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THERE'S FEMINISM IN THOSE JUDGMENTS

ANITA BERNSTEIN*

Abstract: This Essay enlists the other contributions to this Symposium to honor the extraordinary transnational phenomenon of Feminist Judgments, a growing set of multi-authored volumes that find progressive potential in decisional law. Although *The Common Law Inside the Female Body* is a very different work, this Essay identifies common ground between this book and Feminist Judgments. The modus operandi of Feminist Judgments is to rewrite published judicial decisions to steer their results or their rationales in a feminist direction; *The Common Law Inside the Female Body* celebrates judge-made law as it is, in an unaltered state. That difference noted, the Feminist Judgments movement and my paean to the common law agree on where to go and what to take on the journey. Both share a commitment to reason, precedent, narrative, judge-written primary materials, grievances articulated and heard in court, fidelity to the rule of law, and undoing the subordination of women.

INTRODUCTION

The *Boston College Law Review Electronic Supplement's* editorial decision to lay out the essays of this Symposium in neutral alphabetical order by author, with only the introduction and this response as exceptions—Crawford and Bernstein would otherwise have landed in the middle of the list—opens a question of how to read these works in the aggregate. My title here, “There’s Feminism in Those Judgments,” has a layout in mind. It works with the multi-national, multi-volume, multi-authored, multi-year ongoing project called Feminist Judgments.¹

I’ve been inspired by Feminist Judgments before. A reference to it begins another law review article of mine in which I read decisional law by the esteemed federal judge Jack B. Weinstein as feminist jurisprudence.² In that

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¹ For an overview of the American subset of Feminist Judgments, see U.S. FEMINIST JUDGMENTS PROJECT, U. NEV. WILLIAM S. BOYD L.S., <https://law.unlv.edu/us-feminist-judgments> [<https://perma.cc/NNN6-FC2S>] [hereinafter *Judgments Project*]; see also FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

² Anita Bernstein, *The Feminist Jurisprudence of Jack B. Weinstein*, 64 DE PAUL L. REV. 341, 341 (2015) [hereinafter Bernstein, *Feminist Jurisprudence*].

piece I described the judge's reaction to this recharacterization of his corpus, an assessment he never asked for and did not set out to acquire.³ Judge Weinstein had his own characterization of "the ideology" behind his decisions, which he brought up unprompted during a 2014 phone call. "The individual . . . gets her due," Weinstein said. "She should be able to look to the courts to get her protection."⁴

Feminist Judgments pursues that same goal. As reviewed in a Time magazine story, this initiative commits "the power of the imagination" toward "harnessing the legal process to remedy centuries of bias, exclusion, and injustice."⁵ Its power comes from outside the authority of an official court.

Readers may be familiar with the jurisprudential method of the initiative. Joining an edited volume that addresses a particular subcategory of case law, writers rewrite published judicial decisions. Each rewrite hews to the facts and procedural history present in the original. Writers also are stuck with constraints present at the time in that they may not cite anything newer than the decision they are changing. Feminist Judgments authors are free, however—more than free, they are encouraged—to stray from the precedent they return to in two respects: its result and its rationale.

Scholars thus re-envision a disappointing, benighted, or incomplete judicial decision as an instrument of progress. "When they write feminist judgments (using feminist perspectives or methods to produce revised versions of actual court opinions)," as three leaders of the initiative explain this work, "feminist authors translate feminist theory into the language of law practice and judging."⁶ Later in this description of their project, these leaders make a point that I find welcoming to both my characterization of my beloved Judge as a creator of feminist jurisprudence and what I contended in *The Common Law Inside the Female Body*. Linda Berger, Bridget Crawford, and Kathryn Stanichi make their point with reference to a rewrite by Deborah Rhode in their *Feminist Judgments: Rewritten Opinions of the United States Court*.

Rhode chose *Johnson v. Transportation Agency*,⁷ in which a man complained that sex-based affirmative action stood between him and a job promotion he'd wanted.⁸ Paul Johnson, employed by Santa Clara County in northern

³ *Id.* at 342 n.12 (stating that Judge Weinstein was "gracious and a little bemused" by the thought of his having written feminist jurisprudence). I am one of the judge's former law clerks.

