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## Symposium: Toward A Feminist Revision of Torts

Jennifer B. Wiggins

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## TOWARD A FEMINIST REVISION OF TORTS

JENNIFER B. WRIGGINS\*

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### INTRODUCTION

This conference, celebrating the twentieth anniversary of the Feminism and Legal Theory Project, presents a welcome opportunity to reflect on prior work and consider new directions. This essay will first discuss why it is important for feminists to focus on torts as a field.

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\* Professor of Law, *University of Maine School of Law*; Visiting Professor, *Boston University School of Law*; Visiting Professor, *Harvard Law School*. Many thanks to the editors and staff of the *American University Journal of Gender, Social Policy & the Law* and to the organizers of the Twentieth Anniversary Celebration of the Feminism & Legal Theory Project. I am grateful to Joshua Scott and David Goldberg for excellent research assistance, to Deborah Tuerkheimer for reviewing drafts, and to George Chauncey, Martha Fineman, Sally Goldfarb, Julie Goldscheid, Quince Hopkins, and Liz Schneider for useful comments.

Second, the essay will outline some broad approaches that feminist legal theory can take. The approaches outlined here are acknowledging context and “asking the woman question[s].”<sup>1</sup> Third, I will apply these approaches to various aspects of torts. This leads to suggestions for changes in the ways we think about torts, as well as in some statutes that relate to torts.

### I. THE IMPORTANCE OF TORTS FOR FEMINISTS

Feminist legal writers have directed little attention to tort law, compared with family law, criminal law, and constitutional law. This lack of emphasis is unfortunate, since tort law deserves attention for many reasons.

Torts is a key mechanism of compensation for, and deterrence of, injury in the United States.<sup>2</sup> Torts has important normative and narrative roles. Prosser and Keeton famously claimed, “[p]erhaps more than any other branch of the law, the law of torts is a battleground for social theory.”<sup>3</sup> Tort law is concerned with a wide range of individual injury and recognizes a wide range of harms, from emotional harm, to dignitary harm, to physical harm.

Tort law has dealt, at times, in a more nuanced way than many might expect with issues of gender difference.<sup>4</sup> Torts has a flexible methodology, namely common law adjudication. Torts has a decentralized, egalitarian decision-making system—the jury (for cases that get that far).<sup>5</sup> The torts enforcement mechanism depends only

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1. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836-37 (1990) (defining “asking the woman question” as a technique that identifies and examines elements of existing legal doctrine that overlook disadvantaged women). See generally Regina Austin, “Bad for Business”: *Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207 (2000) (stressing the importance of context in evaluating racial stereotypes in economic transactions and giving racial discrimination within the fast food industry as an example); Regina Austin, *Of False Teeth and Biting Critiques: Jones v. Fisher in Context*, 15 TOURO L. REV. 389 (1999) (stressing the significance of context in evaluating law); Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL’Y & L. 115, 118-21 (1994) (suggesting ways to frame questions to analyze the extent of gender bias in torts casebooks and course materials).

2. See David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 395 (2000) (stating that tort law’s major goals are inducing effective and efficient deterrence and compensation).

3. THE LAW OF TORTS 15 (W. Page Keeton et al. eds., 5th ed. 1984).

4. See Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN’S L.J. 79, 86-87 (1998) (using three categories of cases to analyze tort law’s intricate interaction with gender difference: 1) women injured as passengers in cars and wagons; 2) women injured as drivers of wagons; and 3) women injured boarding and disembarking from trains). See generally BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION 1865-1920* (2001) (analyzing lawsuits against the railroads and their results in terms of race and gender).

5. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624-25 (1991)

indirectly on the state, since enforcement is through private lawyers bringing contingency fee cases.<sup>6</sup> This system has limitations. For instance, tort litigation generally is not pursued when the defendant lacks attainable assets or liability insurance. This system also has strengths. For example, during the period shortly after the end of slavery and through the end of Jim Crow, black women and men sometimes were able to find lawyers to successfully sue railroads and other defendants for their physical and dignitary injuries.<sup>7</sup> These plaintiffs rarely would have been able to hire a lawyer on an hourly basis. Their successful lawsuits held railroads and other defendants responsible for their actions in ways that the state would not have done during this era.<sup>8</sup> Tort law, if effectively enforced, would provide compensation for harms such as those recognized in the now-defunct civil remedy provision of the Violence Against Women Act; indeed, almost all cases brought under that provision also included intentional tort claims.<sup>9</sup>

Although tort law does not talk much about equality or discrimination, it does talk about changing behavior, injury, and harms, all central feminist concerns. All of these aspects make tort law an interesting area for study and reform. Individual self-

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(discussing the role of the jury as the “principal fact-finder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict”); *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (stating that “[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all the people”).

