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Book Review: The Measure of Injury: Race, Gender, and Tort Law

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It was originally believed that the ‘reasonable man’ standard was gender neutral . . . . But man is not generic except to other men . . . . Because ‘reasonable man’ was intended to be a universal term, the change to ‘reasonable person’ was thought to continue the same universal standard without utilizing the gendered term ‘man.’ The language of tort law was neutered, made ‘politically correct,’ and sensitized. Although tort law protected itself from allegations of sexism, it did not change its content and character.1

Tort law typically is not what first comes to mind when discussing areas of the law ripe for social justice-minded reform. As Martha Chamallas writes, “[g]ender and race have disappeared from the face of tort law. The old doctrines that explicitly limited recovery exclusively to one gender have been either abolished or extended on a gender-neutral basis.”2 In my Tort Law course, there was little if any discussion of how tort reform could promote race and gender equality. I was excited by a book that promised an intersectional analysis of tort law, and for the most part, The Measure of Injury3 lived up to my expectations.

INTRODUCTION

In The Measure of Injury: Race, Gender, and Tort Law, Martha Chamallas and Jennifer B. Wriggins explore how the social identity of victims and cultural views on gender and race affect contemporary tort law in the U.S. While tort law has generally been seen as a domain where victims are viewed without attention to their gender or race,4 The Measure of Injury proposes that unconscious biases, cultural values, and cause-and-effect judgments influence decision-making in tort law. To inform their analysis of gender, race, and tort law, Chamallas and Wriggins draw from feminist theory, critical race theory, and

social and cognitive psychology. While there is substantial existing scholarship on torts as a gendered area of law, Chamallas and Wriggins take a novel approach to the subject by examining the interface between gender and race. The text sheds valuable light on the interplay between these two identities that are often treated as wholly distinct axes of oppression in legal scholarship. The analysis of how the tort law system devalues minority and women plaintiffs that The Measure of Injury provides is an insightful contribution to torts scholarship and should shape discussions of how we, as a society, want to compensate victims and deter future harms.

**THEORETICAL FRAMES**

Chamallas and Wriggins begin by explaining the theoretical frames they use to inform their approach to tort law. They define their approach as “critical” because it sits outside of the two dominant tort theories popular today—law and economics and corrective justice (p. 14). While these two theories describe negligence and physical accidents as the most important areas of tort law, Chamallas and Wriggins’ scholarship focuses largely on intentional torts (p. 15). Similarly, the Third Restatement of Torts, which the authors use as their point of reference for the book, purports not to advance any policy goals, but rather, as scholar John Goldberg explains, solely to compensate the injured and deter antisocial conduct (p. 17). Chamallas and Wriggins depart from Goldberg’s view of the Restatement as a clarifying document and propose that the Restatement can also function to channel visions of how the law could or should function (p. 18). The authors critically examine the stated objectives of the Restatement and argue for a broader definition of compensation and deterrence (p. 20). Their approach remains rooted in the Third Restatement, a practical choice, while also challenging the reader’s ideas about what tort law should seek to encompass. For those not well versed in tort theory, this section is invaluable for understanding the rest of the text and provides a solid overview of the major theories the book incorporates. Although the authors assume that readers will have some basic tort knowledge, the text is very accessible and could probably be understood easily by someone with little legal background.

Chamallas and Wriggins rely heavily upon feminist theory, including liberal feminism, cultural feminism, and radical feminism, in their analysis of gender (pp. 25-26). Refreshingly, they pay careful attention to intersectional feminism and acknowledge that intersecting axes of subordination can result in a multitude of different experiences for women (p. 26). However, the authors mainly limit their intersectional analysis to the interplay of gender and race, and in doing so, they ignore other relevant intersectional identities: sexual

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orientation, disability, class, etc. (p. 23). While limiting the text to issues of gender and race makes the scope more manageable, the authors lose opportunities to explore other subordinating identities that likely influence the same types of cases.

