben Yakas, *MTA Adds Aretha Franklin ‘Respect’ Tributes to Franklin Avenue & Franklin Street Subway Stations*, GOTHAMIST (Sept. 4, 2018, 1:45 PM), [https://gothamist.com/2018/09/04/mta\\_aretha\\_franklin\\_respect.php](https://gothamist.com/2018/09/04/mta_aretha_franklin_respect.php) [<https://perma.cc/Q7CB-32M2>].

DO NOT WANTS #5 AND #6: LOSSES OR TAKINGS OF CHATTELS  
AND MONEY

While white women experience wage discrimination, for women of color this discrimination is worse. “In 2018, female full-time, year-round workers made only 82 cents for every dollar earned by men, a gender wage gap of 18 percent,” according to the Institute for Women’s Policy Research (IWPR).<sup>52</sup> This gap continues even after women go on to receive more higher-ed degrees than men.<sup>53</sup> As is common with news stories of this kind, the IWPR noted progress. The gender gap is narrowing—but at an extraordinarily slow pace. The year at which women will achieve pay equity at the current rate of improvement is 2059, the IWPR estimates, and “[f]or women of color, the rate of change is even slower. Hispanic women will have to wait until 2224 and Black women will wait until 2119 for equal pay.”<sup>54</sup>

In contrast to the well-researched problem of gender and race discrimination in the distribution of income received for work, injustice with respect to the chattels that belong to women of color is harder to prove, maybe even to perceive. Yet it must be there. We know about race-based deprivations of, and threats to, moveable property that extend to both women and men. Residential segregation forces women of color disproportionately into housing that holds their possessions less safely: it is easier to steal chattels (and cash) from an unsafe home. A 2006 study found that African Americans are much less likely to own one iconic chattel, an automobile, than other racial groups.<sup>55</sup> The automobile is dropping in popularity,<sup>56</sup> especially among younger people,<sup>57</sup> and probably deserves the condemnation it gets from those who worry about the environment. But having a car is

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<sup>52</sup> *Pay Equity & Discrimination*, INST. FOR WOMEN’S POL’Y RES., <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination> [<https://perma.cc/DXE6-64CW>] (citation omitted). It is tiresomely necessary to keep including “full-time” and “year-round” to fend off a favorite bogus rationalization of the gap—that women work fewer hours than men. Apples to apples here.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citations omitted).

<sup>55</sup> Kathleen Maclay, *Study Explores Metro Car Ownership Patterns, Race, Segregation and Disaster Planning* (Mar. 23, 2006), [https://www.berkeley.edu/news/media/releases/2006/03/23\\_carownership.shtml](https://www.berkeley.edu/news/media/releases/2006/03/23_carownership.shtml) [<https://perma.cc/AU64-PN69>].

<sup>56</sup> Jim Edwards, *Carpocalypse Now: Lyft’s Founders Are Right—We’re in the Endgame for Traditional Car Ownership*, BUS. INSIDER (Mar. 3, 2019, 2:44 AM), <https://www.businessinsider.com/carpocalypse-cars-automobile-sales-data-us-europe-2019-3> [<https://perma.cc/UY98-9S6W>] (reporting worldwide reductions in manufacture, sales, and registration of automobiles).

<sup>57</sup> Mary Wisniewski, *Why Americans, Particularly Millennials, Have Fallen Out of Love with Cars*, CHI. TRIB. (Nov. 12, 2018, 5:00 AM), <https://www.chicagotribune.com/business/ct-biz-young-adults-cars-attitudes-20181106-story.html> [<https://perma.cc/Q5T4-99VG>].

progressive when it helps a poor person flee disaster. It was the extraordinary—and racially impactful—devastation of Hurricane Katrina that spurred research about the automobile-ownership gap.<sup>58</sup>

Intellectual property, though not a chattel, can *faûte de mieux* go here as well. I am thankful for the presence of this field in the Symposium, a feat I didn't manage in the book. American creators of color have generated extraordinary wealth in this category.<sup>59</sup>

The Do Not Want here with respect to race and intellectual property is more complicated than mere enforcement of an owner's monopoly power to exclude. As Ruth Okediji has elaborated in writings grouped around a theme of "traditional knowledge" rooted in indigenous communities around the world, some of which lore has achieved spectacular innovation in public health, static property rights do not suffice to protect this knowledge. Okediji uses the word "protection" to cover a concatenation of safeguards that include the opportunity for these groups to continue using and improving what they learned.<sup>60</sup> Old school ownership with its power to enlist the state in enforcement is not always enough. This point taken, I have a memory about what I just called the mere enforcement of an (African American) owner's monopoly power to exclude.

