

## TEACHING TORTS AS IF GENDER MATTERS: INTENTIONAL TORTS \*

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SYMPOSIUM: SOLIDARITY, INCLUSION, AND REPRESENTATION: TENSIONS AND POSSIBILITIES WITHIN CONTEMPORARY FEMINISM:

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This article is dedicated to my aunt and uncle, Jessica and Harold Seiden, of New Hyde Park, New York.

### [\*115] INTRODUCTION

Gender matters in tort law. In a society where power, privilege, and points-of-view correlate with gender ascriptions, a legal analysis that ignores gender is grossly inadequate. For too long lawyers, judges, and law professors have accepted an understanding of tort law as gender-neutral or genderless and have failed to analyze its gender dynamics. Even if gender-neutrality turns out to be our ultimate goal, in a context of gender bias, gender-neutrality just masks systemic oppressions. For years now feminist legal scholars have provided poignant critiques of tort law<sup>n1</sup> and offered methods for exposing gender bias [\*116] in law.<sup>n2</sup> Regardless of whether one ultimately adopts a feminist analysis of torts, the time has come to include that analysis in the teaching of all first-year torts classes. I offer here a guide to thinking about how that might be done and a few examples from my teaching experience to invite conversation.

Every person in every torts case has a gender, race, sexual orientation, ethnicity, age, economic/social class, and a range of physical and mental abilities. Torts parties are not fungible by these aspects of identity and their accompanying social structures of power and privilege. In many legal cases, torts parties' claims are interpreted differently, their perspectives are valued differently, and the law responds to their harms differently based in part on these aspects of identity. Since tort law is a legal response to society's understanding of just ways to allocate responsibility for personal injuries, we impede law students' [\*117] education and their effectiveness as

lawyers if we do not conscientiously and attentively expose them to these dynamics and give them the knowledge and skills to change the law when it is unjust.

Although I will center my comments here on gender, I cannot stress enough that gender cannot be analyzed independently. In my teaching and scholarship, I adhere to an analytic approach used by many feminist scholars, n3 that we cannot search out one kind of bias without looking into the manifestations of others -- that all "isms" of domination and oppression are interrelated. As eloquently articulated by Professor Mari Matsuda:

The way I try to understand the interconnection of all forms of subordination is through a method I call "ask the other question." When I see something that looks racist, I ask, "Where is the patriarchy in this?" When I see something that looks sexist, I ask, "Where is the heterosexism in this?" When I see something that looks homophobic, I ask, "Where are the class interests in this?" Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.

[I]sn't it also true that dismantling any one form of subordination is impossible without dismantling every other? And more and more, particularly in the women of color movement, the answer is that "no person is free until the last and the least of us is free." n4

Because biases and oppressions based on these aspects of identity are so interwoven, our analysis will be inadequate if we look solely at gender issues. We cannot stop there, although gender issues are as good as any place to start.

**[\*118]** I have divided this paper into three Parts. First, I discuss ways in which gender affects torts casebooks, classes, and teaching. In that Part, I propose some critical questions that can be used to hone one's analysis and reveal gender bias in our existing materials. Second, I suggest general things law professors can do to teach torts as if gender matters. Finally, I offer a few concrete examples from the first-year torts course I teach to illustrate the possibilities.

#### I. WAYS IN WHICH GENDER AFFECTS TORTS CASEBOOKS, CLASSES AND TEACHING

How does one go about discovering ways in which gender affects tort law, and how can these insights be incorporated into a torts course? n5 My principal suggestion is rooted in the core of feminist methodology: Ask the "women questions." n6 In each circumstance ask: What are the hidden assumptions about gender and about women in this doctrine? In this case? In this remedy? In the way tort litigation proceeds? In the torts framework of analysis? Here are five quick, non-exclusive suggestions about ways to frame the questions to evaluate the extent of gender bias in torts casebooks and course materials:

1. Are women included in the casebook or class materials? Are they plaintiffs or defendants; witnesses or experts; judges, lawyers, and legal scholars; or other people whose interests do or do not "count" in the case? Do the materials include cases by women judges and justices? Are there articles and excerpts by women legal scholars? Are there stories about women attorneys? Do the cases and materials **[\*119]** use pronouns indicating that attorneys, judges, parties, and experts are or may be women?

2. If women are invisible or missing in our casebooks, what does their absence indicate? Women have been injured for as long a period as men have -- why have their experiences, stories, and injuries not ended up in casebooks, legal opinions, courts, or law? Did the casebook editors just leave out the cases about women? Is the gender bias in the law, or in the editing, or both? If the cases about women's injuries and experiences do not exist, are historical materials included to explain ways in which gender bias kept women from using the tort system effectively? Does your torts course explore the historical

correlation between the absence of women lawyers, judges, and law professors and the absence of women's claims in courts or in casebooks?

3. If women are present, are they only sporadically represented in stereotypical ways? n7 Are the women in the materials portrayed solely as wife, daughter, mother, or "old maid" n8 -- only in supporting roles so their presence in law is justified by their relationship or absence of relationship to some man? Or are women only portrayed as victims, ignorant and vulnerable, overly emotional or hypersensitive, incapable of caring for themselves, expressing their needs, or as needing a man's protection? Does the language about women reveal judgments about women's proper roles, attitudes, responses, or moral character? n9 Or are [\*120] women portrayed solely as sexual beings, as either victims of sexual assault, or as seductresses? Are women's claims shown to be of lesser worth, whether through lower economic values placed on them or by refusals to give many women's claims any economic value at all?

4. Are issues of particular concern to women included in the course and casebook? n10 Are they central or afterthoughts? Does the course address issues about: sexuality and consent; contraception, pregnancy, birth, and reproduction; women's health concerns and medical treatment; workplace or educational sexual harassment; patterns of sexual discrimination; incest and sexual assault; sexual seduction and intentional misrepresentation; domestic violence and police failure to protect adequately women and children from violent men; child abduction and custody disputes; date rape and fraternity gang rapes on college campuses; issues about intimate relationships and families; cases about children and violence in public schools; products that predominantly harm women's bodies or minds; suits for the sexual transmission of diseases, including AIDS and fear of AIDS cases; suits by children for in utero injuries caused by medical malpractice, toxic exposures, legal and illegal drugs, and the mother's behavior? If women's experiences around these issues are often different from men's experiences, how are women's experiences and perspectives credited in tort law or how ought they be? Are women's regular and intense fears for their physical safety included in notions of foreseeability, harm, and duty? Are women's unique physiological and psychological relationships with children (pregnancy, birthing, nursing) as well as women's dominant roles as primary caregivers to children, disabled people, and elders appreciated in the tort law? Has the law been constructed with a sensitivity to these facts? Have women's senses of responsibility to others been included in notions of duty? Have women's different lifestyle responsibilities and opportunities been considered in framing remedies, assessing damages, and valuing [\*121] claims, conceptualizing compensation systems, or constructing workplace expectations?

5. Ask the "women questions" about classroom dynamics. Are female law students asked or required to participate equally, listened to carefully, responded to, and challenged? Are their contributions referred to later in class, and are the female law students respected in the same way that male students are respected? n11 Are women law students treated differently depending upon their race, age, sexual orientation, or commitment to feminism? How do torts professors deal with gender issues raised by students? Do some professors suggest that these issues are not relevant to the doctrine or case or course? Or that gender or race or economic class questions are at best side matters that will divert discussion from the real issues and law? Or that gender questions are important, but too sensitive or difficult to be discussed? Are women students' contributions discredited because of the ways they speak -- perhaps, ending answers with questions or on higher tones, engaging in conversation instead of debate or argument, appearing to be more unsure or less confident -- or because of their willingness to bring in different perspectives and experiences from conventional legal analysis? What role does the professor play when some students treat other students disrespectfully in class, whether through verbal abuse and demeaning comments, grunts and groans, rolling eyes, exaggerated inattention, sidebar conversations, or aggressive body language? Do the students treat their female or feminist law professors disrespectfully compared to other professors and how is that addressed in torts class?

## II. WHAT LAW PROFESSORS CAN DO TO TEACH TORTS AS IF GENDER MATTERS

Asking these "women questions" is just the first step. Once torts professors find the glaring absences or misrepresentations of women, what should they do? The answer is very clear, but unfortunately quite time-consuming. Put simply, the task is to rethink the torts course [\*122] syllabus and add or delete materials throughout the course. To be more specific:

1. Add or substitute new materials, including newspaper stories and court records about pending or decided cases, which make women visible and address issues of concern to women. To begin, I recommend doing computer database searches on Westlaw or LEXIS, primarily in the state court databases, but also in NEXIS or DIALOG databases, putting in key words representing issues of concern to women and fundamental torts concepts. For example, when discussing statutes of limitation and discovery rules, a law professor could seek out cases about incest and childhood sexual abuse by entering queries that combine those terms in the same paragraph. n12 In addition, law professors can choose hypotheticals that involve women and directly deal with issues of concern to women. We must be conscious of how we use women in our hypotheticals and whether we are inadvertently reproducing demeaning or disadvantaging stereotypes. Care must be taken that women are not only included in hypotheticals as victims of sexual abuse or violence, although women's experiences in these situations ought not be ignored. A balance can be achieved by including more about women on all issues.

2. Find legal scholarship that reveals theories of biases, particularly gender biases, in tort law and include them in course materials. n13

3. Include cases written by and legal articles or news stories about women judges, women law professors, and women attorneys.

4. Collaborate with other law professors and lawyers to find and use relevant cases. Make the collection and exchange of these kinds of materials a priority at national conferences and on Internet discussion groups. For example, the Society of American Law Teachers has organized conferences in the last few years directly addressing the inclusion of materials about race, class, gender, sexual preference, and [\*123] ethnicity in teaching law. n14 It is extremely valuable to attend these conferences, learn from others, form working groups, share materials, and brainstorm together. There are computer-based international discussion groups, called "listservs," that create spaces for discussion of law-related issues, such as the discussions about feminism and law on "Femjur at suvm.syr.edu" or "Tortprof at chicagokent.kentlaw.edu." With a computer and a modem professors can carry on their learning and sharing all year long, instead of solely at conferences or through articles. Torts professors must share ideas with other torts professors, so we each do not have to reinvent the wheel. We must create a demand for casebooks that treat torts as if gender matters and encourage law textbook publishers to find authors to produce torts course books that are gender inclusive instead of male-biased.

5. Torts professors can locate and include empirical studies about how women fare as plaintiffs or defendants in torts cases, the kinds of claims they bring, whether the verdicts they get are comparable to those men get for similar injuries, and how women's special injuries are treated by tort, insurance, and workers' compensation laws.

6. Offer students information about the status and life experiences of women when teaching the historical development of tort doctrine, so they can make judgments about the role of gender in doctrinal development.

