A Break in the Silence: Including Women's Issues in a Torts Course

Lucinda M. Finley†

I. Introduction: Why Feminist Theory Can Enrich a Torts Course

I teach torts, a mainstay of the first year law curriculum. Judging from the way most casebooks present this subject, one would think that notions about gender roles and gender stereotypes are irrelevant to the past development or current understanding of tort law. Economic theory, on the other hand, is presented as obviously relevant to the subject. So what possible insights could feminist theory offer to tort law? After all, the torts course is not just about women.

But neither is feminist theory. I also teach a course which is commonly misunderstood as marginal: a course on feminist theory and the law. Yet I am struck by the extent to which this course grapples with all the fundamental issues of human experience: birth, death, love, hate, marriage, divorce, caring, violence, employment, unemployment, economic security, poverty, power, and powerlessness. Far from being marginal, feminist theory is concerned with the entire realm of law.

Moreover, teaching feminist theory and the law has made me face the incompleteness of core ideas that fuel our conception of law—ideas such as objectivity, rationality, and neutrality. "Objective" rules are too often

---

† Associate Professor of Law, Yale Law School; visiting Professor of Law, 1989, State University of New York at Buffalo. This paper grows out of the efforts of many women scholars who have been stimulated by the Women in Law Project of the Washington College of Law, American University (directed by Ann Shalleck) to include issues of significance to women throughout the basic law school curriculum. In the torts area, Professors Jean Love and Leslie Bender have especially influenced my thinking and have suggested many cases and areas for thought. Professor Love has prepared an outline of cases and articles concerning more women's issues in torts, and I commend this outline to anyone who wants to enrich the content of a torts course. For Professor Bender's important ideas, see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3 (1988).

The article published here is part of a larger project in which I plan to use the insights of feminist theory to question the prevailing values of tort law and to examine the ways in which tort law's referencing to market values and priorities inhibits the recognition, deterrence, and adequate compensation of women's injuries. This scholarship has been intimately connected to my teaching, since it was my effort to include women's issues in my torts course that led me to critical insights about the tort system. Although I have not here addressed fully the issues contained in the larger paper, it is my hope and expectation that this article's discussion of what can be done in the classroom will lead to enriched thinking about the valuations, assumptions, and effects of tort law.

There are many people who have shared comments with me on this project in its various stages who deserve thanks. Special mention for her assistance and her stimulating conversations and encouragement go to my research assistant, Eileen Hershenov, Yale Law School, '89.

formed by a collection of male perspectives; the "rational" or "reasonable" may well describe only one of several valid courses of action; and the "neutral" rule is highly partial if it fails to consider the viewpoints, experiences, and needs of groups who have largely been excluded from positions powerful enough to set the legal agenda.

These insights have led me to realize that a feminist perspective[1] extends far beyond the corners of the curriculum to which issues of significance to women's lives are usually relegated.[2] Feminism can and should enrich all the the basic law school courses. Indeed, the basic courses will continue to convey only an incomplete knowledge unless they are expanded to examine how law has affected women's opportunities, and how the law's attention to or failure to acknowledge women's experiences has shaped our views of women and women's views of themselves. So, I have begun to include a feminist perspective in my torts class.

Torts is particularly well suited to the inclusion of gender issues, because it, too, grapples with fundamental concerns of human life: the definition of needs and experiences we want our society to value, the ways we want to relate to each other, and how we want the legal system to treat our relationships and their disruptions. To deal with these concerns adequately, students need a balanced legal consciousness informed by the perspective of both genders—in other words, a legal consciousness which has properly elevated the importance of previously submerged women's concerns.

Moreover, the inclusion of women's issues in torts can demonstrate to students that abstract legal concepts—such as causation, duty, and fault rules—arise from concrete, recognizable human experiences, like the battered wife's difficulty in getting her "low priority" calls for help answered by the police. Students may begin to see that law is not a pre-existing, natural, given phenomenon, but that it is socially constructed, and that we can change our laws and the assumptions upon which they are based. As law changes, it can, in turn, alter social practices and policies that may have adversely affected a disempowered group such as women.[3]

Crucially, integrating women's issues into a basic course such as torts can also help women students feel less alienated from law school and from the law.[4] The legal curriculum's silence concerning women's issues is

---

1. A feminist perspective considers the significance of ideas about gender in shaping institutions such as law, and the relevance of the often overlooked or ignored experiences of women as powerful sources of critical insight.

2. For an illuminating feminist re-examination of contracts, another mainstay of the first year curriculum, see Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985), demonstrating that conceptions about women and the importance of concerns associated with women can affect the messages students absorb about legal doctrines.

3. For an example of the interaction between social practices and law in the area of sexual harassment, see the discussion of Rabidue v. Osceola Refining Co., *infra* note 63 and accompanying text.

4. For a moving and illuminating examination of women students' feelings of alienation, the sources of these feelings, and their effect on learning and class participation, see Melling & Weiss,

deafening to many women students; it is a major contributing factor to these students' feelings of marginalization and anger.[5] Acknowledgment of gender issues in torts can help women feel less like outsiders to the enterprise of the law, and may encourage them to engage in open dialogue, to bring up their experiences, to scrutinize the exclusiveness or inclusiveness of various legal rules, and to raise previously unraised questions about the assumptions and impacts of the law—all of which can only enrich class discussion and deepen the understanding of the material for everyone.

Male students can also benefit from the inclusion of women's issues by learning more about the gendered nature of the world. Because what is based on male needs or experiences is too often presumed to be the human norm, many men may be unaware of the extent to which attitudes about gender roles shape and constrain us all, including men. Male students may begin to question that which they might otherwise take for granted. By questioning, they might start to think about the need for change.

There is also much to be gained outside the classroom from infusing a torts course with issues of significance to women's lives. On a practical level, when students become lawyers, they may more accurately perceive and respect the needs of women clients; they may devise strategies or claims that better respond to those needs; and they may more effectively use rules or argue for changes in those rules to aid their women clients. In the long run, such efforts can alter existing tort law, reduce its differential impacts on women, and make it more responsive to widely shared but currently overlooked human values.

More immediately, integrating women's issues into the basic curriculum can help overcome the societal tendency to trivialize women by ignoring them or marginalizing them with the label "special" or "different". As women's issues are included throughout the law school curriculum, they will be more likely to be seen for what they are—serious concerns that affect everyone and raise questions about how the law is or should be intertwined with matters of fundamental human importance.[6]

The Legal Education of Twenty Women, 40 STAN. L. REV. 1299 (1988).

5. My observations on women law students' sense of alienation come from research I have done with Jamienne Studley, Robert Burt, and Austin Sarat under the auspices of a grant from the Rockefeller Foundation Gender Roles Program. We did a longitudinal survey of female and male law students' reactions to a set of legal problems and to the professional socialization process of law school. My observations also come from personal experience and from numerous lengthy conversations with many students.

6. Now that I have sung the praises of teaching torts in a manner more inclusive of women, I offer a word of caution about the risks, especially for women teachers. Since some of what you will be teaching is not currently considered "real" torts, and since in comparing notes students will learn that other sections are not getting this "feminist stuff", there inevitably will emerge some initial student anxiety and resentment. Women teachers are already considered somewhat marginal, and many unwittingly create resistance when they identify with women's concerns and do things that the "real", i.e., male, law professors don't do. There are already many stories circulating among women law teachers about savage teaching evaluations from some male students because a woman professor is "giving a feminist diatribe" instead of teaching the subject—and these include evaluations of women who are simply feminist by reputation, and are not necessarily talking about women in their basic law

In the space allotted I can only begin to sketch out some concrete suggestions for torts teachers. This is not the place to write a revised treatise on tort law, which is what the project really demands. Instead, I will attempt to break the silence on women's issues in torts by asking what is and is not usually taught in a torts course, and about the implicit messages of the inclusions and exclusions. I will ask how the traditional doctrinal components of torts can be re-examined for gender bias in their impact on women. And finally, I will ask how some areas of torts might change if the legal context were expanded to more fully consider women's experiences.

It is my hope that this approach will stimulate more ideas from other torts teachers, and will initiate ongoing effort and conversation aimed at profoundly changing the content of many torts courses.[7]

II. Breaking the Silence: Teaching What Has Not Been Taught

Obviously, the simplest strategy for including women's issues in a torts course is to introduce some topics which are not generally taught, such as interspousal immunities, loss of consortium, or reproductive harm; or to increase attention to topics sometimes covered only superficially, such as damages; or to discuss issues that involve tort concepts but are often thought to be part of other courses, such as sexual harassment or battering. Each of these can inspire fruitful exploration of how notions of gender roles and the valuation of women's activities influence the content of the law, and how the law can thus have differential impacts on people according to their gender.[8]

Without a doubt, introducing some of these topics will mean introducing doctrinal relics. But since this is standard practice, doctrinal relics important to women should not be ignored. Several tort rules that are on the endangered species list already figure prominently in most torts courses, judging from the content of casebooks—doctrines such as contributory negligence, the fellow servant rule, and privity as a limitation on con-

---

course. *See* Banks, *Gender Bias in the Classroom*, 38 J. Legal Educ. 137, 145 (1988). But my experience suggests that if you just persist in demonstrating that women's issues are "real" torts issues, student resentment eases. Many students will come away with a greatly enhanced understanding of the effects of gender, an understanding that they may carry into their other courses; and the more male professors discuss women's issues, the more readily students will accept these issues as an important part of the torts course.

7. Professor Carl Tobias is doing noteworthy work on gender issues in tort law. Inspired by Professor Frug's work on contracts, *supra* note 2, he has written an examination of the gender issues in W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts (7th ed. 1982). Tobias, *Gender Issues and the Prosser, Wade & Schwartz Torts Casebook*, 18 Golden Gate U.L. Rev. 495 (1988).

8. The gender analysis of this article can easily be expanded to apply as well to race and class. Feminist theory seeks to validate and to empower the perspectives of traditionally disempowered groups, and should speak to disempowered groups besides women.

sumer product actions. These now outmoded rules are discussed to show the evolution of the law as it responds to new societal problems and perceived inequities. The doctrinal relics I suggest serve the same pedagogical function. And, by including them, a professor can help overcome the alienating silence about women in most law school courses.

A. *The Intrafamilial Immunity Doctrine*

Discussion of the intrafamilial immunity doctrine is especially useful for exploring the connection between tort law and current societal ideas about what and whose interests are worth protecting. Examination of the doctrine demonstrates how even reform efforts can still be limited by seemingly outmoded patriarchal notions.

