

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

2020

### (Un)Common Law and the Female Body

Lolita Buckner Inniss

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Common Law Commons](#), [Family Law Commons](#), [Jurisprudence Commons](#), [Law and Gender Commons](#), and the [Legal History Commons](#)

---

#### Citation Information

Lolita B. Inniss, *(Un)Common Law and the Female Body*, 61 B.C. L. Rev. E. Supp. I.-95 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/28>, available at <https://scholar.law.colorado.edu/articles/1335/>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# (UN)COMMON LAW AND THE FEMALE BODY

LOLITA BUCKNER INNISS\*

**Abstract:** A dissonance frequently exists between explicit feminist approaches to law and the realities of a common law system that has often ignored and even at times exacerbated women's legal disabilities. In *The Common Law Inside the Female Body*, Anita Bernstein mounts a challenge to this story of division. There is, and has long been, she asserts, a substantial interrelation between the common law and feminist jurisprudential approaches to law. But Bernstein's central argument, far from disrupting broad understandings of the common law, is in keeping with a claim that other legal scholars have long asserted: decisions according to precedent, and other aspects of the common law ideal, do not demand only certain narrow outcomes, or the expression of outcomes in specific language. Bernstein's work suggests that the common law has always offered liberatory potential for women, and this potential grows from longstanding common jurisprudential attributes and understandings, not new or *uncommon* attributes.

## INTRODUCTION

In *The Common Law Inside the Female Body*, Anita Bernstein offers a counterintuitive and in some ways startling proposition: the common law serves to liberate women. As Professor Bernstein notes, this claim upends many typical understandings largely because the historic working of the common law, where it works to the advantage of women, often seems to do so by

---

© 2020, Lolita Buckner Inniss. All rights reserved.

\* Senior Associate Dean for Academic Affairs, Professor of Law and Inaugural Robert G. Storey Distinguished Faculty Fellow, Southern Methodist University Dedman School of Law, A.B. Princeton University, J.D. University of California, Los Angeles, LL.M., PhD Osgoode Hall Law School, York University. linniss@smu.edu. The author foremost thanks Professor Bridget Crawford of the Elisabeth Haub School of Law at Pace University for organizing the scholarly collective that prepared essay responses to this book, and thanks the SMU Dedman School of Law and the Beverly and David Leonard Faculty Research Fund for their generous support of this work. The author also thanks Cassie DuBay for her library assistance, Tenley Dickey for her research assistance and TaLibra Ferguson for her secretarial assistance.

The title of this essay refers to A.P. Herbert's *Uncommon Law*, published in 1935. That book contains several fictitious legal cases meant to poke fun at English common law norms, and ultimately served as a vehicle for law reform. Many of the cases queried actual points of law (Herbert received legal training and was a member of Parliament). In pointing out more obscure and seemingly absurd aspects of law, such as what was then considered a ridiculous question—whether there existed in law a reasonable woman standard (the reasonable man test was then the prevailing test for negligence)—Herbert did much to promote attention to actual legal norms, thus fostering new understandings of old laws and helping to promote new laws.

happenstance, and even then, it is frequently implicit, subtle, and narrowly positivist in its application and effect. Those interested in legal solutions for advancing women's rights in the contemporary world have largely turned to feminist jurisprudence, as it is often explicitly ameliorative in intent and effect, speaks the language of both positive and negative liberty, and is both broadly and deeply focused in its use of law as a tool to improve women's access to legal rights.<sup>1</sup>

## I. HOW THE COMMON LAW RELATES TO FEMINIST JURISPRUDENCE

There is no doubt that a dissonance frequently exists between pronounced feminist approaches to law and the realities of a common law system that has often ignored and—worse—exacerbated women's legal disabilities. Feminist jurisprudence promotes change, mediating legal and social distance, and the political and moral questions that all too often stand in the way of women's advancement. Feminist legal approaches to law have as a goal making visible and audible the way law operates regarding women. Another goal of feminist legal approaches is exposing the silencing of women that often occurs via domestic judicial processes and even in international fora designed to rectify domestic failures involving women, such as CEDAW.<sup>2</sup> In contrast, traditional common law jurisprudence is designed to resist change, at least to the extent that such change assails or undermines longstanding ideas and ideals of law.<sup>3</sup> Bernstein, however, puts to the test this often presumed dichotomy between feminist jurisprudence and the common law. Perhaps foremost, the common law is not, says Bernstein, a fixed entity but rather a dynamic, evolving enterprise that frequently changes, even though such changes may at times be

