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and Tort Law*

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ON RACE, GENDER, AND RADICAL TORT REFORM:  
A REVIEW OF MARTHA CHAMALLAS & JENNIFER B.  
WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER,  
AND TORT LAW*

VINCENT R. JOHNSON\*

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*The Measure of Injury*<sup>1</sup> is an intellectual *tour de force* of gender- and race-based jurisprudence applied to critical issues in the law of torts. Destined to become a landmark in legal scholarship, this book deserves to be widely read, discussed, and debated. In their compact, but rich and provocative volume, the authors—Martha Chamallas of Ohio State University and Jennifer B. Wriggins of the University of Maine—shed light on numerous issues related to the law governing accidents and intentional injuries.

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1. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010) [hereinafter *THE MEASURE OF INJURY*].

The text engages the reader both directly and indirectly. Not only do the authors raise numerous important issues, but the spirit of the book soon causes the reader to formulate other questions about how the tort system works and what it achieves. Although *The Measure of Injury* is focused more on “deconstruction” than “reconstruction,” and furnishes only limited specific proposals for reform,<sup>2</sup> the book offers insights into the American tort system and the challenges it faces. Even readers who differ with the authors’ analysis will likely admit that Chamallas and Wriggins are asking important questions that too often are not raised.

### I. A RADICAL CHALLENGE TO EXISTING TORT LAW

Persons perusing *The Measure of Injury* should not necessarily expect an “easy read.” The volume is highly intellectual, and generally assumes familiarity with not only the main features of American tort law, but with numerous key points on which scholarly and professional opinions differ regarding what the law should be. The authors’ arguments are carefully reasoned, lucidly explained, and abundantly supported by citations to theoretical literature and primary sources.

Law professors are undoubtedly one target audience. It is easy to picture *The Measure of Injury* as the focus of law school seminars. Practicing lawyers, sitting judges, and other readers more immediately interested in what courts and legislatures do today, than in what scholars say or what legal history teaches, might not persevere until they reach the heart of the argument. This is because the early sections of the book offer a detailed, but inevitably dense, discussion which locates the authors’ thesis within a broader theoretical context. However, the initial daunting geography of schools of legal theory soon gives way to a fascinating landscape where the discussions center on many of the most important torts topics of the twenty-first century and earlier eras.

#### A. Identity-Based Scholarship

The authors explain that they draw upon feminist theory (including “liberal, cultural, radical, and intersectional feminism”<sup>3</sup>),

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2. See *id.* at 6 (describing the authors’ “advice on reforming tort law [as] limited and highly contextual”).

3. *Id.* at 25.

critical race theory<sup>4</sup> (including the practices of “asking the ‘race subordination question,’”<sup>5</sup> appreciating the “racial implications of neutrally phrased doctrines,”<sup>6</sup> and requiring justification of “disparate impact”<sup>7</sup>), and general critical theory<sup>8</sup> (including “postmodernism”<sup>9</sup>). Chamallas and Wriggins reject the adequacy of the “law and economics” and “corrective justice” paradigms,<sup>10</sup> and take “for granted” much of the “Realist legacy.”<sup>11</sup> As the authors explain, “this book . . . falls under the genre of identity-based scholarship.”<sup>12</sup>

One of the things that makes the book so energetic is that the authors occasionally volley between being seemingly mainstream and revolutionarily challenging. For example, in one paragraph they say that they “start from an assumption that tort rules ought to be evaluated by their ‘real world’ success . . . rather than by some measure of internal logic or consistency.”<sup>13</sup> This statement is unlikely to alarm many old-style “Restatement-type scholars”<sup>14</sup> (i.e., “the torts establishment”<sup>15</sup>) who believe “that ‘the function of tort law is [to] compensate and deter.’”<sup>16</sup> Yet in the next two paragraphs, the authors assert that they are “highly critical of the Restatement approach and the implicit tort theory that underlies it,”<sup>17</sup> and that their goal is to effect “a change in the ‘deep structures’ of tort law . . . that . . . reflect and reinforce the social subordination of women and racial minorities.”<sup>18</sup>

### *B. Prioritizing Emotional Harm and Relationships*

The authors make clear early in the book that their quest is radical in the sense of going to the root. They challenge “the dual premises that accidental injury lies at the core of tort law and that physical injury, rather than emotional harm or injuries to relationships, is of paramount concern.”<sup>19</sup> Thus, they contest what they insist<sup>20</sup>

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4. *Id.* at 13, 26-28.

5. *Id.* at 27 (citation omitted).

6. *Id.*

7. THE MEASURE OF INJURY, *supra* note 1, at 24.

8. *Id.* at 13-14.

9. *Id.* at 16.

10. *Id.* at 14-17.

11. *Id.* at 20.

12. *Id.* at 8.

13. THE MEASURE OF INJURY, *supra* note 1, at 20.

14. *Id.* at 17.

15. *Id.* at 16.

16. *Id.* at 17.

17. *Id.* at 20.

18. *Id.*

19. THE MEASURE OF INJURY, *supra* note 1, at 2.

20. At various junctures, the authors argue that the subject of intentional tort liability

are the well-entrenched (and misguided) suppositions that the law of negligence (rather than intentional torts) is the primary focal point in American tort law,<sup>21</sup> and that tort law is mainly about liability for physical harm to persons and property damage.<sup>22</sup>

## II. CENTRALITY OF RACE AND GENDER

One of the main objectives of the authors “is to connect the current emphasis on negligence, physical harms, and economic damages to gender and race bias, broadly conceived.”<sup>23</sup> In part, the book argues “that the gender and racial contexts of tort cases [should] be made more visible.”<sup>24</sup> However, the authors go much further. They attach “fundamental” importance to gender in analyzing tort doctrines and evaluating potential reforms.<sup>25</sup> The authors assume as a given that tort law reflects “a basic pattern of male dominance,”<sup>26</sup> and that “whiteness has long served as an unstated default in tort law.”<sup>27</sup>

