Introduction

What is the Common Law Inside the Female Body?

Quietly, faithfully, and without any overt agenda, the common law serves to liberate women. Years of drawing surprise or polite skepticism when I've said so led me to write this book-length defense of that contention. Shared ground between the common law and feminist jurisprudence has always existed, or so I will argue, and mutual supports between the two can enlarge what the law achieves.

One might suppose that the common law and feminist jurisprudence are incompatible if for no other reason than that feminist jurisprudence – feminist anything, actually – seeks change,[1] while the common law has a deserved reputation for conservatism.[2] The common law sites its power in unelected judges rather than legislators. At a minimum it coexisted with, and it probably also gave aid to, feudalism and slavery. It has always emphasized private property rights; it has never pushed explicitly for distributive justice. As for the female body, inside or out, the common law in the past excluded women through both substantive doctrines and procedural rules about who could be heard in court.

Lawyers who seek feminist potential in primary legal materials, for their part, tend to look elsewhere. They put more of their faith in statutes, whose promise lies in their power to install new solutions in a forward-looking approach to reform. Codifications like the Convention on the Elimination of All Forms of Discrimination Against Women aspire to build communities that stretch across national frontiers.[3] The common law is transnational too, but unlike treaties it makes no bold declarations in pursuit of purposeful change. American legal feminists also find promise in amendments to the U.S. Constitution, whose commitments to equal protection and due process have been interpreted to support women's interests. But the common law? *The last thing we need,* a feminist activist might want to say.

The two nevertheless unite around the same commitment. The common law contains precepts and doctrines that strengthen the freedom of individuals; the feminist struggle against the subjugation of women pursues liberty. What has obscured the shared nature of this pursuit is a historical condition now supplanted: at one time, the common law proceeded as if only men could enjoy its opportunities.

No longer. Contemporary American common law recognizes equality on the axis of gender.

Female judges, parties, litigators, judges, and legal scholars – all absent in the common law for many centuries – now share authority in it. Freedoms that the common law safeguards and valorizes along with the security interests that it defends extend to women as well as men. Equality in the formal sense of the term has long ceased to be controversial in the United States. Even its most stalwart resisters acknowledge that it is here to stay. Regardless of the gender we hold or have been assigned, then, all of us share in the bounty of the common law.

Far from being inferior to statutes and treaties and the U.S. Constitution as a feminist instrument, the common law advances gender justice. Its commitments to individual rights – even old school private property rights that originate in what prosperous men want – are liberating. Its deep roots in the past support a foundation for progress. The common law both advances an existing law reform agenda and gives it new ideas. And because it does not understand the Female as a separate creature for legal thought and legal rules, it assimilates women into standard legal reasoning. This book unites a pair of venerable jurisprudential traditions with separate antecedents and finds a vital future for them together.

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Before I move my common law inside the female body, let us start with the common law inside the United States of America, where I write. Thirty-odd legal systems around the world are understood as continuing the court-centered, judge-written tradition that took form in England after the Norman Conquest. "The common law" as used in this book has a view of this heritage that now, having finished writing, I feel sure could have come only from the United States.

My canvas is wider than one wide country, however. English law, especially as William Blackstone described it at the end of the eighteenth century, pervades this book. Decisions and secondary writings from other countries influenced the assertions I make here and gave me ideas. Ecclesiastical law, equity (from back in its Chancery days, when a brighter line separated Equity and Law), Roman law, and modern civil law from France and Germany are here too. Readers working in, or focused on, a different common law legal system have an American cousin in these pages. We are not the same, but we are family.

In my branch of this family, the common law holds extraordinarily strong. Its stubborn endurance might bemuse reformers and critics, most notably the great legal philosopher Jeremy Bentham. So unmodern a jurisprudence, in place for such a long time. Bentham once sent a letter to James Madison – then the president of the United States, and before that a founder of the American republic – offering to bestow on the young country a new code of law. The offer was written to remind Madison of what he and his Constitutional Convention colleagues had done to an

encrusted, ossified, plaque-like English monarchy and the institutions that supported it. American leaders, cried Bentham in his 1811 missive to President Madison, ought to shake off "that mass of foreign law, the yoke of which in the *wordless*, as well as boundless, and shapeless shape of *common*, alias *Unwritten* law, remains still about your necks."[4] The common law is "so primitive," a France-educated torts student of mine once murmured. Surely a more transparent, more democratic, less reflexively conservative and elitist successor would supplant it any moment now. Instead, the United States reaffirms, reifies, and digs deeper into the judge-made law that it imported and expanded.