To examine racial biases in tort law, the authors consider both explicit unequal treatment based on race and the implicit racial biases in supposedly neutral legal doctrines, as explained by critical race theorists (p. 27). Finally, the authors draw on the critical tort theories that pave the way for their scholarship. Earlier scholars fixed upon tort law as a site ripe for investigation into male bias, racial devaluation, and the disconnect between the standards used in civil rights cases and those used for determining tort liability (p. 31). The authors stress the importance of the relationship between civil rights law and tort law, and advocate breaking down the barriers between these two areas to generate a flexible vision of torts responsive to shifting social norms (p. 34). Based on this section, the authors appear to have many analytical resources available to investigate racial bias in tort law, but I found that race was consistently given less attention throughout the book. Furthermore, while the book does perform significant intersectional work, the authors often analyze race and gender separately, and in doing so, they miss the opportunity to examine the areas of tort law that most call for intersectional inquiry.

**HISTORICAL FRAMES**

In this section, Chamallas and Wriggins evaluate two broad categories of cases to demonstrate the historical roots of gender and race in the structure of tort doctrine and damages awards (p. 36). The authors use nervous-shock cases, in which a victim alleges damages based on fright, to illustrate the categorization of harm caused by fright as a purely mental injury rather than a physical harm, despite the fact that victims of nervous shock often suffered accompanying physical harms such as miscarriages (p. 40). Until recently, such mental harm cases were not eligible for recovery (p. 40). This prior exception to the liability rule revealed the implicit valuation of the defendant’s actions and the devaluation of women’s claims (p. 42). Chamallas and Wriggins thoroughly analyze four nervous-shock cases and show how they reinforced stereotypes of upper-middle class white women as weak, childbearing dependents and discouraged male victims from characterizing their harms as fright-based (pp. 42, 45). The authors use their analysis of nervous-shock cases to set up the dichotomy between physical and emotional harms in tort law, a divide that affects recovery for female plaintiffs even today, despite the facial neutrality of the distinction between emotional and economic harms (p. 47). This section of the book clearly shows how women’s injuries are systematically devalued, and the cases the authors chose to analyze support their assertions well. The most interesting part of this section was the way the authors scrutinize how nervous-shock cases also impacted the types of claims that men brought and, in doing so,
reinforced norms about masculinity. This section left me wondering in later chapters about other torts that the authors discuss and their ramifications for men and masculinity. While the book uses “gender” in its title, I was disappointed that this was the text’s only examination of masculinity. Similarly, the authors never discuss transgender individuals, which would have made the book much more inclusive and forward-thinking than merely focusing on biological women.

To explore the racial history of tort law, the authors scrutinize a railroad case, Gulf, Colorado & Santa Fe Railway Co. v. Luther, where an African American female attendant chastised a white woman at the station for letting her children spill water on the floor (pp. 48-49). The Luther decision explicitly referenced the race of the attendant, stating,

What could be more humiliating to a frail, delicate, sensitive woman, with a babe at her breast and her other little ones around her, than to be pounced upon, vilified, and traduced by a negro servant in a railway depot, where her relation as passenger to its owner entitles her to be treated with respect and kindness? (p. 50)

The authors use this case to illustrate how the interaction of race and gender allowed the plaintiff to successfully claim emotional and mental distress while reinforcing stereotypes of white women as delicate and black women as unfeeling and coarse (pp. 48-52). The analysis Chamalla's and Wriggins draw from this case about whiteness as a valuable and tangible tool for recovery showcases why it is so critical to analyze not just race or gender, but the complex and subtle ways the two combine to reinforce traditional stereotypes and power hierarchies. The book would be greatly improved by examining more cases where gender and race intersect. This section is one of the strongest and shows why intersectional analysis is so important when looking at how the law reinforces deeply imbedded structural inequalities.