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is largely ignored by modern legal education to the detriment of women and minorities who will ultimately be served by law school graduates. *See id.* at 64-65, 70. Whether this is true is open to question. Admittedly, the law of negligence is complex, and it takes a great deal of time to cover all of the basic rules (relating, for example, to the reasonably prudent person standard and relevance of customary practices) and the special cases (such as the complex rules governing negligence liability for failure to act and premises-related injuries). However, most casebooks give substantial attention to both the simple intentional torts (battery, assault, false imprisonment, trespass to land and chattels, and conversion) and complex torts (such as misrepresentation, nuisance, defamation, and invasion of privacy) for which intentionally tortious conduct is either required or a common path to liability. Many of these intentional torts are tested on the widely used Multistate Bar Examination, which makes it somewhat probable that these subjects are not ignored in law school classes. Moreover, it seems likely that discussion of intentional tort liability plays a prominent role in classroom coverage of many doctrines not specifically focused on intentional tort causes of action, such as punitive damages, spoliation of evidence, concerted action liability, respondeat superior, joint and several liability, contribution, indemnity, statutes of limitations, and immunities. Some torts theorists may have largely excluded intentional torts from their research focus, but it seems doubtful that the many hundreds of professors who teach tort law in American Bar Association-approved law schools have done so. Today's graduates may be better acquainted with the contours of intentional tort liability than the authors expect. This would seem to be particularly true of students who take Advanced Torts courses at the scores of law schools where such courses are taught, since with respect to those types of subjects (such as fraud, libel, slander, appropriation of name or likeness, intrusion upon seclusion, public disclosure of private facts, false light, tortious interference with contract or prospective advantage, trade libel, and slander of title), intentional tort liability looms far larger than does negligence-based liability.

21. *Id.* at 20.

22. *Id.* at 89-90.

23. *Id.* at 3.

24. *Id.* at 7.

25. THE MEASURE OF INJURY, *supra* note 1, at 21.

26. *Id.* at 22 (citation omitted).

27. *Id.* at 28.

However, the authors say “that gender and race equity should [not] be the only goal . . . or even the most important goal of tort law in every context.”<sup>28</sup> Rather, the authors “align [themselves] with [the] ‘pluralist’ scholars who regard the quest for a unified theory of torts as futile and undesirable.”<sup>29</sup>

### A. Refining the Argument

At various junctures, the authors strive to refine their arguments relating to tort law and race. For example, after explaining for several pages that consciousness of race should infuse tort law, Chamallas and Wriggins opine that “overemphasis [can be] placed on race in calculating an accident victim’s prospects for future income.”<sup>30</sup> In the final chapter of the book, they point out (to the likely surprise and dismay of many readers) that race-based life-expectancy tables are still being used by experts who play important roles in the resolution of tort cases involving calculations of lost earnings.<sup>31</sup> The authors argue, quite appropriately, that “[w]hen courts rely on gender- and race-based earnings tables, it means that historical patterns of wage discrimination in the labor market are replicated in tort awards, even though the labor-force participation of social groups may be changing rapidly.”<sup>32</sup>

The authors also discuss tort liability related to children mixed up at birth and given to the wrong parents. They explain that sometimes the cases “involve reactions to race, when, for example, a child from an unintended [sperm] donor turns out to be of a different race than the mother or siblings.”<sup>33</sup> The authors argue that:

[t]o award a couple damages for emotional distress in such a case might well reinforce racial prejudice or racial antipathy and might be understood as making a statement that it is reasonable for a person to reject a child for the sole reason that his skin color or physical attributes are different from the plaintiffs’.<sup>34</sup>

The authors opine that in such cases it is justifiable for a court to use the doctrine of proximate causation to cut off liability to avoid

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28. *Id.* at 33.

29. *Id.*

30. *Id.* at 27-29.

31. THE MEASURE OF INJURY, *supra* note 1, at 158-70.

32. *Id.* at 159.

33. *Id.* at 112 (citation omitted).

34. *Id.*

“undermin[ing] important public policies, such as promoting racial equality or furthering the best interests of the child.”<sup>35</sup>

*B. Selective Perception and Related Risks*

Viewed in all of its complexity, the authors’ argument seems to be that matters of race should be taken into account by tort law when cognizance will benefit persons who are members of classes that have historically suffered from discrimination, but not otherwise. Nevertheless, the risk of “selective perception,”<sup>36</sup> which the authors note, is a reason why it is dangerous to focus on race at all, particularly in a society where the demographics of majority and minority are shifting. It is easy to strike the wrong balance with regard to identity-related matters, such as race and gender, about which many persons feel deeply. Some readers will protest that it is better to leave an express consideration of race out of tort law altogether. The argument would likely be that less damage is done by treating persons simply as *persons*, not as *African-Americans*, *Whites*, *Hispanics*, *Mixed-Race* individuals, and so on.

The authors correctly note that “because the tort system is committed to individualized determinations—with few checks for systemic bias—devaluation [of persons and their injuries based on race] is largely invisible and unaddressed in contemporary law.”<sup>37</sup> This is troubling particularly because lay juries often play a critical role in tort litigation decision making processes. The authors explore in detail how racial perceptions can distort even seemingly neutral inquiries, such as those related to factual causation.<sup>38</sup> However, they do not explain how the risks of harm resulting from racial bias and prejudice of jurors can be eliminated from the tort system.

A juror’s cameo appearance in tort litigation offers virtually no opportunity for affected litigants to scrutinize, or ever know, whether the resolution of their case was infected by impermissible bias or prejudice based on race, gender, or other grounds. At least with respect to judges, there is an opportunity to evaluate their conduct over a period of years. Moreover, American judges are subject to professional discipline for discriminatory conduct involving race or gender.<sup>39</sup>

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35. *Id.*

36. *Id.* at 29.