Statutes and regulations that proliferate in this country have not lessened the power of judges "to say what the law is," as a famous Supreme Court pronouncement described the judicial role in 1803.[5] Chief Justice Marshall was speaking about the function of federal courts that construe the Constitution and acts of Congress, but contemporary American judges at the state level do this work too. And for state and federal judges, "the law" is not just statutory, constitutional, or common law but all law.

Governmental design explains some of this persistence. Federalism in the United States, in contrast to the version in Canada and Australia, does not situate a high court above all others in all respects. Most of the time, littler tribunals than the U.S. Supreme Court get the last word. When high courts atop one federal capital district, fifty states, and sixteen territories speak about the common law inside their boundaries, what they decide is harder to wipe out by Supreme Court judicial decision than what high courts of Australian states or Canadian provinces might decide. Barnacle-accreting of the kind that irked Jeremy Bentham now builds up in many more courts. It also sticks around longer and more diffusely than it used to, with the "unpublished" category of case law almost an oxymoron – unpublished decisions get read and quoted all the time – and electronic technology standing by to disseminate judge-authored content immediately after courts part with it.

The so-called Erie doctrine in principle limits judicial power to enlarge the common law but in practice does little to diminish its growth in American federal courts. *Erie Railroad Co.* v. *Tompkins* held in 1938 that a federal trial court had to apply state law to the controversy: *Swift* v. *Tyson*, the 1842 decision it overruled, had permitted a federal version of common law to govern.[6] *Erie* honored a classic common law rule, the doctrine that land possessors do not owe trespassers a duty of reasonable care. Mr. Tompkins had to lose under Pennsylvania law. He might have prevailed if the federal court could have applied another more favorable common law position, but state law controlled.

Erie continues to limit what judges can do when their jurisdiction is based on diversity of litigants' citizenship, but it does not stop them from expanding the common law elsewhere. In the torts class we share, my students and I learn about common law doctrine from decisions that came to federal courts via the admiralty route – two well-known ones written by the famous Learned Hand, *T.J. Hooper* and

United States v. *Carroll Towing*, in particular[7] – and the Federal Employers Liability Act, which supplies federal common law to guide redress for railroad injuries. The federal Alien Tort statute, enacted in 1789, invites foreign claimants to allege violations of the law of nations in American federal courts. Common law abounds in the law of federal criminal sentencing, interpretations of the Federal Rules of Evidence and the Federal Rules of Civil Procedure, disputes between states, and claims against the U.S. government as proprietor.[8] One observer equates federal common law with the judicial task of interpretation in general, defining federal common law as "any federal rule of decision that is not mandated on the face of any federal rule or text."[9] It's everywhere.

Sprawl, authority, and perdurability thus keep the American common law significant. Any locus of lawmaking power in a large wealthy country that professes commitment to the rule of law will generate political and material impacts on the world. That it shows no signs of going away in the United States means that the common law will continue to deserve attention in the near-term future.

"It" shows no signs of going away, I just said. The common law "will continue to deserve attention," as if this jurisprudential heritage were a person with a claim of merit. Will "make a difference in the world," like a promising applicant characterized in a recommendation. Here's what I think is American about *The Common Law Inside the Female Body*. Not its "feminist" takeaways – the term feminist scare-quoted here because, like the English political writer Rebecca West circa 1913, I am not sure what the word means.[10] Conclusions suited to the feminist label get reached all over the world. Instead, the American-ness here is my premise that the common law has a point of view.