It dates back fifteen or so years ago to when I lived in Atlanta, a city known for cutting-edge new African American-created art, music in particular. Numerous students at my school had a keen interest in the application of copyright law to this material. Continuing to know "something close 2 nothing," as the song sang,<sup>61</sup> about both the art and the law here, I enjoyed talking copyright with more knowledgeable interlocutors. I'll paraphrase what one of them once said.

This lawyer and I were talking about the status of speeches and writings and church sermons of Martin Luther King, Jr., all of them maximally far from the public domain. Videotapes of famous addresses like "I Have a

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<sup>58</sup> Maclay, *supra* note 55.

<sup>59</sup> See, e.g., Katie Halper, *8 Hit Songs White Singers Ripped Off from Black Musicians*, RAW STORY (Jan. 9, 2015), <https://www.rawstory.com/2015/01/8-hit-songs-white-singers-ripped-off-from-black-musicians> [<https://perma.cc/97UG-JFFS>]; Nadja Sayej, *Black History Month: The Seven Must-See Art Exhibitions*, GUARDIAN (Feb. 4, 2019, 12:13 PM), <https://www.theguardian.com/artanddesign/2019/feb/04/black-history-month-art-exhibitions-martin-luther-king-harlem-perspectives> [<https://perma.cc/H8M4-9EXV>].

<sup>60</sup> Ruth L. Okediji, *A Tiered Approach to Rights in Traditional Knowledge*, 58 WASHBURN L.J. 271, 286–96 (2019).

<sup>61</sup> PRINCE, *Raspberry Beret*, on *AROUND THE WORLD IN A DAY* (Paisley Park Records, Warner Bros., 1985).

Dream” at the Lincoln Memorial are equally unshared. Every unit of intellectual property that can be buttoned in a King copyright is buttoned.<sup>62</sup>

“People try to say Dr. King would have wanted us to hear his words,” said the lawyer (approximately).<sup>63</sup> “Like if he were alive, he’d be against copyright. That’s bullshit. He wanted us to pay to hear his words. Every one of those copyrights, he got himself. It’s not his greedy lazy kids like people say. He did it. His property, his idea, money for his family. He thought all the time about how to support them. Especially if he got killed.” No female body here, and no chattels either: but appropriation is a Do Not Want on point.

#### DO NOT WANT #7: BEING FORCED TO DO WHAT WE DON’T WANT TO DO

If in Chapter Five of *The Common Law Inside the Female Body* I was correct to locate a very strong right to terminate one’s own pregnancy<sup>64</sup>—and also to say that being forced to remain pregnant illustrates being ordered to do something we don’t want to do—then women of color have been especially central to and affected by an important common law liberty.<sup>65</sup> In her article about the notorious Philadelphia abortionist Kermit Gosnell, the late Penny Pether wrote that “Black women and Hispanic women seek abortions at rates in excess of their representation in the community—30% and 25%, respectively,” and that “[B]lack and Hispanic women experience unintended pregnancies at rates of 64% and 54%, respectively.”<sup>66</sup> Other writers report an even bigger gap in abortion rates between women of color

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<sup>62</sup> See Valerie Strauss, *53 Years Later, You Still Have to Pay to Use Martin Luther King Jr.’s Famous ‘I Have a Dream’ Speech*, WASH. POST (Jan. 15, 2017, 12:17 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/15/54-years-later-you-still-have-to-pay-to-use-martin-luther-king-jr-s-famous-i-have-a-dream-speech> [https://perma.cc/GM24-UEDB].

<sup>63</sup> “Taylor Branch, author of a Pulitzer Prize-winning trilogy of books that chronicles King’s life and the history of the civil rights movement, said a few years ago that it is harder for Americans to learn about the speech because it is not in the public domain and that he has, to no avail, talked with the King family about it. ‘They are making a mistake,’ he said in 2013.” *Id.*

<sup>64</sup> This contention drew some interest here in the Symposium. See e.g., Cohen, *supra*, note 3 at 141–48 (discussing the “doubled-edged sword” that is a common law right to an abortion); Grossman, *supra*, note 3, at 150–59 (comparing Bernstein’s common law right to an abortion with the constitutional treatment of such a right).

<sup>65</sup> Calling abortion a common law liberty is a move I make in the book, but the phrase is not mine. See BERNSTEIN, *supra*, note 4, at 161, 242 (citing Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336 (1971)).