37. THE MEASURE OF INJURY, *supra* note 1, at 28 (citation omitted).

38. See *id.* at 126-27 (discussing distortion resulting from stereotyping). For a general discussion of causation, see *id.* at 119-53.

39. See MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2010) (providing in part that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias

Perhaps ad hoc lay juries should be replaced by “professional jurors” of the kind recommended by some commentators or by judges sitting as fact finders.<sup>40</sup> “England and most countries depend exclusively on judges for the resolution of disputes, completely abandoning the jury system.”<sup>41</sup> Moreover, if racial bias and prejudice are an invisible, pervasive, and ungovernable risk in lay jury fact finding, perhaps the use of lay juries does not make sense in multi-cultural societies. Maybe individualized awards of damages should be replaced by some standardized mode of compensation more akin to worker’s compensation than to the current tort system. Alternatively, perhaps lay participants in the judicial resolution of disputes should act only in conjunction with professional jurists, as is true in certain civil law countries where lay and professional judges serve as members of a joint decision-making panel.<sup>42</sup>

### C. *The Difficulties of Historical Analysis*

It may be impossible to analyze the history of American tort law fairly and accurately from a racial perspective. This is true because, as the authors candidly acknowledge, reported cases—especially recent decisions—rarely mention the racial identities of the parties.<sup>43</sup> Even older judicial opinions seldom commented on such matters. Focusing too heavily on dated tort precedents that referred to the race of the parties carries with it obvious risks. Placing analytical weight on such anomalies may distort both the explanation of legal history and recommendations bearing on current practices.

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or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation”).

40. See Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 881 (1996) (noting that “[s]ome commentators even suggest discarding the jury system entirely and, instead, conducting trials before professional jurors or judges alone to improve the system’s accountability” (citation omitted)). But see Phil Hardberger, *Juries Under Siege*, 30 ST. MARY’S L.J. 1, 12 (1998) (arguing that in Texas the powers of juries have already been excessively limited).

41. Kristy Lee Bertelsen, Note, *From Specialized Courts to Specialized Juries: Calling for Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 2 (1998); see also MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* 532 (3d ed. 2007) (stating that “[t]he jury died in England in most civil cases for a variety of reasons”).

42. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 195-96 (discussing the German version of the “mixed court” of lay and professional judges).

43. THE MEASURE OF INJURY, *supra* note 1, at 28.



In their review of tort precedent related to race and gender, the authors explore a number of important historical topics: the doctrine of coverture, which merged a woman's legal rights with those of her husband;<sup>44</sup> the "nervous-shock" cases, that often denied recovery for certain types of emotion-related harm, such as miscarriages;<sup>45</sup> wrongful-death cases, where damages were devalued because of the plaintiff's race;<sup>46</sup> and wrongful-birth cases, in which resistance to compensation for interference with the constitutional right to an abortion emerged "in a highly gendered setting,"<sup>47</sup> and courts, at least initially, tended to fix responsibility for losses relating to birth defects solely on pregnant women.<sup>48</sup> These discussions are always interesting and vividly illustrated, but readers who live in a world of instant news, and who may be reluctant to urge a court to rely on even a thirty-year-old case, may have difficulty seeing the relevance of topics related to cases decided long ago, often before Eisenhower, Coolidge, or even McKinley was president. The world has changed. It is interesting to know how courts decided torts cases prior to *Brown v. Board of Education*<sup>49</sup> or the Civil Rights Act of 1964,<sup>50</sup> but there is a valid question about what this says about courts today.

Of course, the authors' goals in offering these "[h]istorical [f]rames"<sup>51</sup> are large. The authors intend to illustrate that issues related to race and gender have always been a problem, and that there are a multitude of ways in which considerations related to race or gender can infect the tort system. This is an important and astute observation. However, even if this viewpoint is accepted as given, there remains the question of how to approach the problem. Presumably, there are at least three alternatives. One option is to place a heavy emphasis on race and gender issues. This is what Chamallas and Wriggins do with fervor, energy, and great skill in their book. Another option is to ignore these issues as much as possible in search of race-blind and gender-blind justice. The authors would argue that this is impossible because "the underlying continuity of gender and racial hierarchy . . . reproduces the same—yet different—tort law."<sup>52</sup> The

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44. *Id.* at 35-36.

45. *See id.* at 36-47 (discussing the impact of gender on "nervous-shock" cases).

46. *See id.* at 37, 52-62 (discussing the impact of race on wrongful-death cases).

47. *Id.* at 137.

48. *See id.* at 128-38 (discussing wrongful-birth cases).

49. 347 U.S. 483 (1954); *see* Vincent Robert Johnson, Film Review, *Teaching Transformative Jurisprudence*, 41 J. LEGAL EDUC. 533, 536 (1991) (suggesting that *Brown* was "the most important pronouncement ever made by a United States court").

50. 42 U.S.C. §§ 2000a-2000e (2006).

51. THE MEASURE OF INJURY, *supra* note 1, at 35.

52. *Id.* at 62.

third option is to address issues of race and gender selectively on the assumption that a lighter touch will raise consciousness without alienating those who must embrace the reforms that in many respects are needed. Chamallas and Wriggins, however, are fearless advocates. They are not concerned about alienating potential supporters of reform by over-stressing race- and gender-based issues. The authors are interested in radical change, not ameliorative half-steps.

### III. THE VICTIM'S PERSPECTIVE

Chamallas and Wriggins distinguish their approach to tort law from other perspectives, such as law-and-economics scholarship, which views tort issues from the position of the decision-maker, that is, the legislator or the judge.<sup>53</sup> In contrast, the authors focus on the “victim’s perspective,” and “the position of the governed.”<sup>54</sup> There is nothing wrong with this. Genuine concern for a victim’s plight is dictated not only by good tort theory, but by basic principles of humanity and common decency. Of course, the interests of defendants must also be considered. Justice cannot be achieved by focusing only on those who have been wrongly harmed and neglecting the interests of those wrongly accused of causing harm.