The jurist most noted for this perspective wrote in England but made a deeper mark in the United States. Sir William Blackstone (1723–1780), author of the multivolume *Commentaries on the Laws of England*, will speak in almost every chapter of this book. Blackstone wrote about the laws of England as an *e pluribus* unitary whole. Rooted in, yet distinct from, Roman and natural law, the laws of England as relayed in the *Commentaries* contain doctrines and provisions that unite around their concern with liberty and property.[11] The four volumes summarize fields of law in an arrangement that a contemporary synthesizer would not emulate, but they come across today as well integrated. Blackstone defends a conservatively ordered society buttressed by the rule of law as a source of reason, regularity, and security.

Eighteenth-century nation-builders on my side of the Atlantic revered the *Commentaries*. Their "grievances against the British crown," writes the American political scientist Howard Schweber, "were articulated in terms of prerogatives that the colonists claimed for themselves under the banner of Blackstone's common law."[12] Thomas Jefferson sassed Blackstone in an 1810 letter to John Tyler: "The opinion seems to be that Blackstone is to us what the Alcoran is to the Mahometans, that everything which is necessary is in him, and what is not in him is not necessary"[13] – but he also praised the *Commentaries* as "the most elegant and

best digested of our law catalogue."[14] The book sold briskly in the United States. In 1771, its American fan base, having had access to about a thousand copies imported from England, signed up by advance subscription to buy a new edition scheduled for publication in Philadelphia. On the list of these eager pre-subscribers were John Adams, John Jay, and James Wilson. The Virginia politician Thomas Marshall bought it for his teenage son John, who grew up to be Chief Justice of the United States, and John Marshall along with Abraham Lincoln, James Kent, and Daniel Webster all went on to write about how the *Commentaries* thrilled and inspired them.[15] I tried to count the number of times the U.S. Supreme Court has cited this work. If we include dissenting opinions, it's 397, from 1793 to 2017 and continuing.[16] The only book the Supreme Court has cited more is the founders' blueprint for republican national government, the *Federalist Papers*. *Commentaries on the Laws of England* beats *Wigmore on Evidence*, *Moore's Federal Practice*, books also called *Commentaries* by William Kent and Joseph Story, Laurence Tribe's treatise on American constitutional law, and the Bible.

This keen reception affected American absorption of the common law. While English readers were reading a bigger literature about their legal system, Blackstone had the U.S. market on English law almost to himself.[17] American lawyers and judges who wanted to know what the legal tradition they had inherited said about an issue did not peruse rival judge-written sources like ecclesiastical law, decisions by English local courts, or Equity, explains historian Hendrik Hartog, but "looked to Blackstone, whose statements of the law of England reinforced their sense of a unified and monopolistic common law."[18] Schooled in the *Commentaries* whether we ever read them or not, we in the United States think of the common law as a singular tradition that shares power in the law only with legislation and regulation. Not a monolith, too varied for that, but a system containing precepts that span its disparate fields. If only the principles that animate it "were put in simple, living language," implored *The Heart of Blackstone*, a book published in New York and Cincinnati in 1915, "they would appeal to the hearts of young and old, men and women."[19]

Scholars with expertise in this subject who write from the motherland evidently prefer not to generalize about overarching doctrinal commitments of the sort that occupied *The Heart of Blackstone, or Principles of the Common Law* a hundred years ago and now occupy *The Common Law Inside the Female Body*. Frederic Maitland, for example, understood the common law to exist not in its doctrines but instead in its writs, which function as instruments.[20] A treatise called *The Practice of Law in All Its Principal Departments, with a View of Rights, Injuries, and Remedies* (1838) could have shared what its author, the English barrister Joseph Chitty, considered to be Heart of Blackstone-like principles of the common law, but it doesn't.

Let us move to twentieth-century English assessments of what this source material is about. John Hamilton Baker wrote that the common law delivers liberty (only) via its "ability to enforce popular notions of fairness"[21] – and "popular notions"

presumably sway and vary. (In the ensuing chapters of this book, I will take a different view of common law liberty.) S. F. C. Milsom, reviewing a corner of the common law related to commercial obligation, mused that "no single principle seems to explain all cases."[22] One does occasionally find British scholarship willing to find substantive provisions in this body of law as a whole. The jurist and hereditary peer Frederick Pollock titled a 1911 book *The Genius of the Common Law*, offering in it an American-style generalization: "The Common Law favors competition whenever free competition is practicable."[23] In making this assertion, Pollock may have been influenced by his many decades of trans-Atlantic correspondence with Oliver Wendell Holmes Jr., the noted author of *The Common Law*, a multifaceted monograph credited with presenting "a general theory of tort."[24] And Pollock wrote *The Genius of the Common Law* in response to an invitation from an American institution to lecture on the subject.