6. This is not to suggest that the state is uninvolved in the torts system. See, e.g., Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 74 (1994) (arguing that courts’ admission into evidence of race-specific and gender-specific economic data in torts cases is unconstitutional state action).

7. See, e.g., *Fla. E. Coast Ry. v. Geiger*, 64 So. 238, 240 (Fla. 1914) (upholding a second jury award for damages awarded to a “colored” man injured while getting off and back onto a train); *Fla. E. Coast Ry. v. Geiger*, 60 So. 753, 757 (Fla. 1913) (reversing a jury verdict for a black plaintiff); *Wilson v. Singer Sewing Machine Co.*, 113 S.E. 508, 510 (N.C. 1922) (upholding a jury verdict for a “colored woman” for assault and trespass by Singer’s agent). See generally WELKE, *supra* note 4 (analyzing lawsuits against the railroads and their results in terms of race and gender). See, e.g., Jennifer Wriggins, *The Color of Injury: Race, Gender, and Torts in the First Half of the Twentieth Century* (2004) [hereinafter Wriggins, *The Color of Injury*] (work in progress, on file with author) (showing that, despite the mechanisms of exclusion from participation in virtually all aspects of the legal system, blacks brought and won tort lawsuits throughout the first half of the twentieth century).

8. See WELKE, *supra* note 4, at 323-75 (outlining judicial decisions that applied the common law, rather than state or federal laws, to require equal treatment of passengers by common carriers).

9. See Jennifer Wriggins, *Domestic Violence Torts*, 75 *S. CAL. L. REV.* 121, 134 n.64 (2001) [hereinafter Wriggins, *Domestic Violence Torts*] (noting that the majority of the seventy-three reported cases brought under the Violence Against Women Act included intentional tort claims).

determination and autonomy are important assumptions in torts,<sup>10</sup> and in that sense tort law is inadequate to those who believe that law should not reflect such assumptions.<sup>11</sup>

## II. GENERAL APPROACHES

This essay discusses some of what feminist perspectives can provide in connection with torts.<sup>12</sup> Very broadly, feminist legal theory looks at pertinent aspects of torts through a lens that pays attention to gender and race.<sup>13</sup> One of the projects of feminist legal theory is to explore and acknowledge the contexts in which law operates. A second aspect of feminist legal theory's work is to ask questions about how law affects women in their diversity. Third, feminist legal theory can, through acknowledging context and asking questions about how law affects women and others, develop ideas for legal reform. The last twenty years of feminist legal thinking and theorizing have taught us that law and its workings are very complex. Broad-brush analyses of the tort system as "male," have turned out to be too simplistic. More nuanced understandings may lead to creative changes.

Torts scholarship and teaching sometimes assume that an acontextual approach to reading cases is sufficient for understanding torts. In reading appellate decisions, the fodder of torts courses and much of torts scholarship, we learn nothing about the parties except

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10. See, e.g., *Scott v. Bradford*, 606 P.2d 554, 556 (Okla. 1979) (noting that "Anglo-American law starts with the premise of thoroughgoing self-determination, each man considered to be his own master").

11. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 28-30 (2004) (arguing that current legal and social systems create false images of autonomy and mask genuine subsidies, and should be replaced by a system which more equitably distributes responsibility for dependency).

12. I am using "feminist perspectives" generally to refer to the techniques of acknowledging context and asking the woman questions. See *supra* note 1 and accompanying text. This is not meant to exhaust the term "feminist perspectives." Nor is it meant to suggest that these techniques are exclusively the province of feminists. Obviously, as much scholarship has discussed, the category of "women" is not monolithic, and equally obviously the technique of contextualizing need not be limited to women's concerns. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296-99 (1991) (exploring the race and gender dimensions of violence against women of color by focusing on battering and rape, the way in which experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the feminist or antiracist discourse); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 160-67 (1989) (arguing that black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender).