It is essential to remember that women and minorities are not only victims of tortious conduct, but also alleged perpetrators of torts. They not only sue when their privacy is invaded,<sup>55</sup> but are sued for invading the privacy of others.<sup>56</sup> Pregnant women not only suffer emotional distress when their unborn children are harmed,<sup>57</sup> but they cause emotional distress to fathers by negligently harming their

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53. *Id.* at 22.

54. *Id.* (quotation marks omitted).

55. *See, e.g.,* Alderson v. Bonner, 132 P.3d 1261, 1267 (Idaho Ct. App. 2006) (permitting recovery for intrusion upon seclusion because, even though “standing on another’s front porch and looking through a window in the door is not normally offensive,” an uninvited man’s “peering in the window at a young female, with video camera in hand and without announcing his presence, . . . is objectionable”); Pendleton v. Fassett, No. 08-227-C, 2009 WL 2849542, at \*15 (W.D. Ky. Sept. 1, 2009) (allowing an invasion of privacy claim based on intrusion to go to trial because there was evidence that a student was made to bare her breasts during a search for drugs).

56. *See* Miller v. Brooks, 472 S.E.2d 350, 354-55 (N.C. Ct. App. 1996) (holding that a privacy claim was stated against a wife who hired private investigators to install a hidden camera in the bedroom of her estranged husband’s separate residence); *cf.* Clayton v. Richards, 47 S.W.3d 149, 154, 155-56 (Tex. App. 2001) (holding that there were issues of fact as to whether a wife, who hired a private investigator to install a hidden video camera in the bedroom she shared with her husband, invaded her husband’s privacy, and whether the investigator was liable for knowingly assisting the wife in the commission of tortious acts).

57. *See* THE MEASURE OF INJURY, *supra* note 1, at 102-12 (discussing reproductive harm).

unborn children.<sup>58</sup> Women and minorities drive cars, operate small businesses, represent clients, and heal patients. When their activities produce losses, female and minority actors are sued and called upon to defend their conduct. They have rights when they are defendants, just as they have rights when they are plaintiffs. It cannot be assumed that women or minorities are only victims, or that solicitude for those groups necessitates a pro-plaintiff bias.

#### IV. APPEALING ARGUMENTS AND INTERESTING QUESTIONS

The authors raise many questions and observations that are intellectually interesting and professionally challenging. They query “whether certain types of injuries (e.g., emotional harm) or certain types of damages (e.g., noneconomic damages) have been devalued in part because of their cognitive association with women.”<sup>59</sup> Similarly, the authors observe that lead paint litigation, which has generally been unsuccessful in providing remedies to injured persons,<sup>60</sup> “most often arises in low-income, predominantly minority communities, where there is a large stock of deteriorating older buildings that pose a lead paint hazard, especially to children.”<sup>61</sup> Chamallas and Wriggins also note that although most states hold that “bystander” claims for negligent infliction of emotional distress should be limited to close family members, typically related by blood, marriage, or adoption, “this exclusion of nontraditional families can have a negative effect on minority families, which often do not mirror the white middle-class ideal.”<sup>62</sup>

Some readers will doubt the accuracy or usefulness of the authors’ assertion “that tort law reflects a masculinist viewpoint that . . . seems oblivious or indifferent to the . . . suffering many women experience,”<sup>63</sup> or that sexual abuse has been “perpetuated by male-focused standards of consent.”<sup>64</sup> The authors contend that intentional

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58. See *Tesar v. Anderson*, 789 N.W.2d 351, 361-62 (Wis. Ct. App. 2010) (holding that public policy did not preclude liability in a wrongful death action brought by a father to recover against the mother’s automobile insurer when their unborn child was stillborn as a result of the mother’s negligent driving).

59. THE MEASURE OF INJURY, *supra* note 1, at 24.

60. See, e.g., *State v. Lead Indus. Ass’n*, 951 A.2d 428, 443 (R.I. 2008) (holding that a state action related to lead paint hazards failed because there was no infringement of a “public right” sufficient to support a cause of action for public nuisance and because the state did not allege that the “defendants were in control of lead pigment at the time it caused harm to children”).

61. THE MEASURE OF INJURY, *supra* note 1, at 29; see also *id.* at 138-53 (discussing lead paint cases).

62. *Id.* at 114-15.

63. *Id.* at 25-26.

64. *Id.* at 26.

tort law and the negligence doctrine have failed “to make protection of sexual autonomy and integrity a high priority.”<sup>65</sup> However, the numerous cases holding that (male) defendants are subject to liability for transmitting sexually-related diseases,<sup>66</sup> for spying on naked women,<sup>67</sup> and for various forms of clergy sexual abuse<sup>68</sup> would seem to prove otherwise, at least in recent decades, but also in some earlier cases.<sup>69</sup>

Chamallas and Wriggins raise many issues that have natural appeal to anyone who believes that there is a moral imperative to strive to make the world a better place. Two of those issues relate to tort liability for domestic violence and reproductive injuries.

### A. Domestic Violence

The authors argue that victims of domestic violence are routinely deprived of recourse under tort law “by short statutes of limitations, . . . technical procedural rules . . . , and a system of insurance that denies coverage for women abused in their homes.”<sup>70</sup> They also argue

65. *Id.*

66. *See, e.g.*, John B. v. Superior Court, 137 P.3d 153, 161 (Cal. 2006) (holding that liability for the tort of negligent transmission of HIV does not depend solely on actual knowledge of infection and includes situations where the actor has reason to know of the infection); Doe v. Roe, 267 Cal. Rptr. 564, 564, 568 (Cal. Ct. App. 1990) (imposing liability for negligent transmission of herpes simplex II).

