Introduction to *Feminist Judgments: Rewritten Tort Opinions*

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No one would dispute that torts is a foundational legal subject. It is a required part of the first-year law school curriculum and the course where students first discover the power of courts to declare certain conduct “wrongful” and subject to legal sanctions, even though the conduct may not amount to a crime or constitute a violation of statutory or regulatory law. Beyond the classroom, tort law has become a bedrock feature of US legal culture and has permeated social and political culture as well, to the extent that it is often a subject of intense political and media interest. Tort law provokes and is implicated in a variety of important contemporary debates: about personal responsibility and individual and institutional accountability; about appropriate levels of societal investment in safety and tolerance of risk; about striking the right balance between deterring harmful behavior and economic growth and innovation; and about which human interests and types of injuries are deserving of recognition and protection through tort compensation, to name only a few.

This wider debate, however, is most often couched in gender-neutral terms, with only the rare mention of feminism, the personal identity of the parties to the litigation, or the impact of tort rulings on particular social groups. At a time when tort theory is undergoing somewhat of a resurgence among legal academics, the idea of a feminist tort law is still difficult for many scholars and lawyers to imagine. Despite decades of feminist and critical torts scholarship, juxtaposing feminism and torts still requires explanation and defense. Looming over this volume of rewritten torts opinions is the overarching question: Aside from changing the result in some individual cases, what can feminism possibly bring to tort law?

We start from the premise that tort law is dynamic, malleable, and capable of transformation and view this project as designed to encourage such a transformation. Although the rewritten opinions in this volume are not “real” – in the sense of being delivered by real judges in a court of law – as we see it, the opinion authors and commentators are engaged not only in a hypothetical thought experiment, but in an exercise designed to illustrate and persuade. Indeed, a primary goal of this project is to demonstrate how feminist insights and feminist reasoning could potentially reshape important tort doctrines and influence judges and other legal actors to make the law more equitable, inclusive, and responsive to the needs, interests, and perspectives of women and other marginalized groups.

Although tort law has not been impervious to feminist-inspired reforms, it has clearly lagged behind constitutional law and statutory civil rights law when it comes to placing gender equality front and center, and it often takes a back seat to criminal law in addressing issues of sexual violence. Similarly, feminist and critical theory has barely made a dent in the body of tort theory, which is dominated by law and economics scholarship with its preoccupation with efficiency, and corrective justice scholarship which largely ignores social divisions and inequalities in society, even while purporting to be guided by moral principles. By showing how it might be done, this project is directed toward expanding and accelerating feminist interventions into this crucial body of common law, at a time when feminism is on the rise in the larger society and the #MeToo movement has exposed the failure of existing law to put an end to widespread sexual abuse and injustice.

THE CHANGING FACE OF TORT LAW

Gender and race have always played a key role in shaping US tort law. Prior to the mid-nineteenth century, tort recovery was explicitly linked to the legal and social status of the injured party. The institution of slavery, as well as the legal regime of coverture that denied independent legal rights to married women, prevented most African Americans and women of all races from suing for personal injuries in their own right. Because slaves were the property of their owners, personal injuries to slaves were treated as injuries to the slaveholder, rather than to the slave.³ During the same period, married women also

possessed no independent legal status. The doctrine of coverture operated to “merge” a married woman’s legal rights with those of her husband; husbands alone had the right to institute suits on behalf of their wives and possessed exclusive property rights in their wives’ bodies and labor.

Aside from erecting procedural obstacles to legal redress, the regimes of slavery and coverture affected substantive tort law, resulting in race- and gender-segregated causes of actions. To be recognized in law, personal injury to the slave had first to be translated into pecuniary loss to the slaveholder, ending up with white slaveholding plaintiffs owning both a human being and a valuable tort claim for economic loss in the event of a slave’s intentional or accidental injury at the hands of another. A similar legal maneuver affected the rights of married women who were not enslaved. Although married women were not regarded as property itself, coverture also resulted in a denial of substantive rights flowing from personal injury. Thus, when a wife was tortiously injured, it was her husband who had a claim for the material value of her household and sexual services, denominated a “loss of consortium” claim that was denied to the wife when her husband was injured.

With the end of slavery and the formal abandonment of coverture, however, gender and race largely vanished from the face of tort law, and tort law appeared on its face to be increasingly gender and race neutral. Even during the era of racial segregation and “separate spheres” – when gender- and race-specific thinking remained the order of the day – judges opted not to create new gender- and race-specific tort rules. For the most part, however, this change in the law was largely cosmetic. Although legal realist and other progressive torts scholars often criticized this ostensibly neutral body of law for being formalist and under-protective of the interests of plaintiffs, it was not until the 1980s that legal scholars first began to unearth the implicit racial and gender bias in various tort doctrines and in the deep structures of tort law.

