IMPORTING FEMINIST THEORIES TO CHANGE TORT LAW

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For most of my career as a law professor, I have taught courses in two areas. I have taught the basic Torts course to first year students, and for the upper class students I have offered a cluster of courses centering on social inequality, women's rights, and feminism. For the first ten years of my career, I did not put the two together. I located feminism and women's issues mainly in the context of constitutional law, employment discrimination or domestic law. I thought the world of torts was divided principally along lines of plaintiffs/victims and defendants/injurers, without an obvious connection to gender.

Approximately ten years ago, I began to see a connection between torts and feminism. I noticed that, in contrast to my male colleagues who taught Torts, I felt a need to spend more class hours on intentional torts, emotional distress and relational interests. I had a vague sense that these areas were of special importance to women and I did not want to omit them from the syllabus in order to make room for more discussion of strict liability or law and economics. By the late 1980s, moreover, a new genre of scholarship began to emerge that applied insights of feminist legal theory to specific tort doctrines.

If we stop to think about this for a moment, it should come as no surprise that tort law is ripe for feminist analysis. Ever since the writings of the legal realists, we have realized that the major concepts in tort law — duty, negligence, proximate cause and legal injury — are value laden inquiries that cannot be separated from considerations of social policy. Feminist writers are now going beyond the legal realists to investigate the role that gender ideology and unconscious gender bias play in our understanding of these basic tort concepts.

My goal in this essay is to take you back to first semester Torts class. You remember that somehow that year you learned to think like a lawyer — you did not discover many answers but slowly you began to ask the right questions, to separate the relevant from the irrelevant and to trace out the logical implications of rules or principles. This time, however, I want you to imagine that you are learning Torts for the first time and at the same time you are learning to think like a feminist. Despite the great diversity in feminist thinking and the multiple schools of feminist thought, there are a few recurring "moves"

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that feminists often use in their analyses of the law. These moves place women at the center rather than at the margin of the study of law. You will know you have learned to think like a feminist when these moves feel as natural to you as distinguishing a case.

Because I have never been good at keeping secrets, let me list the three feminist moves at the outset. In looking at tort law, I believe first, feminists will be suspicious of generalizations based on sex and explicit sex-based distinctions; second, feminists will want to tease out the implicit male bias in apparently gender neutral rules or principles; third, feminists will place great importance on women's experience and will be on the lookout for how the law fails to express women's experience in its recognition of legal injuries.

The first feminist move — suspicion of sex-based distinctions and generalizations — is the most familiar move to those of us who lived through the 1970s, an era that is sometimes called the Equality Stage or the era of liberal feminism.[1] The primary emphasis of feminist writing and activism in this era was on stressing the similarities between men and women. This was the philosophy behind the ERA. The central message of the 1970s was that gender should be irrelevant to the distribution of legal benefits and burdens and that persons should be treated as individuals, rather than as members of an ascribed class.

Before the line of equal protection cases that Ruth Bader Ginsburg and other women's rights litigators brought to the Supreme Court in the 1970s, tort law (like virtually all other areas of the law) used explicit gender lines to determine legal entitlements. Only husbands could recover for the loss of spousal consortium when their wives suffered a disabling injury. Women, not men, had a cause of action for breach of a promise to marry. Without much fanfare, the courts gradually abolished explicit gender distinctions and either extended the cause of action to both genders (like loss of consortium) or abolished the claim altogether (like breach of promise to marry). Thus there now seems to be an acceptance that under the law men and women should not be considered separate and opposite classes of persons. Formal equality — treating men and women the same on the face of the law — is now a dominant theme in the law.

Despite these changes, feminists cannot afford to forget this first feminist move. Formal equality theory still poses a challenge to deeply ingrained legal practices. For example, I recently completed some research on the award of damages in tort actions, focusing on the important element of loss of future earning capacity.[2] I found that one

1. For discussion of the stages of feminist legal theory, see Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L. J. 191 (1989-90); Clare Dalton, *Where We Stand: Observations of the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L. J. 1 (1988).

2. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).

prominent exception to the hostility against the use of explicit gender distinctions is the common practice of using gender-based tables to determine loss of future earning capacity. Particularly when a young woman is injured and there is no track record of earnings, economists will estimate this element of damages by using data based on economic patterns for women only — both to project how many years the plaintiff would have worked and how much she would have earned. In my work on the Gender and Race Bias Taskforce for the Supreme Court of Iowa, I discovered that litigators and judges often uncritically accept these explicitly gender-based projections, despite the fact that the practice dramatically reduces awards for women, magnifies past and present employment discrimination and seems to be a clear violation of equal protection. Perhaps because this gender-based generalization is hidden from view under a maze of statistics, there is yet little recognition of its capacity to devalue the potential of women and deprive women of fair compensation for their injuries.

The second feminist move — uncovering implicit male bias in neutral legal standards — is perhaps the most important of the three moves I will discuss. To tease out implicit male bias, there must first be an examination of the real life impact of laws on women as a group. It is a variant of disparate impact analysis. The technique is to discover how even noncontroversial legal standards can sometimes systematically disadvantage women. When I speak of "male bias" I am including practices that have a negative, even if unintended, impact.