In sum, my perspective here is American in that *The Common Law Inside the Female Body* features a protagonist with a point of view. Treating the common law as if it were a person animated by ideas and commitments may seem peculiar at first, but it is faithful to an established pattern. The common law everywhere personifies all its players. English cases call the government by a pair of humanish names, Rex and Regina. Case law in my country skips these Latin references to monarchy but "State" and "United States" and the name of an individual state all show up regularly as parties pressing their interests in common law courts. Enterprises participate in common law litigation with names and identities distinct from their owners and managers. Chapter 5 of this book, which argues that the common law furnishes a strong right to rid oneself of an unwanted occupant located in one's interior, makes its case more or less stipulating to the personhood of an embryo or fetus. I don't happen to believe this occupant is a person, but I think that the common law believes it is one, even before so-called quickening early in the second trimester of pregnancy. The common law emerges in the form of consequences imposed on stakeholders who prevail or suffer in court. Individuals and entities with legal personality enjoy, endure, resist, waive, protest, and fulfill their common law obligations, entitlements, and responsibilities.

As the abortion example illustrates, this protagonist of *The Common Law Inside the Female Body* is distinct from its author and her opinions. A few of the views I ascribe to the common law make me queasy. More often, however, I find this character's perspective admirable – so much so that in my judgment the most significant lapse of the common law lies not in any of its doctrines but in its historical inability to give full force to its principles. Slavery always was incompatible with the common law, I think. The great eighteenth-century common law judge Lord Mansfield said almost as much;[25] Blackstone wrote that slavery was antithetical to his cherished Laws of England.[26] American common law jurisdictions gave unforgivable aid to oppression when they treated enslavement as a lawful condition. In the courts of these jurisdictions, the common law failed and was failed.

All along, the hero of this book has provisioned persons with rights and liberties. What has been contingent or historically unsteady about what the common law renders is who gets to be a person. Baker observes that "in speaking of freemen," the Magna Carta "exclud[ed] the unfree" and did so "deliberately."[27] Individuals permitted to speak and write about law-based freedom in England, he continues in *Personal Liberty Under the Common Law of England, 1200–1600*, came from the same social groups and educational settings "as those who advised the government, most of the officials of government, and those who sat in judgment in the King's courts. They argued together, ate together, and shared a set of common assumptions." What they shared, not everyone shared. The medieval common law had status labels for unfree persons, among them "serf" and "villein,"[28] and medieval English slurred people with words like "churl," "caitiff," "wretch" (meaning exile), and "harlot."[29] "Those whose liberties developed latest," Baker concludes, "were those with the most limited access" to law-furnished power.[30]

The aspect of these liberties that occupies *The Common Law Inside the Female Body* is freedom *from* much more than freedom *to*. Following a lead traceable to Hobbes and Hegel, though more recently associated with the twentieth-century philosopher Isaiah Berlin, I will use the (sometimes controversial) phrase "negative liberty" to reference an entitlement to withdraw and repel; to refuse invitations and offers and orders; and to separate oneself from external claims.[31] Human beings recognized as persons do not receive anything material by the common law to give them freedom *to* flourish. But they may reject invasion and intrusion.