FEMINIST AND CRITICAL TORTS SCHOLARSHIP

In retrospect, Professor Richard Delgado’s 1982 article, Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling, marked the beginning of a vibrant, if still not voluminous, body of critical torts

scholarship. In that article, Delgado criticized courts that had ruled that racial insults and harassment on the job were “mere insults” not actionable under the rubric of intentional infliction of emotional distress and proposed a new tort for racial insults. What set Delgado’s article apart from other mainstream critiques of specific tort doctrines was his singling out of torts as a site of inequality and as an area ripe for critical analysis. He employed many of the themes that would subsequently become prominent in critical race theory: that racism and racial insults were endemic in our culture; that racial harassment had a devastating and often cumulative effect on its victims who faced bias in other settings; and that, in the long run, the negative racial stereotypes and imagery communicated by racial insults created a culture that reproduced racial injury in succeeding generations.

Inspired by feminist theory and, in particular, the blossoming of the new field of feminist legal theory, feminist torts scholars in the late 1980s and early 1990s began to expose the hidden (and sometimes not so hidden) male bias in specific tort doctrines as well as in basic torts concepts. In exploratory articles, Leslie Bender and Lucinda Finley, for example, broadly canvassed the domain of torts, looking for marginalized sectors of tort law where the law failed to address recurring injuries that disproportionately affected women.7 They tried to envision what a more inclusive tort law might look like, imagining, for example, the replacement of the ubiquitous “reasonable man” standard with a more protective standard of care that would require persons to act like responsible neighbors who had a stake in the well-being of others.

This early feminist torts scholarship challenged the conventional wisdom that ostensibly gender-neutral doctrines were actually objective or gender-inclusive or free from gender bias. For example, Martha Chamallas and women’s historian Linda K. Kerber employed an interdisciplinary approach to theorize that tort recovery for emotional harm had been stunted by its cognitive association with early negligence claims brought by pregnant women seeking damages for stillbirths and miscarriages and mothers suing for nervous shock as result of seeing their children killed or injured.8 Their study exposed how an entire category of harm could be devalued because of its link to gender, even in cases brought by men.

Although much of the early feminist torts scholarship centered on gender, critical scholars also built upon Delgado’s germinal article and noticed the distance between civil rights norms and ideals and the standards used to determine tort liability for discriminatory behavior. In an early intersectional article, for example, Regina Austin focused on the inadequacies of the tort of intentional infliction of emotional distress to redress dignitary injuries of low-income workers, calling on courts to tackle multidimensional harassment based on race, ethnicity, gender, and “color of collar.”

In the decades since, feminist and critical torts scholarship has matured to cover a wider range of topics and to utilize a greater variety of theoretical approaches, mirroring the diversification of feminist legal theory more generally. Feminist and critical writers have critiqued the three major theories of tort liability – liability based on intent, negligence liability, and strict liability – and have argued that the methods courts use to calculate and award both economic and noneconomic damages are infected with gender and race bias.


15 See, e.g., Sarah L. Swan, Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate, 64 U. Kan. L. Rev. 963 (2016); Martha Chamallas, The
interests, devaluation of caregivers’ injuries, as well as bias in the litigation process. Their critiques have drawn upon each of the most prominent strands or brands of feminist legal theory – liberal feminism, dominance feminism, cultural feminism, and intersectional feminism – and have borrowed from critical race theory, and more recently, disability studies and queer and trans theory. Although some of the feminist torts scholarship is theoretical in nature, much of it falls into the category of applied feminist scholarship, applying feminist and critical insights to specific issues.

Many of the recurring themes found in feminist and critical torts scholarship echo those found in the larger body of critical scholarship, adapted to the context of tort law. Thus, for example, we see writers placing importance on gender in analyzing the meaning and effect of current tort doctrines. This gender-aware stance presents a contrast to that of most tort scholars and courts who still proceed in a gender-blind fashion, neglecting to question the gendered origins of a particular rule, the gender implications of a particular doctrine, or what changes would have to be made to avoid or ameliorate gender disadvantage. Feminist and critical scholars often eschew formalist or


See, e.g., Anne Bloom with Steven Paul Miller, Blindsight: How We See Disabilities in Tort Litigation, 86 Wash. L. Rev. 709 (2011).


abstract inquiries, preferring contextual analyses that tap into women’s lived experiences. The critical lens these scholars bring to the law also tends to make them skeptical of abstract dichotomies which permeate the law (e.g., physical v. emotional harm; economic v. noneconomic damages), and tend to overstate distinctions, mask implicit hierarchies of interests and values, and function to legitimate structural bias in tort law.

In contrast to mainstream theoretical approaches, such as law and economics, which implicitly take the perspective of the legislator or judge, feminist and critical scholars often factor the “victim’s perspective” into their analysis and focus attention on those who are subjected or governed by the law. Particularly in recent years, much feminist and critical scholarship has taken an intersectional turn, mindful of the complexities posed by interlocking systems of gender, race, and other forms of oppression and the danger of essentialist overgeneralizing from the experience of one subgroup of women. Finally, feminist and critical scholarship is often wary of a conventional wisdom that asserts that gender equality has already been achieved or that we live in a post-racial society. One familiar move in these writings is to look behind claims of progress to uncover important continuities in the subordinate position of the injured parties and to understand how basic hierarchies are reproduced over time.