⁴ *Id.*

⁵ *Judgments Project*, *supra* note 1 (referencing a Time Magazine sidebar from 2015).

⁶ Bridget J. Crawford et al., *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 168 (2018).

⁷ See *Johnson v. Transp. Agency*, 480 U.S. 616, 625 (1987); Deborah Gordon, *Commentary on Johnson v. Transportation Agency*, in *FEMINIST JUDGEMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT*, *supra* note 1, at 327.

⁸ *Johnson*, 480 U.S. at 625.

California, had applied to be a road dispatcher. The county gave this job to the only female applicant, Diane Joyce, a woman who had scored two points lower than him on a set of numerical criteria.⁹

Deborah Rhode, in her *Feminist Judgments* rewrite of the opinion, refused to agree that the scorecard that rated Johnson better than Joyce—an amalgam that put seniority, relevant experience, evaluations by managers, and performance at interviews into a single integer—accurately measured the candidates' relative merits.¹⁰ This disagreement with “the real” *Johnson* notwithstanding, Rhode wrote her decision as an Opinion for the Court that went along with the 6-3 result in favor of the defendant agency; she did not offer a dissent or concurrence.¹¹

A very different path ended at the same result, in other words. Both the real case and the Rhode version came out in favor of Diane Joyce and her employer. Moreover, “Rhode’s feminist critique fits seamlessly into the original opinion in *Johnson*, parts of which she left intact,” the *Feminist Judgments* editors observed, continuing with a conclusion:¹² “The effect of this pastiche of feminist rewrite combined with the original opinion is noteworthy in that it is difficult, if not impossible, to tell which sections of the feminist rewrite of *Johnson* are the words of the original Court and which are Rhode’s.”¹³

I. A VIEW OF WHAT “FEMINIST JUDGMENTS” CAN INCLUDE

The decision that Justice William Brennan wrote for the *Johnson* Court, signed by five of his colleagues and concurred in by Justice Sandra Day O’Connor, is not itself a feminist judgment, but it is something that a feminist jurist can build on. If Deborah Rhode had had a seat on the Court in the Term that started in October 1986, she and the other Justices in the majority would be disagreeing not on who ought to win but on how to support the outcome they all favored. One can imagine a conversation in chambers between Brennan as leader of the Court’s liberal wing (we have noted that *Feminist Judgments* sticks with historical reality as much as it can) and Associate Justice Rhode about the possibility of signing the same opinion.¹⁴

If that prospect had failed, the Justices would have negotiated which of the two routes to a shared end would fill the majority opinion and which relegated to another concurrence. Brennan would have listened to Rhode just as

⁹ *Id.*

¹⁰ Gordon, *supra* note 7, at 332.

¹¹ *Id.* at 340.

¹² Crawford et al., *supra* note 6, at 183.

¹³ *Id.*

¹⁴ See Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 661 (2013) (noting Justice Brennan’s mastery of “getting to five”).

Rhode listened to Brennan to build her *Johnson* rewrite. Paul Johnson and Santa Clara County and even Diane Joyce probably would not notice the difference, but a different *Johnson*—a decision with a deeper feminist imprint—would move into volume 480 of the United States Reports.

Reasons to esteem Feminist Judgments abound;¹⁵ the one I embrace in this Essay, aided by the six pieces that precede mine, focuses on what the rewrites in these volumes join. Decisional law at present contains judgments hostile to feminism, many more judgments that pay no attention to feminism, and every now and then a piece of judicial writing that moves a feminist agenda forward. To give one non-typical but illustrative example, the corpus of decisions that I gathered in *The Feminist Jurisprudence of Jack B. Weinstein* includes decisions groupable under six gender-progressive umbrellas: attention to women of low income,¹⁶ sensitivity to the interests of female offenders being sentenced,¹⁷ women’s civil rights,¹⁸ “the woman’s constitution,”¹⁹ redress for women’s personal injury,²⁰ and feminism beyond women, a group in which I included male litigants, children, and one transgender plaintiff whom an expert had characterized as “he/she” in a report.²¹

The Weinstein sextet is not a definitive list of what feminism cares about: instead, it is my arrangement of the output of one judge who had not labeled himself a feminist or even a feminist ally. I was reminded of Judge Weinstein, and of the characterization he used to describe his work, when I read Ann Bartow in this Symposium.²² Many judge-written outcomes, Bartow says, “are driven by an unexamined but intense internal, personal sense of fairness.”²³ Feminist jurisprudence also wants to achieve fairness. Like other social justice movements, this one makes connections with persons who do not identify themselves as members.