If the intrafamilial immunity doctrine is discussed at all in torts courses, it usually comes up in cases involving automobile accidents. But to leave the doctrine in that context is to ignore its historical underpinnings and its disparate impact on women's ability to use tort law to redress a category of serious injuries. Interspousal immunity was originally based on the notion that husband and wife merged into one being—the husband—upon marriage.[9] Intrafamilial immunity was additionally based on the principle that the husband and father was the equivalent of the absolute monarch within the family.[10] In its early days, the doctrine was often developed and applied in suits brought by battered wives against their husbands, and operated to close off tort law as a route for compensation for victims of domestic violence and sexual abuse. The principal rationale offered for the immunity in early cases was that litigation might disrupt family harmony or the sanctity of the conjugal bond. It seems a cruel irony that this rationale was developed in cases like *Roller v. Roller*,[11] in which a daughter sought damages against her father because he had raped her, and *Thompson v. Thompson*,[12] in which a battered wife sued her husband and sought damages for the serious injuries he inflicted on her in repeated assaults.[13] Students will often express outrage or utter

9. *See, e.g.*, Thompson v. Thompson, *infra* note 12, at 614-15 (noting that "at common law the husband and wife were regarded as one."); *see also* 1 W. BLACKSTONE, COMMENTARIES *430 ("By marriage, the husband and wife are one person in law [citation omitted]: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .").

10. *Id.* at *430 (referring to the husband as the wife's "baron" or "lord").

11. 37 Wash. 242, 79 P. 788 (1905).

12. 218 U.S. 611 (1910).

13. Lest one think that these rulings are just turn of the century curiosities, see Fisher v. Toler, 194 Kan. 701, 401 P.2d 1012 (1965) for an illustration of judicial blindness created by formalistic reasoning and rigid adherence to precedent. In this case, while a divorce action was pending, the husband repeatedly rammed his car into his wife's car in an attempt to kill her. She was seriously injured and brought a tort suit. Even though the marriage was dissolved by the time of adjudication, and there clearly was no domestic harmony still to be preserved, the court ruled that because the couple had been legally married when the assault took place, the interspousal immunity statute barred the wife's suit.

bewilderment that courts could rhapsodize about domestic harmony after an assault had occurred. But these decisions were firmly rooted in the old common law tradition in which women were subject to the control of their husbands, who had the legal right to "chastise" their wives and children.[14] Such notions about proper familial relationships not only affected tort law, but contributed to the law's persistent tendency not to consider as an injury the abuse suffered within the supposed haven of the home—a tendency that still shapes the law and law enforcement today.

The history of efforts to reform the intrafamilial immunity doctrine demonstrates the persistence of the patriarchal principle that husbands and fathers have the right to discipline their females. By the mid-nineteenth century, the Married Women's Property Acts gave women the right not only to contract and hold property, but to sue in their own name.[15] After asking how these laws should have affected the intrafamilial immunity doctrine, a torts instructor should point out that, despite the grant of the right to sue, courts used tortured equality reasoning[16] to rule that the Acts were not intended to give women a right against their husbands. Instead, the Acts were construed only to allow women to sue as "femme sole" for injuries for which men could also sue. The Married Women's Property Acts thus functioned as formal equality provisions, rather than as efforts to improve the substantive equality of women by providing them with a remedy against domestic violence.

Thompson v. Thompson[17] is illustrative of this formalistic approach. The Supreme Court ruled that the District of Columbia Married Women's Property Act was designed to achieve equality of contracting and suing rights between men and women, but was not intended to challenge the aspect of the regime of coverture that gave the husband the right to chastise his wife. This ruling was not surprising for the time, since domestic violence was not regarded as a significant problem—the court considered the specter of "frivolous" litigation to be far more serious—and

---

14. For a reference to the "old law" of England, which gave a husband the right to chastise his wife "in the same moderation that a man is allowed to correct his servants or children," see 1 W. BLACKSTONE, COMMENTARIES *432-33; *see also* Lusby v. Lusby, *infra* note 18, at 390 A.2d 78-79, 89, for a summary of women's disabilities and subjection to "correction" by their husbands under the common law.

15. *See, e.g., Thompson, supra* note 12, 218 U.S. at 615-16 (citing District of Columbia Women's Property Acts); Frug, *supra* note 2, at 1088 & nn. 75 & 77 (citing the Married Women's Property Acts of Kentucky and Maryland); Gold-Bikin and Sussman, *infra* note 18, at 53 (referring generally to the role of the Married Women's Property Acts in eroding interspousal immunity).

16. The use of equality reasoning appears tortured when courts bend a statute's words to judge women by male standards in order to create an artificial parallel between the rights of women and men. *See, e.g.,* Geduldig v. Aiello, 417 U.S. 484 (1974) (finding that discrimination in health benefit coverage on the basis of pregnancy is not sex discrimination because women are not left unprotected from any health risk for which men are protected); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (following *Geduldig*); *see also* Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

17. *See supra* note 11.

society retained the attitude that the right to "discipline" the wife was among men's privileges in marriage.

As this attitude has changed, immunity has been lifted in some situations that enable abused wives and daughters to sue their husbands or fathers.[18] Some jurisdictions, however, have retained intrafamilial immunity for intentional torts, while abrogating immunity for negligent actions. Others wholly retain immunity.[19] Thus, it is still easier for someone injured in a car accident occasioned by the negligence of a family member to recover in tort than for a woman injured physically and emotionally by the blows of her husband.

A case that illustrates both the power of changed social attitudes to influence the law and judicial reasoning's potential limiting of those reform efforts is *Moran v. Beyer*.[20] A woman brought a tort suit against her former husband, seeking damages for the cuts, bruises, and broken nose she had suffered in a series of violent encounters during their marriage. In his answer to the complaint, the husband admitted the assaults, claimed they were in self-defense, and invoked the Illinois interspousal immunity statute.[21] Reversing the district court's award of summary judgment on the basis of the immunity statute, the Seventh Circuit Court of Appeals struck

---

18. For cases in which abused daughters obtained relief in tort, see Elkington v. Foust, 618 P.2d 37 (Utah 1980) (stepdaughter awarded $12,000 in compensatory and $10,000 in punitive damages against stepfather for sexual assault and battery); and Parsons v. McRoberts, 123 Ill. App. 3d 1006, 463 N.E.2d 1049 (1984) (stepdaughter awarded $18,000 in compensatory and $12,000 in punitive damages for intentional sexual assault and battery).

Cases in which wives have recovered tort damages against their husbands for assault include Gay v. Gay, 62 N.C. App. 288, 302 S.E.2d 495 (1983) (wife awarded $13,169 in compensatory damages and $10,000 in punitive damages against husband who choked her, fractured her leg and ankle, and threatened to kill her); and Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (wife's action for intentional tort against husband who raped her at gunpoint in a truck on a public highway not barred by interspousal immunity doctrine). The low amount of damages in *Gay* and the fact that the prosecutor had dropped rape and assault charges against the husband in *Lusby* are worthy of comment. The first situation is illustrative of the problems women still face in having their grave injuries from domestic violence fully appreciated. The latter case suggests why recourse to the tort system can be such a crucial safety valve for abused women in a society that still finds the idea of rape in a marriage hard to fathom. The tort system continues to suffer from some of the same biases as the criminal system, however. The idea that domestic violence is a private matter, inappropriate for legal intervention, still affects tort rulings. See Gold-Bikin and Sussman, *Domestic Torts: The Courts Are Reluctant to Get Involved*, TRIAL, June 1986, at 53.

19. As of 1985 ten jurisdictions still retained full interspousal immunity; five had abrogated immunity for intentional torts but not for negligent acts; and four states had abrogated immunity only for negligence while retaining it for intentional acts, which would include most instances of battering and sexual abuse. Note, *Husband and Wife — Interspousal Immunity for Intentional Torts is Unconstitutionally Irrational*, 58 TEMPLE L.Q. 709 (1985) (analyzing Moran v. Beyer, *infra* note 20).

20. 734 F.2d 1245 (7th Cir. 1984).

21. In 1981, after the acts complained of had occurred and Moran's suit had been filed, Illinois amended its immunity statute to permit interspousal tort actions for intentional torts where one spouse inflicted physical harm on the other. ILL. REV. STAT. ch. 40, ¶ 1001 (1981). However,in the context of nonintentional tort actions between spouses, the statute as amended is still viable. *See, e.g.*, Nicpon v. Nicpon, 156 Ill. App. 3d 464, 495 N.E.2d 1193 (1986) (action for personal injuries from automobile accident caused by husband's willful and wanton misconduct barred by immunity doctrine); State Farm Mutual Auto Ins. Co. v. Palmer, 123 Ill. App. 3d 674, 463 N.E.2d 129 (1984) (that husband and wife were suffering from marital discord does not bar application of immunity doctrine in negligence case).

down the statute as a violation of the equal protection clause of the Fourteenth Amendment on the grounds that the statute created a classification based on marriage, and that such a classification was not rationally related to the state's avowed goal of maintaining marital harmony. This 1984 ruling signifies the growing appreciation of the seriousness of domestic violence and of the role played by the doctrine of immunity in barring women from obtaining tort damages for this pervasive problem. However, the court side-stepped the opportunity to declare the immunity statute to be an unconstitutional instance of sex discrimination. The abused woman's attorney had argued that the statute, which still employed the term "coverture", was not actually designed to preserve marital harmony, but rather was derived from and designed to preserve the historically discriminatory regime of coverture in which wives were nonpersons whose legal identity became completely subsumed in their husbands'. By not explicitly accepting this argument, and by relying instead on the insufficiency of the articulated legislative purpose, the court left the door open for the legislature to retain immunity supported by more plausible rationales.

Treatment of the intrafamilial immunity cases in a torts course not only acquaints students with the concept of immunity from suit; it also sensitizes them to the seriousness of domestic violence and the difficulties women have had in gaining access to the tort system for redress of physical injury. Class discussion about why a state might retain immunity for intentional acts—such as the assumption that intentional family violence should be dealt with by family agencies, by the criminal system, or by divorce—may suggest how notions about what is and is not a private matter, or about what is and is not appropriate for certain forms of legal intervention, can selectively close off legal remedies. It should be noted that shunting these spousal injury cases into the criminal system or the family agency system deprives the woman of any *monetary* recovery for her personal injuries. The divorce alternative may also leave her economically worse off than before. Thus, each of the non-tort alternatives can economically disadvantage women—a disadvantage that could be ameliorated by also allowing women access to the tort system.