THE FEMINIST JUDGMENTS TORTS PROJECT

This feminist judgments torts project is a special kind of applied feminism scholarship that questions, critiques, and revises tort doctrine through the process of rewriting torts opinions issued by state and federal courts. It is one of a growing series of such feminist judgments projects in the United States, now covering both public and private law. The first US volume in the series focused on opinions from the US Supreme Court, tackling important constitutional and statutory issues relating to equality and personal liberty.24 Other projects have or will address tax law,25 reproductive justice,26 family law, employment discrimination law, health law, trusts and estates, property, and criminal law. This is the first volume devoted to an area of law that forms part of the core first-year law school curriculum.

24 Feminist Judgments: Rewritten Opinions of the United States Supreme Court (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).
The larger feminist judgments project is a global project. It was originally launched by feminist scholars in Canada and the United Kingdom and has since spawned projects in Ireland, Australia, New Zealand, Scotland, Africa, India, and Mexico as well as a project on international law. The common thread of all the projects is a commitment to demonstrating the difference that feminism might make to the substance and rhetoric of judicial decision-making, even absent large-scale legislative or political reforms. The “ground rules” of the project require opinion writers to limit their citations to sources that were available at the time of the opinions, the idea being to show that feminist outcomes and reasoning were possible even in the distant past before contemporary feminist legal theories had emerged. However, opinion writers are not asked to do the impossible and jettison their own knowledge base and contemporary feminist consciousness when writing their opinions. The result is an intriguing mixture of past and present, allowing the authors and readers to imagine the different trajectories the law might have taken if guided by contemporary feminist values, arguments, and modes of reasoning. This distinctive methodology makes the opinions in the feminist judgments volumes ideal texts for use in the classroom, inviting students to debate whether the rewritten opinions are realistic, persuasive, and accord with their own sense of what the insights of feminism might bring to a particular legal controversy.

In line with other feminist judgments projects, the authors and commentators in the feminist torts project were free to pursue their own feminist visions. As editors, we did not attempt to define “feminism” or restrict writers and commentators to any particular brand or variety of feminist or critical theory. In many instances, opinion writers and commentators ended up having a similar “take” on the case. In those instances, the commentary serves mainly to place the opinion in its legal and cultural context and elaborate on the objectives and particular moves of the feminist judgment. In some cases, however, commentators and authors had differing feminist visions. In addition to introducing and contextualizing the feminist opinion, commentators were free to express their disagreement with the opinion and to indicate how they might rewrite the opinion in a different way.

One of the most challenging and consequential aspects of the project was selecting the particular tort opinions to rewrite. The sixteen cases in this volume came from a longer list of potential cases that we included in a call to potential authors and commentators in which we also sought suggestions for additional cases we might include. We narrowed the list based on author interest and, in a few instances, we added cases that were suggested to us.

The volume contains four “classic” cases that appear in virtually every torts casebook. In perhaps the most explicit way, these cases exemplify how feminist
thinking and methods could infiltrate basic tort concepts and debunk the notion that torts is a neutral body of law, divorced from considerations of gender or personal identity. The other twelve cases, however, are not part of the torts canon, although some of them are noteworthy enough to have been the subject of commentary, or included as a principal case or in the notes of a torts casebook. In our view, however, these cases are just as significant as the “classic” cases and deserve equal attention. They reveal how tort law has addressed or neglected to address issues of particular importance to women and other social minorities and suggest that the torts canon itself could be revised along feminist lines. Perhaps not surprisingly, many of these cases involve sexual violence and abuse, violations of reproductive rights and interests, and invasions of sexual privacy. By including these cases in the volume, we hope to bring these marginalized areas, marked by gender and sexuality, closer to the center of tort law.

UNRECONSTRUCTED TORT LAW

In a variety of ways, the opinions in this volume show that despite the facial neutrality of contemporary tort law, gender, race, and the personal identity of plaintiffs still affect the availability of tort claims, the prospects for liability and the measure of damages. Although doctrines change, the updated versions often reproduce gender disadvantages and other inequalities, even if in softer, less explicit forms. Legal historian Reva Siegel has described this phenomenon as “preservation through transformation,” a process by which a basic hierarchy may remain intact even though the legal rules and legal rhetoric surrounding it undergo substantial change. In fact, the basic hierarchy is preserved precisely because it has been updated to fit the sensibilities of the time. In law, a regime can soften, admitting more exceptions or providing somewhat more protection to a vulnerable group, without dislodging the basic power structure.