To have an impact, a Feminist Judgment revisit needs some purchase in the rock it climbs, some commitments that will interest and might persuade fairness-minded readers. That an attentive reader of the Rhode’s *Johnson* rewrite cannot be sure where Brennan ends and Rhode begins means there must

¹⁵ See generally *Judgment Projects*, *supra* note 5 (gathering accolades).

¹⁶ Bernstein, *Feminist Jurisprudence*, *supra* note 2, at 343.

¹⁷ *Id.* at 346.

¹⁸ *Id.* at 348.

¹⁹ *Id.* at 353 (citing Kenneth L. Karst, *Women’s Constitution*, 1984 DUKE L.J. 447).

²⁰ *Id.* at 358.

²¹ *Id.* at 360, 363. With this sixth grouping I did not make a claim about the gender of litigants but instead claimed that feminism in this set of Weinstein-authored decisions extends beyond women.

²² *Id.* at 342 n.12 (describing Judge Weinstein as “gracious and a little bemused” by the thought of his having written feminist jurisprudence).

²³ Ann Bartow, *The Female Legal Realist Inside the Common Law*, 61 B.C.L. REV. E. SUPP. I-85 (2020).

be something hospitable to Rhode in the Brennan original. Even a case that gets ground up by a feminist jurist can be grist for a progressive mill.²⁴ The rewritten judicial decision probably does not look exactly like feminism, but it is feminist-adjacent when another jurist concerned with progress on this front can engage this hospitality. The Rhode revision of *Johnson v. Transportation Agency*, in borrowing language literally and intelligibly from the real actual decision to construct a separate judicial decision without visible seams, demonstrates unity as well as divergence. Once a source is feminist-adjacent—able to accept a feminist perspective in the sense of agreeing about arguments, factual material, and analogies that matter—it becomes accurate, or at least defensible, to say there is feminism in that source.

The (in)famous continuity of the common law, which I cheerfully admit can and does retard progress, rests on the same common purpose among participants in its work. Judges reach comfortably across centuries and oceans to cite a decision even when they would find its author off-putting or hard to talk to in person. Lawyers go to court with arguments fashioned out of simultaneously distant and pertinent precedents. Equally central to the common law, though less visible in published decisions, is the role of *disanalogy*, where a judge or advocate emphasizes difference rather than sameness between two conditions or cases.²⁵ Practitioners of this methodology cite cases but also stand ready to distinguish them.

Whether embracing an analogy or source or arguing against it, our protagonist cannot work alone. Common law lawmaking needs a community. Metaphors for it emphasize this connection to the experiences of other people. Nouns that writers have compared to the common law—a tree, a river, a web, bricolage—refer to durability derived from multiple inputs and the passage of time.²⁶

²⁴ See Bernstein, *Feminist Jurisprudence*, *supra* note 2, at 341. A rewrite in an early Feminist Judgments volume demolished an unsound decision by the Supreme Court of Canada. Jennifer Koshan, *Newfoundland (Treasury Board) v. N.A.P.E.*, 18 CANADIAN J. WOMEN & L. 321 (2006). That case, which ruled against a group of working-class women, is not defensible in its result; I do not defend it here except as an example of the methodology I esteem in this Essay.

²⁵ I used that word in the book when comparing slavery and coverture. ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 25 (2019) [hereinafter BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY*]. Then of course I found some similarities.

²⁶ See, e.g., Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 104–05 (2012) (discussing “[a]ncestral [b]ricolage”); Isabelle Richard, *Metaphors in English for Law: Let Us Keep Them!*, LEXIS J. ENG. LEXICOLOGY, 2014, at 4–6, 7–8, <https://journals.openedition.org/lexis/251> [<https://perma.cc/L7XR-GRR4>] (noting the metaphors of “tree,” “river,” and “web”).

