

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2019

The Common Law as Silver Slippers

Bridget J. Crawford

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Common Law Commons](#), and the [Law and Gender Commons](#)

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

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

THE COMMON LAW AS SILVER SLIPPERS

*Bridget J. Crawford**

INTRODUCTION	131
I. COMMON LAW PROTECTION FOR WOMEN'S BODIES	133
II. REACH OF THE COMMON LAW	134
III. LESSONS FROM THE COMMON LAW.....	136
IV. VIEWPOINTS ON THE COMMON LAW	138
CONCLUSION: THE COMMON LAW AS SILVER SLIPPERS.....	139

“Your Silver Shoes will carry you over the desert,” replied Glinda. “If you had known their power you could have gone back to your Aunt Em the very first day you came to this country . . . All you have to do is to knock the heels together three times and command the shoes to carry you wherever you wish to go.”

—L. Frank Baum[†]

INTRODUCTION

Toward the end of L. Frank Baum's classic tale, *The Wonderful Wizard of Oz*, Glinda, the Good Witch of the South, makes a startling revelation to Dorothy. During the girl's entire sojourn in Oz, Dorothy always had the power to return home to her beloved Kansas. She did not need any help from the Scarecrow, the Tin Woodman, the Cowardly Lion, or even the Wizard himself. All Dorothy had to do was click together the heels of the shoes she was already wearing. Some readers interpret Dorothy's shoes as a metaphor for inner strength: We already have within us the resources we need to face any situation; we simply do not realize it. That message, embodied in Glinda's words to Dorothy, now adorns a plethora of inspirational shirts, coffee mugs, and dorm room posters.

* Professor of Law, Elisabeth Haub School of Law at Pace University.

[†] L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* 257 (Books of Wonder & William Morrow and Co., Inc. 1987) (1900).

Dorothy walked, ran, and skipped down the Yellow Brick Road in shoes with powers she did not understand at the beginning of her journey. So, too, have law students, legal scholars, lawyers, and judges been working with the common law without realizing its full power. Professor Anita Bernstein’s book, *The Common Law Inside the Female Body*,¹ is an erudite investigation into the history and operation of the common law. Bernstein’s careful and wide-ranging study leads to her arresting thesis: The common law—an old, unpredictable, and slow system that has been there all along—has tremendous power to support and even advance women’s legal claims to personal liberty. In other words, women have always had the common law right to be treated equally to men. We simply have not realized it.

Bernstein makes a convincing argument that the common law tradition has a unifying theoretical commitment: “[T]he law ought to leave individuals alone and to honor this ascribed desire in the face of incursions or threats by other individuals.”² Bernstein finds expressions of this commitment in multiple substantive areas. Criminal law embraces a right of self-defense (“If you are attacking me with deadly force, I have a right to resist with deadly force.”).³ Tort law does not impose on a bystander the duty to rescue, absent a specific type of prior relationship with the endangered (“I don’t have to jump into the lake to save a drowning stranger I stumbled upon.”).⁴ Contract law generally prefers monetary damages over specific performance (“You can’t make me do what I don’t want to, even if I signed a contract to do it.”).⁵ Property law limits an owner’s liability, based on the owner’s relationship to a person who enters the property (“You can’t make me liable for an injury suffered by a trespasser who then fell and broke his ankle on my land.”).⁶ Together this adds up to what Bernstein refers to as the common law’s respect for “condoned self-regard,” the ability to say what one does not want.⁷ Condoned self-regard expresses itself as a negative liberty—the right to be free from a particular obligation or duty.

Bernstein enhances gender equality discourse with her argument that this negative liberty provides a framework for understanding women’s rights to bodily integrity. Because negative liberty—the right to say no—means that “boundary-crossing into the personal identity and space of a person *qua* person is wrong,” then the common law as it has been interpreted for

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

² *Id.* at 9.

³ *See id.* The imagined party’s statements throughout this paragraph are mine, not Bernstein’s.

⁴ *See id.* at 10, 156–57.