Siegel’s rather sober account of the difficulties and limitations of effecting social change through law, however, does not mean that real or meaningful


28 On the torts canon, see Martha Chamallas, Vanished from the First Year: Lost Torts and the Deep Structures of Tort Law 104 in Legal Canons (J. M. Balkin & Sanford Levinson eds., 2000).

change can never occur. The trick is identifying which interventions at which moments can make an appreciable difference. In a recent book, Catharine MacKinnon employed the metaphor of “butterfly politics” evoking chaos theory to argue that unstable social systems, such as the social system of gender inequality, can sometimes be destabilized, even if they normally tend to return to their starting point when faced with a legal challenge. She maintains that the “right small human intervention in an unstable political system can sooner or later have large reverberations.” Interestingly, for MacKinnon, the common law can be a promising site for such a butterfly effect, despite the conventional view of the law as precedent-bound and impervious to radical change. She maintains that the rule of precedent can itself be destabilizing if and when “[a] single breakthrough iterated through many variations . . . opens up a complex flood in a distinctive direction, even as the precedential system resists an initial breakthrough.”

Many of the opinions in this volume exemplify Siegel’s “transformation through preservation” thesis, providing critiques of resilient patterns of inequality that take on a somewhat different shape over time. They show how bias and disadvantage can be reproduced and updated in our ostensibly neutral tort law system. At the same time, however, one of the aspirations of the feminist tort judgments project is to allow scholars to draft opinions that read like one of MacKinnon’s breakthrough opinions. Through the rewritten opinions in this volume, we can glimpse what a feminist reconstruction of tort law might look like and can determine whether such precedents would be capable of destabilizing the system of inequality and injecting a greater degree of gender and social justice into this foundational area of law.

The variety of tort cases in this volume suggest that no area of tort law is entirely free of bias. The traces of gender and race bias can be seen in a wide array of contexts, from the iconic Palsgraf railroad accident (Palsgraf v. Long Island R.R.), to the exploding coke bottle case that produced the revolution in products liability (Escola v. Coca-Cola Bottling). However, one significant lesson we take away from our work on this volume is that certain types of cases pose a particular challenge for courts hearing torts cases. Most simply put, tort law has a problem with sex and reproduction. Many of the cases in this

31 Konrad Lorenz famously coined the term “butterfly effect” to describe how “the flap of a butterfly’s wings in Brazil [can] set off a tornado in Texas.” Id. at 1. The butterfly effect illustrates chaos theory’s understanding of the “complex causality in dynamic unstable systems.” Id.
32 Id.
33 Id. at 5.
volume demonstrate that courts have often failed to come to grips with injuries caused by sexual violence, abuse, harassment, and invasions of privacy and have failed to understand and value the reproductive interests of women and prospective parents. While these cases most often involve female plaintiffs, they are not restricted to one gender. They are gender-related, but not gender-specific, claims.

These gender-related injuries traverse traditional torts categories. They are not confined to specific doctrinal areas but crop up in intentional tort, negligence, and strict liability cases and spill over into debates about the proper measure of damages. Thus, in this volume, sexual assault is not only the subject of a lawsuit alleging an intentional tort (Guthrie v. Conroy), but is the gravamen of negligence litigation against different types of institutional actors (a university and its police department, a commercial lessor, and a hotel) who failed to prevent the sexualized violations from occurring (Tarasoff v. Regents of the Univ. of California; Sharon P. v. Arman, Ltd; McCarty v. Pheasant Run, Inc.). Sexual abuse also underlies a strict vicarious liability claim (Lisa M. v. Henry Mayo Newhall Hospital), as well as a challenge to legislative restrictions on noneconomic damages (Simpkins v. Grace Brethren Church of Delaware). Sexualized invasions of privacy are at the heart of an intentional tort lawsuit (Sipple v. Chronicle Publishing Co.) and form the basis of a negligence claim for emotional distress (Boyles v. Kerr). And sexual harassment lurks in the background of an iconic negligence case involving a bystander’s duty to rescue or render aid (Farwell v. Keaton). Similarly, claims for reproductive injury are not confined to malpractice cases sounding in negligence, where they are most often situated (Broadnax v. Gonzalez; Emerson v. Magendantz), but also arise in the intentional torts context where plaintiffs allege battery and intentional infliction of emotional distress for physicians’ disregard of their reproductive choices (Robinson v. Cutchin).

Regardless of the doctrinal framework used for asserting a claim for sexual or reproductive injury, however, there is little doubt that such injuries often are severe in nature and cause long-term harm to the victims. Many of the rewritten opinions recount devastating physical harm, the kind of harm that the torts system generally protects most fully. Yet, for a variety of reasons, courts do not always regard the plaintiffs’ injuries in these cases as physical harms, or find other reasons to minimize the harm or limit the available damages. Even in those cases in which the sexualized or reproductive injury does not result in immediate physical harm, however, there is often good reason to predict that the resulting nonphysical damage will be severe, leading to the kind of debilitating injury that mimics severe physical injuries. Yet again, many courts seem reluctant to grant full recovery in such cases.
In addition to the severity of the injury, sex and reproduction tort cases are marked by the fact that they often represent systemic injury. While the particular harm to the plaintiff is individualized, the plaintiffs in many of the cases in the volume have suffered an injury that is common to members of their social group. Many of the rewritten opinions, for example, contain statistics about the prevalence of rape and sexual assault and tell familiar stories about how the injury sustained by the plaintiff is tragic yet commonplace. Similarly, the reproductive injury cases highlight the vulnerability of ordinary women who are pregnant or seeking to avoid pregnancy, a predicament that affects the great majority of women at some point in their lives.