13. Part III.A of this essay is part of a larger project examining the roles of race and gender in tort law during the first half of the twentieth century. See generally Wiggins, *The Color of Injury*, *supra* note 7.

what is in the opinion. The parties' genders may be mentioned but are rarely considered significant, while the parties' races are generally not discussed at all. Gender and race, the dominant view seems to be, do not matter and never have mattered. This essay challenges that assumption.

The next section of this essay, which applies tools of feminist legal theory to torts, has two main parts. First, it explores two appellate tort cases that highlight issues of gender and race in ways bearing on classic torts issues of damages and liability.<sup>14</sup> Acknowledging the context of gender and race leads to the observation that torts cases, by their determinations of liability and damages, both reinforce and challenge racial and gender hierarchies. Asking the woman questions with race in mind in connection with these cases leads to a focus on how tort cases have endorsed or challenged racist traditions of "protecting" white women from blacks, particularly black men. Second, this essay examines the almost total absence of domestic violence from the torts lexicon, despite its obviously tortious nature. "Asking the woman questions" in the context of torts leads to a focus on domestic violence. Focusing on domestic violence as a torts issue, this essay presents an argument for mandatory insurance covering injuries from domestic violence.

### III. APPLICATIONS

#### *A. Injury, Liability, Gender, and Race*

##### *1. Recognizing Status Injury to White Women: Gulf, Colorado & Santa Fe Railway v. Luther*

The field of torts mushroomed in the early twentieth century in the

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14. The cases discussed here do not discuss the meaning of race. Discussion of the complex litigation and issues involving racial identity and status is beyond the scope of this essay. See generally John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) (arguing that "race" is a term without a fixed meaning); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 118 (1998) (analyzing trials of racial determination to suggest "a more complex interplay between legal and cultural meanings of race" evidenced through trial testimony going beyond ancestry to ordinary people's understanding of race and their place in the racial hierarchy); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (investigating the relationship between the concepts of race and property and showing that rights in property are contingent upon race); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 46 (1996) (noting that although many think they know what "race" means, it is difficult to define and has various meanings depending on context).

wake of the myriad of injuries associated with industrialization.<sup>15</sup> Negligence law, it is commonly said, evolved to deal with those injuries.<sup>16</sup> These injuries involved harm inflicted in public places by mechanisms of industrialization, such as railroads.<sup>17</sup> Law involving railroads often turned on the duties of “common carriers,” which varied from state to state and which originated in the duties of inns and other private institutions that had important public functions.<sup>18</sup> Race and gender play major roles in some of these opinions.

*Gulf, Colorado & Santa Fe Railway v. Luther* was a 1905 Texas appellate court decision in which the husband of a white woman sued a railroad carrier for his wife’s emotional damages allegedly suffered as a result of an insult by a “negro woman” who was employed by the railroad as an attendant in the “ladies’ waiting room.”<sup>19</sup> The decision upheld the then large sum of \$2,500 awarded by the jury against the railroad.<sup>20</sup> The “negro woman” was never named. Larger railway stations during Jim Crow had a colored waiting room, a white waiting room, and a separate waiting room for white women.<sup>21</sup>

The facts, as described by Mrs. Luther, were that while she was in the ladies’ waiting room with her four children, one of her children spilled a glass of water.<sup>22</sup> When Mrs. Luther told “the negro woman” that the child did not know water was in the cup:

[S]he turned on me with an angry look, and said, “the child did know water was in the cup” . . . . Then she said to me, “If you say

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15. See, e.g., G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 16 (2003) (describing the evolution of negligence in tort law); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 8, 59 (2004) (describing the evolution of accident law).

16. See WHITE, *supra* note 15, at 16 (discussing how tort law developed to accommodate new injuries and duties associated with advancements in transportation, mills, dams, carriages, and ships).

17. See *id.* at 16-17 (illustrating the then-new concept of negligence in *Brown v. Collins*, 53 N.H. 442 (N.H. 1873), where a passing train startled horses that then damaged private property).

18. See WELKE, *supra* note 4, at 324-25 (explaining the evolution of the common law for common carriers and describing nineteenth century common carriers as privately owned companies that served the public by transporting people from one place to another).

