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Overview of Feminist Torts Scholarship

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AN OVERVIEW OF FEMINIST TORTS SCHOLARSHIP*

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INTRODUCTION

Tort law cries out for feminist insights, methodologies, critiques, and reconstructions. Because tort law is mostly common law, that is, law made by judges in response to particular cases (rather than rules made by legislative, executive, or administrative actions), it is flexible enough to respond quickly to feminism's critiques. Feminist legal scholars have just begun to apply feminist theories and methods to analyzing and "revisioning" tort law. Unfortunately, work in this area is lagging behind more traditional areas of study by feminist scholars. Feminist legal scholarship primarily has focused on criminal laws of rape, sexual assault, battery, and defenses; statutory laws against discrimination in the workplace, education, or housing; reproductive freedom issues; combat exclusion policies in the military; family law issues about divorce, custody, and property divisions; constitutional issues like equality, pornography, and hate speech; the development of feminist theories about identity, inclusion, difference, and community; and the relationships of feminist theories to other contemporary legal theories, like neopragmatism, postmodernism, critical race theories, critical legal studies, and lesbian and gay theories.[1] The rich and diverse body of existing feminist work lays the foundation for and intersects with scholarship in torts, but much of it cannot fairly be called torts scholarship so as to be included in this overview. Nonetheless, researchers who are interested in feminism and tort law, particularly

† Professor of Law, Syracuse University. This overview would not exist without the important work being done by feminist legal scholars, particularly in tort law. I wrote this as part of the project at the University of Florida Law School to develop an extensive bibliographic resource on women, feminist jurisprudence, and law. I worry that this overview is unintentionally underinclusive. I hope that torts scholars will contact me if I have missed any relevant feminist scholarship, so I can correct my oversights. I am grateful to Charles Howell, Class of 1993, for his bibliographic and editorial assistance on this article.

I dedicate this essay to my brother and sister-in-law, Cliff and Alice Bender of Fayetteville, N.C.

1 *See generally* FEMINIST LEGAL LITERATURE: A SELECTIVE ANNOTATED BIBLIOGRAPHY (F.C. DeCoste et al. ed., 1991); Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991).

those writing or teaching in these areas, would be negligent if they limited themselves to only those sources included here.

Tort law provides rules that assign legal responsibility for personal injuries and that confer remedies, usually in the form of money damages.[2] Tort law is considered private law because actions are commenced by individuals, groups of individuals, or corporate bodies against other individuals or corporate bodies. Courts award tort damages to individual plaintiffs and not to the state or public coffers. Public law, on the other hand, often includes the state or government as a party to the action and remedies social concerns for the general citizenry before addressing individual concerns.[3] There is a great deal of overlap between public and private law, particularly in the area of tort law, and therefore some claims, like sexual harassment in the workplace, can fall on both sides of the public/private law dichotomy.[4] This overview focuses on private law tort remedies and omits materials on statutory damage remedies like Title VII, as amended by the Civil Rights Act of 1991,[5] or the MacKinnon-Dworkin anti-pornography laws which give civil remedies to victims of harm caused by pornography.[6]

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2 Examples of tort causes of action include battery, assault, false imprisonment, intentional infliction of emotional distress, professional malpractice, defamation, fraud, negligence, workplace accidents (although these are usually covered by a statutory compensation scheme called workers' compensation), some environmental hazards, abnormally dangerous activities, products liability, trespass, and nuisance.

3 Public law includes constitutional, statutory, administrative or regulatory, and criminal law. Feminist and critical scholars have challenged the artificiality of the public/private distinction.

4 For a similar discussion of the public/private law overlap with respect to mass tort law, see Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 864-868 [hereinafter Bender, *Feminist (Re)Torts*].

5 42 U.S.C.S. § 2000e (Law. Co-op. 1989 & Supp. 1992). Title VII, enacted as part of the Civil Rights Act of 1964, provides back pay and equitable relief for victims of sex-based employment discrimination. In 1986 the Supreme Court held that Title VII covers sexual harassment in the workplace, including sexual favors in exchange for job benefits (quid pro quo) and unwelcome sexual advances or comments that make the environment hostile to job performance (hostile environment). Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986). Women who sued for sexual harassment in the workplace under Title VII were not entitled to compensatory damages until 1991 when Congress amended the act to provide compensatory, and sometimes punitive, damages in cases of intentional discrimination, 42 U.S.C.S. § 1981a(a)(1), (b)(1) (Law. Co-op. 1986 & Supp. 1992). Compensatory damages, which are traditional tort remedies, may now be awarded in a Title VII statutory action for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." 42 U.S.C.S. § 1981a(b)(3) (Law. Co-op. 1986 & Supp. 1992). The statute specifically caps the maximum allowable compensatory and punitive awards based on the number of persons employed by the employer. *Id.* No such employer-size damage limitations exist in tort law, although some jurisdictions have statutorily enacted damage caps for nonpecuniary and punitive awards.

6 Catharine MacKinnon and Andrea Dworkin drafted an anti-pornography civil rights law that has been enacted in several communities. *See* CATHARINE A. MACKINNON,

I have not cast a wide net in deciding what is feminist torts scholarship. It is possible to define such scholarship broadly to include articles on tort problems that have effects on women, such as articles about DES and Dalkon Shield litigation or articles about torts involving reproductive issues, regardless of the positions that the authors take in the articles. Although writing about issues that concern women's health and safety is a feminist project, I question whether that alone makes an article feminist. I have included in this overview only those writings that address issues of gender power relations, gender bias, or perspectives on law that arise from women's experiences. Feminist writings about tort law range from historical and doctrinal analyses to theoretical critiques, applications of social sciences, and innovations in teaching torts. These works will be the focus of this overview.