**INTENTIONAL TORTS**

In this chapter, the authors challenge the minimal role that intentional torts have traditionally played in legal scholarship and in the courts (pp. 63-64). The authors argue that relegating intentional torts to the margins of tort jurisprudence ignores their availability as a method for addressing a variety of intentional injuries (p. 65). The two harms they focus on, domestic violence and workplace harassment, illustrate how intentional torts are underutilized and could bring greater recoveries to women and minority plaintiffs (p. 65).

Chamallas and Wriggins identify the barriers that prevent victims from using tort law, specifically focusing on assault, battery, and false imprisonment (p. 68). Domestic violence claims used to be almost entirely blocked by interspousal immunity until it was abolished in the 1990s when domestic

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violence claims were then steered into state criminal laws instead of tort claims (p. 70). The lack of liability insurance covering domestic violence presents the highest barrier for women to recover from domestic violence claims, and the authors’ discussion presents a fascinating look at how insurance, or lack thereof, drives the kind of tort claims filed (p. 71). Because no insurance covers domestic violence, victims and their lawyers have little motivation to seek compensation in tort claims, since almost all tort judgments and settlements come from insurance policies (p. 71). Chamallas and Wriggins find that the exception for domestic violence in homeowners’ insurance policies reproduces the interspousal immunity doctrine by shutting out domestic violence claims (p. 71). The authors do an excellent job of dismantling the justifications behind this insurance exception (p. 72). The other major barrier—a shorter statute of limitations for intentional torts, which arises purely from English tradition—again shows the limited role of intentional torts (p. 73). Chamallas and Wriggins identify the gender bias in this supposedly neutral application by explaining that women are more likely to wait to exercise a domestic violence claim due to pressure to make their marriages work or to the need to first escape an abusive situation (p. 73). The authors’ investigation of these laws reveals the insidious way that laws can reproduce gender-based harms while appearing free from bias. Since most of the book is spent uncovering these biases, it is refreshing that here Chamallas and Wriggins identify practical ways that tort law could be reformed through insurance changes or extensions of the statute of limitations to remedy these biases. While it is clear that The Measure of Injury is more a scholarly investigation than a source of realistic reforms, the concrete changes that the authors do suggest are well thought out.

Workplace harassment tort claims provide a less-grim picture than domestic violence claims; the inclusion of a tort claim in an employment case increases the average award by $137,176 (p. 76). The authors focus on whether behavior that civil rights statutes such as Title VII identify as discriminatory can meet the standard of “extreme and outrageous” conduct necessary to bring a tort claim for intentional infliction of emotional distress (p. 77). A minority of states do view discriminatory workplace harassment as extreme and outrageous, but most use a much higher standard (p. 78). The authors cite a particularly egregious case of racial harassment as an example of the high standard that plaintiffs must meet, but it is unclear whether this case represents an unusually high bar or is merely an atypical illustration. I found myself wondering why the authors did not present more cases as examples (pp. 79-80). The most important theme of this section, one woven through the entire book, is that tort law should look more towards civil rights law when deciding which dignitary harms to compensate. Borrowing from civil rights law would remedy many of the hidden biases in tort law that prevent women and minority plaintiffs from recovering. This suggestion’s intermingling of the two areas of law is appealing because it would be equally useful in cases of race- and gender-based harassment, and it represents an intersectional solution to the problems the authors expose.
NEGLIGENCE

In the chapter on negligence torts, the authors focus on three different types of cases: sexual exploitation, reproductive injuries, and harm to family members (p. 91). They assert that instead of barring compensation in most cases where the sole harm alleged is emotional distress, the law should compensate in cases where the emotional harm is legitimate, even if it is the only harm the plaintiff presents (pp. 90-91). Again, the facially neutral structure of tort law that privileges physical and property-based harms over emotional ones sets up a hierarchy that disproportionately impacts women and minorities who tend to bring emotional distress claims more often (p. 92).