Villeins and serfs now long having left the common law, the way for someone to lack or forfeit this baseline entitlement today is to have or acquire a disability, a legal category that identifies individuals as needing guardianship because of their youth or mental incapacity. Early in his *On Liberty*, John Stuart Mill covered the liberty default with its attendant exceptions: "Over himself, over his own body and mind, the individual is sovereign" – and then Mill added the proviso that this liberty "is meant to apply only to human beings in the maturity of their faculties." Children lack liberty because they are "still in a state to require being taken care of by others." Because of their dependent condition, they "must be protected against their own actions as well as against external injury."[32]

Mill had another reservation, one he seemed to find harder to articulate. Individuals cannot be sovereign over themselves if the society in which they live is itself in "its nonage," that is to say, barbaric. "Liberty, as a principle" can be present only "when mankind have become capable of being improved by free and equal discussion." Individuals living in backwardness enjoy nothing better than their "implicit obedience to an Akbar or a Charlemagne"[33] (note the ethnic diversity here, one of the potentates Mughal and the other a Frankish emperor who ruled most of Western Europe). Whole societies unready for liberty certainly sounds like a rationale for British imperialism, which Mill approved.[34] I would defend this passage only by noting that Mill himself said its point was moot, as "all nations with

whom we need here concern ourselves" have attained liberty-readiness. Adults everywhere can be guided to their own improvement by persuasion.

Only disability in the sense of individual incapacity, then, justifies withholding liberty from a human being. Persons who fall outside the legal classification of disability – a solid majority of the American population – hold a powerful default right to say no to what they do not want. In the chapters of Part I, I will argue that the common law in its contemporary American incarnation furnishes this negative liberty to persons of all genders. John Stuart Mill would agree with this gender-inclusion: When he wrote that *On Liberty*'s liberty excludes (only) children, he defined children as "young persons below the age which the law may fix as that of manhood *or womanhood*."[35] More deeply and comprehensively than any statute or any clause in a written constitution, the common law backs this entitlement with legal force.

To hold negative liberty as rendered by the common law is to enjoy what I will call "condoned self-regard." We may put ourselves first, in other words. Individuals may favor themselves and what they think are their own interests over the demands that another person makes. Only if they have done something that forces them to subordinate what they want for themselves must they yield to the wishes of another individual. In this design, found pervasively in the common law, condoned self-regard is the rule and compelled self-abnegation the exception.

Consider four major common law fields through a lens I'll borrow from the Babylonian Talmud. As recounted in this text, two sages named Hillel and Shammai each had followers with respect to Jewish law. The camps disagreed on a few points, the House of Hillel inclined to liberality and tolerance while the House of Shammai tended to choose the stricter or more pedantic of two options. The famed Babylonian Talmud passage (whose mixed Hebrew and Aramaic I put here into my own English, aided by conversations with abler readers of those languages) starts the story with one sentence: "On one occasion, a Gentile came before Shammai, saying 'I will convert if you teach me the entire Torah while I stand on one foot.'" Shammai responded by swatting the Gentile with a rocklike object. Hillel, more easygoing, accepted the challenge. "That which is hateful to you, do not do to another person," he told the Gentile. "That is the whole Torah. All the rest is just a gloss."[36]

Imagine four fields of the common law recited by someone standing on one foot. Criminal law? Guilty mind coupled with guilty act, the reciter could say, possibly adding a procedural point: the presumption of innocence or a high standard, "beyond a reasonable doubt," required for a conviction. The intentional segment of the law of torts overlaps with the common law of crimes, but it uses a more lenient preponderance-of-the-evidence standard; the common law of accidents obliges a plaintiff to prove an injury, a duty, a breach of that duty, and a causal connection between injury and breach. The common law of contracts demands agreement and

the exchange of consideration. Property has a much-cited standing-on-one-foot recitation that will occupy Chapter 4: the prerogative to exclude.

What unites these disparate subjects, as this book will elaborate, is a view that the law ought to leave individuals alone and to honor this ascribed desire in the face of incursions or threats by other individuals. Criminal law as rendered on one foot strives to protect against arbitrary punishment by the state and to discourage anti-social conduct that threatens the safety and tranquility to which persons are entitled. Tort law works to leave individuals alone in all its subdivisions: Intentional-tort law generates a financial incentive to refrain from invading the interests of others on purpose; the negligence formula of duty-breach-causation-damages condemns the creation of unreasonable risks, while, through its doctrinal barriers to recovery, simultaneously protecting defendants from having to shell out money for harms they did not intend. Strict liability forces plaintiffs to show that the activity that injured them was deviant – a stance that safeguards defendants from liability without fault unless what they did was abnormally dangerous. When the activity is eligible for strict liability, persons who do not engage in it are protected from a nonreciprocal risk, an invasion that they can only suffer and do not impose in return.[37]