I
FEMINIST HISTORIES OF TORT LAW

Martha Chamallas, with the help of historian Linda Kerber, wrote a brilliant history of the impact of gender ideology on the law of fright and negligent infliction of emotional distress.[7] Chamallas and Kerber reveal that while gendered thinking affected the development of legal doctrine about fright and emotional distress, the gender issues remained unexamined by courts. In the early fright cases, courts refused to allow recovery for emotional harms absent a showing of physical impact on the plaintiff.[8]

> These early impact-rule cases did not explicitly turn on the sex of the plaintiff; the legal rules that emerged from the opinions were worded neutrally. But the fright-based injuries themselves at issue in the classic cases were not gender-neutral. Miscarriage, pre-

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TOWARD A FEMINIST THEORY OF THE STATE 195-214 (1989) (describing the harm of pornography and the rationale for a proposed civil remedy statute); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985) (includes text of the Model Anti-Pornography Law in Appendix A, hereinafter "Model Law"). After describing pornography as sex discrimination that exploits and subordinates women and describing its harm, the act makes unlawful coercing a person into, trafficking in, forcing on a person, or physically assaulting a person due to pornography. Model Law § 3, Dworkin at 25-27. Among other remedies, the proposed statute provides that "any person aggrieved by violations of this law may enforce its provisions by means of a civil action . . . . Relief for violation of this act may include reasonable attorney's fees." Model Law § 5(1), Dworkin at 27. This civil action is similar to a tort action, but created by statute instead of by common-law courts. The Seventh Circuit held that an Indianapolis ordinance based on this statute violated the First Amendment in American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir.), *aff'd*, 475 U.S. 1001 (1986). Nonetheless, other jurisdictions have adopted similar provisions.

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

8 *Id.* at 819.

> mature birth, and "hysterical" disorders described women's health problems; the case law administering the impact rule was necessarily the law's administration of redress for gender-related harms. In other cases of negligently produced physical harms, formal legal doctrine required compensation for all proximately caused injuries. The law's treatment of fright-based harms was much less generous.[9]

Courts expressed concern that compensating plaintiffs for fright-induced harms without actual physical impact would unduly burden defendants with unpredictable liability and hold them responsible for plaintiffs' peculiar hypersensitivities.[10] Women's injuries, like miscarriage, premature birth, and other fright traumas, were adjudged to be abnormal and hypersensitive. The dominant standard for determining "normal" responses to fright was male.[11] Even commentators who paid attention to the gender breakdown of fright cases made flawed assessments of what was occurring or ought to occur in these cases.[12]

Chamallas, with Kerber, argues that the inappropriate separation of physical injury from emotional harms is related to gender dynamics in fright cases, in which courts distinguished "physical" harms caused by impact from "emotional" harms caused by fright. Even though the "emotional" harms resulted in interferences with physical integrity, like miscarriage or premature birth, they were shunted off into a separate injury classification.[13] Tort law thus marginalized women's injuries by taking them out of the realm of compensable physical harms. Chamallas and Kerber conclude that "[e]motional harm has been distorted by gendering it female."[14] They argue that cases involving the negligent infliction of emotional distress, specifically progressive cases like *Dillon v. Legg*[15] that finally reverse the "impact rule" and permit mothers to recover for emotional distress from witnessing the negligently caused deaths of their children, are really cases about women's rights because they pressure the legal system to recognize and value the interests of women.[16]

By producing this gendered history of negligent infliction of emotional distress doctrine, Chamallas and Kerber "aspire . . . to contribute to a feminist reconstruction of tort law."[17] Not only do

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9 *Id.* at 832.
10 *Id.* at 832-33.
11 *Id.*
12 *Id.* at 841-851 (criticizing the work of Leon Green and Dr. Hubert Smith).
13 *Id.* at 833-34.
14 *Id.* at 864.
15 Dillon v. Legg, 441 P.2d 912 (Cal. 1968).
16 Chamallas with Kerber, *supra* note 7, at 816, 858-62.
17 *Id.* at 816.

they succeed, they have established a splendid model for other feminist legal scholars to follow in unearthing the gendered histories of tort doctrine.

Likewise, Carl Tobias has written an exhaustive historical analysis of interspousal tort immunity doctrine, revealing its historical linkage to societal views of women, wives, marriage, and the family.[18] Interspousal tort immunity takes on special importance for feminist legal work because it bars battered and abused wives from proceeding with civil suits against their husbands for their intentionally caused harms. Tobias' research indicates how the doctrine developed in the context of women's history. Tobias argues for the total abolition of interspousal immunity and examines how tort law and women are affected by this change in policy. Although he discusses some possible disadvantages from the perspective of women's interests, he concludes that the benefits of abolition in improving the quality of women's lives outweigh the detriments. Tobias' sensitivity to the multiple ways in which family hierarchy and traditional male dominance influence tort doctrine and will continue to affect women's lives even after the immunity's abolition increases his history's value as feminist scholarship.

II
FEMINIST THEORY APPLIED TO TORT DOCTRINE AND CONCEPTS

In 1988 I published a very general introduction to feminist theory for lawyers, showing how some aspects of that theory might affect tort doctrine and analysis.[19] I primarily focus on the "no duty to rescue" doctrine and the "reasonable man/person" standard. After arguing that the reasonable man standard, later transformed to the reasonable person standard to be more inclusive, has historical roots in a legal system and intellectual culture that did not recognize women as capable of reason, I question whether merely changing the language from "reasonable man" to "reasonable person" or using a standard expressed in terms of reason alone can adequately represent women in tort law.[20] I suggest that it is not reason, or even caution, but care that should be our standard. In-

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18 Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989); *see also* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 45-48 (1989) (analyzing the failure of courts to address the history of sex discrimination underlying interspousal immunity doctrine).

19 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter Bender, *Lawyer's Primer*].

20 *Id.* at 20-25. Lucinda Finley's later published work was foundational in the development of this critique. *See* Finley, *supra* note 18, at 57-65 (discussing gender bias in the formulation of the "reasonable person" standard).

stead of determining the reasonableness of defendant's actions, I explain that courts should examine whether a defendant exhibited adequate care for another's safety.[21]

If I were to rewrite that article now, I would explain more carefully that reason has its place in tort law, but that reason is a richer and deeper concept than tort law has historically acknowledged. Caring about and for others' safety and interests is part of reasoning, but it is a part that has been subordinated because of its gendered identification with women. Even though the division between reason and care is a false construct, the reason/care paradigm has been useful in feminist legal analysis to illustrate biases, hidden assumptions, and male-centered norms within the legal system and to suggest reconceptualizations that make law more reflective of human experience and more responsive to concerns of justice.