In gaining familiarity with cases like *Roller*, *Thompson*, and *Moran*, and by drawing their own conclusions about the responsiveness of tort doctrines to changing notions about gender roles and privileges, students may gain an important insight into legal rules' potential for disparate impact on women and other disempowered groups.

B. *Action for Loss of Consortium*

Loss of consortium as an element of damages is frequently mentioned in cases students study, so they have some passing familiarity with it; but

most regard it somewhat pruriently, and misleadingly, as simply recovery for loss of sexual services.

An accurate history of loss of consortium can correct this misconception. Related to master-servant rules, the cause of action initially was blatantly discriminatory—only husbands could sue for loss of household and sexual services when their wives were injured, and wives had no similar right.[22] The rationale for this disparity was once again that wives essentially became their husbands' chattel or property upon marriage, and owed their husbands household and sexual services, while husbands owed no such legally enforceable obligations to wives. Wives were not deemed legally injured when they lost the services and support of their husbands, since losing something to which one has no legal entitlement[23] is not, in the eyes of the law, an injury, no matter how devastating the consequences. As explained in Blackstone's Commentaries, "the inferior hath no kind of property in the company, care, or assistance of the superior . . . and therefore the inferior can suffer no loss or injury."[24] Yet in terms of need for compensation, women on the whole were left worse off economically when their husbands, upon whom they depended for support, were incapacitated, than were husbands who lost their wives' housekeeping and sexual services. Even today, it is much easier for a man to purchase these "traditional" women's services than it is for most married women to enter the paying labor market to make up for a husband's earning capacity.

Despite much criticism, the discriminatory nature of the loss of consortium right of action persisted until it was first repudiated in 1950 by the D.C. Circuit in *Hitaffer v. Argonne Co.*,[25] a decision that allowed wives to sue for loss of services when their husbands were injured. Reform came much later in some states, either through judicial revisions of the common law,[26] or through interpretations of state constitutional equal protection clauses or statutes.[27]

Gradually, the loss of consortium action has become one that recognizes the affectional interests between spouses. Although these affectional inter-

---

22. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 125 at 931-33 (5th ed.1984).

23. The discussion here focuses on tort law. A tax case, Farid-es-Sultaneh v. Commissioner, 160 F.2d 812 (2d Cir. 1947), provides an example of a court's acceptance of marital support as a woman's entitlement. In *Farid*, a wealthy husband's transfer of stock to his wife was interpreted by the court as a sale, not a gift, because the stock was considered a quid pro quo for the wife's giving up her marital rights to support. Unfortunately, even in the twentieth century, women's entitlements for tax purposes are not always the same as women's entitlements for tort purposes.

24. 3 W. BLACKSTONE, COMMENTARIES *142-43.

25. 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, in Smither and Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957).

26. *See, e.g.*, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897 (1968); Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978).

27. *See, e.g.*, Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (extension of right of action to both spouses based in part on Florida constitution); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

ests can be equally strong between people who are not legally married, courts have been reluctant to extend the cause of action to unmarried cohabitants.[28] This reluctance is influenced by traditional social mores, as well as by a hesitancy to make the cause of action seem wholly concerned with emotional interests by disconnecting it from the legal state of marriage, which still has many economic aspects in the eyes of the law.

The rules limiting the bases of recovery when a child is injured also demonstrate the slow pace of reform with regard to loss of consortium, and pose further stark contrasts between legal attitudes toward emotional versus economic injury.[29] Courts have been reluctant to go beyond protecting the economic interests in children by allowing parents a cause of action for loss of a child's society and companionship.[30] In failing to value the emotional interests inherent in the parent-child relationship, courts may be failing to protect something that women may quite acutely feel as an injury. While both parents obviously suffer greatly when their children are injured it is worth considering whether the failure to provide a cause of action for loss of consortium of a child has a particularly harsh impact on the primary caretaking parent, who is usually the mother. Although many fathers have vitally important emotional interests in and involvement with their children, far more women than men have primary child-rearing responsibilities. So women's sense of identity may be more connected with the health and well-being of a child. Moreover, when a child is injured, the daily routine of the primary caretaking parent is more disrupted than that of her spouse, and she must shoulder extra caretaking burdens. A mother may also feel that *she* is injured as well, because her identity as a mother, which society makes crucial for many women, is

---

28. *See, e.g.,* Leonardis v. Morton Chemical Co., 184 N.J. Super. 10, 445 A.2d 45 (1982) and Childers v. Shannon, 183 N.J. Super. 591, 444 A.2d 1141 (1982), both disapproving the decision, based on New Jersey law, in Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980), which had allowed unmarried cohabitants to recover for loss of consortium.

29. The rule that only fathers, and not mothers, could sue for loss of services and earning capacity when a child was injured is a historically discriminatory tort rule closely related to the loss of consortium action. Both of these rules of recovery were initially economic in their emphasis. The protected interest was the husband's or the father's right to receive household services he might otherwise have to purchase, or to the extra income generated by a child. *See, e.g.,* Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899) (relating father's right to sue to legal duty to support, which resided only in the father); Note, *Reciprocity of Rights and Duties Between Parent and Child*, 42 HARV. L. REV. 112 (1928). Since contemporary law recognizes both parents as having a legal duty to support their children, courts now tend to recognize the mother's right to sue as well, especially when she is the one who has paid the child's medical expenses. *See, e.g.,* Winnick v. Kupperman Construction Co., 29 A.D.2d 261, 287 N.Y.S.2d 329 (1968); Skollingsberg v. Brookover, 26 Utah 2d 45, 484 P.2d 1177 (1971); Yordon v. Savage, 279 So. 2d 844 (Fla. 1973).

30. The principal case allowing parents an action for loss of society and companionship other than in a wrongful death context is Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). *Shockley* has been widely rejected by other courts. *See, e.g.,* Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977); Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr 302 (1977). For commentary criticizing the refusal to recognize the relational interests in the parent-child relationship, see Love, *Tortious Interference With the Parent Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 591 (1976).

threatened. Societal judgments and conditioning may make her feel particularly guilty and responsible for her child's injury.

The history of the action for loss of consortium can be useful in examining legal conceptions of injury, and the historical relationship between legally recognized injury and notions of property, status, and obligation. Should tort law continue primarily to value interests that are economic in the sense that they pertain to lost income or services that can be purchased? Or should it also recognize and protect relational, emotional interests? In what way should conceptions of injury reflect social values? Should unmarried people, for example, be deemed injured when their beloved companion is injured? Class discussion can explore the biases, gender-based and otherwise, of existing legal conceptions of injury.

Moreover, the history of reform of the loss of consortium action can provide an opportunity to discuss the appropriate interaction between courts and legislatures. Do decades of legislative acquiescence in a judicially created rule require affirmative legislative action, or can the rule properly be changed by judicial action alone?

C. *Caretaking Issues in the Law of Damages*

Tort law's privileging of pecuniary injuries over lasting emotional scars is closely related to the valuations made in the law of damages. Damages—what can be recovered and how much—are crucial to the tort system. Yet, surprisingly, this topic receives scant attention in most American torts casebooks, and thus, I presume, in most American torts courses.

The only damages issues that receive attention in most tort casebooks are the conundrums of estimating wrongful death damages, such as how a court should calculate future income. Should the court use the loss to survivors standard or the loss to estate principle? How should the court treat taxes and the need to discount to present value? But few American torts casebooks address damages issues that raise important questions of gender bias, such as the valuation of homemaker services in both wrongful death and other situations; whether the caretaking rendered by a spouse (almost always the female spouse) should be recoverable and by what measure; and how sexual stereotyping can affect projections of future income or how basing damages on future income can disadvantage women in an economy where they are on the whole paid significantly less than men.[31]

31. I performed my own informal survey of several leading American torts casebooks, and not one of the six books I checked featured any of these important issues. I checked R. EPSTEIN, C. GREGORY, & H. KALVEN, CASES AND MATERIALS ON TORTS (4th ed. 1985); M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES (3rd ed. 1983); W PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS (8th ed. 1988) (containing only a single paragraph in the notes alluding to the problem of valuing homemakers' services, with citations to articles but to no cases); D. DOBBS, TORTS AND COMPENSATION (1985); P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, CASES AND MATERIALS ON TORT AND ACCIDENT LAW (1983). It interested me to learn, when consulting the bookshelf of a torts professor who has taught in commonwealth countries, that torts

Most torts books and tort cases are silent about why unpaid but crucially productive and important services such as household management and childrearing are consistently undervalued or overlooked in a system which gauges damages to the market economy. This silence suggests that the legal system continues to be influenced by social stereotypes such as the idea that unpaid work in the home is not really "work" or is not economically or emotionally important to the family unit.

Compensation for loss of homemaking services is addressed in a few cases which consider the excessiveness or adequacy of damages awarded for the death of a homemaker.[32] The cases approve widely differing damages for the death of a housewife, and in some instances damages of only a few thousand dollars have been considered adequate for the wrongful death of a woman.[33] Such low damages judgments reflect the tort system's primary valuation of wage-earning capacity. This legal measure automatically devalues women, whose earning capacity has been depressed by society's denial of financial reward for household services rendered within one's own family.

The question of damages for "women's work" can be further explored in cases discussing whether expert economic testimony should be admitted to quantify the marketplace worth of homemaker services. Two New York cases, *Zaninovich v. American Airlines, Inc.*,[34] and *De Long v. County of Erie*,[35] provide a useful contrast. In *Zaninovich*, decided in 1966, the court rejected the need for testimony quantifying the economic worth of homemaker services because it was a "matter within the common ken." In other words, since we all know what housewives do, and we know that it is not really work in the sense that anyone would value it outside the home, we do not need economists to tell us what these services would command if translated into market economy terms. The effect of applying a "common knowledge" standard and rejecting economists' evidence was to reverse a judgment of $200,000 for the death of a twenty-eight-year-old-mother of four unless plaintiff stipulated to reduce the award to $125,000. *De Long*, decided in 1983, shows increased judicial sensitivity to the potential for gender bias in assessments of homemaker services based on "common knowledge". In sustaining a verdict of $600,000 for the wrongful death of a twenty-eight-year-old-mother of three, the court held that expert testimony about the value of her services was admissible because jurors might not be familiar with the economic

---

casebooks used in Britain, Canada, and Australia do cover some of these issues.