Although the Third Restatement recognizes that sexual injuries are more likely to cause emotional distress, the authors contend that it overemphasizes contractual relationships between the parties as a prerequisite to recovery, and that, in reproductive and sexual contexts, the duty of care should expand to allow for recovery in situations lacking a contractual relationship (p. 96). In their view, tort law should parallel constitutional law and emphasize heightened protection for reproductive and sexual rights (p. 96). The authors cite a Texas case where a woman’s boyfriend secretly taped them having sex and spread the tape around a college campus to illustrate where lack of a contractual relationship led the court to deny recovery, despite the clear emotional damage (p. 99). They contrast this case with *Corgan v. Muehling*,7 in which a therapist had sex with his patient, to her psychological detriment (pp. 99-100). In *Corgan*, the majority did not require physical harm for compensation and concluded that the therapist/patient relationship required a duty of care that the therapist exploited (p. 100). In both cases, the authors demonstrate how the power dynamics between the two parties gave rise to the reasonable expectation that the plaintiff would not be sexually exploited (p. 101). The crux of the authors’ comparison is that in both cases the plaintiff had an expectation that the defendant would not take advantage of her sexually, regardless of whether there was a contractual relationship (p. 101). This analysis draws heavily from feminist theory by conceptualizing sexual exploitation as broader than just physical coercion. Such an expansion of tort law would reinforce women’s expectations of sexual autonomy, legally as well as socially, and the authors make a convincing argument for widening the duty of care in sexual and reproductive cases.

Where reproductive rights are concerned, as in cases of stillbirths, miscarriages, and forced sterilization, the authors suggest that torts should draw from constitutional law (p. 105). For the first time in this section, the authors discuss race as it relates to forced sterilizations from the 1930s to 1970s (p. 106). I was pleased to see the authors also briefly discuss socioeconomic status, since victims of coercive sterilization were almost always impoverished recipients of government healthcare programs (p. 107). Forced sterilizations during this time

7 143 Ill. 2d 296 (1991).
period were not deemed offensive to a reasonable person’s sense of dignity because they were performed on impoverished black women who already had children (pp. 110-111). Chamallas and Wriggins propose that where reproductive harms are concerned, a higher duty of care should be imposed on doctors to elevate the emotional injuries stemming from reproductive harms and the harm to infants to the same status as property or physical damage (p. 111). However, the authors then address the problematic fact that this standard would not work in many cases and may even reward racial prejudice—for example, in cases of sperm donation mix-ups wherein the child turns out to be a different race than anticipated (p. 112). Although the authors’ proposal of a higher duty of care would assist many plaintiffs, its practical value is dubious, since the authors suggest that it may just exchange one type of bias for another. The fact that the authors still advocate for these reforms in light of their admitted shortcomings is troubling, but it also, perhaps unintentionally, provides another example of how race and gender biases can compound each other in difficult and complex ways.

In the final section on relational and bystander injuries, the authors question the dominant rule for recovery when a bystander witnesses a trauma: that only close family members may recover for emotional injuries (p. 115). For nontraditional families not made up solely of immediate biological family members, this poses a problem when non-nuclear or non-biological family members seek recovery for witnessing a traumatic event (p. 115). Recently, some courts have begun to embrace a more liberal approach to what “close family” means, including fiancés and long-term but unmarried couples (p. 116). Recognition of these relationships validates kinship relationships and should, the authors argue, be expanded to include same-sex couples, nontraditional families, and other close nonfamilial relationships (pp. 116-117). While the authors make excellent points about how this would synchronize bystander recovery claims with other areas of tort law, this section could be expanded and contain some deeper analysis of the cases. This section is slightly redeemed by its noting that nontraditional family members are often composed of racial minorities and those with lower socioeconomic status. However, there is much more relevant information to explore in this area, and it is disappointing that Chamallas and Wriggins leave this section so brief at a time when nontraditional families, particularly same-sex couples, are experiencing increasing legal recognition.