A. "No Duty to Rescue"

Tort law's view of human nature as highly individualistic, autonomous, and self-interested has generated a "no duty to rescue" doctrine. This doctrine states that an actor has no duty to aid or rescue an imperiled person even when the rescue could be performed with no risk to the rescuer, unless the actor directly caused the peril or is in a narrowly defined category of special relationships with the person in danger. Famous cases illustrating this doctrine are taught to most first year law students—stories of "moral monsters" who make no effort to stop young children from being mangled by machinery in factories[22] and business competitors who stand by and watch a man drown in a trench on their property.[23] In challenging the no duty rule, I rely on alternative conceptions of human nature, developed in some feminist theories, in order to transform this doctrine. Applying a feminist ethic of care and responsibility, I argue that "[t]he recoguition that we are all interdependent and connected and that we are by nature social beings who must interact with one another should lead us to judge conduct as tortious when it does not evidence responsible care or concern for another's safety, welfare, or health."[24] Utilizing this analysis, the "no duty" doctrine might be transformed into a duty to exercise the "conscious care and concern of a responsible neighbor or social acquaintance,"[25] which would impose a duty to aid or rescue within one's capacity under the

21 Bender, *Lawyer's Primer*, *supra* note 19, at 31.

22 Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1898).

23 Yania v. Bigan, 155 A.2d 343 (Pa. 1959).

24 Bender, *Lawyer's Primer*, *supra* note 19, at 31.

25 *Id.*

circumstances.[26] Tort law would no longer condone the inhumane response of doing absolutely nothing to aid or rescue when one could save another person from dying. Finally, my 1988 article argues that feminist theory encourages us to challenge traditional modes of legal analysis and to rethink the questions we ask, including: who are the parties involved, whose interests are protected by tort law, what are appropriate forms of compensation, how should we allocate responsibility for harms and risks, and what assumptions and values underlie various tort doctrines?

B. Tort Liability Crisis

In a 1990 article I further develop some applications of feminist theory to tort law, this time with particular attention to mass or toxic torts.[27] After arguing that the current public outcry about the tort liability "crisis" is primarily an orchestrated campaign by special interest groups, I suggest ways in which feminist analysis might improve the real flaws in our tort system, flaws that get little public attention. The mass tort crisis, I argue, is attributable to corporate violence and organizational self-interest rather than litigious plaintiffs, excessive and unruly jury verdicts, or doctrine prejudiced against defendants. Even absent ill will and fraud, corporate violence follows from many factors: the complex organizations and hierarchical structures that distance decisionmakers from responsibilities for and connections to the harms they generate;[28] the pressures of mass production and distribution systems; priorities of competitive profit-making over human health and safety; the secrecy and lack of requirements for public disclosure of risk-creation by corporations; and, in organizations with as many employees and as much force and power as many nations, the absence of democratic processes and accountability for decisions about nonconsensual risk-imposition on different constituencies. Feminist legal theories can influence the kinds of practices that are permissible for large, profit-seeking corporate enterprises and change laws control-

26 Linda McClain has written extensively on the "no duty to rescue" rule in her interesting article defending legal liberalism's core values and analysis, criticizing my suggested analysis in the *Lawyer's Primer*, and yet supporting a feminist approach. Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); *see also* Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369 (1992).

27 Bender, *Feminist (Re)Torts*, *supra* note 4.

28 *See* KATHY E. FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY (1984) (providing a feminist critique of bureaucratic and corporate hierarchical structures); *see also* KATHLEEN P. IANNELLO, DECISIONS WITHOUT HIERARCHY: FEMINIST INTERVENTIONS IN ORGANIZATION THEORY AND PRACTICE (1992) (studying feminist group organizations and presenting a modified consensual model that avoids the distancing caused by hierarchial structures).

ling corporate forms, corporate decision-making, and public access to corporate records. These changes would reduce the frequency and quantity of mass tort litigation better than any proposed statutory reforms curbing plaintiffs' abilities to recover for their losses.

C. Burdens of Proof and Presumptions in Mass Tort Law

Feminism proclaims the importance of ending power imbalances stemming from systemic practices that subordinate groups of people. Borrowing from feminist analyses of power dynamics and the law's rhetoric about equality and justice, I suggest in my 1990 article that courts are uniquely positioned to assess resource and information imbalances between litigants in mass tort cases. Therefore, courts should actively intervene to balance the relative power of the parties for purposes of the litigation. This can be accomplished by reallocating burdens of proof and production in mass tort litigation and by shifting the presumption of nonliability[29] from defendant corporations (producers of the dangerous products and risks) to plaintiffs (unsuspecting consumers, employees, or area residents).

In such cases, if a plaintiff can demonstrate that the defendant produced a product to which the plaintiff was exposed and that there is "probable cause" to believe that the exposure caused harm, then the defendant would be responsible for plaintiff's out-of-pocket medical expenses and wage loss until the defendant proved at trial that plaintiff's harm was caused by other sources. Tort law currently allocates the presumption of nonliability for these expenses in the opposite fashion. No matter how innocent the plaintiff is, she must bear the cost of her injury and loss until she wins the lawsuit by proving that the defendant's actions caused her harm. In addition, plaintiff must bear the pain and life changes caused by her injuries. Shifting the presumption of nonliability in tort law removes some of the onerous economic burden from wrongfully injured plaintiffs, although they still must bear all the pain, grief, and inconveniences. Defendants, who have better access to scientific studies, product development information, experts, and lawyers, would still have an opportunity to recoup their payments for plaintiff's economic loss by proving that other factors caused the plaintiff's injuries. By redressing the resource and power imbalance,

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29 Under the presumption of nonliability, a defendant is not legally responsible for the economic consequences of an injury before there has been an adjudication of liability or responsibility. In litigation today, injured parties are presumed economically responsible or liable for their own injuries unless they can prove that the defendant caused the harm. Defendants are presumptively not liable or responsible, hence the presumption of nonliability lies with them, unless plaintiffs can prove they caused the harm.

these suggested tort law rules would help realize the feminist goal of eliminating subordination caused by socially created power dynamics, while moving closer to the ideal of equality before the law.

D. Tort Remedies

The work of Carol Gilligan[30] has been influential for feminist legal theorists studying law's narrow value structure and its failure to represent the full depth of thinking, feeling, and acting in our society. Gilligan's feminist scholarship offers an ethic of care and responsibility to complement traditional ethics of rights and justice. Feminist understandings of responsibility and interconnectedness can enrich how we think about legal responsibility.[31] Although paying money damages is equivalent to taking partial responsibility for harm, it has erroneously paraded as the full meaning of responsibility in law. A standard of legal responsibility that includes interpersonal caregiving more closely reflects the experiences and understandings of people routinely responsible for one another. Such an expansion of our concept of responsibility would improve tort law by making corporate decisionmakers personally responsible for the consequences of their decisions, thus humanizing corporations and their activities. Rethinking remedies and procedures for mass tort litigation applies feminist theory in ways that create significant changes in the balance of power among litgants and in the core values of tort law.