7. Teach law students to ask the "women questions" in their analyses of cases and materials and how to spot gender-bias. We ought to ask how the tort and compensation systems, as a whole, reproduce gender-based inequities. Note, for example, that while monetary damages compensate for lost wages, much of women's work is unwaged, and even when women provide waged labor, they are grossly underpaid due to structural gender biases. n15 Women's work is valued less in dollars, yet their combined labor and time commitments at work and [\*124] in the home are often greater than men's. n16 Much of women's labor is not convertible into money, but involves time, caring, and responsibility. n17

When courts limit relief to money damages alone, injured parties cannot be "made whole" and women are not compensated for their time and work. Law professors can explore with students other ways to remedy tort injuries. Another method for locating gender bias is to study the language courts use when speaking about women plaintiffs and the harms claimed -- do they refer to women by their first names, do they minimize their claims, question their credibility, rework their assertions? We can ask students to compare this language to the ways that courts refer to men's claims.

8. Be conscious about how we treat women students in our classes and how responsive we are to alternative perspectives or concerns they may raise.

9. Torts law professors can research and write articles about gender bias in tort law and law in general, so that other torts professors can use those materials and insights in our courses to teach students about the ways hidden assumptions and biases skew the legal process. Better yet, law professors can use their creativity and imagination to propose alternative approaches and causes of action sensitive to women's experiences and need for redress.

Following the above suggestion of sharing materials and ideas, the final part of this paper will suggest some concrete examples of ways in which I have begun to teach torts as if gender matters. Because of space and energy constraints, I will limit the next section to my gender-based materials on intentional torts. Although I am only sharing ideas for teaching intentional torts, the scope of this discussion should in no way detract from the wide range of gender issues in negligence and strict and products liability.

### **[\*125] III. CONCRETE EXAMPLES OF TEACHING TORTS AS IF GENDER MATTERS**

Until last year, I added my own supplements of more than 500 pages to a course taught around a traditional torts casebook. Last year I finally jettisoned the casebook and used only my own materials. n18 The materials were predominantly downloaded cases or double-column laser printouts of cases from Westlaw or LEXIS, although I occasionally added newspaper or magazine articles from NEXIS or DIALOG. I used some law review article excerpts, but not many, because of my concerns about the students' workloads. n19

I spend about a third of my torts course on intentional torts -- over four weeks. n20 Intentional torts are very important, particularly when framing cases for people traditionally excluded from the legal system and for developing an understanding of the goals and purposes of tort [\*126] recovery. Legal scholars and practitioners are increasingly proposing intentional torts analyses, and because debates about intentionality determine the applicability of insurance in many cases, there is a rich vein of new state cases from which to draw. n21 Additionally, the intentional torts cases provide excellent opportunities to explore the relationships between common law tort, statutory remedies, insurance law, and agency principles.

Because I find that most students prefer studying law through contemporary materials, I search for recent cases with relevant fact patterns in which the courts' opinions discuss the historical development of the doctrines and the rules, as well as policy concerns and theories I want to cover during the course. I select cases that occur in interesting contexts and that attend to some of the concerns about gender and identity listed above.

If at all possible, I use cases decided by state supreme courts in the current year, even within the last few months. n22 If I cannot find any of those, I either select intermediate appellate court cases from the current year or particularly interesting supreme court cases from the year before. Approximately eighty to eighty-five percent of the cases which I teach were decided in the last two years. Another ten percent represent classic tort cases. The work that it takes to create a new collection of cases each year is formidable. n23

[\*127] I use three other techniques to increase contact time with the students and allow for richer discussions. n24 First, I set aside an hour per week for an open "Question-and-Answer" period, to which all members of the class

are invited, but not required to attend. Second, I require study groups and meet periodically with the study groups. Third, my most recent adaptation has been to set up e-mail "listservs" (discussion groups) for each of my torts classes so students and I can continue discussions begun in class. We ask and answer questions back-and-forth, and we raise issues that we did not have time to cover in class.

#### A. Intent & Battery

##### 1. Introducing Gender on the First Day

The materials discussed below highlight issues of gender only. n25 After an introductory class on the tort system, its goals and alternatives, I start our first day of class readings with cases on batteries and the meaning of intent. Several years ago I found a classic bar room fight for an opening case, n26 showing students that battery cases of this sort reach state supreme courts in this day and age. I find the idea of a fistfight serving as the classic example of battery to be a very gendered notion in itself. Many traditional casebooks use cases about [\*128] children causing harms as vehicles for exploring intentionality and battery. n27 In the teaching year that began with the bar brawl case, I adhered to the "batteries by children" tradition by including a case examining intent in which a young child put a firecracker in another child's sneaker and lit it. n28 Then to round out this first day's teaching package, I also included excerpts from a case on childhood incest as another example of battery. n29 The incest case served several pedagogical goals. It combined issues of age -- relevant not with respect to the formation of intent as a perpetrator, but as to reliability of the witness' and/or survivor's account -- and unlawful, harmful and/or offensive touching, with an issue that is of grave concern to women, namely childhood sexual abuse by male family members. n30 This case can be empowering to women because it acknowledges their potential entitlement to a remedy for this abuse. Its inclusion also alerts women and men to questions about civil remedies for childhood sexual abuse are appropriate concerns in a torts course. On the other hand, this is a very difficult subject to tackle in the beginning of a course. Last year I decided against starting with this case for two reasons: (1) I was concerned that it might be too upsetting for students in the class who may have been victims of childhood sexual abuse to discuss such a sensitive topic in a class of strangers where they had not yet developed a sense of the safety or dynamics of the class, and (2) it seemed to dump us into difficult feminist issues so quickly that it may have just reinforced students' fears about my class. n31 I am not sure I fared better last year, but I tried a different tactic.

[\*129] We began last year with a case that looked at the meaning of intent in the context of homeowner's policy exclusions and workers' compensation. n32 Often the damages plaintiffs win in an intentional tort suit are the same as those in a negligence tort suit -- compensatory damages and pain and suffering, with punitive damages if the harmful conduct was malicious or especially egregious. n33 In many cases, such as battery, a lawyer may frame a case as having an intentional tort count and a negligence count. Currently, a primary reason litigants may need to distinguish between intentional torts and negligence is insurance coverage -- whether private homeowners' insurance or workers' compensation insurance. Many of the most interesting cases exploring issues of intent have the added twist of how the claim of intentionality impacts the receipt of homeowners or workers' compensation insurance benefits. n34 I believe it is useful for students to start their study of common law tort by seeing its intersections with public law systems and private insurance law. Not only are the subtleties of the meaning [\*130] of intent explicated, but public policy issues about compensation, deterrence, punishment, and naming harms are brought directly into the discussion. Students are immediately confronted with the dilemma between the "principle" of recovering against the actual or primary wrongdoer and the practical consequences of having intentionally caused harms excluded from insurance coverage, either by employer or homeowner's insurance, possibly leaving injured plaintiffs with empty judgments against judgment-proof defendants. I found a case in which gender clearly mattered where the court addressed all these issues. n35

## 2. The Politics of Intent

Last year our first case was a 1993 Louisiana case discussing battery and intent in a workplace context. n36 A co-worker at a construction site had, in play and allegedly with no intent to harm, aimed his acetylene torch at the plaintiff's groin and fired, expecting only air. n37 Instead he severely burned the plaintiff's genitals and inner thighs. n38 The case raises important questions about what needs to be intended in battery (e.g., harm, offense, contact), how to place monetary values on different injuries, n39 and the relationship between workers' compensation and tort actions (workers' compensation's exclusivity provisions and the intentional tort exceptions), which are themes we carry through this whole section. Foremost, I used this case to present the idea of understanding cases from a gendered perspective and genderbased experiences. This is a case where sex and gender clearly matter. n40 Hopefully students learn that judges' or juries' understandings of [\*131] the meaning of the kind of harm suffered can be affected by their gender and can affect the way damages are awarded. Most importantly, students learn that gender does not always mean woman, and sex does not only mean female. Issues of sex and gender, as well as race, class, sexual orientation, age, ethnicity, and disability are about men, too. All this can be examined while defining intent for battery.

Sex and gender also matter in the second major case I selected last year. n41 To further explore this issue of intent in battery, I used a case about the sexual transmission of genital herpes, where a male partner had failed to inform his new female sex partner that he had the disease before she consented to a sexual encounter. n42 After she learned that she had contracted the virus, she sued him for negligence. n43 The complicated post-injury dynamics in that case, which seemed highly gender- and class-influenced, resulted in the parties reaching a one million dollar settlement, and his homeowner's insurance company, State Farm, refusing to pay the claim. n44 State Farm argued that because the man had "intended the injury," they were not obliged to pay under the intentional injury exclusion in the policy. n45 They also made arguments about his failure to cooperate in the investigation and defense [\*132] of the case, but I edited those sections out of the class excerpt. State Farm initiated a declaratory judgment action to determine their contractual obligations under these circumstances. n46 The court, while not deciding the issue, seemed inclined to the view that this man's engaging in sexual relations without informing his sexual partner that he was putting her at risk was most likely negligent, not intentional, and therefore covered by insurance. The court concluded that, at a minimum, whether his actions were intentional was a factual question that could not be resolved on the pleadings. n47 The man in this case was a professional, an optometrist, presumably with assets that could have been used to pay the claim had insurance not been available. n48 This decision saved him from that threat. n49 Had the man been judgmentproof or nearly judgment-proof but insured, the decision that this was negligence and covered by insurance would have benefited the injured woman. Does this decision benefit her, given the agreement she entered into with her injurer? In the notes to this case, I compare it to a 1993 Alabama Supreme Court case, *State Farm Fire & Casualty Co. v. Davis*, in which an insurance company is relieved of liability under an intentional injury exclusion for damages for childhood sexual abuse committed by the insured, a person who otherwise had no available assets to pay the claim. n50 In the *Davis* case, the survivor of childhood sexual abuse was not able to recover damages from the insurer, n51 but [\*133] in the *S.S. & G.W.* case, the insured was covered for the harm he caused, so that his personal assets remained unavailable. In neither case was the injurer meaningfully required to compensate the person he injured from his own assets.

The *S.S. & G.W.* case raises other questions about the meaning of torts judgments and the way tort law should understand sexual relationships between adults. What might it mean to a plaintiff for the court to declare that this kind of harm is negligent and not intentional, even though it requires the insurance company to pay? Aside from issues about insurance coverage, what message does such a judgment send about their experiences? Should courts take

into account the meaning of the judgment to the plaintiff and the defendant or to society in general?

If a person knew he had genital herpes and didn't tell his sexual partner, is that an intentionally caused harm? n52 How should the law understand the concepts of intent and consent in sexual encounters? Between the majority and dissenting opinions in the Texas case, issues of inferring intent in harmful adult sexual relationships and consent to sex as a defense are explored. n53 While we do not explore the consent issues in depth at this point in the class, I mention that we will return to them when we do affirmative defenses to intentional torts in the following weeks. We do examine the historical, social and physical contexts in which these questions arise. Men have often intentionally misled women for sex, with everything from promises of marriage to lies about their own marital statuses. n54 Should this cultural pattern be taken into account in understanding the meaning of intent and consent in heterosexual relationships? Do the same issues apply in same sex sexual relationships? Finally, I ask students to think about whether it should matter in the legal analysis that genital herpes is a much more serious disease for women than men because it can affect their capacities to have healthy children. Tort law, to be effective and legitimate to all people, must consider these gender-related issues.