---

<sup>1</sup> For a fuller discussion of the foundations of feminist jurisprudence, see Lolita Buckner Inniss, 'Other Spaces' in *Legal Pedagogy*, 67 HARV. J. RACIAL & ETHNIC JUST. 67, 71 (2012) (citing 1 FEMINIST LEGAL THEORY (Frances E. Olsen ed., 1995); FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993); Alice Echols, DARING TO BE BAD RADICAL FEMINISM IN AMERICA 1967-1975 (1989); Marie Ashe, *Mind's Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987); Claire Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987-88)).

<sup>2</sup> Lolita Buckner Inniss et al., Cecilia Kell v Canada, in FEMINIST JUDGMENTS IN INTERNATIONAL LAW 333, 339 (Troy Lavers & Loveday Hodson eds., 2019) (decrying the way that even CEDAW-based rulings are sometimes constrained and opaque in regards to women's rights). CEDAW is the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 34th Sess., at 193, U.N. Doc. A/34/46 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

<sup>3</sup> The system of precedent upon which the common law relies, despite its valorization of accuracy, objectivity and the "pure science" of law, sometimes veers away from these ideals, creating a false foundation of law that may be difficult to challenge once it becomes entombed in a system of precedent. See, e.g., Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J.L. COMMENT. 649, 658-59 (2010). Moreover, formalist precedential analysis can sometimes be logically fallacious, such as where jurists "smuggl[e]" the conclusion into the premise. Richard A. Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 184 (1986).

scarcely discernable.<sup>4</sup> Moreover, explicit feminist approaches to law and traditional common law norms, she asserts, were always united around the same commitment to the liberty of individuals. What was and is needed to make this congruence manifest, says Bernstein, is recognition of the directives of the common law as it concerns women.

This book, though not lengthy, is a complex rendering that brings together a number of sometimes disparate ideas in law and philosophy, ranging from discussions of Blackstone's commentaries, the law of torts, criminal law and property law, as well as ideas drawn from continental and Greek philosophy. Looking at some of the book's central claims in broad terms, it is, in large part, a work that seeks to reduce or even eliminate some of the distance between formalist legal approaches that are at the foundation of most traditional common law approaches and legal realist approaches more typically found in feminist jurisprudence, critical race theory, and other critical approaches to law.<sup>5</sup> Bernstein's insistence that the common law speaks to—forcefully—women's rights, if only we would listen, is akin to earlier debates that asserted that legal realism, rather than being a disruption to or a corruption of formalist approaches to law, was simply a method to avoid the “over-general and outworn ab-

---

<sup>4</sup> ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 20–24 (2019).

<sup>5</sup> It bears considering for a moment whether critical race theory or other critical theories should be considered as part of the legal realism movement. Critical theories and legal realism certainly have some relation to one another. Osagie K. Obasogie, *Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 183 (2013) (noting that Critical Race Theory is one of several legal approaches “that attempt to move beyond presumptions that legal doctrine and decision making are coherent and consistent in and of themselves or that they exist anterior to other social, political, and economic developments.”); see also Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283 (1989) (suggesting that contemporary critical theorists have built upon the work of legal realists); Gregory Scott Parks, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL’Y 683 (2008) (asserting that though Critical Race Theory (CRT) is the progeny of legal realism, CRT’s methodological approach has often failed to draw heavily from two foundational aspects of legal realists: the intersections of law and social science and law and public policy). Critical approaches to law, much like legal realist methods, invite inquiry into mainstream, classical legal thought and legal ideologies. Lolita Buckner Inniss, “*Other Spaces*” in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 68 (2012). Nevertheless, though critical approaches sometimes interrogate and expose vital aspects of a legal issue, such methods may just as often choose to embrace existing norms, especially where such embrace is a strategic choice meant to advance the goals of a particular critical ideology. *Id.* Similarly, legal realism may also be rife with contradictions and paradoxes. Many sweeping assertions of legal realism are subject to challenge, such as where one scholar asserts that legal realists, more than any other group of jurists, “insisted upon the inevitability of the appeal to extra-legal norms” in the legal process. Wilfrid E. Rumble, Jr., *The Paradox of American Legal Realism*, 75 ETHICS 166, 166 (1965). Others like Richard Posner have suggested that legal realism, even in its full flower, is best characterized by only moderate departures from precedent. As Posner noted, there is no inconsistency between certain varieties of realism and formalism. One of the most famous of the legal realists, Oliver Wendall Holmes, himself deduced some highly formal legal concepts. “Once the basic premises are chosen on realist grounds . . . deduction can proceed without violating realist norms.” See Posner, *supra* note 3, at 185.