67. *See, e.g.*, Harkey v. Abate, 346 N.W.2d 74, 74, 76 (Mich. Ct. App. 1983) (holding that the installation of hidden viewing devices constituted an invasion of the privacy of women using a roller rink restroom, and that whether the defendant actually used the devices to observe the women was relevant only to the issue of damages).

68. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 314, 331 (Colo. 1993) (finding, in an action by a parishioner who entered into a sexual relationship with an associate priest during a counseling relationship, that there was sufficient evidence for the jury to conclude that the defendants, an Episcopal bishop and the diocese, owed a fiduciary duty to the plaintiff and that they violated that duty by negligently hiring and supervising the associate priest); F.G. v. MacDonell, 696 A.2d 697, 700, 705 (N.J. 1997) (recognizing claims for breach of fiduciary duty and negligent infliction of emotional distress arising from a clergyman’s sexual relationship with a parishioner); Doe v. Archdiocese of Cincinnati, 880 N.E.2d 892, 894, 896 (Ohio 2008) (holding that equitable estoppel is unavailable to overcome the statute of limitations applicable to a clergy sexual abuse claim); Doe 1 *ex rel.* Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 42 (Tenn. 2005) (holding that a church was not entitled to summary judgment on a claim for reckless infliction of emotional distress arising from a former priest’s alleged molestation of children); John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827, 831, 846 (Wis. 2007) (holding that a fraud claim related to clergy sexual misconduct was not barred by the statute of limitations); *see also* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 1-10 (2008) (examining the policy responses resulting from clergy sexual abuse litigation).

69. In a famous early example of judicial recognition of personal autonomy and integrity in sex-related matters, the court held that a doctor could be liable for failing to disclose that the young man he brought with him to help deliver a child lacked medical qualifications, De May v. Roberts, 9 N.W. 146, 146, 149 (Mich. 1881).

70. THE MEASURE OF INJURY, *supra* note 1, at 3.

“that violence against women in the home . . . should be treated as seriously in the law as stranger violence.”<sup>71</sup> Issues of this sort are important and certainly merit open-minded consideration.

The authors accurately note that “the most formidable barrier to tort recovery for domestic violence victims lies . . . in the law’s failure to require or encourage insurers to provide adequate protection for victims of intentional harms.”<sup>72</sup> However, despite discussing the “moral hazard” issue and calling for “serious debate,”<sup>73</sup> the authors do not offer a plan for remedying this deficiency.<sup>74</sup> The political and social obstacles to bringing domestic violence effectively within the scope of standard insurance coverage are substantial. The solution to the lack-of-insurance problem is not obvious.

### *B. Reproductive Injuries*

Chamallas and Wriggins devote great attention to torts involving sexual relations and what might be called “reproductive injuries,” harm related to sterilization, conception, pregnancy, and birth. With vivid illustrations drawn from actual disputes, and detailed consideration of cases that were badly decided, they probe issues related to compensation for emotional distress and relational injuries, as well as ancillary issues, such as consent. At some junctures the discussion is breathtaking, such as the authors’ explanation that a federal court in Maryland held that forced sterilization was not actionable as battery “because it did not cause any additional physical pain, injury or illness other than that occasioned by the C-Section procedure,” when the plaintiff was unconsensually subjected to bilateral tubal ligation.<sup>75</sup>

## V. BREAKING DOWN DOCTRINAL BOUNDARIES

Chamallas and Wriggins argue that it is necessary to rethink the boundaries between torts and domestic relations law and between torts and civil rights statutes.<sup>76</sup> They contend that this must be done in order for tort law to capture and compensate the recurrent injuries experienced disproportionately by marginalized groups as a result of

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71. *Id.* at 25.

72. *Id.* at 73.

73. *Id.* at 72.

74. Wriggins has explored potential remedies on other occasions. *See, e.g.*, Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122-29 (2001) (offering a remedy to improve upon civil liability for domestic violence torts).

75. THE MEASURE OF INJURY, *supra* note 1, at 109-10 (quoting *Robinson v. Cutchin*, 140 F. Supp. 2d 488, 493 (D. Md. 2001)).

76. *Id.* at 20.

family violence, workplace harassment, and sex-related injuries.<sup>77</sup> The authors “criticize efforts to enforce a strict separation between torts and other domains of law.”<sup>78</sup>

#### A. Cross-Boundary Tradition and Precedent

In many respects, the authors’ argument on this point is well-rooted in American legal precedent and practice. It has long been regarded as appropriate for tort law to take cognizance of non-tort legislative enactments in deciding which grievances to remedy. The most obvious example is liability imposed under a negligence per se theory based on legislation which neither expressly nor implicitly creates a civil cause of action.<sup>79</sup> It is also clear that, in many instances, a plaintiff may pursue tort-style remedies under different legal theories for harm resulting from the same course of action. For example, the fact that a victim of a deliberate falsehood might (or might not) be able to sue a defendant for violating the state’s deceptive trade practices act normally does not foreclose a claim based on common law fraud principles.<sup>80</sup>

Recognizing that provisions found in civil rights or family law statutes are important expressions of public policy that are relevant to the development of tort law is hardly a shocking idea. In *Feltmeier v. Feltmeier*, the Illinois Supreme Court reasoned that its recognition that domestic violence could give rise to an action for intentional infliction of emotional distress was consistent with state laws against domestic violence.<sup>81</sup> In *Sorichetti v. City of New York*, the New York Court of Appeals similarly found that the issuance of a statutorily authorized domestic violence protective order was an important factor supporting its decision to impose tort liability based on failure to provide police protection to a child.<sup>82</sup> It is useful to remember, however,

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77. *Id.* at 20-21.

78. *Id.* at 34.

79. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010) (discussing some statutory violations as negligence per se); Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 264-72 (2005) (discussing negligence per se principles in the context of statutory obligations to protect data). *But see* Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 285-86 (2009) (opining that “[i]t is high time for courts of last resort to move away from the problematic intent-based approach of the negligence per se doctrine and to an astute judicial policy analysis approach for harmonizing nonprescriptive legislative and administrative standards with the common law negligence standard”).