**[\*134]** The *S.S. & G.W.* case gives the teacher an opportunity to examine gender issues in the context of learning about different meanings of intent that affect liability for personal injuries and looking at the politics and role of insurance companies in redressing injuries. Although this is not a course in insurance law, these discussions lay the groundwork for our upcoming readings on how workers' compensation insurance addresses issues of sexual abuse and gender harassment in the workplace and whether these harms should be characterized as intentional torts or violations of antidiscrimination laws. n55

#### *B. Intentional Infliction of Emotional Distress and Sexual Harassment/Sexual Discrimination*

##### 1. Opinions by Female State Supreme Court Justices about Sexual Harassment in the Workplace

After we discuss the old classics, *Garratt v. Dailey* n56 and *Vosburg v. Putney*, n57 we study parental liability for children's wrongs and vicarious liability -- issues which involve questions of relationships, power and authority, and our responsibility for and to one another. It is an easy step from parental vicarious liability issues to vicarious liability and agency principles in the workplace, particularly in relation to workers' compensation, intentional torts, and sexual harassment. Needless to say, sexual harassment cases raise many gender issues that often intersect with questions of race, class, and labor/management struggles. Sexual harassment cases also bridge the worlds of intentional tort and antidiscrimination law. *Kerans v. Porter Paint Co.* n58 is a 1991 Ohio Supreme Court case about a supervisor who committed repeated batteries, nonconsensual sexually motivated touchings, and **[\*135]** other offenses toward a co-worker. Defendants claimed that plaintiff's remedy for these harms was limited exclusively to workers' compensation, since the facts of the case involved a workplace injury. n59 If workers' compensation exclusivity applied, Ms. Kerans would have been barred from pursuing her tort claims. Unlike tort remedies, workers' compensation generally does not afford injured employees pain, suffering, or emotional distress damages. n60 One approach to avoiding workers' compensation exclusivity is to characterize sexual harassment as an intentional tort, outside the scope of workers' compensation. This approach raises all the questions about the meaning of intent within the context of harassment. If the conduct is deemed negligent and not intentional, and therefore workers' compensation preempts tort actions for the harms of sexual harassment in the workplace, victims of this practice remain essentially uncompensated. This is particularly true if the harassment occurred before the 1991 Amendment to the Civil Rights Act, which created the possibility for some compensatory damages in limited cases of intentional discrimination. n61

The majority opinion in *Kerans*, written by Justice Alice Robie Resnick, presents an opportunity early in the course to introduce decisions by women state supreme court justices. Her opinion is carefully reasoned and gives students clear, positive images of women justices. That alone would be enough to use the case, but it is even more valuable because Justice Resnick deals with an issue of great concern to women in a manner that is highly sensitive to how sexual harassment makes women feel. Rather than try to fit a claim of supervisor sexual harassment into an intentional tort exception to workers' compensation exclusivity, which raises the concomitant problem of potentially relieving the employer of liability for unauthorized intentional acts, Resnick focuses on the psychological injury and dignitary harm of sexual harassment as creating another kind of exception to the exclusivity of workers' compensation. The harms of sexual harassment are not the kinds of "injuries" against which workers' compensation was designed to insure or from which employers were intended to be [\*136] shielded from tort liability. She addresses issues of intent, but focuses the decision on the different types of harms:

If the workers' compensation scheme were adjudged to be the exclusive remedy for claims based upon sexual harassment in the workplace, as appellee urges, victims of sexual harassment would often be left without a remedy. Generally, injured employees receive coverage only for economic losses resulting from their accidents -- medical bills, lost wages, and diminished earning capacity. However, aside from expenses which they may incur for psychiatric care, victims of sexual harassment generally do not suffer economic loss. Their injuries are much less tangible and often are not susceptible to a neat compensatory formula. Thus, even if this court were to hold that psychiatric conditions resulting solely from emotional stress in the workplace are compensable under the workers' compensation scheme, most victims would not obtain appropriate or sufficient relief.

The mismatch between the workers' compensation laws and claims arising out of sexual harassment in the workplace was recently recognized by the Florida Supreme Court in *Byrd v. Richardson-Greenshields Securities, Inc.* In that case, the court specifically held that Florida's workers' compensation statute does not provide the exclusive remedy for claims based on sexual harassment in the workplace. In justifying its holding, the court stated:

"\* \* \* workers' compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by the sexual harassment laws. While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self esteem. Workers' compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights. \* \* \*"

[\*137] The scope and purpose of Ohio's workers' compensation scheme do not differ from Florida's in any aspect which is relevant to the question before us. As in Florida, it would contravene the legislative intent behind the workers' compensation laws for this court to hold that those laws provide the exclusive remedy for victims of workplace sexual harassment. Consequently, we reject appellee's argument that the appellants' claims are barred by [workers' compensation exclusivity]. n62

Would a male judge have immediately recognized or articulated the nature of the injury so clearly? Students are confronted with questions about the importance of gender in defining the kind of harm and in who is empowered to make those definitions. Interestingly, the Florida Supreme Court case upon which Justice Resnick relies on so heavily, *Byrd v. Richardson-Greenshields Securities, Inc.*, n63 was written by Justice Rosemary Barkett, also a female state supreme court justice. n64 [\*138] Is this just a coincidence or are there lessons to be learned from gender diversity on the courts?

Justice Resnick is creative and thoughtful about the intersection of all relevant areas of law and their consequences for the injured woman. Her

recitation of vicarious liability principles is very educational for students, enhancing the benefit of teaching this case. But most of all, Resnick helps us see how gender matters: in the interaction between coworkers; in the best way to understand and construe the law; in who interprets the facts and law; and in selecting strategies for working with multiple intersecting areas of law, such as intent and tort law, workers' compensation, agency law, and anti-discrimination statutes. There is a very strong dissent in this case as well, and we explore what seemed to anger the dissenter. By studying this case, among others, students have an opportunity to learn current law in contemporary situations relevant to their lives and their potential clients' lives, and to come to understand how gender matters in tort law.

## 2. Intentional Infliction of Emotional Distress -- Gendered Perspectives on Outrageousness and What Constitutes Harassment

Following several other cases introducing the tort of intentional infliction of emotional distress, we read a 1993 workplace case where a woman employee claimed intentional infliction of emotional distress based on the gender discrimination she suffered. n65 Plaintiff alleged that she was not promoted, was paid significantly less than her male counterparts, and was subjected to sexist remarks by her boss, who believed women were incapable of doing any job except secretarial work in an insurance office. n66 The question for the court was whether allegations of sexism and gender discrimination could amount to sufficiently extreme and outrageous conduct to establish a prima facie case of intentional infliction of emotional distress. n67 The majority opinion lays out the elements for an intentional infliction of emotional distress claim, n68 but the most interesting part of the case is the special concurrence by Justice Levine, the first and only woman justice of the North [\*139] Dakota Supreme Court. Her opinion concentrates on the changing mores in society and modern society's clear recognition of the outrageousness and social unacceptability of gender discrimination. n69 The majority agrees that it is possible for a jury to find that gender discrimination in employment in some contexts is outrageous, enabling a plaintiff to meet one of the elements of the prima facie case of intentional infliction of emotional distress. n70 The Swenson majority sent this particular case to a jury for a determination of whether the alleged conduct was extreme and outrageous.

Justice Levine goes further though. After telling about Myra Bradwell n71 and Lavinia Goodell, n72 along with something about the [\*140] history of women's rights to employment, she argues that in 1993 the question of whether any particular occurrence of gender discrimination in employment is outrageous should always go to a jury. n73 She argues that some reasonable people would always find gender discrimination outrageous, and therefore courts would err in granting summary judgment to defendant corporations on plaintiffs' claims that gender discrimination constituted intentional infliction of emotional distress:

Is sex discrimination fairly regarded as "atrocious and utterly intolerable in a civilized community"? The answer must derive not alone from the act of sex discrimination but from the impact of that act on its victim. Sex discrimination debases, devalues and despoils. When we cannot do anything to overcome another's criticism, hatred or contempt, we are, in effect, struck twice: first, by the act and, second and equally devastating, by the realization that we are helpless to undo that act, overcome it or change it. This is particularly true in a workplace. As the majority points out, sex discrimination in the workplace constitutes an abuse of power by one in a superior position over one who is vulnerable and powerless. As children, we learned that lightning does not strike twice. As adults, we must conclude that discrimination surely does. An employee, like Swenson, who is eliminated solely because of her sex is laid low, first by the irrational, discriminatory conduct [\*141] and then, by the inability to do anything about it. Indeed, victims, like Swenson, often need reassurance that it is not their fault that employers have discriminated against them. Discrimination is not a tale of hurt feelings, unkind behavior or inconsiderate conduct by one against another. That it may insult is irrelevant; that it strips its victim of self-esteem, self-confidence

and self-realization is the nub of its evil and the stuff of its outrageousness. As a subscriber to Oliver Wendell Holmes' belief that experience (not logic) fuels the engine of the law, and as a member of a class that has been subjected to discrimination, I find it difficult to understand how, at least, some members of the jury, whom we would all agree were reasonable members of their community, would not agree that sex discrimination, like race discrimination, goes beyond all bounds of decency and is truly atrocious and utterly intolerable in a civilized community.

The jury can take into account our changing social mores, the development of civil-rights law, and plaintiff's susceptibility as a member of a vulnerable class which has been historically discriminated against, to decide whether the conduct, that is, the sex discrimination, directed at plaintiff, constitutes the outrageous conduct necessary for plaintiff to prevail. n74

Finally, even though torts is not a course on sex discrimination or civil rights statutes, it would be negligent to study personal injuries and sexual harassment as a tort without exposing students to an example of how sexual harassment is statutorily remedied. n75 Last year I found an exceptionally cogent New Jersey Supreme Court case n76 that elaborated on many of the major issues that arise in sexual harassment [\*142] cases, whether under statutory law or common law tort -- e.g., criteria for a prima facie case, respondeat superior and vicarious liability of employers, objective versus subjective standards, "reasonable person" versus "reasonable woman" versus "reasonable person of the plaintiff's gender" standards. Justice Marie Garibaldi's comprehensive decision in the case explains why sexual harassment law must pay attention to gender and must use a gender-specific standard to evaluate the complained of conduct:

We believe that in order to fairly evaluate claims of sexual harassment, courts and finders of fact must recognize and respect the difference between male and female perspectives on sexual harassment. The reasonable person standard glosses over that difference, which is important here, and it also has a tendency to be male-biased, due to the tendency of courts and our society in general to view the male perspective as the objective or normative one.