stractions” that characterized uncritical adherence to precedent.<sup>6</sup> In its heyday, say some legal realists, tailored scenarios that demonstrated deep concern about fairness and justice in specific contexts were at the heart of the common law enterprise.<sup>7</sup> Of course, one should not go too far in situating Bernstein’s book squarely among the works of legal realists. After all, a significant critique of legal realism is that, for all of its almost century-long challenge to the hegemony of certain classical legal approaches, it remains the domain of “[e]lite [white] [m]en [s]earching for a [p]ractical [j]urisprudence.”<sup>8</sup> As one adherent noted in discussing legal realists, “[o]ne of the few generalizations that can be confidently made about the Realists is that they were American, white, and male.”<sup>9</sup> But maybe what Bernstein’s book also points up is that we have been too parsimonious in assigning the legal realist label and in deciding which scholarly actors “do” legal realism.<sup>10</sup> Women and people of color did, and currently do, legal realism, in all the ways that characterize the movement. What is necessary, as this book suggests, is to perceive differing legal realistic perspectives as alternative but not new approaches to an old genre.<sup>11</sup>

Bernstein is certainly aware that by claiming that the common law is inside the female body, she calls into question centuries of common law norms that seem to deny women rights. There are noteworthy examples where English law failed women, and failed them spectacularly. One such example is the state of English divorce and property laws relative to women in the early nineteenth century. In one case, Caroline Norton, an English social reformer, left her husband in 1836 and was later sued for adultery.<sup>12</sup> Norton spent over two decades campaigning for the fair treatment of divorced women under English law.<sup>13</sup> Her efforts ultimately helped lead to the enactment of Custody of In-

---

<sup>6</sup> Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1977–78 (2015) (internal quotation marks omitted).

<sup>7</sup> *Id.* at 1977.

<sup>8</sup> Mae C. Quinn, *Feminist Legal Realism*, 35 HARV. J.L. & GENDER 1, 6 (2012). Quinn described the work of some male legal realists as “heady, removed, and largely exclusionary.” *Id.* at 4.

<sup>9</sup> William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 333 (1985).

<sup>10</sup> See *supra* note 5 and accompanying text.

<sup>11</sup> Quinn, *supra* note 8, at 2–3. As Quinn observes, some women, as outsiders and reformist lawyers, “were in community trenches and involved with the trial-court benches” and created their own “practical jurisprudence rooted in realistic projects in the first half of the twentieth century.” *Id.*

<sup>12</sup> Norton was alleged to have committed adultery with the then British Prime Minister in a sensational trial that gained international notoriety. Though found not liable, she was cast out of her home, denied access to her children, and had her personal property retained by her husband. See DIANE ATKINSON, *THE CRIMINAL CONVERSATION OF MRS. NORTON* (2012).