The portrait that emerges from this body of cases is that of a tort system that under-compensates for sexual and reproductive injury, at least if the grievous and systemic nature of the injury is considered a reliable indication of the need for compensation. Indeed, many of the rewritten opinions grapple with the overriding question of how and why this under-compensation has occurred and whether it can be justified. Although the forest can sometimes be lost in all the doctrinal trees embedded in the three theories of tort liability, when viewed under the broad rubric of sexual and reproductive harm, the under-compensation problem becomes increasingly visible and ripe for feminist analysis.

Additionally, from a bird’s-eye view, the sex and reproduction cases in this volume suggest that courts’ reluctance to compensate in this area has consequences for the larger body of tort law. When courts in tort cases do address issues of sex, sexuality, and reproduction, they often choose not to apply the ordinary doctrinal rules that govern the particular theory of tort liability or not to apply the ordinary rules with the same force as in other settings. Thus, the feminist judgments in this volume repeatedly take issue with the exceptional treatment of sexual and reproductive issues and the distortion of tort doctrine that results. For example, when third-party liability for rape is at stake, the familiar concept of foreseeability can be stretched so out of shape that rape becomes unforeseeable, despite the high incidence of rape in the relevant community (Sharon P. v. Arman, Ltd.). Although full recovery for injuries caused by medical malpractice is the norm, in wrongful birth cases, courts have fashioned a hodgepodge of special rules to limit damages, often without articulating a convincing theory for the exceptional treatment (Emerson v. Magendantz). The highly specialized set of rules governing recovery for negligent infliction of emotional harm, the framework employed in many sexual and reproductive harm cases, can jeopardize recovery for a mother of a stillborn child, despite the defendant physician’s negligence and the plaintiff’s obvious suffering (Broadnax v. Gonzalez). The result is not only confusion in
the law, but a subtle undermining of the basic elements of liability under the
three theories of tort liability, as litigators and other legal actors debate whether
their case is the exception or the rule. We may have reached a point where our
facially neutral tort law disfavors, but does not preclude, recovery for sexual
and reproductive harm. But that only raises the question of whether the
contemporary regime is so very different from regimes of the past that erected
total barriers to recovery.

TECHNIQUES OF BIAS

On a more granular level, the feminist opinions in this volume identify and
critique a number of recurring techniques or moves courts have deployed
which end up disadvantaging plaintiffs from marginalized groups. Some of the
techniques are conceptual in nature, while others amount to rhetorical
strategies. Most operate beneath the surface; rarely do the rewritten opinions
charge judges with intentional discrimination. Instead, they more often try to
tease out implicit bias, looking for clues in the language courts use, their
choice of analogies and examples, their empathy (of lack of empathy) for the
plaintiff, and the degree of attention courts give to the gender, racial, or other
identity dimension of the legal issues presented.

To unearth and call out these judicial techniques typically requires not only
a close and critical reading of the original opinion but also some knowledge of
the relevant history and social context. Perhaps most importantly, many of the
judicial techniques criticized by the feminist opinion writers in this torts
volume come from the playbook of feminist and critical theory and are
familiar “red flags” to critical scholars outside of the world of torts. In those
instances in which feminist opinion writers agree with the results reached by
the original opinion, they use feminist and critical theory to provide additional
reasons to support the result or deepen the analysis of the original majority
opinion.

Although we make no attempt here to catalogue all the techniques identi-
fied and analyzed by the opinion writers and commentators, six deserve
mention.

A Use of Gender and Race Stereotypes

Feminist opinion writers in this volume were alert to the use of racial and
gender stereotypes that courts sometimes embed either in their description of
the facts or in their rationales for judgment. Whether it is excusing risky
masculine behavior as normal (Palsgraf v. Long Island R.R.), or assuming that
a Hispanic child is less intelligent and has less potential to succeed in life than a white child (G.M.M. v. Kimpson), or assuming that an African-American woman who already had several children would neither be harmed nor offended by involuntary sterilization (Robinson v. Cutchin), the opinion writers expressed disapproval of the use of overbroad generalizations that purport to describe how members of particular social groups actually behave (i.e., descriptive stereotypes) or how they should behave (i.e., prescriptive stereotypes).

B Victim Blaming

In the context of sexual violence, the feminist judgments criticized the common tendency to “blame the victim” and to shift the focus away from the harmful quality of a perpetrator’s or a defendant’s antisocial or negligent behavior. Although such victim-blaming strategies are ubiquitous, in and outside of tort law, in third-party rape cases predicated on negligence, for example, a feminist opinion writer cautioned that the contributory negligence defense especially invites judges and jurors to scrutinize the behavior of the plaintiff and inject sexist assumptions into the decision-making process (McCarty v. Pheasant Run, Inc.).