⁵ *See id.* at 10.

⁶ *Id.* at 10–11.

⁷ *Id.* at 8, 11.

centuries already secures women the right to not be “penetrated, occupied, or put to use by another person.”⁸ The common law, then, offers women ultimate protection that goes with their bodies, wherever those bodies go. This is what Bernstein means by the common law *inside* the female body.⁹

I. COMMON LAW PROTECTION FOR WOMEN’S BODIES

Bernstein tests her theory of the common law in two particular contexts: rape and unwanted pregnancy. In considering involuntary penetration of a woman’s body by another individual, Bernstein sees an easy case.

As a self-possessor, she may refuse access to her body—and especially to her vagina—for good reason, for no reason, and out of a motive of which she might be or ought to be ashamed The common law unequivocally supports her veto of sexual intercourse regardless of where her refusal originates.¹⁰

In Bernstein’s view, women have dominion over their bodies just as property owners have dominion over their land.¹¹ The person in charge—the woman or the landowner—has absolute authority to determine who and what enters (the person’s body or property) when, how, and where. For that reason, Bernstein says, women who have been raped have the right to receive cash damages, and a woman may use deadly force against an intruder into her body.¹² In the case of an unwanted pregnancy, Bernstein extends the “invasion of physical geography” concept and also highlights how forcing a woman to carry and bear a child she does not want can lead to physical pain and financial consequences, such as medical bills or lost employment time.¹³ Being forced to remain pregnant is the ultimate transgression against women’s negative liberty right to not be forced to use their bodies in ways they do not desire.¹⁴

⁸ *Id.* at 15.

⁹ By “inside the female body,” Bernstein explains that she means “female sexual and reproductive anatomy as it relates to what individuals experience” *Id.* at 22. She elaborates further that her focus is on how humans experience everyday life. Thus, “[c]an a person have a female body as understood in this book without having a vagina and a uterus? I think so.” *Id.* at 24. Historically speaking, “[t]he common law did not have to think about socially constraining group memberships like race, gender, age, wealth, or religion . . . because its leaders did not have to think about them.” *Id.* at 26. Bernstein’s capacious understanding of the common law would extend its repository of rights to all people equally, without regard to sex, race, gender, age, wealth, or religion, or any similar difference.

¹⁰ *Id.* at 115.

¹¹ *Id.* at 115–16.

¹² *Id.* at 116.

¹³ *Id.* at 143–46.

¹⁴ *Id.* at 142–47 (“Physical pain, check. Invasion of physical geography, check. Loss of money, check. Being told to do what we don’t want to do, check.”).

Inspired by my own reaction to Bernstein's contributions to legal scholarship, I invited other scholars to participate in this online Symposium by sharing written reflections on *The Common Law Inside the Female Body*. The contributors have a range of teaching and scholarly expertise, including Civil Procedure, Critical Race Theory, Employment Discrimination, Family Law, Feminist Legal Theory, Immigration Law, Intellectual Property, International Human Rights Law, Law and Religion, Legal Rhetoric and Writing, and Torts. Including voices informed by different professional backgrounds, academic interests, and unique perspectives is an intentional choice rooted in the substantive message of Bernstein's book. The commentators live in different parts of the country, deploy diverse methodologies, and have unique scholarly and pedagogical interests and concerns. But the common law belongs to all of us: Anita Bernstein, who wrote a brilliant book; the six contributors to this online Symposium; the students who publish this law review; anyone who reads Bernstein's book or these Essays; and anyone who studies or thinks about the law, including members of the general public. Each of us rightfully can and must engage with the legacy and promise of the common law. The contributions to this Symposium facilitate that effort. Like Bernstein's book, the review Essays articulate our highest collective aspirations that the law can and will continue to develop in the service of meaningful equality for all people.

The substantive contributions to this Symposium engage in one or more of three broad intellectual moves: (1) testing and exploring the limits of Bernstein's thesis; (2) applying Bernstein's idea of condoned self-regard to particular areas of legal interest and expertise otherwise outside Bernstein's focus; and (3) questioning the common law from viewpoints of those who historically have received (and often continue to receive) unequal treatment under law.