<sup>13</sup> Norton penned an influential pamphlet titled *ENGLISH LAWS FOR WOMEN IN THE NINETEENTH CENTURY* (1854) in which she railed against laws that denied women rights to their own property. Women, Norton argued, occupied the very lowest rung of society when it came to their legal rights. She pointed, for example, to the case of an enslaved man in Kentucky in the nineteenth century who made a contract with his master for his own purchase, paid the agreed upon consideration, but was denied the legal redress when his owner reneged because of the enslaved man’s race and unfree status.

fants Act of 1839,<sup>14</sup> the Matrimonial Causes Act of 1857<sup>15</sup> and the Married Women's Property Act 1870.<sup>16</sup> Bernstein, however, notes that even if the commentaries of a legal giant like Blackstone ultimately supported legal institutions like coverture (which greatly reduced and often eliminated rights of married women), nowhere in his commentaries did Blackstone assert that women suffered any legal disability in their capacity *as women*.<sup>17</sup> This assertion may seem to some like a bit of sophistry; it may assume too much to say that women did not suffer *qua* women if they were denied rights when they married, but would retain rights if they remained unmarried.<sup>18</sup>

To argue that women were free from the strictures of coverture if they chose not to marry seems to laud a negative liberty that is, for many women, little more than a remote possibility. Even in the contemporary world the right *not* to marry, that is, the right to be free from state imposed marriage, is a right that is more assumed than actual, and is a right that has not been clearly articulated in any aspect of United States law.<sup>19</sup> In the context of the Victorian world in which Blackstone wrote, women had yet fewer rights. Some Victorian women had no real choice in the decision whether to marry, however much English law and church law before and after Blackstone required “voluntariness” in assenting to marriage and however much there were proscriptions against forcing women into marriage against their wills.<sup>20</sup> One need not be a legal scholar to recognize that voluntariness, or rather, legal findings of voluntariness and choice, have long been and remain contested notions, especially for women and people of color.<sup>21</sup> It is in such matters that it may be said, as

---

Norton wrote, “I find, in the slave of Kentucky, an exact parallel of the law of England for its married women.” *Id.* at 19.

<sup>14</sup> 2 & 3 Vict., c. 54 (1839) (Eng.).

<sup>15</sup> 33 & 34 Vict. c. 93 (1857) (Eng.).

<sup>16</sup> 20 & 21 Vict., c. 85. (1870) (Eng.). For a discussion of these laws see Danaya C. Wright, “Well-Behaved Women Don’t Make History”: *Rethinking English Family, Law, and History*, 19 WIS. WOMEN’S L.J. 211 (2004).

<sup>17</sup> BERNSTEIN, *supra* note 4, at 80.

<sup>18</sup> *See id.*

<sup>19</sup> Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1513 (2016).

<sup>20</sup> *See id.*

<sup>21</sup> It has long been asserted that yes does not always mean yes for women—assent does not always signal unfettered consent. *See, e.g.,* Maria Drakopoulou, *Feminism and Consent: A Genealogical Inquiry*, in CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY 9, 10 (Rosemary Hunter & Sharon Cowan, eds., 2007) (“[F]eminists argue that the current normative paradigms under which existing social institutions operate disqualify female experience and effectively negate the possibility of genuine choice for women.”). Consider the issue of voluntariness of consent raised in *Bumper v. North Carolina*, 391 U.S. 543 (1968). There, four white law enforcement officers asked for consent to search the home of Mrs. Hattie Leath, “a 66-year-old Negro widow” who lived at the end of an unpaved, rural road and was, at the time of the visit, home alone with several minor children. *Id.* at 546. The trial narrative wherein Mrs. Leath ostensibly gave consent was “shot through with contradictions.” *Id.* at 547 n.8. The racial and gender dynamics, along with the location, wrote legal scholar Peter Brooks, made the free exercise of the right to say no to the search all but impossi-

author Jack London famously did, “[t]he Law is a lie.”<sup>22</sup> Bernstein does observe that the common law, even with its equality premise, cannot on its own guarantee women’s negative liberty without an explicit embrace of women as intended beneficiaries.<sup>23</sup>

## II. PREGNANCY TERMINATION, COMMON LAW AND “CONDONED SELF-REGARD”

One of Bernstein’s most noteworthy contributions is her discussion of pregnancy under conditions where state law forbids termination. Bernstein asserts that formal, state-based proscriptions against termination of pregnancy, such as bars on abortion, are analogous to other mechanisms of effectuating punishment or discipline, such as incarceration, surveillance and other acts.<sup>24</sup> Bernstein goes on to state that bars on abortion are rendered more illegible because the premise for these bars has traditionally rested upon a temporally-based assessment that measures the development of the pregnancy by stages and then applies names such as blastocyst, zygote, embryo or fetus, going from the stage immediately after conception and moving up to the stage closest to birth.<sup>25</sup> Instead of assigning new names at each calendrical stage of a pregnancy, Bernstein opts for a single-word descriptor of the developing pregnancy, “Zef,” which combines the first letters of each the three latter stages.<sup>26</sup> This acronym may cause some to balk at what would appear to be a studied attempt

---

ble. See Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 7–9 (2006).