E. Injury or Harm in Tort Law

Adrian Howe, Joyce McConnell, and Lucinda Finley are leaders in thinking about tort law's understanding of injury or harm. Adrian Howe proposes a shift from the conventional tort idea of individualized, privatized injury to a concept of social injury for women.[32] Because gender bias affects all women, injuries to women are both individual and class-based. Law must be able to respond simultaneously to both aspects of a single harmful act. Howe helps us think about how to implement this change. She traces the concept of social injury through Catharine MacKinnon's work on rape, sexual harassment and pornography, and through the idea of social injury

30 CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); MAKING CONNECTIONS (Carol Gilligan et al. eds., 1990); MAPPING THE MORAL DOMAIN (Carol Gilligan et al. eds., 1988).

31 Treated in full in Bender, *Feminist (Re)Torts*, *supra* note 4, at 901-08, these ideas about responsibility and caregiving are also summarized in Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990).

32 ADRIAN HOWE, THE PROBLEM OF PRIVATIZED INJURIES: FEMINIST STRATEGIES FOR LITIGATION (Institute for Legal Studies Working Paper No. 4:1, 1989); *see also* MARTHA A. FINEMAN & NANCY S. THOMADSEN, AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 148 (1991).

in criminology, which, she argues, is analogous to civil social injury. Howe offers her "social injury strategy as an affirmation of [her] faith in the progressive possibilities of feminist interventions in law."[33] She urges feminist scholars to demonstrate that social injury is part of a gender-ordered legal system. Questions arise whether this can be accomplished within common law tort, or so exceeds tort law's traditional private law base as to be an issue for public law remedies. Feminist arguments about the artificial dichotomy between public and private law are particularly apt here.[34] Such arguments indicate the need for either an integration of public and private law in these cases or a category *sui generis* for injuries suffered by individuals because they are women.[35]

F. Harms From Intrafamilial Sexual Abuse

Joyce McConnell, the feminist torts scholar who has most clearly heeded Howe's call, is studying tort remedies for incest survivors. In her first article on the subject,[36] she explores the fallacy of categorizing incest as either public or private harm, because it is both. By focusing on the case of *Laurie Marie M. v. Jeffrey T.M.*,[37] she shows that even when courts acknowledge the social context of incest and assess liability in an individual case, they fail to account for social harm in calculating damages. Despite a jury verdict awarding Laurie Marie M. $200,000 compensatory and $275,000 punitive damages, the intermediate appellate court remitted both awards to $100,000 each, and further diminished the significance of the harm by characterizing it as "purely private." McConnell argues that it is "folly [to] attempt to situate intrafamilial sexual abuse exclusively on one side of the private/public dichotomy, since incest contains elements of both."[38]

Despite the difficulties in educating courts about the dichotomy misconception, McConnell encourages the continued use of tort law because it

> offer[s] the injured plaintiff a different kind of satisfaction from that derived through a criminal prosecution. For the victim of in-

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33 FINEMAN & THOMADSEN, *supra* note 32, at 166.

34 For an overview of the public-private, and individual-collective aspects of tort remedies, see Bender, *Feminist (Re)Torts*, *supra* note 4, at 864-72.

35 In an exciting work in progress, Suzanne J. Levitt is "Rethinking Harm" from a feminist perspective with particular emphasis on torts, employment discrimination, and topical themes of the public/private dichotomy, the "make whole" concept of damages, coercion/consent, and the effect of the background noise of oppression on law's understanding of injury (detailed proposal on file with author).

36 Joyce McConnell, *Incest As Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143 (1992).

37 559 N.Y.S.2d 336 (App. Div. 1990), *aff'd*, 575 N.E.2d 393 (N.Y. 1991).

38 McConnell, *supra* note 36, at 144-45.

> trafamilial sexual abuse, a tort suit offers the opportunity to be the court's central concern rather than merely a peripheral subject of the defendant's criminal conduct. It offers the victim the opportunity to tell of her suffering, be believed by a jury and vindicate her experience through the award of damages.[39]

In a soon-to-be published second essay, McConnell proposes the use of a class action or mass tort model to acknowledge the social injury of incest.[40] Her analysis is a powerful illustration of feminist contributions to the reconstruction of tort law. Incest survivors, without having to rely on a district attorney to respond, would be able to call both perpetrators and society to account for the harms caused by this all too prevalent practice rooted in patriarchal domination.

G. Undercompensation of Women's Harms

For many years, Lucinda Finley has been thinking, writing, and publicly speaking about how tort law fails to understand harms to women.[41] In her only published article focusing solely on torts, she richly illustrates the influence of gender bias on the development of tort doctrines such as intrafamilial immunity, loss of consortium, rules about assessing damages, and sexual harassment.[42] For example, Finley begins by discussing how doctrines like interspousal tort immunity or the privilege of discipline remove intentional marital injuries from the tort system altogether and force women plaintiffs into the criminal or family court systems, where no monetary damages were available.

Turning to wrongful death actions, Finley argues that courts fail to compensate women for the real and substantial harms that they suffer when their children are negligently killed because damages are frequently limited to pecuniary losses. Finley notes that injuries to children disproportionately affect mothers because their female parenting role closely links self-identity with caretaking duties and children's well-being.[43] She asks tort scholars and students to consider whether tort law should compensate for relational and emotional injuries as well as out-of-pocket expenses and future economic loss. In addition, Finley advances feminist legal theory enor-

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39 *Id.* at 172.

40 Joyce McConnell, Refusing to be Victims: Postmodern Possibilities of Tort Law (unpublished presentation, 1992 Law and Society Annual Meeting, Phila., Pa.).

41 It is unfortunate that Finley's talks on the topic are not published. For those readers who have missed hearing her, I recommend searching for audio tapes of Association of American Law Schools, Law and Society, and Critical Legal Studies conferences since about 1986.

42 Finley, *supra* note 18.

43 *Id.* at 50-51.

mously by arguing that tort law has failed to adequately value homemaker and caretaking services.[44] Traditional damage calculations rely on gender stereotypes and systemic gender bias to skew and underestimate projections of future income women would earn in the market.