II. REACH OF THE COMMON LAW

Three Essays in the collection seek to identify the limits to Bernstein's argument that the common law adequately secures women's rights. Professor David Cohen takes up Bernstein's analysis of the common law right to abortion in his Essay, *The Promise and Peril of a Common Law Right to Abortion*.¹⁵ He contrasts Bernstein's understanding of women's common law rights to bodily autonomy—and thus the right to refuse to carry a pregnancy—with the Supreme Court's reasoning in *Roe v. Wade*.¹⁶ Cohen explains how Bernstein's analysis of the common law might help

¹⁵ David S. Cohen, *The Promise and Peril of a Common Law Right to Abortion*, 114 NW. U. L. REV. ONLINE 140 (2019).

¹⁶ *Id.* at 140–41.

conservative Justices find jurisprudential support for a woman’s right to abortion. He invites readers to consider the possible negative consequences of positioning abortion rights as negative liberties—i.e., a right not to have one’s body invaded, or the right not to be forced to suffer certain physical or financial burdens.¹⁷ If a woman becomes pregnant as the result of consensual sex, Cohen forecasts (as does Bernstein) that there will be some who will argue that the woman consented to all of the consequences of that intercourse, including pregnancy.¹⁸ Cohen therefore would like to develop a more robust defense to this argument.¹⁹ He also points out that the common law is subject to override by legislation, and attentive state legislators might draft laws with Bernstein’s conception of women’s common law rights in mind.²⁰ Cohen contemplates the complicated relationship between negative liberties and rights, placing greater hope in the articulation of a positive right to abortion as a way of making sure that access extends fully and meaningfully to all women.²¹

Like Cohen, Professor Joanna Grossman focuses on Bernstein’s grounding of abortion rights in the common law. In *Women Are (Allegedly) People, Too*,²² Grossman enthusiastically explores possible applications of Bernstein’s theories: “And, oh boy, the common law contains some juicy stuff that really could be deployed to advance the cause of gender equality.”²³ Grossman is highly persuaded, as she says anyone who reads Bernstein’s book will be, “that the common law supports a right to abortion far broader than the Constitution guarantees.”²⁴ Like Bernstein herself (and Cohen in his response), Grossman notes that state statutes limiting a woman’s right to abortion would override any common law rights, and she cautions against leaving behind constitutional arguments, a “both/and” approach that Bernstein also embraces.²⁵

In *The Common Law as a Terrain of Feminist Struggle*, Professor Cyra Akila Choudhury lauds Bernstein’s excavation of the common law as “of critical importance to women.”²⁶ Choudhury focuses on nuances in

¹⁷ See *id.* at 145–48 and accompanying notes.

¹⁸ *Id.* at 145–46.

¹⁹ See *id.*

²⁰ *Id.* at 146.

²¹ *Id.* at 147–48.

²² Joanna L. Grossman, *Women Are (Allegedly) People, Too*, 114 NW. U. L. REV. ONLINE 149 (2019).

²³ *Id.* at 150.

²⁴ *Id.* at 156.

²⁵ *Id.* at 158–59; see also BERNSTEIN, *supra* note 1, at 178–84.

²⁶ Cyra Akila Choudhury, *The Common Law as a Terrain of Feminist Struggle*, 114 NW. U. L. REV. ONLINE 160, 161 (2019).

Bernstein’s formulation of women’s negative liberty rights in their own bodies, such as their rights to not be raped and their rights to not be forced to carry a pregnancy to term against their will.²⁷ Choudhury asks whether the contours of negative rights might differ depending on who is doing the invading. She observes that “while one might be able to repel the intrusions of a private individual as a trespasser, one may not be able to repel the state.”²⁸ Bernstein almost certainly would agree that this is a distinction with a difference, as she openly acknowledges the common law’s limits: “I do not—I cannot—contend that the common law can be counted on to safeguard the entitlement of persons not to have do what they don’t what to do. . . . Who may announce this aversion and get backed from the state has been another matter.”²⁹ So, for example, whether descendants of slaves should receive financial reparations, or whether women might receive financial compensation for being forced to carry a pregnancy to term, would be rendered political questions of power, not matters of common law principle.