32. *See* Annot., 47 A.L.R.4th 100 (1986), which compiles verdicts in cases since 1960 that discuss this problem. These cases are excellent for use in class since they demonstrate that the valuation controversy is still a current issue and that shockingly low damage measurements for the injury or death of a homemaker are considered adequate by some courts.

33. *Id.*

34. 26 A.D.2d 155, 271 N.Y.S.2d 866 (1966).

35. 60 N.Y.2d 296, 457 N.E.2d 717 (1983).

value of these services, and also because expert testimony could "dispel the notion that what is provided without financial reward may be considered of little or no financial value in the marketplace."[36]

Valuing work of women who do unpaid work in the home is important not only in wrongful death cases; after all, if a homemaker is incapacitated for a while, she has lost the ability to provide services even if she has not lost wages, and her family has lost something of value. This problem too often remains submerged in a damages system that uses lost income as the basic measurement of injury. A woman's loss of her capacity to provide household services, whether as her primary job or as her second job, is sometimes dealt with as a loss of consortium actionable by her spouse.[37] Under this view, the injury is not even seen as the woman's injury, and there is no recognition of her loss in not being able to do for her family what she has always done. In those jurisdictions that have abandoned the action for loss of consortium, the loss may go uncompensated. Other courts take the approach that the loss does belong to the woman who has been an accident victim, but there are then disputes about whether this loss should properly be considered economic or noneconomic, and how it should be measured in a system that is based on loss of earning capacity.[38]

A closely related damages issue arises when a family member is injured and requires home care, and a female member of the family provides that care at the cost of leaving paid work outside the home. Using stereotyped notions about woman's "natural" caretaking role and nurturing sensibilities, some courts and commentators have characterized this care as gratuitous, and thus not compensable unless actual expenditures have been made.[39] Others have considered the loss to be that of the injured party, compensable to him, but not recoverable by the wife lest there be double recovery.[40] Even though the caretaking services rendered by the woman may be extremely specialized and time-consuming, and may deprive her of independence, economic opportunity, and leisure time, she is not regarded as suffering an injury. The idea that a woman renders caretaking services out of love and devotion as part of her natural role precludes recognition of the woman's economic and personal sacrifice. Moreover, the

---

36. *Id.*, 60 N.Y.2d at 307-08, 457 N.E.2d at 722-23. *See also* Launey, *Late "Good Wife" Revisited: Appraisal of Housewife's Services*, 29 RES GESTAE 306 (1985), an article by an economist that uses a table to estimate the value of household work, taking into account the number of children in the home. The article shows that the services of a 25-year-old full-time mother of two, discounted to present value, are worth between $460,000 and $765,000 depending on the method of calculation.

37. These issues and illustrative cases are discussed in Graycar, *Compensation for Loss of Capacity to Work in the Home*, 10 SYDNEY L. REV. 528 (1985).

38. *See* cases in *id.* at 536-40.

39. *See, e.g.*, Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939); James v. State *ex rel.* Board of Adm'rs. of Charity Hosp., 154 So. 2d 497 (La. App. Ct. 1963); 15 AM. JUR. 2D *Damages* § 199 (1988).

40. *See, e.g.*, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669 (1974); Cruz v. Hendy International Co., 638 F.2d 719 (5th Cir. 1981).

labor and sacrifice involved in "women's work" is frequently unappreciated because much of it does not involve wage loss for the person doing the work. But even if a woman gives up wages earned in employment outside the home, the measure of damages frequently is only the court's assessment of the value of the home care, rather than the value of the wages foregone by the woman, despite the obvious importance of those wages at a time when another family earner is disabled.[41] Moreover, the law fails to recognize that non-homemaking activities may be crucial to a woman's self-definition, happiness, and to the financial well-being of her family unit.

Class discussion of cases that raise these damages issues can serve various pedagogical purposes. First, such discussion can explore whether and how the tort system's use of lost income as a primary measure of damages perpetuates market system inequities that have a disparate impact on women. It can also illustrate how tort law is shaped by societal notions about the roles and value of women. Students can be sensitized to the significant worth, in both economic and personal terms, of family services performed by women. This awareness can help overcome the societal tendency to take these services for granted in a way that contributes to women's economic subordination. Raising these issues can also challenge many harmful gender stereotypes, such as the assumption that a woman has not suffered any loss when, in order to care for an injured family member, she gives up non-homemaking activities.

Discussion of cases assessing damages for lost or compelled provision of homemaking services can also aid students in their capacity as future lawyers. When they represent women clients, perhaps they will be better prepared to listen to the client's definition of her injury and to present to the court evidence substantiating the economic value of women's services.

Finally, these cases illustrate as well as do any other damages cases the manner in which damages are assessed and the elements of loss which will be considered compensable.

D. *Sexual Harassment*

Sexual harassment especially adversely affects women and can be addressed through tort law, but is almost always absent from torts courses.

---

41. For an illustrative case, see Jackson v. United States, 526 F. Supp. 1149 (E.D. Ark. 1981). The court makes little effort to analyze the problem, noting simply that "[i]n order to render the full-time care that plaintiff requires, she has had to quit her job as a school teacher. Plaintiff urges that we measure these damages by her salary as a school teacher . . . We do not regard this as a proper measure of damages. Her value as a school teacher does not equate with her value as a caretaker." *Id.* at 1154. The reader is left wondering why the court does not regard the loss of wages foregone as a proper measure of damages, when in most other instances the tort system gauges damages according to lost income. The reader is also left musing about which service the court regards as having higher value to society, to the woman, or to the family unit — that of being a school teacher, or that of being an unpaid full-time nurse to her invalid husband.

Although old cases of men "taking liberties" with women may appear in some torts courses to illustrate doctrinal areas such as assault and battery,[42] I suspect these cases were originally selected by casebook authors more for their titillating potential than for the opportunity to examine sensitively a serious and harmful situation confronted far too often by far too many women. The use of the occasional "sexy" case may actually contribute to the denigration of women in the classroom. Rather than sprinkle in sexual harassment cases to illustrate various doctrinal points, I prefer to teach sexual harassment as a whole, to discuss whether tort law should be used to address the problem, and if so, the various ways in which tort law might do so.

With occasional notable exceptions such as *Croaker v. Chicago & Northwestern Railway*,[43] *Hatchett v. Blacketer*,[44] *Martin v. Jensen*,[45] *Skousen v. Nidy*,[46] *Phillips v. Smalley Maintenance Services*,[47] and *Monge v. Beebe Rubber Co.*,[48] sexual harassment victims have rarely found relief through tort law.[49] The men who rendered decisions in the judicial system, and who, it is safe to assume, had never themselves experienced sexual harassment, failed to see the complained-of conduct as sufficiently outrageous to warrant imposition of liability for the intentional infliction of emotional distress. It was assumed that persons of ordinary sensibilities (that is, persons very much like the male decision-makers)[50] would not be offended by conduct common in the workplace. Moreover, limitations on recovery of damages for emotional distress absent physical injury prevented sexually harassed women from recovering even though the barrage of offensive remarks and conduct they had to endure was obviously damaging to their mental health.[51] In addition, the tort of battery can do little for those women who have not actually been touched, or for those who, out of fear of losing their jobs or their homes, engaged in intercourse in a way that appeared consensual and thus seemed to negate the

---

42. *See, e.g.*, PROSSER & KEETON ON TORTS (W. Keeton ed. 5th ed. 1984) § 9, 41-42 n. 36, and § 10, 43-44 n. 13.

43. 36 Wis. 657 (1875), discussed in Catharine MacKinnon, *Sexual Harassment of Working Women* (New Haven and London: Yale University Press, 1983), 166, 283-84 n. 20.

44. 162 Ky. 266, 172 S.W. 533 (1915), discussed in MacKinnon, *supra* note 43, at 166.

45. 113 Wash. 290, 193 P. 674 (1920).

46. 90 Ariz. 215, 367 P.2d 248 (1961).

47. 435 So. 2d 705 (Ala. 1983) (court recognized as tort of intrusion employer's invasion of a woman employee's right to psychic solitude where employer frequently interrogated woman about her sex life and asked her for sexual favors, causing her to suffer from chronic anxiety, to contemplate suicide, and to require counseling and medication).

48. 114 N.H. 130, 316 A.2d 549 (1974) (court recognized tort claim for wrongful discharge where woman was fired for her refusal to date her employer, but court limited recovery to contractual damages (loss of pay) and denied recovery for mental anguish).

49. Tort law's inadequacies in addressing sexual harassment are thoroughly and convincingly discussed in MacKinnon, *supra* note 43, at 164-78, and in Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

50. *See* the discussion of the reasonable person, *infra* note 53-68 and accompanying text.

51. *See* MacKinnon, *supra* note 43, at 167-68.

required tort element of an "offensive" contact.[52] The doctrinal requirements of tort law have been ill-suited to recognizing the kinds of harm women experience when they are sexually harassed.

Catharine MacKinnon, in her book *Sexual Harassment of Working Women*,[53] has insightfully criticized tort law as inadequate for addressing sexual harassment because, as the preceding obstacles to recovery emphasize, tort law is a private law system that tends to treat injurious conduct as a matter of unfortunate and often isolated interactions between individuals. But sexual harassment is a pervasive social practice directed toward women because they are women. More than an individual woman's dignity, peace of mind, and job are involved even in individualized interactions. The objectionable conduct is part of a widespread practice men employ in the workplace to disempower women or to safely define them as sex objects rather than as potential colleagues. These insights about the societal nature of sexual harassment prompted MacKinnon to develop a theory and legal strategy for addressing sexual harassment as employment discrimination or as housing discrimination. Despite the importance of this public law analysis of sexual harassment, the public law remedy of back pay can leave injuries unredressed in situations where a woman is subjected to an offensive work environment but does not actually lose her job. While a victim of sexual harassment may feel injured economically as a member of a disempowered group, she is also likely to feel injured as an individual, and the more individualized focus of tort law may be a way to recognize her particular pain and injury. Most instances of sexual harassment that cause economic injury also cause dignitary and physical injury. And, in those instances where sexual harassment does not lead to direct economic injury,[54] a woman may still be emotionally and physically damaged. Thus, there is renewed interest in using tort law to redress sexual harassment, because of its greater remedial flexibility, its greater potential for addressing a woman's psychic injuries, and the opportunity it presents for punishing the wrongdoer through punitive damages.[55]

I have found that by simply contrasting the public law approach of discrimination law with the individual victim approach of tort law, I can foster rich discussion on the pros and cons of each. On the one hand, tort problems need to be seen in their larger societal context. On the other

---

52. *See* Schoenheider, *supra* note 49, at 1477-78.