80. See, e.g., VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 166-208 (2011) (discussing actions against lawyers by clients and non-clients).

81. 798 N.E.2d 75, 81 (Ill. 2003).

82. 482 N.E.2d 70, 75 (N.Y. 1985) (finding that presentation to a police officer of a protective order issued under the Family Court Act “obligates the officer to investigate and take appropriate action”).

that good arguments can be made against breaking down the boundaries between fields of law. Three such arguments, pertinent to the authors' thesis, relate to legislative resolution of divisive issues, protection of the integrity of legal principles, and inefficiency resulting from remedial duplication.

### *B. Arguments for Separating Areas of Law*

#### *1. Deference to the Legislature*

First, judicial recognition of a new tort remedy can undercut the balance struck by legislation addressing a difficult social issue. This would seem to be particularly true with regard to statutes dealing with race and gender. In these situations, creation of a new remedy by the judiciary may displace the bargain struck by the more democratically responsible branches of government, the legislative and the executive.<sup>83</sup> In the history of Anglo-American law, there has been a tradition—often honored, sometimes ignored—of leaving the resolution of wrenching questions to legislators, rather than to judges.<sup>84</sup> Absent legislative infringement of constitutional rights, judicial deference to the legislature may be warranted by principles calling for respect of the actions of co-equal branches of government.<sup>85</sup>

This argument generally has force only if the legislature intended to strike an exclusive bargain. Anticipating this point, the authors focus on the question of whether relevant civil rights legislation includes language expressly preempting, or not preempting, common law remedies.<sup>86</sup> If a law provides that common law remedies are not

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83. This argument is weakest if judges are elected, rather than appointed. This is particularly true in light of the Supreme Court's ruling that judges and judicial candidates may announce their views on controversial issues. See *Republican Party of Minn. v. White*, 536 U.S. 765, 768, 774-80 (2002) (holding that rules of judicial ethics that bar judges and judicial candidates from announcing their views on disputed legal or political issues violate the First Amendment).

84. See Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1, 3-4 (1927) (stating that, traditionally, "[i]f the judges thought that a new remedy was necessary, they invented it, unless the invention of it would have shocked public opinion, in which event they left [the task] to Parliament").

85. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 9 (4th ed. 2009), stating that:

[I]t is often urged that certain questions are best left to the legislature because of its ability to gather facts through the legislative hearing process, to craft comprehensive solutions to broad-ranging questions, or to represent the will of the public on highly controversial issues. Presumably, the policy favoring deference to co-equal branches of government has less force where legislative or executive action is likely to be distorted by the lobbying of special interest groups, the under-representation of victims in the decision-making process, or lack of adequate funding.

*Id.*

86. *THE MEASURE OF INJURY*, *supra* note 1, at 80-81.

affected by the passage of a statute, there is little reason for courts to defer to the legislature. The authors point out, however, that even courts faced with statutes containing non-preemption language have resisted recognition of tort remedies for race- and gender-related discrimination.<sup>87</sup>

## 2. *Doctrinal Integrity*

Second, there are some boundaries between fields of law that are important to recognize because they protect the integrity of legal principles. A useful example can be drawn from the context of defective product-related tort claims. Suppose that a product purchased by the plaintiff turns out to be ineffective or does not work at all, but causes neither personal injury nor damage to other property. It is widely agreed that the plaintiff's only recourse is under contract law, and the terms of the parties' bargain cannot be circumvented by suing under tort principles.<sup>88</sup> Otherwise, "contract law would drown in a sea of tort."<sup>89</sup> A tort remedy is denied to the plaintiff in order to ensure that contract principles have meaning. Purely economic product-related losses fall on the contract side of the boundary line which sometimes runs between torts and contracts. This arrangement works because the Uniform Commercial Code has been ubiquitously adopted.<sup>90</sup> Even if the parties have not bargained about the allocation of purely economic losses, the UCC supplies default principles to resolve disputes about who should pay.<sup>91</sup>

Conceptually, it is possible that expanding the reach of tort liability to encompass certain forms of impermissible discrimination could "drown" some civil rights statutes in a "sea of tort" by providing more generous terms of recovery. This would be a significant risk in cases where a tort cause of action (such as intentional infliction of emotional distress) is interpreted to cover the same basic type of conduct for which a statute has already defined the conditions and terms of legal remedies. In this type of situation, supplanting statutory civil rights or domestic relations legislation with common law principles would reverse the normal trend of legal development. The tendency in American law has been to replace rag-tag common law

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87. *Id.* at 80.

88. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 549-52 (2009) (discussing products liability).

89. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986).

90. *Cf. Grams v. Milk Prods., Inc.*, 699 N.W.2d 167, 171 (Wis. 2005) (holding that the economic loss rule did not bar tort remedies related to injuries arising under a service contract because no body of law similar to the UCC applies to service contracts).

91. *Id.*



decisions addressing important social issues in a piecemeal fashion with comprehensive statutory solutions<sup>92</sup>—not vice versa.

Still, it is hard not to sympathize with the idea that tort law should be expanded to provide remedies for types of race- and gender-related discrimination for which there is, in many cases, no statutory avenue for redress. This might include such forms of conduct as discrimination against persons based on “how they perform their identity” by resisting stereotypes, as in the case of effeminate men, or resisting assimilation, such as by adopting “ethnic” hairstyles.<sup>93</sup> If a plaintiff can prove to a jury that such discrimination amounts to extreme and outrageous conduct deliberately calculated by the defendant to victimize the plaintiff, recovery for intentional infliction of severe emotional distress, under well-established tort principles,<sup>94</sup> should not be barred simply because no statute has created a parallel remedy.