Sexual injury cases further reveal the undervaluation of women's injuries.[45] Bruce Feldthusen's recent study is a powerful indictment of the Canadian legal system's failure to adequately quantify damages for sexual battery and discrimination.[46] His feminist analysis contends that undercompensation occurs because courts ignore relevant differences between other kinds of cases and sexual battery cases, while emphasizing irrelevant differences. Both moves significantly disadvantage women victims. Damages in sexual battery cases may also be lower because monetary compensation is not always the primary motivation for women who bring these lawsuits; instead, they may sue to punish the assailant, or to achieve corrective justice, public vindication, and the cathartic, healing effect of the litigation itself. Nonetheless, Feldthusen makes a compelling cases for pecuniary damages for lost earning capacity and past and future psychological counselling, as well as for nonpecuniary and punitive damages. He urges courts "to recognize fully 'gender-specific' pain when quantifying non-pecuniary loss . . . [encouraging them to] focus less on the conduct of the perpetrator and more on the injury to the victim."[47] Feldthusen calls on the judicial system to account for its perpetuation of gender discrimination and bias.

H. Failure to Include Women's Experiences in Legal Standards

Finley also challenges law to enlarge its context of analysis by including more of women's experiences. She exposes the gender bias in the reasonable person standard,[48] through cogent analyses

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44 A recent study of wrongful death awards strongly supports Finley's claims about the need to value homemaker services. *See* Goodman et al., *infra* note 95 (discussing gender-based differences in civil damage awards); *see also* Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages*, *in* TORT THEORY 185 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 74-91 (1990); Regina Graycar, *Women's Work: Who Cares?*, 14 SYDNEY L. REV. 86 (1992); Regina Graycar, *Love's Labour's Cost: The High Court Decision in* Van Gervan v. Fenton, 1 TORTS L.J. (forthcoming 1993).

45 *See* McConnell, *supra* note 36, at 146-52.

46 Bruce Feldthusen, *Discriminatory Damage Quantification in Civil Actions for Sexual Battery*, — U. TORONTO L.J. —— (forthcoming 1993).

47 *Id.* at —. Throughout his work he cites to Kate Sutherland, *Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault*, *in* TORT THEORY, *supra* note 44, at 212.

48 Finley, *supra* note 18, at 57-65.

of a sexual harassment case, *Rabidue v. Osceola Refining Co.*,[49] and a DES statute of limitations case, *O'Brien v. Eli Lilly and Co.*[50] Finley uses these cases to illustrate the fallacy of applying a "neutral" reasonable person standard, which, in these particular contexts is actually biased and insensitive to the perspectives and experiences of women.[51] Finely's current work-in-progress is an important empirical and theoretical book that further elaborates this concept. She reconceptualizes the meaning of harm in DES cases[52] and proposes a method for evaluting damage claims asserted by DES daughters. She has interviewed many DES daughters to determine how they characterize their harms and how they understand what would justly compensate them. Finley concludes that tort law does not adequately address the seriousness and consequences of injuries to women's reproductive systems—very physical injuries that are frequently characterized as emotional[53]—and damages inflicted upon their senses of self. Finley's and Feldthusen's works will undoubtedly help courts and practitioners do a better job of relating to women plaintiffs' actual experiences of harm and assessing fair compensation for these injuries.

1. Causation and Time in Tort Law

Applying feminist methods and analyses, Ann Scales argues that law's concepts of time, space, and causality are narrowly rigid, linear, and "white male."[54] Borrowing from the work of French feminist Julia Kristeva[55] and Native American cultures,[56] Scales suggests that women have a different sense of causality and time—one that is multiple, contingent, repetitive, and cyclical.[57] She demonstrates the differences in male and female perceptions of time by

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49 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

50 668 F.2d 704 (3d Cir. 1981) (as amended Jan. 5, 1982).

51 Finley, *supra* note 18, at 57-65. *See also* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404-06 (1992).

52 Diethylstilbestrol (DES) is an estrogen-based drug that was frequently prescribed to pregnant women between the 1950s and early 1970s. Children exposed to DES *in utero* developed serious reproductive tract deformities and injuries, including a deadly signature cervical and vaginal cancer, clear cell adenoma. Most of those injured *in utero* were female children, hence the references to "DES daughters."

53 This is analogous to claims that Chamallas and Kerber made about women's real physical harms being labelled "emotional" and treated differently from other types of harms. *See* Chamallas with Kerber, *supra* note 7, at 814.

54 Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 98-99 (1990) This insightful article is a prelude to a book she is currently writing. It will be a great boost to feminist legal scholarship in tort if Scales expands on her ideas focusing on tort analysis.

55 Julia Kristeva, *Women's Time*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 13 (Alice Jardine & Harry Blake trans., 1981).

56 Scales, *supra* note 54, at 109 n.49, 121.

57 *Id.* at 109-10, 120.

comparing battered women's experiences of time and causation in anticipating further assaults with the traditional self-defense requirement of "imminent harm." To illustrate the differences between linear and multiple causality, Scales utilizes mass tort cases such as Agent Orange, DES, and the Utah atomic bomb radiation fallout cases. Mass torts do not fit neatly into the traditional legal linear sense of causation. Legal cause inquiries are complicated by "the problem of imperfect data, the problem of infinite causal predicates, and the problem of social causation."[58] According to Scales, women and other previously excluded groups will be instrumental in bringing about a paradigm shift in the understanding of legal causation.[59] Although Scales recognizes that there will be great resistance to recognizing the fluidity of causation, she finds that including alternative perceptions is essential to preserve human dignity[60] and to promote the progress of tort law. Causation analysis, a pivotal issue in tort law, calls out for more work by feminist legal theorists.

J. Critiquing Neocontractual Tort Theories

Peter Bell has written a thoughtful, detailed appraisal of a recent development in tort theory—neocontractarian analysis.[61] Neocontractual legal theory postulates that tort rules and damages are based on a hypothetical bargain that would have been agreed to by the litigants. Applying insights gained from feminist theories, Bell concludes that neocontract fails to give proper care and respect to the individuals whom it purports to honor.[62] Neocontract places undue reliance on autonomy and abstraction[63] and fails to take into account the experiences and needs of the injured victims.[64] Bell recommends a more relational and cooperative understanding of human interactions than that offered by neocontract.[65] Bell argues that tort law should utilize alternative theories that empower consumers and tort victims rather than the injurers, whose choices are maximized by neocontractual analysis.[66] Finally, Bell faults neocontract for failing to acknowledge the socially valuable aspects of tort law: increased safety, increased availability of choices and informa-

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58 *Id.* at 117.