53. *See* MacKinnon, *supra* note 43.

54. I say "direct" economic injury—in the sense of loss of a job—recognizing that even if a woman does not lose her job, her performance at work, her motivation at work, her pride in her performance, and her commitment to her work may suffer, with possible adverse consequences for advancement, promotion, or job retention.

55. *See* Schoenheider, *supra* note 49, which discusses the remedial inadequacies of Title VII in certain situations, and the consequent need to turn to tort law. It is ironic that while tort law usually privileges economic types of loss over other types of loss to the detriment of women, in this instance tort law can be more adept than Title VII law in recognizing the noneconomic injurious impacts of sexual harassment.

hand, characterizing a problem as a widespread form of discrimination may not acknowledge the unique ways in which the individual victim might experience the injury and need redress. When students realize that private law problems cannot be neatly separated from public law problems, they more fully understand the ways in which the tort system is part of, is shaped by, and has influence on societal problems that transcend their effects on each individual victim.

Finally, focusing on sexual harassment cases as a discrete unit for study, rather than bringing them up under various founts of tort law, has another pedagogical purpose. The approach can help students learn to think creatively about what theories of action might be suitable to address a situation. After all, clients don't walk into lawyers' offices and say "Hi, I have a battery case, with a potential claim for intentional infliction of emotional distress, wrongful discharge, and tortious interference with a contractual relationship, and I think the conduct to which I've been subjected is severe enough to warrant a claim for punitive damages." The lawyer must first perceive the problem and then match it to available legal theories.

III. Challenging the Perspective: Revealing Gender Bias in Traditional Standards

Another method of examining the relationship between gender notions and the law is to question whether apparently neutral doctrinal rules might be gender-biased in their origins or effects, and whether such rules might be implemented differently when gender is taken into account.

A. *The Reasonable Person Standard*

The reasonable person standard permeates tort law. This traditional standard is an example of a supposedly neutral rule which may actually be suffused with the male perspective and with notions of the male ideal. When I teach torts, the venerable reasonable person standard and the changes it has undergone serve as an illustration of how alterations in doctrine, or in the way we talk about doctrine, can reflect changing social understandings about gender roles. The evolution of the reasonable person standard also presents an occasion to raise questions about the possibility of truly objective standards, and about the cultural mainstreaming effects of purportedly objective standards.

I initially approach this subject by asking, Who is this reasonable person? I point out that at one time this creature was referred to as the reasonable man (increased sensitivity to the need for gender-neutral language has now transformed him into the seemingly more inclusive reasonable person), and that when one looks at the examples offered to illustrate the attributes of this mythical creature, it is apparent that when the law

said "man," it had the male gender in mind. In civil law countries the reasonable man is described as "the good father of the family."[56] In England, courts have sought to give content to the personage of the reasonable man by defining him as the man who rides the Clapham Omnibus.[57] In the United States, the equivalent of middle-class respectability is "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves."[58] These definitions refer to distinctly male prototypes—the man who works outside the home, legally governs the home, and participates in running the home only with regard to physical maintenance activities using machinery.[59]

I also hand out the infamous case of *Fardell v. Potts* from A.E. Herbert's collection of fictitious humorous cases, *Uncommon Law*.[60] In this case the defense lawyer argues that his client, a woman, could not be subject to tort liability because the tort standard of a reasonable man could not possibly have been applied to her, since there is no such thing as a reasonable woman. The court agreed with this rationale and "held" that at law there was no such thing as a reasonable woman. This case can be used in class to discuss the implications for women of this satirical attitude, particularly the gender stereotypes which underly the reasonable man standard. The case raises an important point about the extent to which the societal stereotype of women as unreasonable and overly emotional could actually infect judgments about a woman's conduct. Although the application of the reasonable man standard in *Fardell* absolved a woman of her tortious acts, such absolution is hardly satisfactory. Application of a standard based on male stereotypes means that women are to be evaluated against a standard that was not designed with them in mind and which thus does not reflect their experiences and capabilities. A case in point is *Tucker v. Henniker*,[61] in which a teenaged girl was involved in an accident while she was driving a carriage. She, through her father, sued the man who had provided the horse, contending that its vicious nature caused the accident. The defendant responded that the girl's want of skill in handling the horse caused the accident. The trial court instructed the jury that she was obligated to exercise the level of care, skill, and prudence as "ordinary persons *like herself* were accustomed to exercise in

---

56. Guido Calabresi, *Ideals, Beliefs, Attitudes and the Law* (Syracuse: Syracuse University Press, 1985). This definition reminds me that good fathers had absolute rights over their female relatives. These women were deprived of their legal personhood by being part of the family. If the good father did not live up to the paternalistic ideal, the law would rarely intervene.

57. Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933).

58. Calabresi, *supra* note 56, at 23. *See also* James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951).

59. *See also* Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22-23 (1988).

60. Alan Patrick Herbert, *Uncommon Law: Misleading Cases in the Common Law* (London: G. P. Putnam's Sons, 1927; repr., New York: The Knickerbocker Press, 1930), 11-20.

61. 41 N.H. 317 (1860).

managing their horses." This may seem to be an unobjectionable instruction. But it prompted the defendant to object that the equation of an ordinary person with a girl invited the jury to apply a reasonable woman standard. The very fact that the defendant objected to the trial judge's equating the female plaintiff with a reasonable person, and insisted instead that the instruction should have been that she had to exercise the ordinary diligence "which *men* of common prudence generally exercise about their own affairs," suggests that the reasonable man standard was not inclusive of all humanity, but rather was based on the experiences and skills of the male gender. The appellate court agreed with the defendant that women must be held to the standard of "mankind" in general, and found the jury instruction erroneous. The implication of this holding is that if women are unaccustomed to doing an activity, or are not usually encouraged or properly trained to do it, it would appear inherently unreasonable for them to attempt the activity. But, if it is something that a woman does, she is to be judged according to the level of skill and strength of grown men if something goes amiss.

The purpose in raising questions about the history of and potential for gender bias in a standard, such as the reasonable person/man standard, is not simply to ask whether application of a "reasonable woman" standard would have made a difference in a particular case. The purpose is also to ask whether the perspective from which both the circumstances and the reasonableness of the actions are evaluated can be important to the outcome of the evaluation itself. Clearly, they can. We may then ask, Whose perspective has primarily informed what is "reasonable conduct under the circumstances?" What impact might this perspective have on persons who do not embody the white male middle-class norms in this country? How can we broaden the perspectives and range of factors deemed relevant to the evaluation of reasonable conduct so that women's experience is more fully valued by the legal system and women are judged by standards appropriate to their actual situation?

Lest one think that the now prevalent linguistic change from "reasonable man" to "reasonable *person*" has eliminated the male perspective problem, I include in my course some tort cases in which it appears that, despite use of "reasonable person" language, courts are evaluating a woman's conduct according to a male standard.[62]

---

62. I also hand out to my students two criminal law cases involving the battered woman's syndrome defense because the self-defense standard refers to the reasonable person and because these cases pointedly illustrate the importance of considering whose perspective should bear on the evaluation of conduct or reactions. The cases are State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977), and State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

The self-defense issue for a battered woman who is facing criminal penalties for killing her batterer is analogous to the self-defense issue in tort. In both cases, the question is whether the defendant had a reasonable perception of imminent harm. If the law evaluates this question from a male perspective, it may conclude that if a woman were truly in such grave danger, or were really facing such intolerable domestic circumstances, she would have walked out long ago. Few men have experienced the

Rabidue v. Osceola Refining Co.,[63] an offensive work environment sexual harassment case, presents the clearest example. *Rabidue*, although technically a Title VII case, is in essence a tort claim. The plaintiff alleged that she was fired from her job in retaliation for her complaints about sexual harassment, and sought damages for the emotional distress caused by a hostile and offensive work environment. The court ruled that the appropriate standard for judging offensive work environment sexual harassment claims was one drawn from tort law: whether a reasonable person would have been offended by and suffered distress from the complained-of conduct.

But perspective is crucial in the sexual harassment context. The traditional perspective in this area abounds with myths based on male perceptions that sexual harassment is just harmless kidding around, that women really welcome the sexual overtures, that "no" is really a coy way of saying "yes", and that women who complain, far from being reasonable, are either overly sensitive and prudish or are too assertive and unable to get along with people.[64] When courts allow these male myths to infect their measurement of a reasonable person, they bias the formulation of the standard itself and trivialize sexual harassment by assuming that the complained-of conduct is not really serious or harmful. This is precisely what happened in *Rabidue*. The potential for bias in how facts are presented is highlighted by comparing the majority and dissenting opinions.[65] The ma-

---

panic, fear, and psychological destruction that occur when a woman is physically abused by someone upon whom she is emotionally and economically dependent and to whom she is extremely physically vulnerable. Moreover, men tend to see physical confrontations as separate from tangled emotional webs and as something that can be dealt with by fighting back or retreating. Thus, the male perspective makes it difficult to comprehend how reality looks to a woman abused by her husband or lover. *See* Lenore Walker, *The Battered Woman* (New York and San Francisco: Harper & Row, 1979) (describing popular misconceptions about battered women), 19-31. When a woman's perspective is taken into account, the full psychological complexity of the battered woman's syndrome can be appreciated. And, when assertions of self-defense are evaluated in light of this fuller picture, very different answers emerge to questions like, "Why didn't the woman just leave?" or "Were her actions reasonable?"

In *Wanrow*, the court, aided by feminist defense attorneys, displayed great sensitivity to the potential for gender bias in the supposedly objective jury instruction on self-defense that repeatedly used the male pronoun. The problem with this instruction, noted the court, was that "through the persistent use of the masculine gender [it] leaves the jury with the impression that the objective standard to be applied is that applicable to an altercation between two men." *Wanrow,* 88 Wash. 2d at 240. The court ruled that Wanrow was entitled to have her actions evaluated in light of her subjective perceptions of the situation. In *Kelly*, the court ruled that expert testimony about battering and its effect on women should be admitted to counteract the commonly held myths about battered women that might taint the jury's evaluation of whether Gladys Kelly had reasonable fear of imminent harm. Expert testimony would increase the likelihood that the jury would take the woman's persepective into account. *Kelly,* 478 A.2d at 374-79.