Music gives us another metaphor, call and response, as a way to think about both Feminist Judgments and the essays of this Symposium.²⁷ Call and response starts with a phrase that gets answered after a pause; participants work in collaboration, playing distinct roles.²⁸ Within Feminist Judgments, the first increment or call is the actual case, a historical reality that the rewrite responds to and problematizes. In this Symposium, three Essays identify what is wrong with the historical reality of the common law. We can think of those three as the Call. “Response” here comes from two other Essays. Our leader, who not by coincidence also happens to be a leader of the Feminist Judgments project, achieves a synthesis in her Introduction.

II. THE CALL: SILBAUGH, DINNER, AND AHMAD . . .

Writing with both despair and hope about the possibility of change, Katharine Silbaugh, Deborah Dinner, and Nadia Ahmad identify in their Essays conditions present in the common law that are not progressive. For Silbaugh, the worrisome condition is “social hierarchy.”²⁹ “Patriarchy,” writes Dinner, contrasting this blight to Liberty.³⁰ Ahmad has chosen an unexpected contrast, a phrase I want to call arresting: “the Central Park Five.”³¹

Social hierarchy and patriarchy. Silbaugh and Dinner bring back to my mind a worry that I imagine must be common for writers who put forward contrarian theses: Disagreement with an apparent consensus might indicate that the person who disagrees is wrong. In the book I copped to self-questioning a couple of times. On its first page, my second sentence, I mentioned recurrent “surprise or polite skepticism” that I received in response to my suggestion that the common law functions to liberate women.³² When I asserted what readers seem to agree is the book’s boldest claim—that abortion really is “a common law liberty”³³—I felt obliged to nod again in that direction: “If Ye

²⁷ See Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 469–70 (2005) (arguing that African American traditions, call and response included, understand the creation of music as communal rather than the work of a solitary author).

²⁸ *Id.* at 470–71.

²⁹ Katharine Silbaugh, *The Common Law Inside a Social Hierarchy: Power or Reason?*, 61 B.C.L. REV. E. SUPP. I-105–11 (2020).

³⁰ Deborah Dinner, *Seeking Liberty, Finding Patriarchy: The Common Law’s Historical Legacy*, 61 B.C.L. REV. E. SUPP. I.-89–94 (2020).

³¹ Nadia B. Ahmad, *Re-Reading Anita Bernstein’s The Common Law Inside the Female Body from the Perspective of the Central Park Five*, 61 B.C.L. REV. E. SUPP. I.-69–81 (2020).

³² BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY*, *supra* note 25, at 1.

³³ See *id.* at 161 n.85 (citing Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra 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)). The United States Supreme Court cited the Means article in its 1973 decision *Roe v. Wade*. 410 U.S. 113, 135 n.26 (1973).

Olde Common Law gives individuals a right to rid themselves of pregnancy, one would have expected to hear the news before now. As the cliché asks, where have you been?”³⁴ Part of my last chapter purports to talk back to Jeremy Bentham, the common law’s greatest antagonist, as among a set of interlocutors I felt I had “carried around on my mental shoulder.”³⁵

I found it easier to argue with a dead thinker about the relative merits of legislation and the common law than to assuage my misgiving that the common law might be at least as committed to social hierarchy and patriarchy as it is to the liberty of individuals of all genders. The stance I took on statutory law had the advantage of newer developments. For example, I daresay Jeremy Bentham would have been repelled by the Christmas 2017 tax bill that some Republicans in Congress voted for sight unseen, a piece of legislation on which I had enough time to throw shade before my publisher’s last deadline.³⁶ Social hierarchy, to use Silbaugh’s broader category, or patriarchy, to name the specific kind of social hierarchy that Dinner chose, is harder to gainsay. Deborah Dinner rightly surmises that I do indeed “agree with some of [her] concerns.”³⁷

From her expertise in American history Dinner is also correct, I think, to find patriarchy and racism twined together. Silbaugh expresses the same point and Nadia Ahmad, to whom I will soon turn, puts race at the center of her essay. But Dinner’s reference to “seeking liberty” and finding conditions that are just the opposite is especially succinct. Law as written by American judges in the eighteenth and nineteenth centuries sided with husbands over wives and with purported owners of human beings over the people they had violently enslaved. All the writers in this Symposium deserve my thanks for putting emphasis on this brute historical reality.