However, the authors argue that tort law should do much more than take a “gap filler”<sup>95</sup> approach to workplace harassment. They argue in favor of pervasive remedies under tort law which reflect the public policies found in anti-discrimination statutes. More specifically, they urge that tort law can borrow from Title VII to give meaning to the outrageous conduct requirement in tort actions for intentional infliction of emotional distress.<sup>96</sup> The authors opine that, at present, intricate tort doctrines send a clear message that tort law offers little in the way of redress for domestic violence and workplace harassment.<sup>97</sup>

### 3. Duplication and Inefficiency

Third, any expansion of common law remedies into the provinces now occupied by civil rights law and domestic relations statutes would pose a risk of remedial duplication and inefficiency. These types of costs are sometimes significant because there are limited judicial resources available for the resolution of disputes.<sup>98</sup> In other contexts, certain types of claims have sometimes been rejected on the ground

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92. See JOHNSON & GUNN, *supra* note 85, at 94 (stating that the “Fair Debt Collection Practices Act is a good example of the law’s tendency to replace common-law developments with statutory ‘solutions’”).

93. See THE MEASURE OF INJURY, *supra* note 1, at 77 (noting, for example, “the African American woman who wears her hair in braids or corn rows”).

94. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 (Tentative Draft No. 5, 2007) (defining the requirements of an action for intentional or reckless infliction of emotional disturbance).

95. THE MEASURE OF INJURY, *supra* note 1, at 78.

96. *Id.* at 85.

97. *Id.* at 86-87.

98. See JOHNSON & GUNN, *supra* note 85, at 9 (discussing the importance of administrative convenience and efficiency in the formulation of tort law).

that they are duplicative. For example, in the legal malpractice field, a judge may dismiss a breach of contract claim in a suit that also alleges negligence, if the breach of contract claim amounts to nothing more than an argument that the representation was incompetent and negligent.<sup>99</sup> “False light” invasion of privacy is sometimes not recognized as a tort because it overlaps too much with well-established principles of defamation law.<sup>100</sup> And, touching someone in a sexual manner has been deemed not to constitute an actionable invasion of privacy because offensive touching is actionable as battery and “the tort of invasion of privacy was not intended to be duplicative of some other tort.”<sup>101</sup> In determining whether tort law should routinely provide remedies for forms of discrimination already addressed by state and federal legislation, some account must be taken of the costs of systemic inefficiency resulting from remedial duplication. In *The Measure of Injury*, the authors do not address this issue, focusing instead on the importance of providing better civil remedies for workplace discrimination and domestic violence.

## VI. COMPENSATING EMOTIONAL DISTRESS

A large part of Chamallas and Wriggins’s argument is aimed at expanding the reach of the two independent torts actions offering compensation for purely emotional suffering: intentional infliction of emotional distress,<sup>102</sup> sometimes called the tort of outrage,<sup>103</sup> and negligent infliction of emotional distress.<sup>104</sup> The authors’ contention is that these causes of action have the potential to redress a wide range of losses that are particularly significant to women and racial minorities.

Despite the fact that the authors compellingly state their case, their quest faces great obstacles. With respect to actions for intentional

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99. See *Oberg v. Burke*, No. 040721A, 2007 WL 1418546, at \*4 (Mass. Super. Ct. 2007) (noting a breach of contract claim cannot be characterized apart from a malpractice claim on the facts); *Sitar v. Sitar*, 854 N.Y.S.2d 536, 538 (App. Div. 2008) (dismissing the plaintiff’s claims for fraud and negligent misrepresentation because they arose from the same facts as the plaintiff’s legal malpractice claim and the plaintiff did not allege distinct damages).

100. See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579-80 (Tex. 1994) (refusing to recognize false light because defamation encompasses most false light claims and false light “lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law”).

101. *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003).

102. See *THE MEASURE OF INJURY*, *supra* note 1, at 66-87 (discussing intentional infliction of emotional distress in relationship to domestic violence and workplace harassment).

103. See, e.g., *Klinger v. Wells Fargo Bank*, No. C10-5546RJB, 2010 WL 4237849, at \*6 (W.D. Wash. 2010).

104. See *THE MEASURE OF INJURY*, *supra* note 1, at 89-117 (discussing negligence, generally).

infliction of emotional harm, many states, as the authors acknowledge,<sup>105</sup> articulate the requirements for recovery in exceptionally demanding terms. It will be difficult or impossible to reverse this course of development because the tort of outrage has been much litigated and the accretion of unfriendly precedent is substantial. Moreover, insofar as negligent infliction is concerned, the law (viewed nationally) is so muddled<sup>106</sup> that it is hard to imagine that this tort will someday offer a reliable path to recovery for seriously injured plaintiffs in cases not involving observation of the tortiously caused death or serious injury of a family member. However, the authors can take comfort in the fact that the Supreme Court of Tennessee recently opined that “the development of the law in the United States relating to negligent infliction of emotional distress claims has been to enlarge rather than to restrict the circumstances amenable to the filing of a negligent infliction of emotional distress claim.”<sup>107</sup>

If there is one obstacle the authors underestimate, it is the difficulty of quantifying emotional distress damages. Rather, the authors argue that judicial reluctance to provide compensation for emotional distress “cannot be explained or justified solely by the difficulty of measuring intangible injuries or finding a logical stopping point for liability.”<sup>108</sup>

Many types of tort damages, such as lost wages, medical expenses, and the costs of repairing or replacing property, can be ascertained with reasonable certainty.<sup>109</sup> The bills, receipts, and written cost estimates may be gathered, and the total added up. Defense counsel may dispute the reasonableness of such expenditures or the accuracy of the numbers, but the jury nevertheless has access to concrete evidence to guide its assessment of how much damage was caused by the defendant’s tortious conduct. This is even true with respect to out-of-pocket costs related to emotional distress, such as amounts spent on counseling and prescriptions. Indeed, even with regard to “parasitic damages” for pain and suffering

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105. *Id.* at 78 (stating that “[s]ome states set the bar of proof of ‘outrageousness’ so high that they allow recovery only in extremely aggravated [cases]”).