<sup>22</sup> JACK LONDON, *THE PEOPLE OF THE ABYSS* 267 (1st ed. 1903). London decries the way in which the law often substitutes voluntariness for involuntariness in its findings, and vice versa, when doing so helps to evade broader societal responsibility for harms. See *id.* at 265–70.

<sup>23</sup> BERNSTEIN, *supra* note 4, at 180.

<sup>24</sup> Much scholarship has discussed surveillance as a means of control, especially the control of women and people of color. A significant focus of such work has been the use of cameras, computers, or other contemporary technological methods of surveillance. Paradoxically, there has been a move away from analysis of “low tech” methods of observations, such as ordinary, unmediated, direct watching of comings and goings, observing maternal behaviors or cross-racial interactions that violate communal norms. Linda S. Greene, et al., *Talking About Black Lives Matter and #MeToo*, 34 WISC. J. GENDER, L. & SOC. 109, 175–76 (2019). These forms of surveillance persist as important aspects of the project of watching others. DAVID LYON, *SURVEILLANCE AFTER SEPTEMBER 11*, at 6 (2003). Consider especially how a traditional marker of pregnancy, the absence of a menstrual period in a presumably healthy menstruating female required close observation (by women themselves, or by others). Such observations were often enacted and aided by exhortations that girls and women precisely mark on calendars the beginnings and ends of their menstrual cycles. Even where some early twentieth century reformers sought to give women more control over childbearing, a key feature in exerting control was close self-observation of menstruation and the use of “private” calendar markings. See, e.g., Margaret H. Sanger, *Family Limitation*, in 1 DOCUMENTING FIRST WAVE FEMINISMS: TRANSNATIONAL COLLABORATIONS AND CROSSCURRENTS 280, 282 (Nancy Margaret Forestell & Maureen Anne Moynagh eds., 2012).

<sup>25</sup> BERNSTEIN, *supra* note 4, at 142.

<sup>26</sup> *Id.* at 143.

to dehumanize the developing infant. Bernstein suggests, however, that this alternate word captures existing scientific and lay descriptions of fetal development.<sup>27</sup> Use of the word Zef, says Bernstein, helps to clarify discussions by offering a unitary discursive approach to understanding pregnancy in general, and unwanted pregnancy in particular, since common law does not divide unborn entities into categories.

It is not so clear that the common law eschewed categorical approaches to pregnancy, however, at least so far as it concerns the law of the United States in the immediate pre-revolutionary period and early national period. Intriguingly, and perhaps in accord with Bernstein's claim about the common law inside the female body, termination of a pregnancy was widely permitted in the United States prior to 1821, and even afterwards in certain limited circumstances.<sup>28</sup> This permissiveness, however, typically existed only up until the time of quickening.<sup>29</sup> "Quickening" was a means of measuring the calendrical development of a pregnancy based upon when the pregnant woman felt movement from the progressing pregnancy.<sup>30</sup> Though on average such movement may occur at around sixteen weeks into the pregnancy, it has long been understood to occur anywhere from ten weeks to twenty-five weeks into the pregnancy.<sup>31</sup> Hence, although there was no fixed time for quickening to occur, it divided the pregnancy into two distinct and essentially temporal periods when a pregnancy was not legally cognizable, followed by a period when a pregnancy developed into a life form, a quickened fetus, that was legally cognizable.<sup>32</sup> As long as women were themselves the reporters of the phenomenon of quickening, this meant that they were in practice and in principle in charge of the whether terminations of pregnancy could be regulated. In England, which enacted legislation in 1803 to bar abortion after quickening, on pain of death, the question of quickening became a crucial one—so much so that determinations of quickening were sometimes put to juries comprised of matrons

---

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

<sup>28</sup> *Roe v. Wade*, 410 U.S. 113, 138 (1973). The first U.S. abortion statute was enacted in Connecticut in 1821. See CONN. GEN. STAT. ANN. § 20-14 (West 2013).