Taken together, the Essays of Cohen, Grossman, and Choudhury celebrate Bernstein’s focus on the common law. But they also serve as warning flags to the reader who might be tempted to read Bernstein’s thesis too narrowly. The common law is not the only tool available to secure women’s rights; it is simply a forgotten (or long-neglected) one that should be resurrected as part of a larger legal strategy.

III. LESSONS FROM THE COMMON LAW

The second group of Essays applies Bernstein’s idea of condoned self-regard to the unexpected areas of intellectual property and employment law. One of the nation’s leading intellectual property scholars, Professor Margaret Chon, uses Bernstein’s study of the common law as a springboard for contemplating larger questions about how the law is learned, taught, and interpreted.³⁰ Chon takes inspiration from Bernstein’s “twin grounds of condoned self-regard and negative liberty” to explore the statute-based intellectual property areas of copyright, patent, and trademark.³¹ Copyright has dual concerns, as Chon explains: the negative right of the holder of the intellectual property (i.e., the right not to be infringed upon), and the positive right of any alleged infringer to “fair use” of another’s intellectual property.³²

²⁷ *See id.* at 164–65.

²⁸ *Id.* at 165.

²⁹ BERNSTEIN, *supra* note 1, at 53.

³⁰ Margaret Chon, *Intellectual Property Infringement and the Right to Say No*, 114 NW. U. L. REV. ONLINE 169 (2019).

³¹ *Id.* at 169–71.

³² *Id.* at 172–74.

Intellectual property rights writ large are concerned primarily with commercial interests (exploitation for unfair or no value).³³ Chon explains that intellectual property law’s primary concern with commercial harms may cause it to ignore certain common law traditions: “[T]he overly-narrow view of IP as a set of commercial rights negates the intertwined history of common law privacy and statutory publication in copyright law, not to mention the various intersectional approaches of IP more broadly within torts-like human rights regimes.”³⁴ In Chon’s analysis, Bernstein’s capacious approach to the common law is entirely relevant to intellectual property. Familiar common law doctrines might help answer both the question of whether consumers can refuse to share data with companies that maintain online social media platforms, for example, and the question of whether women (and others) can assert robust rights to be free from online harassment.³⁵ In Chon’s understanding, intellectual property law need not rely exclusively on its statutory scaffolding. It is resilient—and complex—enough to make use of both codified law and common law frameworks with human-centered and flexible dimensions.

Like Chon, Professor Maritza Reyes makes concrete Bernstein’s claims about the power of the common law by applying the claims to unexpected terrain—the employment context. Reyes’s Essay, *The Female Body in the Workplace: Judges and the Common Law*,³⁶ takes particular inspiration from the third chapter of Bernstein’s book: “Women Too May Say No to What They Don’t Want.”³⁷ Reyes develops a list of her own (and certainly many women’s) “Do Not Wants” for the workplace:

I Do Not Want to smile *all the time* just to make people feel comfortable all around me . . . 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 the same or usually heavier workload for less pay.³⁸

Although judges should be conversant with the methods and commitments of the common law, Reyes laments what she perceives as judges’ lack of “fellow-feeling,” a common law imperative that Bernstein identifies.³⁹ Reyes

³³ *Id.* at 174–75.

³⁴ *Id.*

³⁵ *Id.* at 171.

³⁶ Maritza I. Reyes, *The Female Body in the Workplace: Judges and the Common Law*, 114 NW. U. L. REV. ONLINE 177 (2019).

³⁷ BERNSTEIN, *supra* note 1, at 75–112.

³⁸ Reyes, *supra* note 36, at 179–81.