63. 805 F.2d 611 (6th Cir. 1986).

64. *See* MacKinnon, *supra* note 43, at 25-27, 50-51, 83-90, 144-47; Anthony Astrachan, *How Men Feel: Their Response to Women's Demand for Equality and Power* (Garden City, N.Y.: Anchor Press/Doubleday, 1986) (describing attitudes of blue collar and professional men towards sexual harassment in the workplace).

65. This case is also useful in teaching students about the manner in which the court and the lawyers shape and shade the facts. Among the many remarkable aspects of *Rabidue* is that the majority opinion mentions few of the salient harassment facts — it is left to the dissent to tell us what was

jority opinion characterizes Rabidue as an "abrasive", "aggressive", troublesome worker who had to put up with a few pranks and dirty words, but nothing worse.[66] Upon reading the dissent, a more complete and very different picture emerges. Rabidue was the first woman to rise to a salaried management position at Osceola, and during her seven years there she had to endure a work environment that could charitably be called anti-female. The walls of the common work areas were littered with posters of nude or scantily clad women, including posters with imagery of male violence toward women. One such poster showed a prone nude woman who had a golf ball on her breast and a man standing over her raising a golf club and yelling "fore!" The women's complaints about these posters earned them taunts from their male co-workers. Rabidue's co-supervisor, with whom she had to work closely, repeatedly referred to women, including Rabidue, with a variety of obscene euphemisms for various parts of the female anatomy. His personal assessment of Rabidue, which he said to her face, was that "all that bitch needs is a good lay." Her complaints about this co-worker led to her being reprimanded for her bad attitude, while he was given "some fatherly advice" about better interpersonal relations, so his higher managerial potential could be fully realized.[67]

The district court and the majority of the court of appeals held that a reasonable person could not find this work environment offensive, because obscenities are merely annoying, and the posters could not have much impact on a person in a society where pornography is widely consumed, displayed, and condoned.[68] Consumed, displayed, and condoned by whom, one must ask? It is painfully obvious that the court's assessment was based on a male view of the world. It is largely men who make, purvey,

---

really going on in the workplace. The majority focused on an "acrimonious working relationship" between Rabidue and Henry, the other supervisor, and made statements insinuating that the acrimony was attributable to Rabidue. Henry was depicted as simply being a vulgar individual who couldn't help himself. The offensive posters on the walls of the workplace were only summarily described, almost in passing. This description of the facts trivilized the conduct and placed a subtle suggestion of blame on the victim: knowing poor Henry was vulgar, Rabidue should have done something to reduce the acrimony, she should have known that the men used bad language and had the posters displayed, and thus she voluntarily encountered her problems and assumed the risk of working in the environment. *See* 805 F.2d at 620 for assumption of risk reasoning.

Clearly, the manner in which a court characterizes the facts, what it chooses to focus on, and what it leaves unmentioned, can be part of gender bias. *See, e.g., Report of the New York Task Force on Women in the Courts,* 15 FORDHAM URB. L.J. 1 (1986-87) for discussions of this, and other sorts of gender bias.

66. *Rabidue,* 805 F.2d at 615. This characterization of Rabidue is itself gender-biased. While finding the compaining victim to be obnoxious, the majority never passed adverse judgment on the personality of her male tormentor. Women who fail to act in conformity with demure female stereotypes and who seek to assert their views in the workplace are often judged adversely, while similar "masculine" behavior in men is rewarded. Current litigation efforts seek condemnation of such differential judgments as a form of employment discrimination. *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd in part, rev'd in part,* 825 F.2d 458 (D.C. Cir. 1987), *cert. granted,* 108 S. Ct. 1106 (1988).

67. *Rabidue,* 805 F.2d at 624 (Keith, J., dissenting).

68. *Id.* at 622.

and condone misogynistic pornography. It is only by excluding women from the reasonable person standard that a court could use this standard to hold that a work environment, repeatedly complained of by women workers as being harmful, degrading, disruptive to their ability to work, and the source of extreme physical stress, was acceptable to the reasonable person.

Another case which more subtly demonstrates the male bias in the reasonableness standard is *O'Brien v. Eli Lilly.*[69] In *O'Brien* the court ruled that the statute of limitations had expired before the plaintiff DES victim brought her claim because she had not displayed the diligence of the reasonable person in pursuing information about the nature of her injury. When she was fourteen, the plaintiff was diagnosed as having vaginal cancer. So as not to upset her with this traumatic news, neither her parents nor her doctor told her that the tumor she had was malignant, and that this was why she was having a hysterectomy, a partial vaginectomy, and radiation treatments. Also, when asked by the girl's treating physician, the mother denied that she had ever taken DES. Five years later, when she was twenty, O'Brien read a brief article in Newsweek about a woman who had had a similar medical history and had subsequently died because of cancer caused by DES. O'Brien became very upset because she now suspected that she, too, had had cancer and that it might recur. Because it was this dread disease and the loss of reproductive capacity that were most on O'Brien's mind as she struggled to cope with finally being told the truth about her illness, she accepted her doctor's uncertain and inconclusive statements about the relationship between her prior cancer and DES. She also accepted her mother's denying having taken the drug. Three years later, O'Brien read more newspaper articles about DES and again asked her mother if she had ever taken it. Again, her mother replied with a denial. O'Brien persisted, however, and asked her mother's doctor to do some investigating. By contacting the doctor who had treated the pregnant mother twenty-three years prior, it was confirmed that, unbeknownst to her, Mrs. O'Brien had been given DES. A lawsuit was promptly filed. The court ruled, however, that the suit should have been filed when O'Brien first learned she had had cancer. In the court's view, she should have done more research into her family medical history and into DES at that time, since that is what a reasonable person, showing due diligence, would have done upon learning that she had had cancer of the reproductive organs. As the dissent points out, however, this assessment of what a reasonable person would have done completely discounts the emotional trauma of a young woman who learns that she has had cancer and that she faces not only physical incompleteness as a woman but also a high isk of early death. Although some extraordinarily stoic

69. 668 F.2d 704 (3d Cir. 1981).

people may run to the public library upon learning such news, the typical young female DES victim becomes emotionally traumatized and needs to spend time dealing with her fear, anxiety, and anger at her mother and doctors.[70] At this time of acute emotional vulnerability, the typical young woman also is likely to believe her mother and doctors, people she has been deeply conditioned to trust. The court's assessment of when the reasonable person should have known that she had a cause of action against a DES manufacturer does not acknowledge the understandable—and, given the context, entirely reasonable—reaction of the typical DES victim. Ironically, the perspective of people like the plaintiff does not enter into the evaluation.

The use of these cases to illustrate that the purportedly objective reasonable person standard may actually be subjective due to its failure to include a variety of perspectives and experiences and its use of biased stereotypes raises several important questions. Should we adopt a new objective standard that includes elements of female stereotypes along with the male stereotypes?[71] Should we adopt a reasonable woman standard when the conduct of women is being evaluated? If so, should such a standard be used only when a woman's conduct as victim is being evaluated, or also when her conduct as tortfeasor, or injurer of others, is under examination? Do we need a universal rule for all situations, or should we adopt the view that sometimes the imposition of cultural norms on people who do not fit them may be necessary to enhance safety, but that in other situations the failure to accept differences may be unjust?

I will only suggest some lines of response to these questions. One problem with incorporating female stereotypes into the male stereotyped reasonable person standard is that many people do not fit their gender stereotype. What would this move do for the woman who is not conventionally nurturing, caring, child-oriented, and self-effacingly feminine? Female stereotypes have often been as constraining women as the expectation that they conform to male standards.[72] It seems counterproductive to replace one caricature with another. To be objective a standard does not have to be stereotyped — it can include consideration of the actual context of the event and how someone with the individual's experiences would react

---

70. For a discussion of the psychological impacts of learning that one has been exposed to DES, see Roberta Apfel and Susan Fisher, *To Do No Harm* (New Haven: Yale University Press 1985).

71. This suggestion is advanced by Calabresi, *supra* note 56, at 30-32. He proposes that the tort standard of the reasonable person should respect and reflect pluralism by incorporating some values which women "have traditionally nurtured", such as care of children, "gentility, gentleness, and perhaps even a bit of reticence in sexual matters." *Id.* at 30. The obvious stereotyping of women according to their most traditional and historically circumscribing attributes in Calabresi's comments raises the issue of whether these traits are the ones we would want to add to the reasonable person standard on women's behalf, and whether the addition of these traits would help or hurt women.

72. For other criticisms of the incorporation of female stereotypes suggested by Calabresi, see Scales, Book Review, 4 YALE L. & POL. REV. 283, 293-94 (1985).

without descending into pure subjectivity in the sense of asking only how the event looked to the individual.

The reasonable woman standard was suggested by Judge Keith in dissent in *Rabidue*.[73] While victims should have the perspectives and experience of people like themselves taken into account in evaluating their situations, the "reasonable woman" proposal does not fully solve the problems at hand. What does a reasonable woman standard do for a man who finds the conduct at a place such as Osceola offensive and painful? What about a man who works in the home and reacts as a reasonable mother would? In other words, substituting a reasonable woman standard to judge the conduct of women, but not going further to question the inclusiveness of the norms informing the reasonable person standard, implies that women's experiences and reactions are something for women only, rather than normal human responses. Since women are a significant proportion of persons, their experiences should count as the experiences of a reasonable person, not merely as the experiences of a reasonable woman.

A reasonable woman standard may also create the perception that the law allows "special" treatment for women—that it lets them off the hook with regard to expected normal, human (that is, "male") behavior. There is then a danger that stereotypes will proliferate of women as more sensitive, in need of special treatment, not reasonable like men, and not able to "take it" according to the prevailing standards of the workplace. Rather than create a special standard for women, and thereby uphold the notion that women are something abnormal, we must constantly question and challenge the inclusiveness of the model underlying the assessment of a reasonable person. We must insist that the model be expanded to include the perspectives of the many people —or, more accurately, the majority of the population—who have been considered outside the mainstream in this society.