C Minimization of Sexualized Injuries

The judicial tendency to devalue and minimize sexualized injuries was criticized by several feminist opinion writers. From calling an attempted rape a “mishap” (McCarty v. Pheasant Run, Inc.), to downplaying the seriousness of repeated sexual harassment in the workplace (Guthrie v. Conroy), to dismissing the serious consequences of emotional abuse in the domestic violence context (Lyman v. Huber), the feminist opinions critiqued the courts’ failure to appreciate the devastating effects of sexual abuse on its victims. Through use of statistics and other evidence, the feminist opinion writers found ways to make these gender-related injuries more salient to readers (Sharon P. v. Arman, Ltd.), and in some instances, the feminist opinion and commentary writers were able to reframe the facts of the case and the plaintiffs’ injuries to bring a hidden sexual dimension to the forefront (Tarasoff v. Regents of Univ. of Calif.; Farwell v. Keaton).

D Misunderstanding Pregnancy and Reproduction

In the reproductive injury context, feminist opinion writers took courts to task for misunderstanding the physical, emotional, and relational aspects of
pregnancy and for devaluing women’s reproductive choices and health. Judicial failure to respect and value women’s desire not to become pregnant and give birth (Emerson v. Magendantz), or the desire to have more children (Robinson v. Cutchin), was a prominent theme. At a deeper level, a feminist judgment criticized a court for artificially separating an injury to a fetus in utero from the entailed physical injury to the pregnant woman, displaying a masculine failure to imagine the interconnected nature of this kind of harm (Broadnax v. Gonzalez).

E Failure to Incorporate History of Racialized Practices

Taking a page from critical race theory and its use of history to illuminate the meaning of contemporary racialized practices, a feminist opinion drew upon the historical devaluation of black motherhood in the United States and the history of coerced sterilization of women of color to transform an ordinary case of lack of consent to a medical procedure into a claim of battery and intentional infliction of emotional distress (Robinson v. Cutchin). Other opinion writers invoked a race-conscious historical analysis – attentive to the legacy of slavery and racial segregation – to justify providing greater protection for consumers and employees (Escola v. Coca-Cola Bottling Co.) and eliminating racial disparities in the award of economic damages (G.M.M. v. Kimpson).

F Use of Gender-Correlated Dichotomies

Feminist opinion writers expressed skepticism about the judicial use of dichotomies that privilege certain types of injuries and types of damages over others and mask the gender-correlation underwriting the categories. Feminist writers challenged the physical/emotional distinction to argue for fuller protection of emotional injuries stemming from sexual exploitation (Boyles v. Kerr) and domestic abuse (Lyman v. Huber) and objected to the singling out of noneconomic damages in a damage cap case involving clergy sexual abuse of minors (Simpkins v. Grace Brethren Church of Delaware).

SOLUTIONS

In addition to pointing out the various techniques courts in tort cases have used to obscure, minimize, or justify gender-related injuries, several feminist writers and commentators offered strategies and approaches to correct for bias and to steer tort law in a more inclusive and egalitarian direction. The strategies ranged from offering methods for teasing out implicit bias, to
identifying discriminatory effects of specific tort doctrines, to broader prescriptions for reform that sought to enlarge the scope of tort protection by borrowing norms and principles from other legal domains.

Five such strategies or approaches stood out as particularly promising.

A **Tailor Doctrines to Lived Experiences**

In several instances, the feminist opinions sought to connect tort doctrine to the actual or lived experiences of the parties, rather than relying on abstract categories or dichotomies to determine rights and the scope of protection. Thus, one opinion writer urged that the right to privacy be tailored to protect LGBT plaintiffs who needed the freedom to be selective about choosing to whom to disclose their sexual orientation (*Sipple v. Chronicle Publishing Co.*). Another writer emphasized that vicarious liability rules ought to take into account the vulnerability of female patients who tend to defer to the advice and instructions of medical professionals (*Lisa M. v. Henry Mayo Newhall Hosp.*). A third urged that the tort concept of outrageous behavior be applied in a way that captures harmful workplace sexual harassment on a flexible case-by-case basis (*Guthrie v. Conroy*).

B **Ameliorate Disparate Impact of Neutral Rules**

In an age in which most explicit gender- and race-based rules have been eliminated, feminist opinion writers broadened their definition of bias to include neutral tort rules that have adverse disparate impact on particular social groups. Their opinions argued that, from a collective perspective, such rules can severely limit the degree of tort protection available to marginalized social groups, even though some atypical members of the group may qualify for recovery. For example, one opinion spelled out the disparate gender impact of capping noneconomic damages, given the disproportionate importance of noneconomic damages to women whose injuries tend to yield lower amounts of economic damages than men (*Simpkins v. Grace Brethren Church of Delaware*). Another writer demonstrated the adverse gender effect of relying on the reasonable person standard to determine the severity of injuries suffered as a result of domestic abuse (*Lyman v. Huber*).