Let me give you two examples from contemporary torts scholarship. The first involves the claim for negligent infliction of mental distress.[3] The technique of teasing out male biases is useful here for exposing the gender effects of legal hierarchies. The law of torts, for example, values physical security and property more than emotional harm and human relationships. This apparently gender neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has disadvantaged women, who often do the emotional work of maintaining relationships. This has meant, for example, that the law was late in recognizing the claim of a mother who suffered nervous shock when she witnessed the negligent death or injury of her child. I believe that the law's reluctance to compensate for emotional harm in these "bystander" cases was part of a general devaluation of maternal and reproductive claims that were linked to women plaintiffs. This kind of subtle bias is not the same as saying that men and women are treated differently or that there are different rules for men and women. In fact, the law has treated male and female "bystanders" the same. Rather, the claim of bias here is analogous to the claim of discrimination in the comparable worth context. The core of the comparable worth claim is that jobs in which women

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

predominate are valued less than jobs in which men predominate. Similarly, tort claims associated with women and their interests are often placed lower in the hierarchy than claims more commonly associated with men and their interests.

In the contemporary debate about tort reform, the gendered hierarchy of damages comes prominently into play. Lucinda Finley, for example, has criticized a proposal before Congress that would cap non-economic losses in health care liability actions — cases of medical negligence or products liability cases involving a medical product.[4] These are cases in which women plaintiffs predominate. Most importantly, because women tend to have smaller economic losses than men of the same age, non-economic losses are particularly important to this group of plaintiffs. The proposed cap thus has a double negative effect on women — it restricts an important element of damages for women in those very cases which women tend to bring. From a non-gender lens, the reform to cap non-economic damages might seem fair because such damages are harder to quantify than wage losses or medical bills. From a feminist perspective, however, the reform is unfair because it fails to compensate women for injuries to their fertility and other important relational interests and falls disproportionately on women with low earning power. Particularly when you consider that gender-based data is used to lower awards for women for loss of future earning capacity, the capping of non-economic damages would further tilt the torts system away from women's interests.

The third feminist move — placing high value on women's experience — can be traced to consciousness-raising groups of the late 1960s and early 1970s where women were encouraged to express their subjective responses to everyday life and discovered that their personal problems also had a political or social dimension. The emphasis on women's experience is especially useful to identify exclusions in the law, particularly those injuries that have not been recognized or have been minimized because women's experience is not expressed in the law.

The story of the recognition of sexual harassment is perhaps the best example of the grassroots development of a legal claim grounded in women's experience. Although sexual harassment of women on the job occurred long before the mid-1970s, it was not until that time that the injury was given a name and challenged as a form of sex discrimination in employment. Before then, harassing conduct was apt to be dismissed as a personal flirtation or the inevitable by-product of mixing the sexes at work. A transformation in the cultural meaning occurred when women workers began to express their negative response to touching, jokes, propositions and other sexualized conduct

4. Lucinda Finley, *Tort Reform: An Important Issue for Women*, 2 CIRCLES: BUFF. WOMEN'S J. L. & SOC. POL'Y 10 (1993). *See also* Pamela Anagnos Liapakis, *Tort Reform Could Leave Women Shortchanged*, NAT'L L. J. C2, July 24, 1995.

at work and to tell why they felt powerless to complain. Starting from women's experience and perspective, feminists were able to cast sexual behavior in a different light: to argue that what was pleasurable or inconsequential from the harasser's viewpoint was disturbing and serious when seen from the eyes of the target.

This attention to women's experience and perspective is beginning to have an impact on tort law. We are looking more closely at the staple of tort law — the reasonable person — and recognizing that, in some situations, gender influences one's perceptions and experiences.[5] Because women as a group are more vulnerable to sexual attack, exploitation and coercion, it is reasonable for women to be more wary of sexualized conduct that has the potential for escalation. In a recent case from the Supreme Court of Ohio — *Kerans v. Porter Paint Co.*[6] — the Court held a company responsible in tort for failing to take corrective action against an employee who had a history of sexually harassing behavior and posed a threat of sexual harassment against fellow employees. Ten years ago, this plaintiff would not have had much of a chance of winning a negligence action of this kind. The duty to provide a safe work environment would probably not have been thought to have anything to do with sexual harassment. Additionally, the shift in cultural understanding of harassment is likely to influence the adjudication of claims for intentional infliction of mental distress. The flexible standard for this cause of action — whether the defendant's conduct is extreme and outrageous — is capable of responding to women's perspectives.

In these precedents I see tort law evolving to address sex discrimination, sexual harassment and sexual violence in a more serious and aggressive fashion. At a time when the dominant trend is to cut back on remedies for plaintiffs, there is also a counter trend to recognize new harms and to redefine what is wrongful by paying more careful attention to women's real life experiences.

I hope that these examples give you some idea of what I mean by "thinking like a feminist." Like the skill of thinking like a lawyer, it provides a way of framing questions with few definitive answers. I want to close by relating a question a student asked me in my Women and the Law class. She wondered whether it was possible to think like a lawyer and a feminist at the same time. I should have let her answer that question for herself after she finished the course. Instead, I could not resist saying that I believed that feminist analyses greatly enriched the law and that the question should be reframed to ask

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5. *See* Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. OF L. & FEMINISM 41 (1989); Kathyrn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. OF WOMEN & L. 95 (1992).

6. 575 N.E.2d 428 (Ohio 1991). *See* Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115 (1994).

whether it was possible to think like a lawyer without giving some thought to women.