The Central Park Five. When Nadia Ahmad observes that I did not use the title “The Common Law Inside the White Female Body,” she makes a valuable point that has occupied another post-monograph publication of mine about what I said in my book and did not say. A companion symposium published at the end of last year gave me a chance to write up a kind of “The

³⁴ BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY*, *supra* note 25, at 160. In an earlier iteration of this point I attributed *Where Have You Been?* to one individual. Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 *BUFF. L. REV.* 1141, 1148 (2015) (citing lyrics by Rihanna).

³⁵ BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY*, *supra* note 25, at 190.

³⁶ *Id.* at 192 (“I feel sure that Jeremy Bentham would support changes to the Internal Revenue Code to follow other countries and simplify the payment of federal income tax. H&R Block and Intuit, seller of TurboTax, have spent millions each year keeping this reform a distant dream.”).

³⁷ Dinner, *supra* note 30, at I-94.

Common Law Inside the African American Female Body.”³⁸ Regardless of what its merits may be, that essay, whose real title is *Negative Liberty Meets Positive Social Change*, certainly does not resolve the problem(s) of race present in my book, for at least three reasons. First, when I contend that the common law can and does deliver negative liberty to women of color, I risk misreading the record. “Whitewashing” comes to mind as a word for too much good cheer on that point. Second, I lack authority to speak about prospects for persons whose identity and experiences I do not share. Third, that essay exists outside the actual book.

And so I mention *Negative Liberty Meets Positive Social Change* here for a narrower purpose, which is to identify an overlap in my thinking with the Ahmad thesis. On the subject of pregnancy and abortion, both Ahmad and I think that it is important to note that “[pregnant women of color face] greater morbidity and mortality than their white counterparts.”³⁹ She and I make different uses of this datum, however. Ahmad reads it to say that “all women do not experience pregnancy and its consequences the same way.”⁴⁰ I agree, but the racial difference I find of interest relates not to Ahmad’s broad and abstract “pregnancy and its consequences” but life and death for women of color as a fact on the ground. All American women, undivided by race, are much more likely to die in childbirth than they are to die of an abortion; on top of that, “the racial disparity in [American] maternal deaths is jaw-dropping.”⁴¹ Because maternal death threatens African American women more than white women, the common law liberty of abortion—which delivers shelter from a deadly risk—holds urgent importance for members of a racial minority.⁴²

Referencing the Central Park Five makes a bold contribution to this Symposium that I did not anticipate. I find Ahmad’s inclusion exciting and pertinent. The phrase refers to teenagers who in 1989 were arrested for an exceptionally violent, luridly publicized attack on a white woman, an attack that they did not commit and for which crime they were sentenced to prison. The experience of these now middle-aged men lies at the center of an acclaimed 2019 film, “When They See Us,” that reported on their exoneration and vindication. DNA evidence pinned responsibility on a stranger to the five of them, an adult.⁴³

³⁸ See Anita Bernstein, *Negative Liberty Meets Positive Social Change*, 114 NW. U.L. REV. ONLINE 195 (2019), <https://northwesternlawreview.org/articles/negative-liberty-meets-positive-social-change/> [<https://perma.cc/2ZLF-7DJC>] [hereinafter Bernstein, *Negative Liberty*].

³⁹ Ahmad, *supra* note 31, at I-76.

⁴⁰ *Id.*

⁴¹ Bernstein, *Negative Liberty*, *supra* note 38, at 209 (quoting Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty and the State*, 127 YALE L.J. 1270, 1330 (2018)).

⁴² BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY, *supra* note 25, at 144.

⁴³ See Ahmad, *supra* note 31, at I-73–75.