<sup>66</sup> Penelope Pether, *Engaging in Good Faith: Ethics, Archives, and Critical Constitutionalisms*, 57 VILL. L. REV. 79, 100 (2012).

and white women,<sup>67</sup> with one of them adding that black women have abortions at a higher rate than white women, even controlling for income.<sup>68</sup>

Why? I'll dismiss the unsupported contention that black women terminate their pregnancies because they are "targeted for abortion" by a campaign of racial genocide.<sup>69</sup> Anyone who wants to make a claim that bold needs some evidence. I have never seen any.

The Guttmacher Institute has looked for better answers to this question. It found that "[m]inority women, women who are poor and women with little education are more likely than women overall to report dissatisfaction with either their contraceptive method or provider."<sup>70</sup> It also found some skepticism and distrust in this population about medical services and providers that might lead to less use of contraceptives.<sup>71</sup>

To which one might add, as I did in the abortion chapter, that terminating a pregnancy is much safer than not terminating it. Dying from childbirth is fourteen times more likely than dying from abortion.<sup>72</sup> American law understands action taken to preserve one's uniquely precious life—even an action that kills another person, which abortion might not be—as not only defensible but commendable.<sup>73</sup> Sheltered readers might think that childbirth is benign and routine rather than a threat to life and health. It is, when you're lucky. Let's keep women of color up front rather than on the side: "Although the rates of maternal mortality are generally disconcerting in the United

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<sup>67</sup> See, e.g., V. Noah Gimbel, *Fetal Tissue Research & Abortion: Conscription, Commodification, and the Future of Choice*, 40 HARV. J.L. & GENDER 229, 254 (2017) ("Black women are nearly four times as likely to have an abortion than white women, while Hispanic women are twice as likely as whites."); Clare Huntington, *Abortion Talk*, 117 MICH. L. REV. 1043, 1052 (2019) (finding an abortion rate "among Black women [that] approaches three times the rate of white women"); see also Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 1 (Aug. 6, 2008), <https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture> [<https://perma.cc/S2VT-GFZA>] ("This much is true: In the United States, the abortion rate for black women is almost five times that for white women.") [hereinafter Cohen, *Abortion and Women of Color*].

<sup>68</sup> Cohen, *Abortion and Women of Color*, *supra* note 67.

<sup>69</sup> See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 568 (2016) (reporting the use of this assertion in state legislatures).

<sup>70</sup> Cohen, *Abortion and Women of Color*, *supra* note 67.

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

<sup>72</sup> BERNSTEIN, *supra* note 4, at 144 (citing 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)).

<sup>73</sup> Not just American law but Anglo-American common law jurisprudence. *Id.* at 54, 120 (quoting Blackstone's approval of homicide committed in self-defense).

States,” write Michele Goodwin and Erwin Chemerinsky, “they are particularly horrendous for Black women.”<sup>74</sup> Furthermore,

Black women’s maternal mortality is nearly three and half times that of white women, and rates are even worse in states like Mississippi, Arkansas, and Louisiana, where few or only one abortion clinic remains. For example, one report shows that while “Black mothers gave birth to 11.4% of babies born in Texas in 2011 and 2012 . . . they accounted for 28.8% of all pregnancy related deaths.” Another recent report observes that the maternal mortality rates in Chicksaw, Mississippi surpasses that of Rwanda: “[i]n some rural counties and dense cities alike, the racial disparity in maternal deaths is jaw-dropping.” In New York City, “Black women are twelve times more likely than white women to die from pregnancy-related causes.”<sup>75</sup>

So much of what’s wrong with contemporary abortion discourse, in my view, is its lack of interest in facts of the kind Goodwin and Chemerinsky have assembled. I’ve spent years irked by the presentation of abortion in conversations about politics and regulation. Rickety theology like “ensoulment;”<sup>76</sup> pointless questions like “When Does Life Begin?;”<sup>77</sup> the misleading premise that men and women contribute equally to the making of an embryo;<sup>78</sup> sloppy language (“baby” as what abortion destroys; “mother” for pregnant woman or person) as a ticket to reach sloppy conclusions;<sup>79</sup> how male, I used to think, to change the subject by bringing up descriptively inaccurate abstractions when one can’t compete on a material, physical, human-reproductive plane. Them as can, do. Them as can’t, lecture and hector.

Experiences of women of color are more important in the American abortion debate than those of white women, by analogy to how experiences of women are more important there than those of men. Women of color experience the stakes of freedom related to human reproduction at a level that other cohorts of persons can only hear or read about. We’re not all the same for this purpose.