But what about the persistent idea in tort law that we need norms of safe conduct to promote the general welfare? After all, we do not want the dim-witted to maintain combustible hayricks, or mechanically ignorant women to ignore their squealing brakes, or men suddenly entrusted with the care of a baby to feed it the beer that is the only thing in the refrigerator, and then get away with the argument that they did not know any better because they were stupid, or were never taught to do things outside their gender roles. The need for broad, or male-based, norms in some circumstances, however, may not apply when we turn to the problem of evaluating whether someone should be deemed injured by conduct which she or he, and others in similar situations, found destructive, threatening, or injurious. In some areas of tort law, especially when we are evaluating a victim's conduct, we can be more comfortable with the consequences and

73. *Rabidue*, 805 F.2d at 626.

justice of taking the perspective and capabilities of people like the victim into account.

B. *Gender Bias in Other Torts Standards*

Gender bias resulting from the operation of stereotypes also influences evaluations of emotional distress, nervous shock, harm to appearance, and the standard of slander per se for imputations of impurity to a woman. For example, historically, women's complaints of pain or injury have often been dismissed as emotional or hysterical complaints, while men's complaints about the same ailment were more likely to be treated as serious physical harm.[74] Thus, more women's injuries may be cast into the "emotional distress" pile; and it has always been harder to recover for emotional injuries.[75] By contrast, within acknowledged categories of emotional injuries, it has often been easier for women than for men to recover for nervous shock or the intentional infliction of emotional distress.[76] Women are stereotypically regarded as having a more sensitive nature, and their sensitivites have often been jealously protected. Men, on the other hand, are expected to be able to take many indignities and invasions of their mental well-being. Thus, men are not extended the same right to peace of mind as are women in this regard, even though that right is something that most people would regard as generally worthy of protecting. Similarly, because their appearance is presumed to be more emotionally and economically important to women than to men, women are more likely to recover for mental distress associated with injuries to facial or bodily appearance—their pain and suffering is deemed greater than that of a facially or bodily (but not sexually) disfigured man.[77]

A teacher can use gender bias in tort rules and standards to raise important questions about the way in which stereotypes can shape reality, and the consequent dangers in reform solutions that adopt the "formal equality" approach of simply eliminating the elements of female stereotype in a standard, or the "special treatment" approach which incorporates into legal standards inaccurate female stereotypes. A formal equality

---

74. *See, e.g.*, Pernick, *A Calculus of Suffering* (New York: Columbia University Press, 1985).

75. Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982) (DES emotional distress case) is an example of the trivialization of physical consequences and profound emotional trauma to a woman whose reproductive capacity had been endangered.

76. Professor Regina Austin discusses gender and racial bias in intentional infliction of emotional distress cases in *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

77. *See, e.g.*, Del Ponte v. Del Ponte, Sup. Ct. of NSW (Austrialia) Court of Appeal, 6 Nov. 1987, a facial scarring case in which the defendant argued that by taking into account the particular social impact of facial scars on a girl, the trial court's damages award constituted sex discrimination. The Court of Appeals ruled that the trial court had not improperly differentiated among classes of plaintiffs according to sex-based stereotypes, but rather had made a proper individualized assessment of the actual damage to the plaintiff. *See also* Greer v. Palmer, 55 Pa. D. & C. 109 (1946); Nikkari v. Jackson, 226 Minn. 88, 32 N.W.2d 149 (1948).

solution can mean that women will again be evaluated by male-based standards. Such standards may actually be less descriptive of women than a standard based on female stereotypes. For example, women at one time were, and sometimes still are, concretely injured in a way that men are not by allegations of sexual promiscuity. And, given current societal values, women are much more likely than are men to be evaluated for jobs, relationships, and other opportunities on the basis of their appearance. Thus, when a woman's face is injured, or she is disfigured, her sense of worth as a woman may be severely affected and her consequent emotional anguish may well be greater than a man's. Similarly, the indignities and rebuffs she is likely to face may be more emotionally and economically damaging than they would be to a man. Under a formal equality approach, eliminating the effect of the stereotype that women care more about their apearance would mean that men and women would be treated the same—as men. Thus, a woman's injuries would be evaluated according to the male-influenced reasonable person standard, and the actual extent of injuries that a woman may suffer may be discounted. Some stereotypes may be based on socially constructed, but actually felt, differences, and thus should not be lightly discarded. But it remains important constantly to question the accuracy and differential impacts of stereotypes underlying tort rules.

By making students aware of stereotypes and encouraging them to question their accuracy, the stereotypes might begin to break down in ways beneficial to everyone. For example, students may more fully appreciate that men, too, can experience injuries usually associated with the "reasonable woman." Rather than trivializing a man's claim for damages as redress for injuries such as emotional abuse and loss of esteem from facial and bodily disfigurements, students and future lawyers may help the legal profession to take these male injuries seriously.

Finally, discussion which acknowledges the power of stereotype in the law can also alleviate the frustration or anger of women students who may acutely experience gender bias in legal education and who may consequently develop a sense of alienation from the law.[78]

IV. Enlarging the Context: Including Women's Experiences

The basic torts course can be further enriched by delving more fully into the context of cases that involve women. This means moving beyond what is provided in the usually terse descriptions of immediate facts found in excerpted appellate opinions. Tort law is, in many respects, highly contextual because the application of the rules is so fact-dependent. But it is not contextual in the sense in which feminists often invoke the term, be-

78. *See* Frug, *supra* note 2, for the effects of unspoken stereotypes on men and women law students.

cause the context that is deemed relevant in most opinions and casebooks rarely includes the impact on women of the social practice at issue. Yet many women students will notice such omissions, and might wonder whether their own experience, which might call into question the assumptions or the ruling in a case, is worth mentioning and learning from. Others who notice the silence might feel frustration or alienation when a court or professor fails to consider how the situation appeared to the people affected by it. By including more consideration of the realities of women's lives in classroom discussion, we can reach these students and learn from them about how the law might need to change in order to be more responsive to the needs of women.

Cases involving issues central to women's identity, such as reproduction and efforts to control it, and matters of physical security and vulnerability, are especially useful for enlarging the context to achieve these goals. For those teachers who may feel that you do not know enough about how women experience a situation to expand the context, I urge you to listen to your women students and to encourage them to share their experiences.

A. *DES*

I learned a great deal to enhance my own critical understanding of DES cases such as *Sindell v. Abbott Labs*[79] and *Payton v. Abbott Labs*[80] from some women in my torts classes who were DES daughters with various problems associated with *in utero* exposure to DES. Now, in discussing the causation dilemma in *Sindell* and related cases, I expand the context to discuss the frequency with which doctors in the mid-1950s through early 1970s prescribed DES, even when there were no indications of likely problems with a pregnancy, and despite mounting evidence that DES was ineffective in preventing miscarriage or in making pregnancies safer. Moreover, women receiving DES sometimes were not told what they were being given or what its purpose was. Nor did most women at the time dare to question the wisdom of their doctors, or even ask simple questions about the manufacturer of the pill, the reason it was being prescribed, or its possible risks. I also explain that the pill was made according to a generic formula, and that often each manufacturer's pill was indistinguishable from the others.[81] With the addition of these and other facts to the context of the case, the plaintiffs' lack of knowledge about the identity of the manufacturer and about the connection between DES and their injuries becomes more understandable, and the bad fit between their situation and the identity rules of causation becomes more evident. The

79. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

80. 386 Mass. 540, 437 N.E.2d 171 (1982).

81. Good sources for learning about the medical context of DES are Apfel and Fisher, *supra* note 70; Cynthia Orenberg, *DES: The Complete Story* (New York: St. Martin's Press, 1981); and Robert Meyers, *The Bitter Pill* (New York: Seaview/Putnam, 1983).

plaintiffs' sense of frustration becomes more compelling, as does the need to find ways to hold the major participants in the industry responsible. As a result, the innovations of the California court in *Sindell*, adopting a market share theory for allocating liability among the major manufacturers of DES, do not look so much like judicial activism unhinged from the basic principles of tort law.

I have learned from the experiences of women while teaching another DES case, *Payton v. Abbott Labs.*[82] *Payton* is usually included in torts books to stand for the proposition that trivial emotional distress should not be compensable because it is not a serious enough injury, because it is too easy for plaintiffs to feign emotional disturbance, and because the courts might be flooded with frivolous claims.[83] But, if we consider the feelings of a woman whose reproductive organs are misshapen in ways that make it extremely unlikely, or extremely dangerous, for her to become pregnant in a society in which many women's sense of identity and role is tied to their ability to have children, then the experiences of the plaintiffs in *Payton* start to look more like genuine injuries and less like frivolous emotional distress. Women exposed to DES also often suffer intense anxiety and anger or guilt in their relationships with their mothers and with husbands or lovers, psychological effects that the psychiatric profession takes seriously and that require intensive counseling.[84] Adding the relevant facts concerning women's experiences with DES exposure to the generally presented fact pattern in a case like *Payton* not only calls into question the court's conclusion; it also re-emphasizes the frequency with which women's injuries have been relegated by the medical profession and by the legal system to the "emotional" category,[85] thus blocking compensation through the tort system.

B. *Birth Control Pills*

Study of the prescription drug rule, as applied to birth control pills, offers more opportunities for expanding the legal context to include women's experiences. Under this rule, drug manufacturers must warn the prescribing physician, but have no duty to warn the patient who is the ultimate user, about the risks of birth control pills. Most courts considering claims by women injured by the pill reflexively applied the rule to bar the women's claims against drug manufacturers.[86] The courts did not ac-

---

82. *See supra* note 75.

83. *Payton*, 386 Mass. at 552-55, 437 N.E.2d at 180-81.

84. The serious psychological effects of DES exposure and loss of reproductive capacity are discussed in Apfel, *supra* note 70.

85. For example, when women complain of physical symptoms of pain, they are more likely than are men to be suspected of suffering mental distress or hysteria or to be prescribed tranquilizers or drugs directed to the mind, not to the part of the body which is in pain. *See, e.g.*, Pernick, *supra* note 74.

86. *See, e.g.*, McEwen v. Ortho Pharmaceutical Corp., 528 P.2d 522 (Or. 1974); Seley v. G. D.

knowledge that the relationship between a prescribing physician and a healthy patient coming in to have her blood pressure checked and to routinely refill birth control pills is likely to involve far less physician scrutiny than the relationship between a physician and an ill patient constantly under the doctor's care.