Common law tenets pertaining to contracts and property also defend individuals from what feels to them like incursions. Demanding agreement and consideration as conditions for enforcement frees persons from burdensome obligations to do what they do not want to do or to pay money for the opportunity to escape. Whenever this responsibility does indeed burden them, the law has inferred that they volunteered for an obligation and were in effect compensated for this sacrifice of their interests. Property's prerogative to exclude is the very distillation of condoned self-regard. Excluders do not need a good reason to support their choice. Their exclusion can be unreasonable, inefficient, foolish, selfish, and perverse. What the common law condones is their putting themselves first, ahead of all other persons and above other considerations and policies.

Onward to particulars about self-regard as condoned in these four common law fields, a bit too long to recite on one foot.

The common law of crimes fosters self-regard by granting individuals a generous privilege of self-defense. It frequently deems the intentional killing of another person justified – which means more than, or better than, merely tolerated or excused. Homicide is justified if qualifying conditions existed at the time the defendant-assailant chose deadly force. The common law does not oblige a defender to use the gentlest available force, nor err on the side of withholding violence. It often will not compel individuals to retreat rather than apply force in self-defense even if retreat can safely avert harm to them. It honors the killing of what it calls a "fleeing felon," even though the target on the loose has not been adjudicated a felon and even if he poses no threat to the assailant's body or psyche. (The target of deadly force might be clutching a cumbersome stolen item, for example, hoping only to run away.)

To recall the Babylonian Talmud's adjective, invasions are hateful to us. They may be fended off.

Next, torts. "No duty to rescue," decrees the common law, by which it means no private-law obligation to render kindness or benevolence even when a kind or benevolent action would save the beneficiary's life and be cheap and convenient to render. As with self-defense, the common law imposes limits on this prerogative, but all of them require prior volunteering. Unless the would-be rescuer has done something to qualify for an obligation of care, he or she may neglect the welfare of another person, permit that other person to suffer or die, and escape liability. The common law of torts also leaves unremedied other harms that derive from unreasonable conduct on the ground that the defendant had no duty of care, especially when the consequence is financial or emotional. Readily preventable physical injuries can also fall under the no-duty umbrella.

In the common law of contracts, condoned self-regard occupies several doctrinal provisions. Prominent among them is the ban on contracts of self-enslavement. Common law courts will not enforce an agreement that meets every other criterion for a validly formed contract.[38] Only if condoned self-regard is foundational does it make sense for a contract to fail solely for rejecting this fundament. The common law of contracts emphasizes self-regard at the level of remedy as well as formation. It withholds specific performance most of the time, allowing breachers to pay their way out of their obligations rather than be forced into an act or a physical transfer unwelcome to themselves. In general, contract emphasizes voluntariness as a central condition for the enforcement of an obligation without saying much about why. Condoned self-regard in contract law, as in the common law generally, is too basic for an explanation or even to be noticed. It's like water as seen by a fish.

On to the common law of property beyond the unmitigated prerogative to exclude. We find condoned self-regard in doctrinal overlaps – tort joined with property, crime with property – and also in the law of property separate from any other category. Once a person has control over land or bounded space, this possessor gains even more approval of self-regard from the common law. Defense of habitation, which some writers treat as synonymous with the closely related "castle doctrine," unites the entitlement of self-defense with the power of a land possessor to insist on the impenetrability of his premises. Shooting to kill can be fine under the common law even when the invader had threatened the integrity of only a household boundary rather than human life or health and, as was mentioned, even if the shooter could have easily avoided harm by retreating.

Visitors to possessed land are owed no deference to their interests – no duty of reasonable care – unless they are "invitees," the term for persons whose presence the possessor desires. Persons not overtly invited for the benefit of the possessor are ranked hierarchically with reference to what this possessor thinks of them. Unwanted visitors occupy the lowest rung on the ladder. The middle tier of tolerated but not sought-out people, which the common law calls "licensees," are better off