Although there is far from a uniform female perspective on sexual harassment, nonetheless, the research and literature on sexual harassment suggest that there are differences in the way sexual conduct on the job is perceived by men and women. Kathryn Abrams argues that men consider sexual comments and conduct as "comparatively harmless amusement." When sexual comments or conduct are directed at them, men are apt to find it harmless and perhaps even flattering, but they are unlikely to consider it insulting or intimidating. Women, on the other hand, are more likely to find sexual conduct and comments in the workplace offensive and intimidating. Abrams is speaking here only about heterosexual sexual harassment; she notes that "[t]hese conclusions might be different if a man were harassed by a gay male employer or supervisor." Indeed, our general observation of a current social debate suggests to us that many men find the prospect of sexual harassment by other men extremely insulting and intimidating [\*143] and not at all a "comparatively harmless amusement." n77

Justice Garibaldi relies on the work of a noted feminist legal scholar, Professor Kathryn Abrams, to show that gender differences in perception exist. Garibaldi then explains why these differences occur:

Two societal realities may underlie the difference in male and female perspectives. First, women live in a world in which the possibility of sexual violence is ever-present. Given that background, women may find sexual conduct in an inappropriate setting threatening. As the *Ellison* [v. Brady] court perceptively wrote,

because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are

victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Second, in many areas of the workforce, women still represent a minority and are relatively recent entrants into the field. Because of their predominantly junior and minority status, for some women it is more difficult than it is for men to win credibility and respect from employers, coworkers, and clients or customers. That can make women's position in the workplace marginal or precarious from the start. Sexual harassment operates to further discredit the female employee by treating her as a sexual object rather than as a credible coworker. That can both undermine the woman's self-confidence [\*144] and interfere with her ability to be perceived by others as a capable worker with the potential to advance and succeed. Because of women's different status in the workplace, conduct that may be "just a joke" for men may have far more serious implications for women.

Those and other differences between the experiences of men and women shape the different perspectives of men and women. Finders of fact applying the gender-specific reasonableness standard must understand and respect those different perspectives. n78

Garibaldi's explanation of doctrinal issues with respect to employer liability for supervisor and coworker sexual or gender-based harassment of employees is carefully scripted and serves as another excellent teaching tool. I would like to reemphasize that these cases do as good a job, if not a better one, of explaining the doctrine and its development and underlying policy concerns as any cases in traditional casebooks. By using these cases instead of the ones in a traditional casebook, a torts professor can show that gender matters in law, and in tort law in particular. Students are exposed to these arguments in opinions written by state supreme court justices, not solely as arguments made in class by their professors.

After sexual harassment, we discuss the success of using tort actions to remedy racial harassment, the importance of power dynamics, structures of privilege, special vulnerabilities in racial contexts, and the role of tort law vis-a-vis civil rights statutes in addressing racial harms. At this point in the class, I usually give students excerpts of some articles and a short bibliography on racist speech.

### *C. Intentional Torts and Intimate Relations*

Last year we moved from intentional infliction of emotional distress in the workplace context of sexual and racial harassment to its manifestations in the home. Issues of violence and intentional harms in [\*145] intimate relations were often shrouded from tort law by intrafamilial immunities or shuffled off to family courts under divorce law with no compensatory remedies. Recent developments in tort law are challenging some of these traditions. With the elimination of intraspousal and intrafamilial tort immunities for intentional torts in most states, there are many cases of battery between domestic partners and cases of sexual battery, particularly incest by parents of children, that can be incorporated into the torts materials at this point. In keeping with asking the "women questions," this is an excellent place in the course to begin to explore issues of domestic violence against women and some responses of tort law. n79 Most of the victims of childhood sexual abuse are female as well, so this is an opportune time in the course to discuss the difficult issues of incest and sexual abuse of children that may have been postponed from the first week. Although the childhood incest cases become a major teaching tool when discussing statutes of limitations and the discovery rule later in the course, excerpts of cases illustrating the application of intentional torts to these harms fit well at this point in the course.

In last year's materials we explored the changing relationship between tort law and intimate relations through several cases about intentional torts and marriage. The Texas Supreme Court in 1993 evaluated the availability of emotional distress tort actions in connection with divorce proceedings. n80 In her divorce action, Sheila Twyman sought tort damages from her husband William Twyman for severe sexual abuse, bondage, and other instances of sexual sadism during the marriage. n81 What a powerful example of gender dynamics and tort law! n82 This case raises questions about differences between intentional [\*146] and negligent emotional distress causes of action in Texas, the sanctity of the private sphere (home) from public intrusion (law), and the relationship between the law's traditional refusal to intervene in family dynamics and patterns of gender oppression and violence in the family, particularly through doctrines like intrafamily immunity and the denial of tort claims in divorce proceedings. n83 The plurality decided that with an adequate pleading of outrageousness, a married woman plaintiff could make a claim for intentional infliction of emotional distress against her husband for harms experienced during the marriage, but not for negligent infliction of emotional distress. n84 This case evokes heated debates among the justices that are passionately replicated by students in class. Among the multiple opinions exploring these issues, Justice Spector's dissent is of particular interest.

[\*147] Justice Spector, the first and only woman on the Texas Supreme Court, looks more deeply into what the court is doing as a practical matter by its decision. She chastises the court for rejecting negligent infliction of emotional distress as a cause of action in Texas and for pretending that granting a cause of action for intentional infliction of emotional distress in these cases creates a viable option for women to recover for intramarital abuse. n85 After all, few cases ever seem to meet the threshold of extreme and outrageous conduct necessary for intentional infliction of emotional distress claims. She also overtly names and discusses how the gender issues in the case reflect gender politics in society and law generally. As Professor Ellen Smith Pryor wrote to me, "Spector's opinion is very useful because she asks the 'woman question' . . . ." n86 Rarely are these issues addressed so directly in a judicial opinion; Spector argues that gender matters and affects how, when and why the court finds causes of action to exist. I share excerpts of Spector's opinion at length to illustrate her explanations of how gender matters in tort law.

It is no coincidence that both this cause and *Boyles* involve serious emotional distress claims asserted by women against men. From the beginning, tort recovery for infliction of emotional distress has developed primarily as a means of compensating women for injuries inflicted by men insensitive to the harm caused by their conduct. In "[t]he leading case which broke through the shackles," [*Wilkinson v. Downton*], a man amused himself by falsely informing a woman that her husband had been gravely injured, causing a serious and permanent shock to her nervous system. Similarly, in the watershed Texas case, [*Hill v. Kimball*] a man severely beat two others in the presence of a pregnant woman, who suffered a miscarriage as a result of her emotional distress. . . .

I do not argue that women alone have an interest in recovery for emotional distress. However, since the [\*148] overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women, I do argue that men have had a disproportionate interest in downplaying such claims.

Like the struggle for women's rights, the movement toward recovery for emotional distress has been long and tortuous. In the judicial system dominated by men, emotional distress claims have historically been marginalized:

The law of torts values physical security and property more highly than emotional security and human relationships. This apparently gender-neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned. The law has often failed to

compensate women for recurring harms -- serious though they may be in the lives of women -- for which there is no precise masculine analogue.

Even Prosser recognizes the role of gender in the historical treatment of claims like that involved in *Hill v. Kimball*:

It is not difficult to discover in the earlier opinions a distinctly masculine astonishment that any woman should ever allow herself to be frightened or shocked into a miscarriage.

Displaying a comparable "masculine astonishment," the dissenting opinion by Justice Hecht insists that, with a few possible exceptions, women have played no distinct part in the development of tort recovery for emotional distress. As a general matter, Justice Hecht questions how a legal system dominated by men could develop a tort to compensate women even while marginalizing women's claims. The answer is amply illustrated [\*149] by the present case: to provide some appearance of relief for Sheila Twyman, the court recognizes the tort of intentional infliction of emotional distress; but in doing so, it restricts her to a theory which, as Justice Hecht observes, is "seldom successful." n87

Finally, Justice Spector explores how strict intent requirements for torts in intimate relations miss truths about human interactions and continue to make women bear the physical, emotional and legal burden of their male partners' abuses and insensitivities.

This court has previously made clear that the distinguishing feature of an intentional tort is "the specific intent to inflict injury." This definition of an "intentional" injury is echoed in the portion of the Restatement [of Torts] governing intentional infliction of emotional distress:

The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.

Unfortunately, in many cases, severe emotional distress is caused by an actor who does not actually desire to inflict severe emotional distress, and who is even [\*150] oblivious to the fact that such distress is certain, or substantially certain, to result from his conduct. It may well be the case, for example, that William Twyman never actually intended to inflict emotional distress upon Sheila, and never expected the injury that his conduct caused. Rather, he may have insisted on bondage activities solely for the purpose of satisfying his own desires. Similarly, Dan Boyles may have videotaped his activities with Susan Kerr not for the purpose of injuring her, but rather for the purpose of amusing himself and his friends. . . .

Sheila's recovery for William's conduct should not depend upon proof of William's sensitivity. To apply a standard based on intent is to excuse William's conduct so long as he believed his actions were harmless.

Brutish behavior that causes severe injury, even though unintentionally, should not be trivialized. Foreclosing recovery for such behavior may prevent litigation of frivolous claims; but it also denies redress in exactly those instances where it is most needed. n88

Justice Spector's forthright opinion provoked an extremely defensive and hostile reaction from another justice who spent a large portion of his concurrence vehemently attacking Spector and her dissent. The gender dynamics on the court between the justices became a further, thinly veiled issue that competed with the gender dynamics in the law and between the parties. Cases like *Twyman* clearly show how much gender matters in tort law and how tort law has been and often continues to be unavailable or unresponsive to women's needs in the locations, like the home, where women are most often injured by others.

The next two cases also explore the place for tort claims when intimate relations go awry. Amatory, n89 or as they have been pejoratively [\*151] been called, "heart balm" torts, are a fascinating area for study, n90 particularly when one looks at their history of acceptance, subsequent rejection through antiheart balm legislation in most states, and then attempted reintroduction and reconceptualization in the 1990s. n91 In a factually intriguing case that combines issues of cultural and sexual biases, Ohio appeals court judge Ann McManamon confronts questions about remedies for amatory torts, fraud, and intentional infliction of emotional distress arising from a failed marriage. n92 According to his Asian Indian cultural traditions, the defendant, Dr. Singh (defendant) placed an advertisement in "India Abroad" offering his sister-in-law, Satinder Kaur, for marriage. Plaintiff, Mr. Singh, who was unrelated to Dr. Singh, answered the ad, and Kaur and Singh were soon married. The marriage was unhappy and dissolved within three years. Singh then sued the doctor for fraudulently inducing him to marry Kaur, knowing that she had an "incurable disease," which impaired her ability to have normal sexual relations, n93 and for intentional infliction of emotional distress for helping her end the marriage. The lower court dismissed the complaint as an attempt to revive an obsolete amatory action by another name. n94 After describing the crux of amatory actions, Judge McManamon decided that this claim did not fit in any of them and, therefore, was not barred by legislation invalidating civil actions for amatory claims. n95 Judge McManamon interpreted the [\*152] complaint as against public policy for a different reason, rooted in gender dynamics:

Although the complaint is couched in terms of fraud and emotional distress, it patently stems from Dr. Singh's advertisement and the negotiations which offered his sister-in-law for marriage. Although other cultures may recognize the marketing of brides, we cannot respond to a demand that Ohio courts enforce or condone such activity. The [Ohio] Married Woman's Act of 1887 effected a radical change in the rights of married women while removing most of their common-law disabilities. Married women were given equal rights with their husbands to contract, take, hold and dispose of property without their husband's consent, and to sue or be sued alone. The intent of the Act was patently to emancipate women and to place them on equal footing with men in respect to their rights and liabilities.