But in 1985, a woman judge, Justice Ruth Abrams of the Massachusetts Supreme Judicial Court, in *MacDonald v. Ortho Pharmaceutical Corp.*,[87] filled her footnotes with information about the actual nature of the nebulous doctor-healthy woman contact when birth control pills are being prescribed and represcribed.[88] Justice Abrams ruled that because this interaction does not fit the model of the doctor's using superior medical expertise to make choices for the ill and passive patient, the prescription drug rule should not apply and the pill manufacturer should have a duty to warn the patient directly. This duty to warn the ultimate user is especially important since women are often left by both their partners and their physicians to make the important choice of birth control method on their own, guided only by package inserts and the popular media. Moreover, few physicians take the time to explain fully the risks, pros, cons, and warning signals of these contraceptives. By highlighting such elements of a reality unique to women, Justice Abrams appropriately altered a tort rule and opened up an avenue of recovery for women injured by birth control pills.

C. *Wrongful Life and Wrongful Birth*

Analysis of both wrongful life cases and wrongful birth cases can benefit from consideration of women's interests in reproductive autonomy and full information.

In wrongful life cases, the parents of damaged children sue doctors or genetic counselors for giving erroneous or inadequate information about the likelihood of bearing a defective child. *Curlender v. Bio-Science Labs*[89] and *Turpin v. Sortini*,[90] illustrate the moral and legal difficulties of recognizing causes of action and assessing damages where the claim suggests as the desirable outcome the failure to give birth to a child that has nonetheless been born. The fact that wrongful life claims are a form of informed consent claim, in which parents, particularly women, are asserting a right to be able to make fully informed reproductive decisions, is rarely stressed. By failing to explore this aspect of wrongful life, one over-

---

Searle & Co., 423 N.E.2d 831 (Ohio 1981).

87. 475 N.E.2d 65 (Mass. 1985).

88. It is not coincidental, in my view, that the leading transformative case was authored by a woman judge. While writing the text of the opinion in traditional form, she used her footnotes to educate the readers, and perhaps her colleagues on the bench, to a set of facts more complete than those usually considered legally relevant in such cases.

89. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

90. 643 P.2d 954 (Cal. 1982).

looks an opportunity to explore the connection of this claim with a woman's interest in reproductive autonomy, including the interest in being able to choose not to conceive or to abort.[91]

In wrongful birth cases, the damaged children themselves sue, usually contending that if their parents had had adequate information they would have avoided conception or had an abortion. These cases also raise the related issue of whether tort law can indirectly be used to impose a duty to abort on a woman who has not chosen that option but then seeks damages for a damaged child. An argument that the failure to abort is a failure to mitigate damages may be tantamount to imposing a duty to abort, because the choice not to abort will not be respected by the provision of a tort cause of action for the ensuing damages. *Sorkin v. Lee*[92] and *Troppi v. Scarf*[93] are illustrative of cases in which a defense akin to the avoidable consequences doctrine was used. In these cases, defendants asserted that the parents could have avoided the complained-of harm—a damaged child—by choosing abortion. The court upheld this defense in *Sorkin*, but rejected it in *Troppi* on the rationale that undergoing an abortion against one's wishes went beyond the bounds of reasonable actions in mitigation of damages. The abortion defense in these cases suggests that, in this area of reproductive health, tort law might too easily slide from being used to protect a woman's interest in autonomous decision-making to second guessing her decisions in a way that invades her autonomy.

If it occurs without adequate consideration of women's interests, the natural course of doctrinal evolution in this area could lead to tort causes of action by children against their mothers for engaging in conduct before or during pregnancy that endangered the fetus. *Grodin v. Grodin*,[94] in which a child sued his mother because she took tetracycline while pregnant, thus causing him to have discolored teeth, and the recent threatened prosecution in California of a woman who miscarried her fetus because she continued to smoke and engage in sex while pregnant, suggest that the day is approaching when tort law may be invoked by damaged children

---

91. This aspect of wrongful life claims has also been overlooked by courts assessing the constitutionality of statutes cutting off wrongful life causes of action. In Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986), the court upheld the constitutionality of a statute that barred tort suits when an element of the complaint was that an abortion would have been performed if additional information had been available to the pregnant woman. *See* MINN. STAT. § 145.424 (1984). In the court's view this statute did not amount to a direct interference with the constitutionally protected right to have an abortion. The court never considered, however, an equal protection issue lurking in the case: why should only women seeking to vindicate their right to informed reproductive choice be barred from bringing tort claims, when patients with other types of informed consent malpractice claims could sue?

92. 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).

93. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

94. 102 Mich. App. 396, 301 N.W.2d 869 (1980). *See also* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive*, 21 U.S.D. L. REV. 325 (1984); Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

against their mothers. This would be especially likely where there is an applicable insurance policy and plausible causal conduct on the part of the mother, such as smoking, drug use, unhealthy dietary or exercise habits, or workplace exposure to teratogenic substances. Such tort actions would pose a direct threat to the privacy and autonomy of women, and would be based on the questionable assumption that the fetus and the mother are separate beings with conflicting interests, rather than an inseparable, single unit. Most things that pregnant women do or ingest can affect their fetuses whether one views mother and fetus as a single autonomous being or as two separate beings. But if the autonomous entity is viewed as one being—a pregnant woman—this would mean that the choice or decision-making ability resides in her rather than in the state or in her employer.

An examination of the possible extensions of the wrongful birth theory thus highlights the implications of bringing the law into matters long considered private. It is not always clear whether women are ultimately helped or hurt by such a move.[95] The resolution of this dilemma turns on recognizing the nature of women's autonomy interests in reproduction, and women's inseparable connection to their fetuses. If women's need for autonomy is seen as the starting point for analysis, then it will be possible to see that in some instances, when women themselves are seeking to protect their rights, women need the intervention of the legal system in order to have their autonomy interests respected, as when a health care professional has given them inadequate information upon which to base a reproductive decision. At other times, such as when others are calling into question, on behalf of a fetus, a decision made by a pregnant woman, the law must refrain from intervening or calling into question a woman's conduct. An example of the latter situation arises when a woman takes a drug while pregnant in order to preserve her health. By extension, the health of the fetus that is part of her will benefit since if the mother could not treat her infection, the fetus might be harmed by the maternal environment.

D. *The Public Duty Doctrine*

Women's attempts to use tort law to protect their interests in physical security and autonomy can also be explored through the public duty doctrine. This doctrine seeks to determine when, if ever, the police should be held liable for failing to respond to complaints of crime, and historically has served to insulate the police from liability by blocking the efforts of battered women seeking redress through the tort system.

Barred by interspousal immunity from suing their battering husbands, women who attempted to sue the police—whose policy was to respond last

95. For a discussion of the perceived public/private dichotomy and its legal implications for women, see Olsen, *The Family and the Market: A Study Of Ideology and Reform*, 96 HARV. L. REV. 1497 (1983).

or not at all to domestic complaints—would find that in the eyes of the law the police had no duty to protect such women. *Riss v. New York*,[96] which is used in many torts case books to illustrate the public duty doctrine, is an example of a case in which the complaints of a woman repeatedly assaulted by her ex-lover met with no police response until the ex-lover left her permanently disfigured. The court held that police decisions about how to deploy their limited resources could not be questioned by the courts. From the battered woman's point of view, this reasoning seems peculiarly unresponsive to the problem provoking the suit. The plaintiff's need was to force change in precisely the police priorities to which the court deferred, and to draw attention to the grievously disparate impact on women of the routine police assumption that "domestic squabbles" were not serious criminal matters.

After *Riss*, appreciation of the gravity of battering increased, as did awareness of how police failure to respond contributed to the problem. Police non-response had led to augmented injuries that could have been prevented and to a climate of social tolerance of domestic battering. Consequently, courts started responding with large tort judgments against police departments in cases brought by battered women, such as *Thurman v. City of Torrington*,[97] and *Nearing v. Oregon*.[98] In *Thurman*, a woman disabled from the beatings she received from her former husband recovered a multi-million dollar constitutional tort judgment because the police policy of responding last to domestic violence complaints violated her right to equal protection under the law. *Thurman* led to a major reform of the Connecticut domestic violence law, so that arrests, as well as training of police personnel about the nature of domestic violence and how to effectively handle it, are now required in Connecticut.[99]

By teaching the preceding sequence of cases, a teacher can increase student sensitivity to the seriousness of domestic violence and to the need for creative lawyering pushing at the edges of tort concepts. A teacher who does not explore the domestic violence context of the public duty rule in a case such as *Riss* is also foregoing an opportunity to demonstrate how the law can change and grow in response to evolving understandings of problems such as battering. Moreover, if a case like *Sindell* is taught as more than simply an abstract exercise in advanced causation doctrine, students have an opportunity to learn about the vulnerabilities of women and their offspring in the reproductive process, and how hard it can be for women to gain the knowledge necessary to assert more control over their own reproductive lives or to seek compensation when something has gone awry. I have also found cases involving reproductive harm useful for help-

96. 22 N.Y.2d 579, 240 N.E.2d 860 (1968).
97. 595 F. Supp. 1521 (D. Conn. 1984).
98. 295 Or. 702, 670 P.2d 137 (1983).
99. CONN. GEN. STAT. §46b-38a-f (1987).

ing make male students aware that what they might wish to reflexively dismiss as "women's problems" greatly affect them, too. Informed consent, duty to warn, and birth defect causation cases vividly communicate to men in the class the interest of each parent in the reproductive health of the other, and the effect of a damaged newborn on both men and women. Through this line of cases, students can also deepen their analysis of the relationship between courts and legislatures by asking, under what circumstances is it desireable for the legislature to act to reduce the need for the after-the-fact remedy of tort?

V. Conclusion

Including issues of significance to women's lives in a torts course and exploring the gender impact of tort doctrines helps make one's course more responsive to the experiences of a diverse range of students. It also helps teach all students about the relevance of life experiences to legal development and critique. Such an approach also emphasizes the need to take women seriously by increasing their visibility in the legal system. Ultimately, the approach enriches the torts course by demonstrating that tort law is intertwined with and responsive to problems that some might too readily dismiss as "women's issues" but which are, on the contrary, fundamental issues of life. Reproductive health and autonomy, for example, should be of intimate concern to both men and women. Unfortunately, however, the law's selective perspective and the linkage of the tort system with market valuations makes it difficult to obtain legal recognition for human interests which so many of us would deem of great importance.