<sup>29</sup> Lolita Buckner Inniss, *Bridging the Great Divide—A Response to Linda Greenhouse and Reva B. Siegel's Before (and After) Roe v. Wade: New Questions About Backlash*, 89 WASH. U.L. REV. 963, 966 (2012). Though Connecticut represents the first explicit state criminalization of post-quickening abortion, between 1821 and 1841 ten states criminalized abortions, chiefly by making providers of abortifacients and mechanical abortion procedures subject to prosecution and criminal penalties. CONTROLLING REPRODUCTION, AN AMERICAN HISTORY 138 (Andrea Tone ed., 1996).

<sup>30</sup> *Roe v. Wade* described quickening as the first recognizable movement of a fetus in utero. 410 U.S. at 132.

<sup>31</sup> ROBERT LYALL, *THE MEDICAL EVIDENCE RELATIVE TO THE DURATION OF HUMAN PREGNANCY*, at xvi (1826).

<sup>32</sup> J. SHOSHANNA EHRLICH, *WHO DECIDES?: THE ABORTION RIGHTS OF TEENS* 3 (2006).

with first-hand knowledge of the phenomenon.<sup>33</sup> Perhaps not surprisingly, as physicians became more involved in managing women's reproductive health, there was a growing tendency to discount women's reports of quickening.<sup>34</sup> Self-reported quickening did not, as some nineteenth century male medical experts complained, necessarily mean that a woman was pregnant.<sup>35</sup> So retaining quickening as the legal standard meant that women, and not doctors, judges, or legislators, shaped the legal boundaries of abortion.<sup>36</sup>

Beyond the notion of the calendrical measuring of a pregnancy, prior to the middle and late nineteenth century, treatment of pregnancy in the pre-Revolutionary and early United States was in accord with the circumscribed, indirect and often obscure ways in which law engaged with matters of sex and sexuality.<sup>37</sup> Not surprisingly, abortion prosecutions in the colonial and early national period were rare. They often failed because of a defect of proof. For instance, in Connecticut in 1742, a woman died after becoming ill in the aftermath of a mechanical abortion.<sup>38</sup> The case became the subject of a legal inquiry—not because of the abortion itself—but because of the death of the pregnant woman.<sup>39</sup> This is perhaps in accord with Bernstein's notion of "the common law inside the female body," the idea that Anglo-American common law traditions have long supported women's right to say no to unwanted pregnancy, or other instances wherein women might exercise what Bernstein calls "condone[d] self-regard."<sup>40</sup>

---

<sup>33</sup> GEORGE VIVIAN POORE, A TREATISE ON MEDICAL JURISPRUDENCE 342–43 (1902) (discussing the use of juries of matrons who examined women to determine if they were "quick" with child).

<sup>34</sup> LAURA R. WOLIVER, THE POLITICAL GEOGRAPHIES OF PREGNANCY 85 (2010).

<sup>35</sup> LISA FORMAN CODY, BIRTHING THE NATION: SEX, SCIENCE, AND THE CONCEPTION OF EIGHTEENTH-CENTURY BRITONS 282 (2005). The question of whether a woman was pregnant was one that "the whole faculty of physic, in every part of the world, could not determine in the early months of pregnancy." *Id.* (internal quotation marks omitted) How then, scoffed one male expert, could mere women make such determinations? Going on, he opined: "It would be as wise to appoint a jury of infants to determine these questions." *Id.* (internal quotation marks omitted).

<sup>36</sup> LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 12 (1998).

<sup>37</sup> MARY P. RYAN, WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825–1880, at 97 (1990).

<sup>38</sup> Cornelia Hughes Drayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 19–20 (1991).