³⁹ *Id.* at 183; *see* BERNSTEIN, *supra* note 1, at 34 (describing fellow-feeling as related to the understanding that another has experienced harm, and that the effect of judicial opinions is to “call on the public to feel how someone else once felt thwarted”).

reminds readers not only that judges decide cases involving women's employment, but also that judges themselves are employers.⁴⁰ For this reason, Reyes urges judges to “accept responsibility for the failure to develop the common law to liberate women.”⁴¹ Reyes herself worked as a career clerk and staff attorney in the federal court system before becoming a law professor,⁴² so she knows first-hand of what she speaks.

Chon's and Reyes's contributions show how Bernstein's fundamental understanding of the vitality of the common law can enrich the understanding of rights in other areas. By using examples from intellectual property and employment law, Chon and Reyes use the common law to advance claims where rights and negative liberties intersect.

IV. VIEWPOINTS ON THE COMMON LAW

The third intellectual move—viewing the common law from the perspective of historically (and frequently presently) disadvantaged people—grounds Professor Teri McMurtry-Chubb's Essay, *In Search of the Common Law Inside the Black Female Body*. McMurtry-Chubb contemplates the economic operations of the common law to draw attention to its failure to protect enslaved black women.⁴³ The common law also entrenched control by white men (and women) over every aspect of black bodies.⁴⁴ McMurtry-Chubb cites a set of medical directives that one plantation owner wrote and distributed in 1843 to all of the overseers of his slaves. Black women's bodies were, from the owner's perspective, “valuable for both their physical and reproductive labor.”⁴⁵ In other words, the slave owner viewed women not only as workers, but also as property producers because the woman could bear children—future accessions to the “wealth” of the owner. Through primary sources, McMurtry-Chubb brings attention to the ways that black women's bodies routinely were and are subject to violation, invasion, and aggression. McMurtry-Chubb notes that Bernstein would agree that these constitute gross violations of black women's common law rights and invite conversation about how to make those rights meaningful.⁴⁶

⁴⁰ Reyes, *supra* note 36, at 181.

⁴¹ *Id.* at 186.

⁴² See *Maritza Reyes Faculty Biography*, FLA. AGRIC. & MECHANICAL U. C. L., <https://law.famu.edu/faculty/maritza-reyes> [<https://perma.cc/YX79-ZKW5>].

⁴³ Teri McMurtry-Chubb, *In Search of the Common Law Inside the Black Female Body*, 114 NW. U. L. REV. ONLINE 187 (2019).

⁴⁴ *Id.* at 189.

⁴⁵ *Id.* at 188.

⁴⁶ *Id.* at 192, 194; BERNSTEIN, *supra* note 1, at 26 (“Slavery presents numerous examples of how the common law failed to live up to its commitments.”).

CONCLUSION: THE COMMON LAW AS SILVER SLIPPERS

After reading these Essays, along with Professor Bernstein's Response, the astute reader naturally might ask where and how to proceed. In *The Wonderful Wizard of Oz*, after Glinda reveals to Dorothy that the Silver Slippers always had the power to accomplish what Dorothy wanted the most—to return home to Kansas—Dorothy bids a fond farewell to the Cowardly Lion, Tin Woodman, and Scarecrow.⁴⁷ Just three clicks of the heels of her Silver Slippers and Dorothy is back in Kansas, free to pursue her own destiny. So too, now that Bernstein has illuminated that the common law has always been available to women as a liberty-enhancing system, women (and their allies) can make greater use of the common law to advance women's liberation and equality. But while Dorothy lands in Kansas without the Silver Slippers,⁴⁸ the common law will not be lost through use. To the contrary, the more that women use common law arguments to assert their rights to control what happens to their own bodies, the more likely it is that judges will adopt this reasoning. One common law decision begets another. The Silver Slippers may have been single-use, but the common law can improve with each case.

⁴⁷ Baum, *supra* note †.

⁴⁸ *Id.* at 259 (after landing in Kansas, "Dorothy stood up and found she was in her stocking-feet. For the Silver Shoes had fallen off in her flight through the air, and were lost forever in the desert.").