C **Borrow Constitutional and Civil Rights Norms**

To inject a dose of equality and social justice into tort law, feminist opinion writers borrowed from constitutional law and statutory civil rights law, arguing
that certain fundamental principles from public law should migrate into tort law. They argued that constitutional and Title VII norms of equality should inform courts’ determinations of what qualifies as outrageous conduct (*Guthrie v. Conroy*) and that equal protection principles should shape the contours of the tort privacy claim of public disclosure of private facts (*Sipple v. Chronicle Publishing Co.*). They also relied on equal protection guarantees to call for an end to the use of gender- and race-based data to determine the amount of damages awarded to injured children (*G.M.M. v. Kimpson*). In the reproductive injury context, they relied on the fundamental constitutional right to make one’s own determination about whether or not to beget or bear a child as the basis for awarding full tort recovery for all foreseeable harm in wrongful birth cases (*Emerson v. Magendantz*), and for classifying involuntary sterilization as outrageous conduct that can lead to punitive damages (*Robinson v. Cutchin*).

**D Correct the Underutilization of Tort Law**

Some feminist opinion writers contested the view that tort law was an inappropriate domain to adjudicate cases of sexualized injury and objected to the judicial tendency to steer these cases into the criminal law. Stressing many of the advantages of the complaint-driven civil tort system, these writers found no sufficient reason for courts to shy away from providing tort relief in hostile environment sexual harassment cases (*Guthrie v. Conroy*) or in cases of rape and domestic abuse (*McCarty v. Pheasant Run, Inc.; Lyman v. Huber*).

**E End Sexual Exceptionalism**

An important observation running throughout many of the feminist critiques of current tort doctrine was that cases alleging sexual and reproductive injury were often treated differently (and less favorably) than other cases litigated under the same tort theory. Feminist opinion writers called for an end to such sexual exceptionalism and urged, for example, that wrongful birth cases be treated the same as ordinary malpractice cases (*Emerson v. Magendantz*), and that cases involving sexual abuse of an enterprise’s customers and clients give rise to vicarious liability on the same basis as cases of nonsexual aggression (*Lisa M. v. Henry Mayo Newhall Hosp.*). Their arguments also revealed that the judicial penchant for devising elaborate specialized rules for harms that disproportionately injure women and other marginalized groups often recapitulates older exclusionary doctrines and reproduces inequality (*Boyles v. Kerr; Sharon P. v. Arman, Ltd.*).
The cases and commentary in this volume are organized with the first-year torts class in mind. Following this Introduction (Part i), Part ii consists of “classic” tort cases arranged in chronological order. Three of the classic cases deal with the all-important element of duty in negligence cases (*Palsgraf v. Long Island R.R. Co.*; *Farwell v. Keaton*; *Tarasoff v. Regents of Univ. of Calif.*). The fourth involves proof of negligence and strict products liability (*Escola v. Coca-Cola Bottling Co.*).

Part iii consists of intentional tort cases. One case involves a battery claim (*Robinson v. Cutchin*); three cases involve claims of intentional infliction of emotional distress (*Robinson v. Cutchin*; *Guthrie v. Conroy*; *Lyman v. Huber*) and one is a right to privacy case (*Sipple v. Chronicle Publishing Co.*).


Part v consists of two damages cases. One involves the calculation of economic damages (*G.M.M. v. Kimpson*). The other case is a challenge to a cap on noneconomic damages (*Simpkins v. Grace Brethren Church of Delaware*).

To give a flavor of the contents of the volume, below are one-sentence highlights of the opinions and commentaries.

- *Palsgraf v. Long Island R.R. Co.*: Professor Maurice Dyson’s dissent takes on Cardozo’s famous “zone of danger” test for its underlying subjectivity, gender, and class bias. Professor Taunya Banks’s commentary recounts the little-known backstory of the litigation and discusses the larger social, political, and economic context.

- *Escola v. Coca-Cola Bottling Co.*: Building on Justice Traynor’s famous concurrence, Professor Zanita Fenton’s opinion provides gender, race, and class rationales for strict products liability, consumer protection, and workplace safety. In her commentary, Professor Mary Davis explains the evolution from negligence to strict products liability and delves into the facts and people behind the *Escola* case.

- *Farwell v. Keaton*: Professor Sarah Swan’s rewritten majority opinion replaces the myriad exceptions to the “no duty to rescue” rule with a humanitarian approach based on the circumstantial connection between
the parties in the case. Re-characterizing the case as one involving sexual harassment, Professor e. christi cunningham’s commentary identifies an alternative feminist basis for imposing a duty to render aid.

- **Tarasoff v. Regents of Univ. of Calif.** Professors Sharmila Lodhia and Stephanie Wildman reveal the full story of the Berkeley student’s stalking and delusional romance and broaden the duty to warn potential victims of gender violence. Professor Jamie Abrams’s commentary explains the struggle on the California Supreme Court and the difficulties of holding law enforcement accountable in sexual and domestic violence cases.