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

<sup>40</sup> BERNSTEIN, *supra* note 4, at 33. I could not help but chuckle somewhat at the chapter titled "Saying No to What We Don't Want," for it reminded me of former-first lady Nancy Reagan's unlikely "Just Say No" campaign. *Id.* at 33. Reagan's "Just Say No" campaign exhorted people to avoid the harms of drug use by simply saying no when drugs were offered. This is not to imply that Bernstein's "no" is in anyway facile or humorous. Indeed, Nancy Reagan's "Just Say No" campaign was risible not because it centered on saying no, but because it promoted a simplistic, zero-tolerance policy of drug use that offered no meaningful legal or social policy mechanism for enactment. *See, e.g.,* Noah Mamber, *Coke and Smack at the Drugstore: Harm Reductive Drug Legalization: An Alternative to a Criminalization Society*, 15 CORNELL J.L. & PUB. POL'Y 619, 661 (2006). But even granting the seriousness and validity of Bernstein's claims here, some feminist scholars have asserted that women

Whether condoned self-regard allowed women to push back against prohibitions on their conduct, and whether those prohibitions grew from legal or social norms, historically speaking, the common law interceded most often in cases involving allegations of sexual violence to the extent that the violence could lead to depletion of public or certain private property resources.<sup>41</sup> So, for example, statutes in the early United States treated rape as an act of sexualized violence punishable as a capital crime. The intersection of property concerns and harm to women was an especially potent impetus for the common law, either where women and their capacities were deemed the personal property of men, or where women's bodies or capacities created undue, additional, or indeed any burden on the public fisc. For instance, bastardy (bearing children outside of marriage) was universally punished in the early national period in the United States, as it was an offense that often burdened public funds.<sup>42</sup> Additionally, actions such as seduction of young unmarried women (typically resulting in pregnancy) long persisted as an Anglo-American civil legal wrong that could be brought by fathers for loss of their daughters' services and for the cost of raising the child.<sup>43</sup>

In contrast, harms against women that lacked an inherent element of violence, or that had little effect on public funds or on men's private property rights, had much less purchase in legal formulations. Did this mean that the common law was not "inside the female body" in these instances? Or, is the more apt description that the common law was "inside the female body," and in some cases, a matryoshka effect existed where the law was "inside the female body," but that female body itself was in male hands?<sup>44</sup> In either case, with Bernstein's assertion that the common law is inside the female body, her work shows that women's relationship to the common law is about longstanding common jurisprudential attributes, not new or *uncommon* attributes.

---

cannot, in broad terms, just say no to patriarchy unless and until women are able to participate in shaping the social structures that produce their freedom and their restraint. See, e.g., Nancy J. Hirschmann, *Autonomy? Or Freedom? A Return to Psychoanalytic Theory*, in AUTONOMY, OPPRESSION, AND GENDER 61, 77–78 (Andrea Veltman & Mark Piper eds., 2014).

<sup>41</sup> RYAN, *supra* note 37, at 97.

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

<sup>43</sup> Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 11–12 (2012) (citing Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382–83 (1993)); see also M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. 33, 41 (1987). Criminal seduction, defined as having sexual intercourse with an unmarried, sexually inactive woman using persuasion or enticement, and often with the promise of marriage, is not a long-established aspect of the formal criminal law regime. H.W. Humble, *Seduction as a Crime*, 21 COLUM. L. REV. 144, 144–45 (1921).

<sup>44</sup> I see this legal and factual metaphor as a matryoshka effect, where numerous shapes, sometimes differing, but often related or similar, are contained within one another. This is distinct from a *mise en abîme* legal metaphor where there is recurrence of exact images or concepts referring to or signifying the textual whole, such as occurs in certain constitutional provisions. Inniss, *supra* note 5, at 85 n.97.

## CONCLUSION

*The Common Law Inside the Female Body* makes a unique and interesting addition to existing literature on the nature and importance of feminist jurisprudence. While following on some other existing scholarship in the regime of legal realism, it takes a sharp departure by making the bold claim that feminist approaches to law may not only be reconciled with the common law but are, and have long been, part and parcel of the common law. In this regard the book adopts normative ideas about gender progress and the common law that move well beyond the types of discussions most frequently seen in this context. Bernstein's work, like that of some other scholars who have questioned the presumed dichotomy between common law, formalist methods and critical or legal realist methods, asks new questions and makes new observations about what are in effect old methods of legal analysis. Thus, what has been deemed *uncommon law* may be all too common law.