Innocence and guilt, or exoneration and blame, come together in Ahmad's reflections about the Central Park Five. Both the common law and I receive a bit of blame in her Essay. I shall defend both, though not with vehemence.⁴⁴

Did the personified entity I've been calling "the common law" hurt Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Korey (then Kharey) Wise?⁴⁵ Posing that question made my knee jerk, I admit. I want to say no. One need not be a Bernstein-level fan of the common law to assign more fault to other conditions: I would mention reliance on confessions by law enforcement, media indifference to black victims of violent crime, and a full-page ad in all the big-circulation New York newspapers that influenced Central Park Five jurors by stoking fear and hatred.⁴⁶ Nothing about precedent, judge-written decisions, *stare decisis*, reasoning by analogy, or any other hallmark of the common law seems to me central to the miscarriage of justice that Ahmad connects to my book.

On reflection, while I wouldn't go so far as to agree that the common law was a Central Park Five malefactor, or that it "blocks entry to the United States by means of the 'accident' of immigrant deaths, not just detention and deportation,"⁴⁷ I share in the disapproval that Ahmad expresses. The jurisprudence that

⁴⁴ I keep Ahmad's criticism of the common law above the line and respond to the criticism of me down here in a footnote. When she wrote that in contrast to some scholars, who "propose that legal scholars should 'avoid essentialism to achieve normative commitments to social transformation,' Bernstein is more comfortable making broad generalizations about the operation of the system," Ahmad applied "essentialism" to my book. *Id.* at I.-73. "Making broad generalizations" is different from the pejorative word I see used most often to condemn generalizations by women about women when these authors or works neglect race, class, sexual orientation, or another identifier that functions to distinguish or divide members of the group. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Certainly I have made my share of broad generalizations over the years, inside *The Common Law Inside the Female Body* and out, but I have also gone out of my way to abjure essentialism. See, e.g., Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201 (2012) (arguing in favor of variety and multiplicity); Anita Bernstein, *Toward More Parsimony and Transparency in "The Essentials of Marriage,"* 2011 MICH. ST. L. REV. 81, 85–86 (expressing my concern about a belief present in judge-written law that rigidly conditions the freedom of individuals and couples to choose the terms of their marriages). Ahmad's diction treated "pregnancy and its consequences" as if it were a single thing with an essence, whereas in *Negative Liberty Meets Positive Social Change* I focused on the difference between African American deaths caused by childbirth and African American lives saved by abortion. Bernstein, *Negative Liberty*, *supra* note 38, at 209.

⁴⁵ See Ahmad, *supra* note 31, at I.-73–74.

⁴⁶ A law review article published more than a decade before the 2016 election noted the extreme vituperation that Donald Trump wrote into his high-priced speech about the case. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 15 CARDOZO L. REV. 1315, 1350–51 (2004) (quoting Trump's words in the newspaper ad: "I want to hate [them]. They should be forced to suffer . . . I am not looking to psychoanalyze them or understand them, I am looking to punish them."). Stoked fear and hatred had an effect on the outcome. See *id.* at 1357–60 (gathering evidence to support this proposition).

⁴⁷ Ahmad, *supra* note 31, at I.-78.

I praise as a safeguard of negative liberty occupies itself at least as much with protecting hard-to-justify distributions of wealth, health, and safety. Ahmad implies that at some point the priorities of the common law become too objectionable to tolerate without protest, and that its indifference to injustice might be an overt wrong. Her bottom line has merit.

III. . . . AND A RESPONSE FROM INNIS AND BARTOW

Lolita Buckner Inniss and Ann Bartow do not, at least in the eyes of this reader, disagree with the problem as described in the Essays I've grouped under *The Call*, but they have something different to say about it. Inniss references jurisprudence and history to situate *The Common Law Inside the Female Body* as in or near (though not “squarely among”) “the works of legal realists.”⁴⁸ That taxonomical move, which did not occur to me as author, returns when Ann Bartow expresses the same idea.⁴⁹