- **Robinson v. Cutchin:** Professor Alena Allen builds a legal foundation for holding physicians liable for battery and intentional infliction of emotional distress when they perform sterilization procedures on women of color without securing their consent. The commentary by Professor Yvonne Lindgren unpacks the implicit racialized judgments in the opinion that trade on the stereotype that the reproductive practices of African-American women are deviant and excessive.

- **Guthrie v. Conroy:** Professor Sandra Sperino’s dissent explains how courts misuse summary judgment in hostile workplace environment cases and argues for a contextual application of the element of “outrageousness” based on victims’ experience of sexual harassment. Professor L. Camille Hébert’s commentary catalogues the various techniques courts have used to exclude feminist perspectives in harassment cases and urges a greater role for tort litigation.

- **Lyman v. Huber:** Professor Jeffrey Thomas and Leah Thomas revise the requirements for proving an actionable claim of emotional domestic abuse to bring parity to claims alleging physical and emotional injury. Caroline Forell’s commentary argues against use of the objective reasonable person standard to determine the severity of injury in tort cases brought by survivors of domestic abuse.

- **Sipple v. Chronicle Publishing Co.:** Professor Scott Skinner-Thompson’s opinion reshapes the right to privacy claim to protect LGBT plaintiffs by incorporating constitutional principles of freedom of association and equality. Anna Lauren Hoffman’s commentary paints a portrait of the plaintiff as an involuntary “gay hero” whose life was upended by publicity and reflects on the limitations of law as a vehicle of liberation.

- **Sharon P. v. Arman, Ltd.:** Professor Yifat Bitton unpacks the ubiquitous tort concept of “foreseeability” to uncover hidden gender bias andreshapes the law in third-party rape cases to take women’s systemic vulnerability to sexual violence into consideration. The commentary by Professor Jessica Hynes updates developments in third-party sexual assault.
cases in California and elsewhere and argues for extending the duty of reasonable care to all such cases.

- **Broadnax v. Gonzalez**: Professors Eileen Kaufman and Laura Dooley reframe the injury suffered by pregnant women when they suffer a miscarriage or stillbirth due to their doctor’s negligence and argue for full relief for plaintiffs’ physical and emotional suffering. Professor Elizabeth Kukura’s commentary critiques the dominant two-patient model of care in which physicians owe a duty to the pregnant woman and the fetus and explains how affording recovery for pregnancy loss does not require recognition of fetal rights or personhood.

- **Boyles v. Kerr**: Professor Cristina Tilley’s opinion interprets and modernizes negligence doctrine to expand the concept of injury to include serious emotional and relational harms and demonstrates how courts can disrupt sexual stereotypes about interpersonal relationships between men and women. Professor Lisa Pruitt’s commentary narrates the full story behind the sex tape litigation, the history of the negligent infliction tort, and the implications of the case for the digital age.

- **Emerson v. Magendantz**: Professor Katharine Silbaugh underscores the centrality of women’s autonomy and reproductive choice to justify recovery of full damages in wrongful birth and conception cases. In her commentary, Professor Lucinda Finley elaborates on how difficult it is for many courts to address the complex reality of pregnancy and avoid moralistic judgments based on romanticized stereotypes of mothering.

- **McCarty v. Pheasant Run, Inc.**: Professor Hannah Brenner Johnson objects to Judge Richard Posner’s economic formula for determining the reasonableness of a defendant’s behavior and questions use of the contributory negligence defense to limit a plaintiff’s recovery in cases of rape and sexual assault. Professor Molly Wilder’s commentary charges that Judge Posner’s rhetoric and his law and economics philosophy leads him to weigh the economic interests of businesses over women’s physical and emotional well-being.

- **Lisa M. v. Henry Mayo Newhall Hospital**: Professor Stacey Tovino’s opinion ensures that victims of sexual assault have the same opportunity to invoke vicarious liability as other victims and documents the risk of sexual assault in the healthcare setting. In her commentary, Christine Tamer situates the case at the intersection of sexual violence and women’s health and examines how job-created power can makes a patient vulnerable to harm by medical professionals.

- **G.M.M. v. Kimpson**: Professor Jennifer Wriggins and Sara Cressy make the case that basing the amount of tort damages on the race, ethnicity, or
sex of a person violates the US Constitution and cannot justify a lower recovery for a minority child injured by lead paint exposure. Professor Twila Perry explains the history behind the use of race-based and gender-based tables and discusses the complications and trade-offs of the various methods for remedying the violation.

- *Simpkins v. Grace Brethren Church of Delaware*: Professor Shaakirrah Sanders exposes the gender discriminatory impact of caps on noneconomic damages to argue that limiting damages in a case of clergy sexual abuse of a minor child violates equal protection and the right to a jury trial. In her commentary, Professor Jill Wieber Lens explains the tort reform movement and discusses how states could mitigate the harsh effects of damage caps for sexual abuse victims.