59 Acknowledgement of women's causality "has the additional virtue of emhracing mystery." *Id.* at 121. In an intriguing paragraph, Scales suggests the torts of "insult to mystery" and "ecological arrogance." *Id.*

60 *Id.* at 123.

61 Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177 (1990).

62 *Id.* at 1180.

63 *Id.* at 1205-11.

64 *Id.* at 1211-15.

65 *Id.* at 1207-09.

66 *Id.* at 1215-21.

tion for consumers, and internalization of some costs of injury by producers.[67] Bell's work is especially important because he is one of the few traditional torts scholars who use the work and insights of feminist legal scholars to complement their own theorizing and research.

III
FEMINIST THEORY APPLIED TO TEACHING TORTS

Feminist tort theorists have also written and spoken about teaching torts. For example, the Lucinda Finley article mentioned earlier, is designed to teach torts professors how to include feminist concerns and analyses in their courses.[68] She discusses cases which can be used to reveal gender bias and doctrines particularly amenable to feminist critique. Finley also suggests changes in tort law, especially with regard to the standard of care, sexual harassment doctrine, and the valuation of homemaker services and women's injuries. Her work encourages torts professors to begin to make their courses more inclusive.[69]

Carl Tobias approaches teaching torts by analyzing gender bias in a very popular torts casebook.[70] Following the methodology developed and utilized by Professor Mary Joe Frug to examine a contracts casebook,[71] Tobias examines the treatment of women as characters, the gendered language, and the organization of cases and materials. He then discusses the "maleness" of the casebook, including the fact that all of the book's illustrations of legal heroes, torts scholars, and judges are male.[72] Tobias also asserts that information about women's history and issues of great significance to women are often arranged poorly or excluded altogether.[73] In the last half of his article, Tobias analyzes gender issues that arise in the casebook's intentional tort materials. While he rarely finds in-

67 *Id.* at 1237-46.

68 Finley, *supra* note 18.

69 At the 1993 Women and the Law Project annual meeting in San Francisco, Professors Jean Love and Okianer Christian Dark offered lists of tort cases useful for teaching intentional torts and harassment; *see also* audio presentations of Professors Phoebe Haddon and Tauyna L. Banks at the October 1992 AALS Workshop for Minority Law Teachers in Washington, D.C. For further help in eliminating sex bias in law school courses, see Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988).

70 Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

71 Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985). Similary, Mary Coombs has evaluated a criminal law text from a feminist perspective. Mary I. Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988).

72 Tobias, *supra* note 70, at 506-08.

73 *Id.* at 508.

stances of overt sexism, Tobias exposes subtler forms of gender bias. Intentional torts implicate power, and thus are an ideal forum for identifying and rectifying relative imbalances of power. Tobias demonstrates how the casebook, which omits cases on potential intentional torts such as sexual harassment, inadequately addresses this dimension.[74] He concludes by recommending changes in the book's next edition and by suggesting methods for teaching from the book.

IV
TORT ISSUES IMPORTANT TO WOMEN'S LIVES

Many torts articles discuss issues important to women's lives, such as reproductive torts, sexual harassment, intrafamilial violence and products that have harmed women, such as DES, Dalkon Shield, and oral contraceptives. In this section, I will examine feminist approaches that focus on women's experiences and protect women by providing tort remedies or protect them from being sued. During the early 1980s, feminist authors, like Gail Ballou,[75] Camille LeGrand, and Frances Leonard[76] proposed ways to use the tort system to compensate survivors of rape and sexual assault. Although criminal law may result in the incarceration of a rapist, the survivor must resort to a private law remedy to recover damages for physical and emotional harm, as well as her pecuniary losses. Camille W. Cook and Pamela Kirkwood Millsaps,[77] Margaret Allen,[78] Christine Cleary,[79] and Melissa Salten[80] all argue for tort remedies for incest survivors, despite problems with statutes of limitations, repressed memories, and questions about insurance coverage. After documenting the social contexts of physical assaults on women and arguing for mandatory arrest policies, Caroline Forell analyzes cases and experiences dealing with tort liability for police officers who fail to

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74 *Id.* at 518-9. Tobias faults the casebook for using quotes to illustrate that "mere solicitation of a woman to illicit intercourse" does not state a cause of action and that "there is no harm in asking," but does not raise questions about the effects of power relations on intentional torts, such as sexual harassment of students by faculty or employees by supervisors. *Id.* at 519.

75 Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105 (1981).

76 Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479 (1979).

77 Camille W. Cook & Pamela K. Millsaps, *Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest*, 26 U. RICH. L. REV. 1 (1991).

78 Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609 (1983).

79 Christine Cleary, Comment, *Litigating Incest Torts Under Homeowner's Insurance Policies*, 18 GOLDEN GATE U. L. REV. 539 (1988).

80 Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189 (1984).

assist battered women.[81] Denise LeBoeuf and Laurie Morin explore tort issues and remedies for female patients exploited by their therapists.[82] Thomas Lyon and Caroline Forell examine the sexual misconduct of lawyers with female clients.[83] Krista Schoenheider,[84] Benson Wolman,[85] Alice Montgomery,[86] and Sarah Wald[87] theorize about tort liability (independent of, or in addition to, Title VII remedies) as a means to recover for sexual harassment and employment discrimination in the workplace.[88] Regina Austin and Jean Love

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81 Caroline Forell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, 6 BERKELEY WOMEN'S L.J. 215 (1990-91). Both Caroline Forell and Laura Harper recognize the difficulty posed for women in bringing constitutional tort actions under 42 U.S.C. § 1983 after DeSbaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989); *see also* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393 (1990). The *DeShaney* case held that the Department of Social Services was not liable for failing to protect a battered child from his father, despite the fact that Social Services had ample evidence about the child's abuse and failed to follow-up adequately. There was no constitutionally based violation because social services employees were not the parties causing the injury—that is, they did not act affirmatively, they merely failed to act. The Supreme Court in *DeShaney* acknowledged that there might be a tort action but found that there was no constitutional protection. For an analysis of police failure to assist prior to *DeShaney*, see Ruth Gundle, *Civil Liability for Police Failure to Arrest:* Nearing v. Weaver, 9 WOMEN'S RTS. L. REP. 259 (1986).