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<sup>74</sup> Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 Yale L.J. 1270, 1330 (2018).

<sup>75</sup> *Id.* at 1330–31 (footnotes omitted) (alterations in original).

<sup>76</sup> Lindsey Disney & Larry Poston, *The Breath of Life: Christian Perspectives on Conception and Ensoulment*, 92 ANGLICAN THEOLOGICAL REV. 271, 273 (2010) (defining ensoulment as “when a soul becomes present in a human”).

<sup>77</sup> See, e.g., Julia Neuberger, *Embryos and Ensoulment: When Does Life Begin?*, 365 LANCET 837, 838 (2005).

<sup>78</sup> RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW 142–43 (1994) (discussing this premise as informing the resolution of disputes over embryos produced through in vitro fertilization).

<sup>79</sup> Chris Cameron, *Trump Repeats a False Claim That Doctors ‘Execute’ Newborns*, N.Y. TIMES (Apr. 28, 2019) <https://www.nytimes.com/2019/04/28/us/politics/trump-abortion-fact-check.html> [<https://perma.cc/Q2GF-EBEW>].

## CONCLUSION

At the time that I was drafting what you can find above this line in this Response—that the common law inside the female body achieves positive results for individuals by standing up for the negative kind of liberty, and that its strength warrants extra mention with respect to the black female body—I found myself stopping to click repeatedly on “the 1619 Project,” a cluster of writings and photographs published by the New York Times to mark the four hundredth anniversary of the first slave ship to reach the American colonists’ shoreline.<sup>80</sup> Very likely this material unfolding in August 2019 influenced what I’ve said in these bytes more than I know, but one of the 1619 Project articles landed specifically at the center of my thoughts.

Its author was Nikole Hannah-Jones, the Times staff writer who pitched the idea and shepherded it through publication. In her piece, Hannah-Jones assembled historical evidence to argue that what white American men of the eighteenth century asserted about the national government they were building needed African American effort and commitment to become real. “Our democracy’s founding ideals were false when they were written,” Hannah-Jones began. “Black Americans have fought to make them true.”<sup>81</sup>

Indeed. In writing about reverence in eighteenth-century America for a version of the common law articulated and defended by William Blackstone, the opponent of American revolutionary thought who was nonetheless beloved by readers who thought they were freeing themselves of an English yoke,<sup>82</sup> I tried to be candid about the weaknesses of this one of several “founding ideals” that informed the formation of the United States. Contributors to this Symposium have shared my misgivings about the common law. However stoutly Englishmen like Lord Mansfield and *The Common Law Inside the Female Body* protagonist Blackstone may have insisted that the common law and slavery are incompatible, antebellum judges and legislators in this country thought otherwise; their view of the common law reigned supreme for too long.<sup>83</sup> I don’t think that the common law cannot fail and can only be failed. It *has* failed.

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<sup>80</sup> Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [https://perma.cc/57RH-Y7NU].

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

<sup>82</sup> BERNSTEIN, *supra* note 4, at 4–5 (reflecting on a deep “fan base” of well-educated American men, some of them famous, who hungrily read and praised Blackstone’s *Commentaries on the Laws of England* as soon as the book was published in the late eighteenth century).

<sup>83</sup> *Id.* at 25–27.



Instead, this Response has connected negative liberty with African American female experience in parallel to what Hannah-Jones laid out in her assessment of terminology like “all men are created equal” and “unalienable rights,” a condition that Thomas Jefferson wrote about while affirmatively making these rights alien to his family members.<sup>84</sup> These pronouncements did not describe the political world that the Founders founded. They do describe what African American thought and effort achieved by believing in them and working to make them fact on American ground.

Hannah-Jones, reviewing the record of Reconstruction, provides examples of this achievement. She credits nineteenth-century African American elected officials for joining white Republicans “to write the most egalitarian state constitutions the South had ever seen.”<sup>85</sup> This coalition “helped pass more equitable tax legislation and laws that prohibited discrimination in public transportation, accommodation and housing. Perhaps their biggest achievement was the establishment of that most democratic of American institutions: the public school.”<sup>86</sup>

Makers of the American republic wrote about freedom as a good thing but betrayed the delivery, leaving much of the necessary work to cohorts they disenfranchised. Like other founding ideals, negative liberty as provisioned by the common law holds great promise and also has a way to go before attaining its liberating force. Experience predicts that women of color will lead that way.

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<sup>84</sup> Hannah-Jones, *supra* note 80.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*