From that date, women may not be considered the personal chattels of men, whether they are merchandised by relatives in magazine advertisements or otherwise. Persons who adhere to such customs are free to pursue them, but should they ultimately be dissatisfied with a wife so selected, we hold it is against the public policy of this state to treat these agreements as enforceable. n96

Judge McManamon then recharacterizes what the plaintiff really seeks to do in this case:

Further, Harbhajan Singh argues, in effect, that his wife was defective since she had an unnamed "incurable disease" which adversely impaired her ability to have normal sexual relations. Again, we hold, as a public policy, that this state cannot recognize a cause of action which treats female persons as goods and subjects others to suits if the women themselves are found unacceptable. Harbhajan Singh's attempt to craft a [\*153] "defective-bride" cause of action by framing his complaint in terms of fraud and intentional infliction of emotional distress is unavailing. These claims are clearly premised on an alleged "defect" in Satinder Kaur which Dr. Singh allegedly did not disclose before the marriage. Such claims are against public policy and their dismissal was proper. n97

Reconstructing Singh's complaint as a "defective bride" cause of action, McManamon finds that it violates public policy concerning the emancipation and equality of women. n98 Nonetheless, her opinion also assumes that the fraud and intentional infliction of emotional distress claims could be actionable in

this context, and so she explains the application of those torts to the facts in the case n99 -- educating students about fraud and the elements of intentional infliction of emotional distress. Unfortunately, her treatment of issues of cultural difference and their relation to tort law is insubstantial, but classroom discussions on this point can still be lively and sensitizing. Among other things, we ask: If a gender-specific standard is best in sexual harassment cases like *Lehmann*, why isn't a culturally-specific standard best in cases like *Singh*?

Another opportunity to study new uses of intentional torts in intimate relations occurs in *Marshak v. Marshak*. n100 After ten years of marriage and six children, Karel Marshak asked her husband Sheldon for a divorce. n101 He became violently enraged, and as she was calling the police, he took the children and left in the car. n102 In a terribly tragic story, the father, assisted by family and friends, abducted his own children out of the country to an unknown location. n103 Ms. Marshak spent years trying to locate the children, often asking his friends and family where the father and children were. No one would [\*154] tell her. She then used police agencies and employed private detectives to find her children, but each time she finally tracked her husband and children down and acquired appropriate court orders to get the children returned, Mr. Marshak violated the orders and slipped away again. n104 At different times Ms. Marshak found them in Israel and in Brazil, but they are still at large, and she has not seen her children in nearly ten years. n105 During the course of her search, she filed a tort lawsuit against Sheldon's friend, mother, and sisters for their conspiracy to intentionally interfere with her custodial relationship with her children, for aiding and abetting in the abduction of her children, and for intentional infliction of emotional distress. She won \$ 886,499 at the trial level, but the father's friend appealed. n106 The Connecticut Supreme Court rejected the application of intentional infliction of emotional distress to this case, but did adopt a new intentional tort of child abduction based on § 700 of the Restatement (Second) of Torts. n107 Unfortunately for Karel Marshak, the tort did not apply in her case because she and her husband were not divorced and he still had joint custody of his children when he took them. n108 Only parents who violate custody or visitation orders can abduct their own children in violation of this tort. Those who assist parents maintaining lawful custody cannot be liable for violation of this tort. n109 Karel Marshak won on the legal principle, but lost the case. Therefore, she lost the judgment she had won at the trial, a judgment which barely covered her expenses in attempting to locate her children over the years. She must continue her search if she ever hopes to see her children again. In the meantime, the people who helped Sheldon abduct the children from their mother suffer no legal consequences. Should they bear some of the expenses of her search, given their role in making the abduction possible? Is this a just result?

[\*155] Students can learn from cases like *Marshak* how state courts can change the common law by recognizing new torts, yet how the courts can distance themselves from the realities in peoples' lives. Must tort law leave Ms. Marshak without a remedy? Students can also compare this tort to other intentional torts they have studied. The gender and family issues involved in child custody disputes rarely enter torts classes, but this case provides an important bridge between areas of law. In many cases where women suffered tremendous emotional harm, and even economic loss, like in *Marshak*, the courts tell us that there just cannot be a remedy for every harm, no matter how egregious. n110 I ask the students to think about why wrongs in interpersonal relations are often noncompensable, while tortious wrongs committed in business relations often permit compensation. For instance, compare the absence of amatory torts with the presence of torts for interference with contractual or prospective business relations.

#### D. Defenses to Intentional Torts -- Consent and Gender Issues

We then study defenses to intentional torts, and here I will limit my discussion to some issues regarding the consent doctrine and concerns to women. The *S.S. & G.W.* case, mentioned earlier, opens the class discussion about how

illicitly-obtained consent to sexual intercourse could result in a battery action, where a sexual partner agreed to sexual intercourse without knowledge that her partner had an incurable sexually transmitted disease. n111 There are quite a few cases about [\*156] sexually transmitted diseases, including cases about HIV-infection, from which a torts professor could choose to raise issues of battery and negligence liability when consent to intercourse was uninformed about the risk of contracting the disease. n112 How much needs to be disclosed for consent to sexual relations to be effective? Whose risk or obligation is it to get or give that information? Should this cause of action sound in battery or negligence for breach of duty to inform? Clearly these are health and safety issues of concern to women and men alike, but are there any special gender issues involved?

In a case that combines a discussion of amatory torts with a discussion of consent to sexual intercourse, the Idaho Supreme Court recently permitted a deceived wife to proceed on her battery claim against her husband for engaging in sexual intercourse with her without telling her about his other simultaneous sexual relationship. n113 One of her primary claims for damages was fear of contracting AIDS or another sexually transmitted disease. n114 The Idaho Supreme Court, reversing the lower court decision that had denied her battery claim, reasoned:

Finally, Mary Neal contends that she has alleged a prima facie case of battery against Thomas Neal. Her battery claim is founded on her assertion that although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement with another woman, she would not have consented, as sexual relations under those circumstances would have been offensive to her. Therefore, she contends that his failure to disclose the [\*157] fact of the affair rendered her consent ineffective and subjects him to liability for battery.

. . . .

The district court concluded that Thomas Neal's failure to disclose the fact of his sexual relationship with LaGasse did not vitiate Mary Neal's consent to engage in sexual relations with him, such consent being measured at the time of the relations. We do not agree with the district court's reasoning. To accept that the consent, or lack thereof, must be measured by only those facts which are known to the parties at the time of the alleged battery would effectively destroy any exception for consent induced by fraud or deceit. Obviously if the fraud or deceit were known at the time of the occurrence, the "consented to" act would never occur.

Mary Neal's affidavit states that: "[I]f the undersigned had realized that her husband was having sexual intercourse with counterdefendant LaGasse, the undersigned would not have consented to sexual intercourse with counterdefendant Neal and to do so would have been offensive." The district court opined that because the act was not actually offensive at the time it occurred, her later statements that it would have been offensive were ineffective. This reasoning ignores the possibility that Mary Neal may have engaged in a sexual act based upon a substantial mistake concerning the nature of the contact or the harm to be expected from it, and that she did not become aware of the offensiveness until well after the act had occurred. Mary Neal's affidavit at least raises a genuine issue of material fact as to whether there was indeed consent to the alleged act of battery. n115

Unlike cases of consent to sexual intercourse where the plaintiff had not been informed of existing sexually transmitted diseases, the Neal case challenges the meaning of consent to sexual relations in a [\*158] marriage context where the wife is so offended by her husband's infidelities that she would no longer consent to being touched by him if she knew. Certainly this case opens space in class to link discussions of consent to debates about the appropriateness of tort remedies for different kinds of harms in intimate relationships.

Battery liability can also result when consent to sexual intercourse is obtained from incompetent or uniquely vulnerable parties. n116 In order to illustrate how consent to intercourse can be vitiated when it was obtained through an abuse of power, I use a case about a male psychological counselor who engaged in allegedly consensual sexual intercourse with a female patient in a drug treatment center. n117 In the *Bunce v. Parkside Lodge of Columbus* case, Byron Brown was a drug center counselor at Parkside Lodge of Ohio, Inc., and Kimberly Bunce was a patient experiencing drug withdrawal at that residential treatment facility. n118 When Bunce admitted that she had consented to a sexual relationship with Brown, the lower court dismissed her complaint for sexual assault and battery. n119 The appeals court reinstated that claim because of questions about the validity of her consent:

The trial court determined that, because Bunce admitted that she had consented to intercourse with Brown, any sexual contact was consensual and, therefore, the jury could only conclude that no assault had taken place. . . . Bunce asserts that the evidence showed that she had a diminished capacity to make intelligent decisions due to both her addiction and the nature of her relationship with Brown. She therefore argues that it was a question of fact for the jury whether her consent to sexual intercourse was valid.

. . . . First, Bunce raised a question of fact as to whether she met the definition of a patient in an institution, with [\*159] Brown having care over her, as required under [the applicable criminal statute which deemed consensual sexual intercourse a battery when "[t]he offender knows that the other person's ability to appraise the nature of or control his or her own conduct is substantially impaired," or when "[t]he other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over such other person."] Clearly, at the time of the sexual acts alleged herein, Brown was in a position of control over Bunce's treatment and daily activities. Bunce in turn was obliged to rely upon his authority and, the evidence indicates, placed her trust in him.

Second, Bunce adequately raised an issue as to whether her ability to control her own conduct was diminished and whether Brown was aware of the impairment, as required by [the applicable criminal statute]. Evidence presented by Bunce sufficiently alleged that, as a drug addict seeking treatment and possibly coping with withdrawal symptoms or emotional instability, her ability to control her conduct may have been impaired. Bunce's evidence also indicated that, as an experienced counselor of chemically dependent patients, Brown could be expected to recognize his patients' vulnerability.

Because of the relationship of the two parties, the issue of whether sexual contact was consensual was no longer a simple question of whether Bunce admitted to having allowed the contact, but a genuine issue of fact as to whether her consent was the result of independent volition. We therefore find that the trial court erred in directing the verdict on the question of whether a sexual assault occurred. n120

The *Bunce* case also raises questions about professional ethics and the vicarious liability of treatment centers for harms to the patients inflicted [\*160] by counselors. Some professional malpractice issues, which are explored more in the negligence section of the torts course, may also arise in cases where physicians, lawyers, and clergy engage in sexual intercourse with their clients. Women are frequently the victims of these professional abuses, so these topics fit well in a torts course that treats gender seriously.

Battery claims for touchings without consent or with invalid consent also occur in medical contexts. n121 In a famous case concerning a University of Chicago medical experiment with DES (diethylstilbestrol, a miscarriage preventative that causes, among other things, cancerous and precancerous conditions in the reproductive tracts of children in utero), pregnant women in the hospital's prenatal clinic were secretly enrolled in a double blind study in

which they were not told about the existence of the study or the experimental nature or name of the drug they were taking. n122 The court found that although they voluntarily took the pills they were prescribed, they never consented to taking an experimental drug like DES and its administration to them could be a battery. n123 In an opinion that was later vacated on other grounds, a California appeals court made an interesting ruling that a patient's consent to surgery could be conditioned upon her physician's health, such that his failure to inform her of his HIV-positive status could turn an otherwise consented-to surgery into an unlawful touching or battery. n124 In *Faya v. Almaraz*, Maryland's highest court ruled that the failure of a physician to inform his patients of his HIV-positive status could result in negligence liability under a lack of informed consent analysis. n125

[\*161] Under a consent and battery analysis, we also study a case in which a pregnant woman who is a Jehovah's Witness was given a blood transfusion, against her clear and express wishes, in order to save her life. n126 Consent cases offer a rich array of materials that illustrate gender-biases, structural imbalances of power and knowledge, and the law's responses. Unfortunately, many cases of abuse against women occur in sexual contexts. Even some cases in a nonsexual context present troubling issues because they often portray women solely as victims or as predominantly sexual beings. A careful balance must be struck to show that women can use the tort system for remedies that harms they suffer, but with care not to show women merely as helpless victims or sexual objects. Another place in the affirmative defense materials where there are good teaching tools about tort law and women's issues are self-defense cases, concerning women who injure or kill their abusers/batterers.