106. See JOHNSON & GUNN, *supra* note 85, at 569 (stating that “[n]o area of tort law is more unsettled than compensation for negligent infliction of emotional distress” and that “decisions continually restate the criteria for recovery, and there are often substantial differences in the requirements, or their interpretation, from one jurisdiction to the next, and within any one jurisdiction at different times”).

107. *Eskin v. Bartee*, 262 S.W.3d 727, 734, 738 (Tenn. 2008) (holding that family members stated a claim for negligent infliction of emotional distress even though they did not see the event that injured a child).

108. THE MEASURE OF INJURY, *supra* note 1, at 21.

109. Note, however, that the authors argue many types of economic damages, such as future medical expenses and loss of future earning capacity, are “notoriously hard to measure.” *Id.* at 179.

incidental to a physical injury,<sup>110</sup> a jury can make some comparison to out-of-pocket losses in determining how much to award for intangible suffering. It is not uncommon for lawyers negotiating the settlement of cases to talk about general damages for emotional distress being calculated as a certain multiple of special out-of-pocket damages.

In contrast, there is little to guide a jury's assessment of the proper amount of compensation for purely emotional suffering.<sup>111</sup> An award can have more to do with the eloquence or effectiveness of counsel, the identity of the plaintiff,<sup>112</sup> or the efforts of "tort reformers" decrying lawsuit "abuse"<sup>113</sup> than with the amount of harm actually caused by the defendant. These realities create a serious risk that similarly affected plaintiffs may be treated very differently, and that emotional distress awards may vary radically from one case to the next. Presumably, to address these concerns as well as the prospect of "runaway verdicts," many states, in certain types of cases, have capped awards for noneconomic losses<sup>114</sup> or denied recovery for emotional distress not resulting in out-of-pocket expenditures.<sup>115</sup> Moreover, scholars argue that awards for psychic suffering are inherently suspect because emotional distress is simply not monetizable.<sup>116</sup>

Not surprisingly, Chamallas and Wiggins address these points. They argue that caps on noneconomic damages, while neutral on

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110. See *Kennedy v. Carriage Cemetery Servs., Inc.*, 727 F. Supp. 2d 925, 934 (D. Nev. 2010) (distinguishing "parasitic damages" for emotional harm from damages that are recoverable in actions for intentional or negligent infliction of emotional distress).

111. See DAN B. DOBBS, *THE LAW OF TORTS* 1051 (2000) (stating that awards for emotional and physical "pain are not easy to evaluate because there is no objective criterion for judgment").

112. See *id.* (opining that a "claim of [emotional or physical] pain is . . . a serious threat to the defendant since, lacking any highly objective components, it permits juries to roam through their biases in setting an award").

113. In Texas, tort reform battles are sometimes waged on busy highways. Roughly a decade ago, a group called Citizens Against Lawsuit Abuse erected billboards saying "Lawsuit Abuse. We All Pay. We All Lose." It was virtually impossible to reach the courthouse without seeing one of these signs. I served on a panel of prospective jurors in a medical malpractice case. During voir dire, the plaintiff's attorney asked whether any of the potential jurors had seen the billboards decrying "lawsuit abuse." Forty-nine of the fifty potential jurors raised their hands. The case settled before a jury was empaneled.

114. See, e.g., CAL. CIV. CODE § 3333.2 (West 2010) (providing that in an action "against a health care provider based on professional negligence," a plaintiff may not recover more than \$250,000 in noneconomic damages as compensation for "pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage"); see also DOBBS, *supra* note 111, at 1071-73 (discussing capping statutes).

115. See, e.g., *Smith v. Cote*, 513 A.2d 341, 343, 350 (N.H. 1986) (allowing recovery for emotional distress damages in a wrongful birth cause of action only to the extent that they result in "tangible pecuniary losses," such as medical expenses or counseling fees).

116. Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 TENN. L. REV. 1, 8-27 (2003). He offers examples of per diem arguments and opposes their use "because they exploit the suggestible nature" of jurors and "compound the illogic of attempting to monetize pain and suffering into a damages remedy." *Id.* at 11.

their face, have a disparate and devastating impact on women and minorities because it is harder for such plaintiffs to prove economic losses, and therefore recovery of noneconomic losses is more important.<sup>117</sup> They further contend that the argument that money damages cannot repair intangible harms is flawed, because that is also true of certain types of economic losses, for which recovery of damages is ordinarily not capped.<sup>118</sup> Some readers will find the authors' arguments on these points persuasive.

### VII. OTHER IMPORTANT QUESTIONS

As Chamallas and Wriggins explain, their book is focused on race and gender, and they "have not wrestled with other important dimensions of personal identity, such as sexual orientation, disability, and social class."<sup>119</sup> It would be interesting to know what they think about those issues, and about whether focusing on those matters would cause the authors to refine or modify their gender- and race-based critique of tort law. Moreover, it is intriguing to consider how the authors would address other important contemporary issues, such as those arising in the legal malpractice context. At many junctures, the authors explore the conduct and responsibility of *medical* professionals. Presumably, similar questions could be raised about the conduct of *lawyers*.

### CONCLUSION

Judged by any fair standard, *The Measure of Injury* is an important book. Even those who disagree with the authors' sustained emphasis on race and gender must acknowledge that this volume addresses important questions about the American tort system in a thoughtful and intellectually rigorous fashion.

*The Measure of Injury* presents a coherent vision for radically reshaping tort law. To the extent that the authors' arguments are found to be persuasive, *The Measure of Injury* may play a key role in revolutionizing the compensation of intentional injuries and accidents.

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117. See *THE MEASURE OF INJURY*, *supra* note 1, at 170-82 (discussing caps on noneconomic compensatory damages).

118. *Id.* at 180.

119. *Id.* at 23.