

PART I

Introduction

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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,¹ the idea of a feminist tort law is still difficult for many scholars and lawyers to imagine.² 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?

¹ See PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdiek ed., 2018).

² See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* 13–21 (2010) (discussing feminism in tort theory).

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

³ See Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 *CONN. L. REV.* 1, 22–25 (1995); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* 6–10 (1978).

possessed no independent legal status.⁴ 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.⁵

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*,⁶ marked the beginning of a vibrant, if still not voluminous, body of critical torts

⁴ See NORMA BASCH, IN THE EYES OF THE LAW: MARRIAGE, WOMEN, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 42–69 (1982).

⁵ Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 41 (1996).

⁶ 17 HARV. C.R.-C. L. REV. 133 (1982).

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.

⁷ Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Lucinda Finley, *A Break in the Silence: Including Women’s Issues in a Torts Class*, 1 YALE J. L. & FEMINISM 41 (1989).

⁸ Martha Chamallas with Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

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."⁹

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,¹⁰ negligence liability,¹¹ and strict liability¹² – and have argued that the methods courts use to calculate and award both economic and noneconomic damages are infected with gender and race bias.¹³ Their scholarship has addressed timely and undertheorized topics, such as tort liability for harms inflicted by domestic violence,¹⁴ rape and sexual harassment,¹⁵ denials of reproductive autonomy and reproductive

⁹ Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

¹⁰ See, e.g., Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WILLIAM & MARY L. REV. 215 (2007); Jennifer Wiggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001); Lisa Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 78 IND. L.J. 965 (2004); Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115 (1994).

¹¹ See, e.g., Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999); Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001); Martha Chamallas, *Gaining Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351 (2010); Sarah Swan, *Triangulating Rape*, 37 N.Y. U. REV. L. & SOC. CHANGE 403 (2013).

¹² See, e.g., Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013); Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J.L. & POL'Y 295 (2009).

¹³ See e.g., Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004); Frank M. McClellan, *The Dark Side of the "Tort Reform" Movement: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

¹⁴ See, e.g., Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 U. KAN. L. REV. 695 (2014).

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,¹⁶ devaluation of caregivers' injuries,¹⁷ as well as bias in the litigation process.¹⁸ 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 feminism¹⁹ – and have borrowed from critical race theory,²⁰ and more recently, disability studies²¹ and queer and trans theory.²² Although some of the feminist torts scholarship is theoretical in nature,²³ 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

Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons, 10 J. TORT L. (2017).

- ¹⁶ See, e.g., Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955 (2019); Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721 (2018); Carolyn A. Goodzeit, *Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory*, 63 FORDHAM L. REV. 175 (1994).
- ¹⁷ See, e.g., Regina Graycar, *Before the High Court: Women's Work; Who Cares?*, 14 SYDNEY L. REV. 86 (1992).
- ¹⁸ See, e.g., Donald G. Gifford & Brian Jones, *Keeping Cases Away from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557 (2016).
- ¹⁹ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 19–26 (3d ed. 2012) (discussing brands of feminist legal theory).
- ²⁰ See, e.g., Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905 (2005); Jody D. Armour, *Toward a Tort-Based Theory of Civil Rights, Civil Liberties, and Racial Justice*, 38 LOY. L.A.L. REV. 1469 (2005).
- ²¹ See, e.g., Anne Bloom with Steven Paul Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011).
- ²² Anne Bloom, *To Be Real: Sexual Identity in Tort Litigation*, 88 N. C. L. REV. 357 (2010); Anne Bloom, *Regulating Middlesex* in FAULT LINES: TORT LAW AS CULTURAL PRACTICE 148–59 (David M. Engel & Michael McCann eds., 2009); Anita Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711 (2010); Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051 (2018).
- ²³ See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Joanne Conaghan, *Tort Law and Feminist Critique*, 56 CURRENT LEGAL PROBS. 175 (2003); Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of the Masculine Order*, 54 VAND. L. REV. 1367 (2001).

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 tort 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).

²⁵ FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

²⁶ FEMINIST JUDGMENTS: REPRODUCTIVE JUSTICE REWRITTEN (Kimberly M. Mutcherson ed., 2020).

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