I hope these few examples from my intentional torts materials have illustrated concrete applications of feminist methods to the restructuring of a torts course. Equally interesting and dramatic changes can be made in the negligence and strict liability sections of the first year torts class, but my suggestions on issues and cases to include in those sections will be saved for another article, if law professors express to me an interest in reading about them.

#### CONCLUSION

Gender matters in torts courses, with respect to both the issues that are addressed, and the cases that are selected. Some court opinions directly address gender dynamics, while others are valuable because they analyze matters of concern to women's lives. Bringing gender into torts courses does not mean promoting a particular ideological approach to torts. Gender issues can be included in courses with law and economics perspectives as readily as in courses with critical, traditional, or other perspectives. Nor does it mean that every case discussed in class must center on gender issues. What it does require is [\*162] attention to gender in the selection of cases and materials, in the construction of issues, and in the classroom dynamics.

That gender matters and affects law has recently been acknowledged from the highest bench in our land. In *J.E.B. v. Alabama ex rel. T.B.*, n127 the U.S. Supreme Court found that uses of peremptory challenges to eliminate jurors from the petit jury on the basis of gender violated the Constitution in the same way that race-based exclusions were held to violate the constitution in *Batson v. Kentucky*. n128 Justice Sandra Day O'Connor concurred, but recognized the role that gender plays in life and law:

We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them."

Individuals are not expected to ignore as jurors what they know as men -- or women. n129

She concluded that although gender matters in fact, it is better not to let it matter in rules regulating how the government practices law, referring in this case to the selection of jury members. n130 Nevertheless, she remains extremely reluctant to apply this same mandatory genderless approach to litigation between private parties. Because tort law governs litigation between private parties, tort litigation would fall outside her understanding of when the Constitution requires genderblindness. [\*163] She reaches this result by applying feminist method and asking a "woman question:"

Will we, in the name of fighting gender discrimination, hold that the battered wife -- on trial for wounding her abusive husband -- is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not. n131

When even a decidedly conservative justice on the U.S. Supreme Court uses feminist methodology to show the relevance of gender, we must take heed. There will never be a better time than now to begin to teach, learn, and practice tort law as if gender matters.

#### FOOTNOTES:

n1 For citations to most writings in American feminist torts scholarship prior to 1992, see Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 *Cornell L. Rev.* 575 (1993). Some additional relevant critiques that were not available when the overview was published are: Taunya L. Banks, *Teaching Laws with Flaws: Adopting a Pluralist Approach to Torts*, 57 *Mo. L. Rev.* 443 (1992); Leslie Bender with Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 *Chi.-Kent L. Rev.* 313 (1994); Anita Bernstein, *Law, Culture and Harassment*, 142 *U. Penn. L. Rev.* 1227 (1994); Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 *Harv. L. Rev.* 517 (1993); Joanne Conaghan, *Harassment and the Law of Torts: Khorasandjian v. Bush*, 1 *Feminist Legal Stud.* 189 (1993); Bruce Feldthusen, *Discriminatory Damage Quantification in Civil Actions for Sexual Battery*, 44 *U. Toronto L.J.* 133 (1994); Lucinda Finley, *Tort Reform: An Important Issue for Women*, 10 *Circles* 3 (1993); Jane Hinde, *Civil Remedies for Childhood Sexual Abuse*, 1 *Feminist Legal Stud.* 197 (1993); Jane E. Larson, *"Imagine Her Satisfaction": The Transformative Task of Feminist Tort Work*, 33 *Washburn L.J.* 56 (1993) [hereinafter Larson, *Imagine*]; Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 *Colum. L. Rev.* 374 (1993) [hereinafter Larson, *Seduction*]; Joan L. Neisser, *Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or Confidence?*, 26 *Ind. L. Rev.* 433 (1993); Joan L. Neisser, *School Officials: Parents or Protectors? The Contribution of a Feminist Perspective*, 39 *Wayne L. Rev.* 1507 (1993); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 *S.C. L. Rev.* 543 (1992); Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 *Mo. L. Rev.* 371 (1992); Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 *Chi.-Kent L. Rev.* 409 (1992); Carl Tobias, *The Case for a Feminist Torts Casebook*, 38 *Vill. L. Rev.* 1517 (1993); Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or A Shield for Employers?*, 11 *Hofstra Lab. L.J.* 141 (1993); Rhonda L. Kohler, *Comment, The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 *Loy. L.A. L. Rev.* 1025 (1992); Elise M. Whitaker, *Note, Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 *Ga. L. Rev.* 849 (1993); Christine W. Lewis, Jane R. Goodson & Renee D. Culverhouse, *The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment*, 55 *Ala. Law.* 33 (1994); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise* (1994) (unpublished manuscript, on file with author).

n2 Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829 (1990).

n3 E.g., Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 *Ga. L. Rev.* 849, 850 (1990); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 *Stan. L. Rev.* 1183, 1189 (1991).

n4 Matsuda, *supra* note 3, at 1189 (1991) (footnote omitted).

n5 Nancy S. Erickson gives a marvelous overview of similar concerns and advice in her article, *Sex Bias in Law School Courses: Some Common Issues*, 38 *J. Legal Educ.* 101 (1988).

n6 Originally, feminist method began by asking what was called the "woman question." See generally Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *Berkeley Women's L.J.* 64 (1985). Over the years, and after poignant critiques by women of color and lesbians, in particular, it became clear that many women believed that the word "woman" in the singular excluded them and solely represented a homogeneous group of white, middle class, heterosexual North American women. Since my understanding of asking the "woman question" is not intended to be limited only to that narrow group of women, it seems better to frame the issue as asking the "women questions." I hope no readers become confused and think I intend these questions to be asked to women instead of about women.

n7 For examinations of stereotypical representations of women in classic casebooks, see Mary I. Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 *J. Legal Educ.* 117 (1988); Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 *Rutgers L. Rev.* 309 (1990); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *Am. U. L. Rev.* 1065 (1985); Carl Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 *Golden Gate U. L. Rev.* 495 (1988).

n8 Stereotypes about women are rampant in the Restatement of Torts, particularly in the comments. See, e.g., Restatement (Second) of Torts § 46, illus. 9 (1965) (describing a party to an intentional infliction of emotional distress lawsuit as "an eccentric and mentally deficient old maid"). Why does her marital status or age matter? And even if her marital status does matter, calling her an "old maid" has different implications from calling her an unmarried or single woman.

n9 See, e.g., *id.* § 18 cmt. f., (discussing what might be offensive to "any decent married woman" and how "even the most prudish of women" would not be offended by something else). Adjectives like "decent" and "prudish" send strong messages about the reporter's or drafters' values and prejudices, which get written into our understandings of the law. In addition, the comment refers to women being treated by a physician. The comment apparently presumes that the physician is male and that only women experience offensive medical touchings. Would a hypothetical example of a male patient examined by a female physician for prostate or urinary tract problems have the same impact in the comments about offensive batteries?

n10 For a foundational early article suggesting issues of concern to women that ought to be included in torts courses, see Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 *Yale J.L. & Feminism* 41 (1989).

n11 For an introduction to gender bias in law schools, see Taunya L. Banks, *Gender Bias in the Classroom*, 38 *J. Legal Educ.* 137 (1988); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 *J. Legal Educ.* 147 (1988). A substantial body of work has further elaborated on this subject.

n12 Try a Westlaw query in the "allstates" database such as: Date(1994) & ("statute of limitations" "discovery rule") /s (incest "sexual abuse"). To vary

results, change the connectors to find cases where those phrases are in the same paragraph or change the date restriction to find cases from an earlier time.

n13 For useful examples, see the materials cited in note 1, *supra*.

n14 See, e.g., Judith Resnick, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 *Stan. L. Rev.* 1525, 1526 n.4 (1993) (noting that "[i]n May of 1993, the Society of American Law Teachers convened a conference, 'Integrating Class, Disability, Gender, Race, and Sexual Orientation into Our Teaching and Course Material'"); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299, 1344 n.114 (1988) (referring to a speech given at the Panel on Racism, Sexism, and Heterosexism in Legal Education, Society of American Law Teachers Conference (Jan. 4, 1986)).

n15 Deborah L. Rhode, *Occupational Inequality*, 1988 *Duke L.J.* 1207, 1207-08.

n16 Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* 2-3 (1989).

n17 *Id.* at 6-7.

n18 Using solely one's own reproduced materials creates problems of legitimacy with some students, particularly as a feminist law professor (were I young and just starting my teaching career, those problems would be compounded). I would be misleading other torts professors if I did not mention that teaching torts as if gender matters has its costs, problems, and pitfalls, which we must develop strategies to overcome. Exploration of those issues, however, must await another article. For some of my more general thoughts about problems of teaching law as a woman and feminist, see Leslie Bender, *For Mary Joe Frug: Empowering Women Law Professors*, 6 *Wis. Women's L.J.* 1 (1991).

n19 Torts students definitely should be familiar with the ideas in contemporary tort thinking, but I usually present them orally without asking students to read the primary sources.

n20 When we spend four weeks on intentional torts, we have very little time for products liability and none for defamation, privacy, and business-related torts. I rationalize this by convincing myself that students can pursue these issues in separate courses. This year I have solved the problem by introducing these torts through cases that combine them with other torts that I am teaching. Privacy torts are examined in conjunction with intentional infliction of emotional distress in *Howell v. New York Post*, 612 *N.E.2d* 699 (N.Y. 1993), a New York Court of Appeals decision by Chief Justice Judith Kaye deciding whether a psychiatric patient had a tort remedy for the harms she suffered when a reporter sneaked onto hospital property, took a photograph of her with her companion, Hedda Nussbaum. The photographer then published the photograph in the paper to accompany a story about Ms. Nussbaum's recovery from the trauma of being beaten by Joel Steinberg and from his beating to death their child, Lisa. To teach assault, I use *Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 518 *F. Supp.* 993 (S.D. Tex. 1981), which also teaches students about intentional interference with business relationships torts. The latter case is also useful for discussing race-based discrimination, vigilantes, and the kinds of public interest lawyering done by the Southern Poverty Law Center. Throughout negligence, we study products liability cases and raise products issues, so that we do not have a lot to cover by the end of the course.

n21 See *infra* text accompanying notes 32-55.