**CAUSATION**

Causation may seem like another neutral zone of tort law, but legal determinations of causation are tinged with assessments based on gender and race. Here, Chamallas and Wriggins take a creative approach to looking at wrongful birth cases and lead paint exposure cases, commonly brought on behalf of impoverished minority children (p. 119). The authors make great interdisciplinary use of cognitive and social psychology to explain what judges and jurors view as normal, thereby revealing biases made in causal judgments (p.
Psychologists have discovered that people prefer causal explanations that strike them as plausible and likely (p. 125). When bad things happen to a group that an individual considers him/herself to be part of, (s)he is much more likely to attribute the event to situational or external forces, but when a person does not consider themselves a part of that group, (s)he is much more likely to blame the victim (p. 125). This type of thinking promotes racial and gender stereotypes, such as seeing black people as lazy or stupid, while judging whites in the same situation less harshly (p. 126). The authors’ use of cognitive and social psychology to scrutinize the ways juries and judges may unconsciously make biased decisions may be the most interesting and creative interdisciplinary analysis Chamallas and Wriggins undertake, and in addition to being a particularly enjoyable section, it demonstrates how other disciplines can successfully be brought into legal scholarship to shed light on legal norms.

Wrongful birth cases (wherein pregnant plaintiffs allege that their doctors failed to give them all of the information necessary to make an informed choice about whether to abort or continue with the pregnancy) gained traction in the 1980s after Roe, when some courts began to use the but-for causation test to recognize that, but for a doctor’s negligence in failing to inform a woman of certain risks, she would have aborted her pregnancy (p. 133). Even though the doctor’s negligence did not produce the injury to the child, some courts were willing to reconceptualize reproduction as something a woman could choose not to do if she desired (p. 133). Chamallas and Wriggins explain how thinking about wrongful birth claims shifted from placing the blame on dispositional factors, such as the woman herself, to situational factors, such as a doctor’s lack of adequate testing or information (p. 134). The authors’ use of psychology to examine and explain this shift again shows the value that cross-disciplinary analysis can bring to a critique of tort law, and this section presents a surprisingly fresh analysis of reproductive rights from the tort law perspective.

Lead paint cases demonstrate another contentious area of causation influenced by racial bias (p. 139). Minority children are far more likely to experience high levels of lead exposure than white children, and plaintiffs with lead exposure have difficulty proving specific causation (p. 139). In lead paint cases, defendants typically allege that the plaintiff’s injuries, such as learning disorders and decreased cognitive capabilities, were caused by genetic factors or the mother’s behavior while pregnant or raising the child (p. 141). Chamallas and Wriggins posit that the race and socioeconomic class of typical lead paint plaintiffs associates them with problems like drug and alcohol abuse, broken families, poor schools, and other harms commonly experienced by poor urban minorities (p. 142). Defendants use discovery of the educational and medical records of the parents to prove that the child’s impairments are simply part and parcel of his/her upbringing and low class status (p. 144). The authors acknowledge that a vast array of factors play into determinations of causation,

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including conflicting studies, confusion about the causal burden that plaintiffs must prove in these cases, and scientific uncertainty about how much lead exposure may contribute or predispose plaintiffs to certain injuries (pp. 146-148). Lead paint plaintiffs must meet a higher burden of proof to recover because of racial biases that depict them as inherently less likely to succeed in life (p. 150). The authors do not shy away from the vastly complex and partially unknown relationship between genetics, toxic exposure, and learning disabilities, which injects significant ambiguity into lead paint cases. Additionally, their identification of racial prejudice here is not significantly diminished by the acknowledgment of some scientific uncertainty about lead exposure.