82 Denise LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83 (1988); Laurie A. Morin, *Civil Remedies for Therapist-Patient Sexual Exploitation*, 19 GOLDEN GATE U. L. REV. 401 (1989).

83 Caroline Forell, *Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues*, 22 GOLDEN GATE U. L. REV. 611 (1992); Thomas Lyon, Note, *Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?*, 10 HARV. WOMEN'S L.J. 159 (1987) (analyzing from a feminist perspective the unequal power and emotional instability of divorce clients and recommending both professional disciplinary action and direct tort liability). Both of these articles use the famous case of *Barbara A. v. John G.*, 145 Cal. App.3d 369 (1983), as a starting point.

84 Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

85 Benson A. Wolman, Comment, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U. L. REV. 245 (1988).

86 Alice Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879, 888-911 (1980) (recommending the use of torts like assault and battery, intentional interference with contract, and fraud and deceit to remedy workplace sexual harassment).

87 Sarah E. Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J. 35 (1982) (emphasizing intentional infliction of emotional distress and recommending new cause of action under state unfair or deceptive practices acts).

88 *But see* Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 303-04 (1991)(recommending an amendment to Title VII instead of using tort actions as a remedy to sexual harassment). Catharine MacKinnon's work was foundational in naming sexual harassment as a harm and getting it included under Title VII. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). The Civil Rights Act of 1991 amended Title VII, 42 U.S.C. § 2000e, thus permitting compensatory damages for emotional distress and other harms from sexual harassment in some cases. 42 U.S.C.S. § 1981a(a)(1).

write about using the tort of intentional infliction of emotional distress to recover for hate speech and employer abuses based on race, gender, and class discrimination.[89]

Other interesting articles consider the relationship of tort law to reproductive rights and injuries. Karen Bussel uses women's autonomy as the basis for her strong feminist argument for the prohibition of tort liability for gestational surrogate mothers engaged in lawful behavior.[90] Patricia Quintilian discusses the use of informed consent doctrine to respond to the increasing numbers of unnecessary hysterectomies performed on women.[91] In support of women's access to nurse-midwives during childbirth, Donna M. Peizer argues for the elimination of vicarious liability for physicians, with limited exceptions.[92] She notes that history reveals women's loss of control over childbirth,[93] and that the fear of vicarious liability among doctors "poses one of the most formidable obstacles to full utilization of nurse-midwives. . . ."[94] These examples indicate the range of ways that feminist legal scholars write about tort issues that affect women.

V

Social Science Research in Feminism and Tort Law

Jane Goodman, Elizabeth Loftus, Marian Miller, and Edith Greene have studied the effects of gender bias and stereotypes on wrongful death damages.[95] After reviewing past research on gender bias in civil jury awards of monetary damages and analyzing data from the Washington State Task Force on the Economic Consequences of Gender in Civil Litigation Study, the authors generated their own data by conducting a simulated wrongful death jury study. In addition to jury verdict amounts, Goodman and her colleagues collected written statements from sample jurors explaining how they determined an appropriate sum of damages. The article con-

89 Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990); *see also* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing tort actions for hate speech).

90 Karen A. Bussel, Note, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661 (1991).

91 Patricia Quintilian, Comment, *Unnecessary Hysterectomy: The Lack of Informed Consent*, 13 GOLDEN GATE U. L. REV. 573 (1983).

92 Donna M. Peizer, *A Social and Legal Analysis of the Independent Practice of Midwifery: Vicarious Liability of the Collaborating Physician and Judicial Means of Addressing Denial of Hospital Privileges*, 2 BERKELEY WOMEN'S L.J. 139 (1986).

93 *Id.* at 141.

94 *Id.* at 171.

95 Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 LAW & SOC'Y REV. 263 (1991).

tains tables of data and excerpted juror commentaries. This research reveals that a "double standard" persists in jury awards for wrongful death depending upon the sex of the decedent. The authors conclude that "it can be traced most directly to stereotypes about employment remuneration, based on longstanding discrimination against women in the workplace" and to "strong stereotypes about male and female roles in the home."[96] To reduce gender bias favoring males, they suggest the use of experts to inform juries about the reasonable value of household services, regardless of whether wages were actually paid. There is a wealth of opportunity for future feminist social science research about tort law cases, outcomes, practices, and harms.

VI
BOOK REVIEWS

Some feminist theorists have published book reviews of torts books or used torts examples in their reviews. In a review of Stephen Sugarman's book about tort law,[97] Stephanie Wildman reflects on the feminist implications of Sugarman's tort law proposals.[98] Sugarman has suggested eliminating tort law in general and substituting a compensation system funded jointly by employers and the Social Security system. Wildman, while generally open to his suggestions, worries that his proposal to end tort recovery, and thus end compensation for nonpecuniary losses (other than a capped damage maximum for pain and suffering), devalues emotional and relational losses. She questions the wisdom of Sugarman's approach in a society that measures value in terms of money.[99] Wildman's feminist perspective is also apparent in her criticism of Sugarman's proposals as "institutionaliz[ing] the invisibility of nonearner work"[100] and for his assumption that all homemakers are attached to someone in the workforce.

In her review of Catharine MacKinnon's *Toward a Feminist Theory of the State*,[101] Wildman uses tort examples to support MacKinnon's thesis that law and the legal system are gendered male and do not take seriously the abuse of women by men.[102] Wildman argues that in famous tort cases such as *Tarasoff v. Regents of the University of Cali-*

96 *Id.* at 281-82.

97 STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989).

98 Stephanie M. Wildman, *Enlightened Social Insurance in a World Made Safer*, 44 U. MIAMI L. REV. 877 (1990).

99 *Id.* at 890.

100 *Id.* at 891.

101 MACKINNON, *supra* note 6.

102 Stephanie M. Wildman, *Review Essay: The Power of Women*, 2 YALE J.L. & FEMINISM 435 (1990).

fornia,[103] *Riss v. City of New York*,[104] *Sindell v. Abbott Laboratories*,[105] and *Steinhauser v. Hertz Corp.*,[106] the courts ignored or marginalized the issue of the abuse of women. She also questions whether the gender of the victims in other famous cases like *Palsgraf v. Long Island Railroad Co.*[107] and *Dillon v. Legg*[108] influenced their outcomes. By applying MacKinnon's analysis to tort cases, Wildman bolsters the power of MacKinnon's critique about male biases in law masquerading in language of objectivity and neutrality.