n22 For example, a typical Westlaw search in the "allstates" database to find intentional tort cases about battery, assault or false imprisonment would begin: Date(1994) & Court(High) & (intent intent!) /p (battery assault "false imprisonment") % Title(State Commonwealth People). For intentional torts that are also crimes, I advise the researcher to include the "but not" phrase (%) in order to exclude criminal cases (that is, cases in which the state is a party).

n23 I am ambivalent at this point about whether it makes sense to do this. On the positive side, this kind of annual survey of state supreme court cases helps keep me fresh on tort law and tort law practice in a way that improves my

teaching and hopefully the students' learning. Also, I come across wonderful cases about which I would never have known. On the negative side, it means that I am always teaching from new material, that my daily class preparation takes considerably longer, and that I always have to spend a substantial part of the summer reading through volumes of cases on the computer, to select and edit cases to include in my course materials.

n24 Usually when I teach torts at Syracuse University, it is a five-credit, one-semester course. Having taught the class five and four days per week, I have found that students make the most progress, have the highest quality discussions, and are best able to absorb the materials if we meet three times per week for longer than the traditional fifty-minute class. The longer class time permits richer investigation of case materials and treatment of more cases as a group.

n25 As I introduce particular cases I have used in my torts teaching, please remember that my teaching materials are always a work-in-progress and that my examples are intended to be illustrative, not definitive, of what is available and what can be done. My course contains many other cases found in traditional torts classes, as well as cases and materials addressing issues of race, class, and ethnicity independent of gender, but constraints of time and space require me to omit them from this article. I have included fairly long excerpts from selected cases on the theory that law professors who are considering including gender in their torts courses would benefit from seeing the language the courts use and might be unlikely otherwise to seek out and read these cases. On the other hand, I have limited my commentary about the cases. Not only do I believe that other teachers are as capable as I in analyzing the courts' approaches and policy concerns, but I also do not want my own particular interpretations to skew the possibilities for their use in torts courses by other law professors.

n26 *Frey v. Kouf*, 484 N.W.2d 864 (S.D. 1992).

n27 E.g., *Van Camp v. McAfoos*, 156 N.W.2d 878 (Iowa 1968); *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955); *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891); see Dan B. Dobbs, *Torts and Compensation* (1985); James A. Henderson, Jr., Richard N. Pearson, & John A. Siciliano, *The Torts Process* (4th ed. 1994); John W. Wade, Victor E. Schwartz, Kathryn Kelly, & David F. Partlett, *Prosser, Wade, and Schwartz's Cases and Materials on Torts* (9th ed. 1994).

n28 *Waters v. Blackshear*, 591 N.E.2d 184 (Mass. 1992).

n29 *Laurie Marie M. v. Jeffrey T.M.*, 159 A.2d 52 (N.Y. App. Div. 1990).

n30 *Id.*

n31 Unfortunately, many first-year students come to my class primed by upper-class students, usually who have not had me as a professor, with misconceptions about the content and method in my classes, feminism, feminist and gender theories, and tort law. Although I can usually disavow them of their negative preconceptions, it is always an upstream battle in the first few weeks to jettison some of this flotsam.

n32 *Villa v. Derouen*, 614 So.2d 714 (La. Ct. App. 1993).

n33 22 Am. Jur. 2d Damages § 475 (1988).

n34 See, e.g., *State Farm Fire & Casualty Co. v. Davis*, 612 So.2d 458 (Ala. 1993) (relieving an insurance company from liability under an intentional injury exclusion for its policy-holder's sexual abuse of a child); *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994) (holding that if an employer intentionally created working conditions which made an employee's injury substantially certain to occur, the employee would be free to pursue a tort action separate from and in addition to workers' compensation); *Grillo v. Nat'l Bank of Washington*, 540 A.2d 743 (D.C. App. 1988) (noting that any injuries specifically intended by the employer fall outside the exclusivity of workers' compensation); *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882 (Mich. 1986) (holding that workers' compensation exclusivity did not preclude an action by a worker alleging that his employer committed an intentional tort against him); *North*

*Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138 (Minn. Ct. App. 1988) (holding that negligent transmission of herpes through voluntary consensual sexual intercourse was arguably an accidental occurrence under a homeowner's policy, requiring the insurer to defend the underlying action); *Blythe v. Radiometer Am., Inc.*, 866 P.2d 218 (Mont. 1993) (holding that unless the workplace harm sustained by an employee was maliciously and specifically directed, the employee was limited to workers' compensation remedies); *Harn v. Continental Lumber Co.*, 506 N.W.2d 91 (S.D. 1993) (noting that whether an employer intentionally caused an employee's injury determined whether workers' compensation exclusivity applied); *State Farm Fire & Casualty Co. v. S.S. & G.W.*, 858 S.W.2d 374 (Tex. 1993) (finding a material issue of fact as to whether a man who engaged in sexual relations with a woman without informing her that he carried genital herpes acted negligently or intentionally and noting that intentionality by the man would take the woman's injury outside the scope of insurance coverage); *Loveridge v. Chartier*, 468 N.W.2d 146 (Wis. 1991) (stating that permitting insurance coverage for negligent transmission of sexually transmitted diseases would not violate public policy).

n35 *Villa*, 614 So.2d at 714.

n36 *Id.*

n37 *Id.*

n38 *Id.* The *Villa* case raises questions about the possible role of ethnicity in this battery as well. The plaintiff, Eusebio Villa, was being "teased" by Michael Derouen. We discuss whether it would matter if the motivation for the horseplay was really harassment based on race or ethnicity. How ought a court inquire into that issue in determining questions of intent?

n39 Raising issues of economic class, we explore whether injuries to one's genitals should be valued equally for all parties or should be valued depending upon one's wealth, income, prestige, status, or career.

n40 This year in the notes following the case I introduced the recent United States Supreme Court case on prohibiting gender-based uses of peremptory challenges, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and asked students whom they would prefer to have on the jury or to be the judge if they represented the plaintiff or the defendant.

n41 *State Farm Fire & Casualty Co. v. S.S. & G.W.*, 858 S.W.2d 374 (Tex. 1993).

n42 *Id.* at 376.

n43 I assume that she chose a negligence rather than intent claim because she thought it would be too difficult to prove intent or because she wanted to get to his homeowner's insurance.

n44 *S.S. & G.W.*, 858 S.W.2d at 376.

n45 Usually, the reason it is important to distinguish between intentional torts and negligence involves insurance coverage. In workers' compensation, all tort actions are preempted by a provision in the workers' compensation statute making workers' compensation an exclusive remedy for workplace injuries, unless the jurisdiction adopts a narrow exception to exclusivity for intentional torts committed against the employee. 2A Arthur Larson, *Workmen's Compensation Law* § 65.00, at 12-1 (1993). Likewise, in many insurance policies, the insurance company will refuse to pay third-party claims against the insured if the injury was intended or expected, or if the harm was not an "accident." 1B John Alan Appleman and Jean Appleman, *Insurance Law and Practice* § 451, at 248 (1981). These exclusions are justified by public policy concerns about deterrence and economic concerns about the losses insurance companies might endure if they permitted people to insure against harms they intentionally set out to cause. These concerns result in cases being framed in unusual ways in order to circumvent insurance bars to recovery.

n46 *S.S. & G.W.*, 858 S.W.2d at 376.

n47 *Id.* at 381.

n48 In many lawsuits of this kind, the defendant lacks adequate assets to pay for the damages he caused, and the plaintiff can only recover her losses if there is insurance coverage.

n49 Actually, in this case, the man made a peculiar agreement with the woman. Along with their one million dollar settlement, she signed a document relinquishing her claim to his assets in exchange for their joint pursuit of a claim against his homeowner's insurance company for coverage or bad faith and his assigning one-third of those damages to her. *S.S. & G.W.*, 878 *S.W.2d* at 376. It seems to me that he cleverly ended up not being hurt by the litigation whether he won or lost. She only recovered for her damages if he proved that his conduct was negligent rather than intentional, and if State Farm acted in bad faith. State Farm raised questions about whether his failure to cooperate with them should preclude him from recovering on the bad faith claim. The ethics of this arrangement make for a lively discussion of professional responsibility, as well as motivations to enter into agreements of this sort.

n50 *State Farm Fire & Casualty Co. v. Davis*, 612 *So.2d* 458 (Ala. 1993).

n51 *Id.* at 466.

n52 See, e.g., Robert G. Spector, Tort Liability for Transmission of a Venereal Disease, 14 *Fair are* 23 (1994).

n53 *S.S. & G.W.*, 858 *S.W.2d* at 376-387.

n54 See Larson, *Imagine*, *supra* note 1 (designing a framework for a tort of sexual fraud).

n55 Next year, as a transitional case falling somewhere between the *S.S. & G.W.* insurance exclusion case and a workers' compensation exclusivity exceptions case, *infra*, I will probably include *Middlekauff v. Allstate Insurance Co.*, 439 *S.E.2d* 394 (Va. 1994) or *Lichtman v. Knouf*, 445 *S.E.2d* 114 (Va. 1994), which hold that systemic workplace harassment causing emotional distress and psychological harm is not an "injury by accident" within the meaning of the Virginia Workers' Compensation Act, Va. Code Ann. § 65.2 (Michie 1950), such that a tort lawsuit is not barred by its exclusivity provision.

n56 279 *P.2d* 1091 (Wash. 1955).

n57 50 *N.W.* 403 (Wis. 1891).

n58 575 *N.E.2d* 428 (Ohio 1991).

n59 For an overview of this area, see Vance, *supra* note 3.

n60 2A Arthur Larson, *Workmen's Compensation Law* § 65.51(e), at 12-76 (1993).

n61 42 *U.S.C.* § 1981a (West 1994).

n62 *Kerans*, 575 *N.E.2d* at 431 (citations omitted) (quoting *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 *So.2d* 1099, 1104 (Fla. 1989).

n63 552 *So.2d* 1099 (Fla. 1989).

n64 Justice Barkett concluded that the public policy represented by Title VII, the Florida Human Rights Act, 1977 Fla. Stat. ch. 760.01-.10 (1986) (superseded 1992), and other antidiscrimination laws, as well as U.S. Supreme Court opinions and Equal Employment Opportunity Commission guidelines, would be undermined by enforcement of workers' compensation exclusivity for workplace sexual harassment:

In light of this overwhelming public policy, we cannot say that the exclusivity rule of the workers' compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the

exclusivity rule of workers' compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964.

This, we cannot condone. Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law.

*Id.* at 1103-04.

n65 *Swenson v. Northern Crop Ins. Inc.*, 498 N.W.2d 174 (N.D. 1993).

n66 *Id.* at 176.

n67 *Id.* at 181.

n68 *Id.*

n69 *Id.* at 187.

n70 *Id.* at 183.

n71 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). About the decision to deny Myra Bradwell the right to practice law, Levine observes: "It may be that no reasonable jury in 1873 would have found Bradwell's exclusion outrageous. But, surely, the same cannot be said about juries in 1993. Fortunately, former custom does not prevent present practice from constituting extreme and outrageous conduct." *Swenson*, 498 N.W.2d at 188 (Levine, J., concurring specially).

n72 *Motion to Admit Miss Lavinia Goodell*, 39 Wis. 232 (1875). Justice Levine's rendition of the Goodell case is so wonderful, that I share the entire account:

Goodell's case commands special attention as a paradigm of conventional thinking about women. Chief Justice Ryan, in a unanimous opinion for himself and the two justices who then comprised the Wisconsin Supreme Court, denied Goodell's application squarely on the basis of her sex. He explained, in excruciating detail, the common law tradition of excluding women from the profession of law, because: "The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. . . ."