**DAMAGES**

In the final chapter, Chamallas and Wriggins examine the tables used to calculate lost income as well as award caps on noneconomic compensatory damages. These tables are notable because they remain race- and gender-specific when most other overt race and gender classifications have been erased from tort law (p. 159). This means that factors like women taking more time off from work for pregnancy and increased incarceration rates for black men figure into these earning tables (p. 159). As a result, women and minority plaintiffs are awarded substantially less than they would be with “blended” tables based on averages calculated from plaintiffs of all racial and gender backgrounds (p. 159). This blatant discrimination gained attention recently when the judge in *MacMillan v. City of New York* and the Special Master of the Federal September 11 Victim Compensation Fund declined to use gender- or race-based tables to calculate award amounts, using blended tables instead (pp. 155-156). The authors also compare U.S. practices with the Israeli and Canadian systems, which use blended tables to avoid replicating systematic inequalities based on class or race (p. 163). Chamallas and Wriggins make a particularly strong argument against the use of non-blended tables by pointing out that, while such tables may have described the earning power of women and minorities in the past, they are not indicative of current or future earning potential for women and minorities (p. 167). Past inequalities should not be used to influence future compensation; this both replicates past harms and ignores potential future gains made in earning power and wage equality. The simultaneous discussion of race and gender here is another of the few examples in *The Measure of Injury* where the authors combine their analysis of race and gender in a truly intersectional manner, and it left me wishing there were more such instances in the text.

The authors also tackle the subject of caps on noneconomic compensatory damages, a major issue in tort reform (p. 170). Because tort law values economic over noneconomic injuries, women are disparately burdened by caps on noneconomic compensatory damages (p. 172). Women’s injuries tend to be harder to assign an economic value because they often involve harms to relationships, dignity, and reproductive capability (pp. 173-174). Thus,
noneconomic compensatory damages frequently make up a higher proportion of
the awards given to women, which in turn negatively affects the chances that
women will be able to find representation to bring these cases (p. 175).
Chamallas and Wriggins point to a number of different types of cases to support
their claims, as well as studies showing the effect these caps have on female
plaintiffs (pp. 175-177). For the authors, the distinction between economic and
noneconomic damages is a false dichotomy, as many economic harms are just as
difficult to calculate as noneconomic ones (p. 178). The impact of damage caps
on racial minorities gets only a brief treatment, which seems due more to the
scarce research on the subject than the authors’ lack of attention (pp. 177-178).
However, since the authors seem to give less attention to racial analysis
throughout the whole book, it was a discouraging way to end the substantive
portion of the book. The authors would have been wiser to end with a section
like the previous one, which showcased the importance of intersectional analysis.

CONCLUSION

As a critical look at the intersection of gender, race, and tort law, The
Measure of Injury should prove to be a foundational book for those interested in
intersectional law and tort theory. The main theme of The Measure of Injury is
clear: despite appearances of race and gender neutrality, the identity of plaintiffs
makes a significant difference in how tort law claims are both presented and
compensated (p. 183). While Chamallas and Wriggins suggest some practical
solutions for remedying the injustices the book brings to light, their focus is
mainly on examining the structural inequalities of tort law (pp. 188-189). The
authors fiercely advocate for expanding the conceptual and practical limitations
of tort law to alleviate the disparate impacts on women and minority plaintiffs,
and they do not shy away from radical recommendations for reframing tort law.
Their interdisciplinary methodology complements the intersectional nature of the
work and lends fresh insights to their analysis. While practitioners may not find
much functional value in The Measure of Injury, the book should be of value to
scholars in law, feminism, critical race theory, and anyone interested in learning
more about the systematic inequalities of tort law. Although the election of the
first black president who ran against a female vice presidential candidate induced
much speculation about whether society was moving beyond racism and sexism,
it is clear from The Measure of Damages that society still has a long way to go to
identify and remove deep-seated racism and sexism within our own legal system.
Chamallas’ and Wriggins’ work is a substantial step forward in calling attention
to how tort law can be a vehicle for social justice as well as a more complete
method of compensation and deterrence for individual harms.

Emily Stabile

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9. For a fuller discussion of tort law as a means to promote social justice, see Leslie Bender,