All three of us—Inniss and Bartow as nominators of this description and me, in reaction to it—know that legal realism has no unitary definition and few widely agreed-on criteria for inclusion under this aegis. In separate ways, however, the two of them both have in mind one foundational condition present in legal realism. Inniss quotes Brian Leiter to say that “tailored scenarios that demonstrated deep concern about fairness and justice in specific contexts were at the heart of the common law enterprise.”⁵⁰ In contrast to Inniss, whose expression of this jurisprudential stance is more guarded, Bartow owns fairness overtly for herself:

I consider myself a legal realist. I think that judges consider not only abstract rules, but also social interests, public policy, the personal characteristics of the parties, and a personal theory of justice when deciding a case. Some of this is done consciously, but many outcome determinations are driven by an unexamined but intense internal, personal sense of fairness. Bernstein suggests that is a reason for optimism: Judges can be persuaded to be fair to women. Sometimes the common law will guide them to fairness with little friction. Other times, though, they have to engage in what Bernstein charmingly refers to as “handwaving.” The judges know the outcome they think fairness requires, but struggle to explain it as the natural consequence of extant common law in the area. As a result,

⁴⁸ Lolita Buckner Inniss, *(Un)Common Law and the Female Body*, 61 B.C.L. REV. E. SUPP. I.-95, 98 (2020).

⁴⁹ Bartow, *supra* note 23, at I.-85.

⁵⁰ Inniss, *supra* note 48, at I.-98.

they resort to deflection: “Look over here at my holding, isn’t it great? Don’t worry so much about how I reached it!”⁵¹

This response to a call as articulated by the other three Essays says that the common law contains not only the pathologies insightfully described by Silbaugh, Dinner, and Ahmad, but also the seeds of its own repair. Common law judges partake of and reinforce the social ills around them but inside their job is an orientation toward being fair. Flexibility—a virtue that writers who are skeptical about legal realism call “indeterminacy” and worse⁵²—enables the legal realist to act on that outlook.

My own response to the call stakes out a spot of territory near that claimed by Bartow and Innis. While I agree with them that a large enough proportion of judges try to treat persons in their courts with fairness, I think the work of a common law judge focuses more directly on integrity. Here I use this word to include its connotation of oneness.

The integer, the singular litigant, stands at the center of the common law. This person was born or (alternatively it was formed out of paper, if it is the corporate kind of person) alone and will die (or will be dissolved) alone. It wins or loses and is heard or dismissed by itself. As a unique person, a plaintiff needs standing, which means a distinct individual stake in the outcome, to bring a common law claim. Notice and other procedural rights rendered in the common law tradition address defendants at this singular level.

Recognition of a person, I argued in *The Common Law Inside the Female Body*, is what determines whether the common law can deliver what Innis and Bartow call fairness to this participant. Here integrity in the sense of oneness—treating like cases alike, heeding precedent because a current dispute is at one with an earlier iteration of the same conflict—delivers parity of experience to persons. To the common law we persons are the same, at least at a (very important) formal level. The common law says that she who possesses the status of a person possesses negative liberty. She may refuse to share and submit to the intrusions and demands that others would push upon and into her. When we persons insist on our indivisibility, we can call on the common law’s promise to have our back.

⁵¹ Bartow, *supra* note 23, at I.-82–88.

⁵² See John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASH. U.J. L. & POL. 131, 136 (2008) (discussing the caricature of legal realism as amounting to “what the judge had for breakfast”) (internal quotation marks omitted); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 750–51 (2013) (reviewing the alleged indeterminacy of legal realism).

IV. FEMINIST JUDGMENTS INSIDE THE BODY OF THE COMMON LAW

Concluding this Essay, I turn now to the description of this Symposium as presented by its leader. Bridget Crawford writes that she “invited colleagues with diverse interests, backgrounds and experiences to contribute to a collection of reflective essays. The authors include full-time faculty members with academic specialties in Torts, Intellectual Property, Legal History, Environmental Law, Property, Family Law, and Constitutional Law. Scholars with different scholarly perspectives ask where (and whether) the common law can be understood as a strong ground for asserting women’s rights.”⁵³ Crawford is right to focus on diversity because diversity is the point of a symposium. Had she wanted to confine her commentary on *The Common Law Inside the Female Body* to her own ideas, she would have published a review essay with a solitary byline. My focus on unity, noted earlier in this Essay and now with us again, does not disagree with Crawford but complements her work.