Ellen Smith Pryor uses feminist analysis to review A. Engelberg's *Guides to the Evaluation of Permanent Injury*, published by the American Medical Association.[109] Although these *Guides* have been adopted by many states as a standard for determining workers' compensation benefits, Pryor argues that "the *Guides*' flawed promises of objectivity are especially troubling because they appeal to the craving of legislators and other decisionmakers for certainty and clarity in the difficult arena of impairment and disability assessment."[110] She cites numerous examples from the *Guides* that reveal gender biases in assumptions about activities and abilities of injured women that negatively influence their whole-person impairment ratings.[111] In addition, Pryor notes that gender bias is embedded in the guidelines which address injuries to the reproductive system. These guidelines omit consideration of a woman's loss of sexual sensation (whereas a man's is taken into account) and allow individual physicians to incorporate their own subjective, often stereotypical, views

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103 17 Cal. 3d 425 (1976) (involving the fatal stabbing of a female student by a crazed ex-boyfriend who was under psychological treatment and had informed his therapist that be was going to kill her).

104 22 N.Y.2d 579, (1968) (Woman sued city for failing to provide her with adequate police protection, despite her multiple requests for help after she received threats by a rejected suitor. The threats were actualized when he hired someone to throw lye in her face, causing her to be permanently scarred and blinded.).

105 26 Cal. 3d 588 (1980) (Daughters of women who took the prescription drug DES during pregnancy sued multiple manufacturers of DES to seek compensation for their cervical cancers caused by effects of the drug while they were *in utero*.).

106 421 F.2d 1169 (2d Cir. 1970) (Female child with history of sexual abuse became schizophrenic after car accident and sued other driver for damages including her scbizophrenia, which she claimed was caused by the accident.).

107 248 N.Y. 339 (1928) (Woman who was injured by a railroad employee's negligence, which caused a fireworks explosion in a train station, was found to be an unforeseeable plaintiff and ineligible for recovery.).

108 68 Cal.2d 728 (1968) (Mother entitled to recover for emotional distress caused by witnessing the negligently caused death of her child.).

109 Ellen S. Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964 (1990).

110 *Id.* at 965.

111 *Id.* at 970. Levels of appropriate compensation are established through evaluations of the degree of impairment suffered by the whole person and indicated in part by alterations in the activities of daily living.

into the "activities of daily living" measurement for impairment.[112] Pryor explains that the *Guides* should be more explicit about their underlying choices and criteria for compensation in order to prevent the physicians' subjective assumptions about women from dictating compensation standards.[113]

Jean Love and Patricia Cain, in their review of Judith Jarvis Thomson's book on moral theory,[114] suggest that Thomson's hypotheticals are useful for teaching torts classes.[115] Thomson, a philosopher, develops unique hypothetical situations to test theories about moral rights. Love notes analogies between Thomson's hypotheticals and the rights protected by tort law, the laws of self-defense, and public and private necessity doctrine. While the tort section of Love's review is not explicitly feminist, it is combined with other sections that suggest a feminist approach to using Thomson's materials in the classroom.[116]

VII
OVERVIEWS

While chairing the Association of American Law Schools Section on Torts, Jean Love wrote a brief overview of recent feminist scholarship in torts and offered suggestions about materials that might be included in a torts course.[117] She also began compiling a list of cases and materials useful in teaching torts from this new perspective.[118] Unfortunately, no other overviews of available cases or feminist writings in tort exist.

CONCLUSION

Feminist theorists have made inroads in rethinking and critiquing tort theory, but much more needs to be done. Feminist legal scholars have taken insights from feminist scholarship in other disciplines and from feminist methods in general to criticize and reconceive tort's precarious position as a private law remedy for individual harms. In doing so, they have unearthed tort law's gen-

112 *Id.* at 970-71.

113 *Id.* at 971-73.

114 JUDITH J. THOMSON, RIGHTS, RESTITUTION & RISK: ESSAYS IN MORAL THEORY (William Parent ed., 1986).

115 Patricia A. Cain & Jean C. Love, *Stories of Rights: Developing Moral Theory and Teaching Law*, 86 MICH. L. REV. 1365 (1988).

116 See, in particular, Pat Cain's discussion on using Judith Thomson's work in her feminist legal theory class. *Id.* at 1378-87.

117 Jean C. Love, *Torts and Retorts—Bringing Gender Issues Into the Torts Course*, Newsletter, Association of American Law Schools, Section on Torts-Compensation Systems (Fall 1989).

118 Jean C. Love, Teaching Torts: A New Perspective—Selected Cases and Articles (Jan. 1987) (unpublished manuscript, on file with the author).

der biases, tested its value system, and added to its causes of action. Not only do we need more feminist legal theorists to question traditional tort law's approach to causation, harm, fault, and legal responsibility, we also need more feminists to translate women's experiences of harm into legal claims that will result in compensation. Feminists need to rethink tort defenses as well.

Feminist tort theorists ought to question the ways in which we organize torts analysis, challenge the values of tort law, suggest new paradigms for resolving personal injury problems, assess compensation systems for systemic bias, and help alleviate the huge human cost of personal injuries in our society. Feminist lawyers and scholars need to evaluate tort litigation strategies and seek alternatives to litigation that protect vulnerable parties and achieve just, prompt resolutions of injury cases. Scores of tort doctrines and analytic concepts remain unexamined, leaving their gender, race, class, and sexuality biases to be unconsciously reproduced in the next generation of cases and lawyers. Feminist legal scholars have their work cut out for them in the area of tort law.

Law schools need torts casebooks with feminist perspectives, or, at a minimum, books that include feminist materials.[119] Feminist law professors must share their experiences and insights about improving methods of teaching about personal injuries and sensitizing students to all of the dynamics involved in these situations. There is a dearth of materials exploring the intersections of race, class, ethnicity, disability, sexual orientation, age, and gender in personal injury situations. This work must be done.

Feminist scholars need to write articles for traditional torts teachers, enabling them to expand the perspectives in their courses. Feminist tort teachers also need more materials containing feminist analyses of tort to give to students. The work that has been done is pathbreaking. The work yet to be done will determine the future benefits of tort law for women.

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119 A recent Australian casebook has made steps in the right direction. HAROLD LUNTZ & DAVID HAMBLY, TORTS: CASES AND COMMENTARY (3d ed. 1992). *See also* TORT THEORY, *supra* note 44.