As for lawyerly skills, women were found sorely deficient:

"There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. . . ."

One might ask, but I won't, whether women's record of accomplishments in "the juridical conflicts of the court room" does not pierce Chief Justice Ryan and the common law's view, shared by a few others, that women are not qualified for the battlefield. Actually, given Chief Justice Ryan's sentiment that the practice of law is filled with "all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene . . .," it is small wonder anyone would willingly undertake it!

Over three years later, Goodell reapplied for admission to practice before the Wisconsin Supreme Court. The Court, enlarged to five members, granted her application. Chief Justice Ryan dissented!

*Swenson*, 498 N.W.2d at 187-188 n.1 (Levine, J., concurring specially) (citation omitted) (quoting *Goodell*, 39 Wis. at 245).

n73 *Id.* at 188.

n74 *Id.* at 188-189 (citations omitted).

n75 I have constructed an outline that I distribute to students as part of the reading on these issues. The outline explains: the multiple approaches to sexual harassment claims, of which tort is one; quid pro quo and hostile environment harassment; sex-based and gender-based harassment; and, other basic premises and issues that arise in sexual harassment litigation.

n76 *Lehmann v. Toys 'R' Us*, 626 A.2d 445 (N.J. 1993).

n77 *Id.* at 459 (citations omitted) (quoting Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203, 1206 n.97 (1989)).

n78 *Id.* (citations omitted) (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (1991)). A recent article which discusses the intersection of tort and civil rights issues and cites to the major writings on the topic is Brian Owsley, Racist Speech and "Reasonable People:" A Proposal for a Tort Remedy, 24 Colum. Hum. Rts. L. Rev. 323 (1993).

n79 See generally Kohler, *supra* note 1; Scherer, *supra* note 1 (providing overviews of tort actions for domestic violence). If the selected cases do not adequately describe the extent of domestic violence against women, I recommend including some materials detailing the pervasiveness of the problem and informing students about other nontort alternatives that have developed such as statutory responses like the Violence Against Women Act of 1994, 108 Stat. 1796, 1902 (1994), orders of protection, mandatory arrest policies, and battered women's shelters.

n80 *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

n81 *Id.* at 620.

n82 This case ought to be read in conjunction with a companion case about emotional distress in intimate relations decided by the Texas Supreme Court the same term, *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (reversing the lower court's ruling for the plaintiff on an invasion of privacy claim, noting that there is no general duty in Texas not to negligently inflict emotional distress). In my class I refer to *Boyles* at this point, but save the case for when we get to negligent infliction of emotional distress. Justice Spector sees how the cases are linked and argues in her *Twyman* dissent:

Today's decision is handed down contemporaneously with the overruling of the motion for rehearing in *Boyles v. Kerr*, in which this court reversed a judgment in favor of a woman who was surreptitiously videotaped during intercourse, then subjected to humiliation and ridicule when the tape was displayed to others. In *Boyles*, as in this case, a majority of this court has determined that severe, negligently-inflicted emotional distress does not warrant judicial relief -- no matter how intolerable the injurious conduct. The reasoning originally articulated in *Boyles*, and now implied in this case, is that "[t]ort law cannot and should not attempt to provide redress for every instance of rude, insensitive, or distasteful behavior"; providing such relief, the *Boyles* majority explained, "would dignify most disputes far beyond their social importance."

Neither of these cases involves "rude, insensitive, or distasteful behavior"; they involve grossly offensive conduct that was appropriately found to warrant judicial relief.

*Twyman*, 855 S.W.2d at 641 (Spector, J., dissenting) (citations and footnote omitted) (quoting *Boyles v. Kerr*, 36 Tex. Sup. Ct. J. 231, 233-234 (1992)).

n83 Cf., Heather S. Call, Note, Tort Law -- Intentional Infliction of Emotional Distress in the Marital Context: *Hakkila v. Hakkila*, 23 N.M. L. Rev. 387 (1993) (discussing a similar case in which the New Mexico Court of Appeals recognized the tort of intentional infliction of emotional distress in a marital setting).

n84 *Twyman*, 855 S.W.2d at 620.

n85 *Id.* at 641 (Spector, J., dissenting).

n86 Letter from Ellen S. Pryor, Professor of Law, University of Texas at Austin, to Leslie Bender (June 20, 1994) (on file with author).

n87 *Twyman*, 855 S.W.2d at 640. (Spector, J., dissenting) (footnote omitted) (quoting (1) Martha Chamallas and Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814 (1990); (2) W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, Prosser and Keeton on the Law of Torts § 12, at 55-56 (1984)); (citing *Wilkinson v. Downton*, 2 Q.B.D. 57 (1897); *Hill v. Kimball*, 13 S.W. 59 (1890)). In another section of her dissent, Justice Spector contextualizes the effect on women of her court's current approach to emotional distress claims:

Given this history [that emotional distress claims are usually brought by women], the plurality's emphatic rejection of infliction of emotional distress claims based on negligence is especially troubling. Today, when the widespread mistreatment of women is being documented throughout the country -- for instance, in the areas of sexual harassment and domestic violence -- a majority of this court takes a step backward and abolishes one way of righting this grievous wrong.

*Id.* at 643 (Spector, J., dissenting).

n88 *Id.* at 644 (Spector, J., dissenting) (citation omitted) (quoting Restatement (Second) of Torts § 46, cmt. i (1965)).

n89 Traditional amatory torts are alienation of affections, criminal conversation, seduction, and breach of promise to marry. Recently lawyers have tried to use intentional infliction of emotional distress to achieve some of the same remedial goals that motivated the development of these torts.

n90 Jane Larson has written a marvelous, comprehensive article about the tort of seduction, citing many cases that would be wonderful to use in a torts class. See Larson, Seduction, supra note 1.

n91 For example, see *Neal v. Neal*, 873 P.2d 871 (Idaho 1994), where a wife attempted to bring a claim for criminal conversation (a civil action for adultery) against her husband and his lover along with her counterclaim for divorce. The court decided in *Neal* to abolish the cause of action for criminal conversation in the state and also to deny permission for her to claim any damages for breach of trust, lack of fidelity, intentional interference with marital relationship or even fear of contracting sexually transmitted diseases because she could not prove actual exposure to a disease. *Id.* at 873-76.

n92 *Singh v. Singh*, 611 N.E.2d 347 (Ohio Ct. App. 1992).

n93 When I read that Ms. Kaur had an "incurable disease" affecting her sexual activity, I assumed she had a sexually transmitted disease. Instead, it turns out from later pleadings filed by the plaintiff that what he was referring to "lower back problems." *Id.* at 351.

n94 *Id.* at 349.

n95 *Id.*

n96 *Id.* at 350 (citations omitted).

n97 *Id.*

n98 *Id.*

N99 *Id. at 350-51.*

n100 628 A.2d 964 (Conn. 1993).

n101 *Id. at 965.*

n102 *Id. at 966.*

n103 *Id. at 967.*

n104 *Id.*

n105 *Id.*

n106 *Id. at 968.*

n107 *Id. at 968-70* (citing Restatement (Second) of Torts § 700 (1977)).

n108 *Id. at 971.*

n109 *Id. at 971-72.*

n110 Another useful case where a court finds no remedy for an egregious harm is *Garland v. Herrin*, 724 F.2d 16 (2d Cir. 1983). Bonnie Garland was brutally beaten and killed in her bedroom in her parents' home by her former boyfriend, Herrin. Her parents, who awoke to find their daughter's bludgeoned body, sued Herrin for intentional infliction of emotional distress. Despite the court's sympathy with their emotional distress, Judge Pratt ruled that third party bystanders could not recover for intentional infliction of emotional distress. *Id. at 17.* This painful scenario raises important questions about violence in intimate relations, about what relationships and harms courts will acknowledge, and about tort law's role as a remedy.

n111 *State Farm Fire & Casualty Co. v. S.S. & G.W.*, 858 S.W.2d 374 (Tex. 1993). Of course, these cases can also be litigated as negligence actions based on breaches of duties to inform or warn. See, e.g., *Tischler v. DiMenna*, 609 N.Y.S.2d 1002 (N.Y. App. Div. 1994) (holding that a girlfriend established a prima facie claim of emotional distress for fear of contracting AIDS from her boyfriend in that the boyfriend owed a duty not to intentionally or negligently inflict mental distress on her); *Mussivand v. David*, 544 N.E.2d 265 (Ohio 1989) (holding that a husband established a negligence cause of action against his wife's lover who exposed the wife, and, therefore, indirectly exposed the husband to a venereal disease).

n112 E.g., *Doe v. Johnson*, 817 F. Supp. 1382 (W.D. Mich. 1993); *Mussivand*, 544 N.E.2d 265; *Berner v. Caldwell*, 543 So.2d 686 (Ala. 1989); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. 1984); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988).

n113 *Neal v. Neal*, 873 P.2d 871 (Idaho 1994). An attorney's deception about his infertility vitiated his client's consent to intercourse in *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

n114 *Neal*, 873 P.2d at 876.

n115 *Neal*, 873 P.2d at 876-77.

n116 For example, statutory rape laws, and tort battery actions based on them, presume that an underage person is incapable of giving valid consent.

n117 *Bunce v. Parkside Lodge of Columbus*, 596 N.E.2d 1106 (Ohio Ct. App. 1991). Accord, *Roy v. Hartogs*, 381 N.Y.S.2d 587 (N.Y. 1976).

n118 *Bunce*, 596 N.E.2d at 1107.

n119 *Id. at 1110.*

n120 *Id.*

n121 A classic case is *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266 (Mass. 1891), which takes on new meaning when read in conjunction with the recent symposium in the Missouri Law Review. Symposium, Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on *O'Brien v. Cunard S.S. Co.*, 57 Mo. L. Rev. 351 (1992). See Banks, supra note 1; Shalleck, supra note 1.

n122 *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978).

n123 *Id.* at 718.

n124 *Kerins v. Hartley*, 860 P.2d 1182 (Cal. Ct. App. 1993), vacated and remanded, 868 P.2d 906 (1994) (en banc) (remanded for reconsideration in light of *Potter v. Firestone*, 863 P.2d 795 (Cal. 1993) on issue of viability of fear of AIDS claim), on remand, 33 Cal Rptr. 2d 172 (1994).

n125 620 A.2d 327 (Md. 1993).

n126 *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990). Other cases in which a pregnant woman's consent or lack of consent is approached by doctors or the courts with doubts about her decisional capacity include forced cesarean sections, termination of life support for pregnant women in comas, and living wills statutes' pregnancy clause exceptions.

n127 114 S. Ct. 1419 (1994).

n128 476 U.S. 79 (1986).

n129 *J.E.B.*, 114 S.Ct. at 1432 (O'Connor, J., concurring) (citations omitted) (quoting *Beck v. Alabama*, 447 U.S. 625, 642 (1980)).

n130 *Id.*

n131 *Id.* at 1433.