Occasionally I venture to write about freedom of speech,⁵⁴ and now, having found connections between this Symposium and the Feminist Judgments project, I’m moved to say a few words on the subject here because Feminist Judgment rewrites of ‘real cases’ are (among many other things) significant expressions of opinion that contribute to what the First Amendment scholar Ronald Krotoszynski in a recent book has identified as a reason to value free speech, the pursuit of democratic self-government.⁵⁵ Separately and together, expressions gathered under the Feminist Judgments aegis make impacts that resemble the thesis about progressive change I offered in *The Common Law Inside the Female Body*. The call-and-response metaphor I’ve used in this Essay also adverts to speech.⁵⁶

A Feminist Judgments rewriter talks to a published judicial decision, a source to which she necessarily has something to add. Jeanne Schroeder once divided jurisprudential movements into those that “give advice to the government”—Schroeder included law and economics in that category—and those that take the perspective of persons who are governed, a cohort that includes “the speculative theorist or critical scholar.”⁵⁷ Contributors to a feminist judgments collection might be speculative theorists and they often are critical

⁵³ Bridget J. Crawford, *The Common Law as a Force for Women*, 61 B.C.L. REV. E. SUPP. I.-63, 64 (2020).

⁵⁴ See Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 PACE L. REV. 1 (2014); Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C.L. REV. 1457 (2012).

⁵⁵ RONALD J. KROTOSZYNSKI, JR., *THE DISAPPEARING FIRST AMENDMENT*, at xvii (2019).

⁵⁶ See *supra* notes 23–25 and accompanying text.

⁵⁷ Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 151 (2000).

scholars; but when they rewrite a decision they also join the advice-to-government team, speaking about “policy.”⁵⁸

As advice-givers who want their ideas and recommendations to have influence, contributors to the Feminist Judgments initiative address what Professor Schroeder called “the government” on its own turf.⁵⁹ They set out to sound like judges, writing opinions that announce what they concluded and why.⁶⁰ As three Feminist Judgments leaders have described this same-and-not-the-same methodology,⁶¹ “rewritten feminist judgments use judicial language and tone—with all of the concomitant constraints and peculiarities—to give voice to feminist resistance.”⁶² This approach to jurisprudence argues with precedents and echoes them at the same time.

The common law follows a similar path. A different path also, I acknowledge as quickly as I can. Activism plays a scant role in the common law but it fills Feminist Judgments. Writers who contribute to these volumes feel uneasy about the present and even more so about the past. So do external admirers of the project like me. We want judge-made law to differ from what it is.

At the same time, an aspect shared by these two separate jurisprudential forces—the notion that I label “continuity meets change”—warrants mention.⁶³ In joining and engaging with what judges wrote into case law, rather than just opposing or refuting a record whose shortcomings are so tellingly told in this Symposium, the Feminist Judgments initiative uses primary-source instruments in its agenda to transform. Ground shared by the common law and Feminist Judgments is in my opinion nourishing enough to support my having found feminism in a conservative powdered-wig import.

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ A minority of Feminist Judgments writings eschew this commitment to mimicking real cases, but this rejection is itself enlightening. *See* Linda L. Berger, Kathryn M. Stanchi, & Bridget J. Crawford, *Learning from Feminist Judgments: Lessons in Language and Advocacy*, 98 TEX. L. REV. ONLINE 40, 64 (2019), <https://texaslawreview.org/learning-from-feminist-judgments-lessons-in-language-and-advocacy/> [<https://perma.cc/C26R-RP2F>] (noting that some of the Indigenous authors who wrote for an Australian volume of Feminist Judgments “rejected the conventional form and content of a judgment, with one contributor explaining her inability to write a judicial opinion and writing an essay instead”).

⁶¹ I borrow this phrase from Roald Hoffmann. ROALD HOFFMAN, *THE SAME AND NOT THE SAME* (1995).

⁶² Crawford et al., *supra* note 6, at 181.

⁶³ BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY*, *supra* note 25, at 20.