19. 90 S.W. 44, 45 (Tex. Civ. App. 1905).

20. *Id.* at 45.

21. See WELKE, *supra* note 4, at 276-77 (showing and describing the floor plan of larger train stations). The many issues involved with Jim Crow public transportation, which of course was famously upheld in *Plessey v. Ferguson*, 163 U.S. 537 (1896), are beyond the scope of this essay. See generally CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* (1983) (examining the struggle to end segregation in Southern transportation); WELKE, *supra* note 4, at 323-75 (discussing the law of racial segregation).

22. See *Luther*, 90 S.W. at 46 (accepting the exact testimony of Mrs. Luther, while omitting all testimony of the black attendant).

the child did not know that the water was in the cup you are a liar.” I then said to her, “I have not been accustomed to be treated this way by colored people.” She then replied: “I am used to your kind. I meet up with them every day.” During the conversation she was standing right over me, shaking her finger right in my face, and looking vicious and angry. She stood over me about five minutes, and said many things to me that I cannot remember, as I was very much frightened at the time.<sup>23</sup>

The part of the decision on appeal that is material here dealt with the duties of common carriers to protect passengers from “violence and insult from whatsoever source arising.”<sup>24</sup> Even though Mrs. Luther did not sustain any physical injury, her mental suffering was deemed compensable because the injury resulted from the common carrier’s breach of duty.<sup>25</sup> The “negro woman” testified differently, but the jury believed Mrs. Luther’s testimony which, according to the appellate court, was “corroborated by other circumstances” not specified.<sup>26</sup>

This case presents fascinating gender and race issues that eclipse the commonplace doctrinal issues. Doctrinally, given the broad duties of common carriers, it is likely that Mr. Luther would have recovered some amount had the waiting room attendant been white.<sup>27</sup> A plaintiff suing a railroad for an employee’s insult did not have to prove that the employee actually committed a tort such as assault before prevailing against the railroad for an injury.<sup>28</sup>

However, gender and race play critical roles in the case in at least the following four ways. First, the plaintiff was in the ladies’ waiting room.<sup>29</sup> This type of waiting room, common in the early twentieth

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23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.* (accepting the jury’s findings of fact as true without further explanation).

27. *See* THE LAW OF TORTS, *supra* note 3, at 57-58 (stating,

[t]he earliest appearance of anything like a separate cause of action for the intentional infliction of mental suffering was in cases holding a common carrier liable for insulting a passenger. . . . [The] decisions rest the liability upon the special obligation of the carrier to the public. . . . [I]n this field the decisions have gone to considerable lengths [to impose liability]).

28. *See id.* (explaining that cases holding common carriers liable for insults to passengers by employees were the beginning of the creation of a separate cause of action for intentional infliction of mental suffering); *see also* Haile v. New Orleans Ry. & Light Co., 65 So. 225, 225-26 (La. 1914) (holding the streetcar company liable for an employee’s statement to a passenger that she was a “big fat woman”); Lipman v. Atlantic Coast Line R.R., 93 S.E. 714, 714 (S.C. 1917) (reversing the dismissal of a claim wherein a railroad employee called a passenger a lunatic, told him he belonged in a lunatic asylum, and that he would have given him two black eyes had he been off duty).

29. *See Luther*, 90 S.W. at 46 (explaining that the complainant was waiting with her children while her husband attended to business matters).



century South, was reserved for white women, their children, and white male escorts (generally husbands).<sup>30</sup> Trains also had “ladies’ cars” reserved for white women, and middle class black women sued train companies when denied access to ladies’ spaces on trains.<sup>31</sup> White women and men zealously guarded their racially separate spaces.<sup>32</sup>

Second, the plaintiff in the lawsuit was Mr. Luther, not Mrs. Luther. Mr. Luther sued for injuries to his wife.<sup>33</sup> Married women under common law, even privileged white women, could not sue in their own names for their own injuries.<sup>34</sup> However, Texas did not adopt the common law rules limiting women’s rights at marriage and instead adopted the civil law on marriage from Spain.<sup>35</sup> Thus, it seems that Mrs. Luther technically could have sued in her own name but that cultural factors perhaps prevented this.

Third, the court’s rhetoric is redolent with paternalistic solicitude for the “frail, delicate, sensitive” white woman and her mental injuries at the hands of the “threatening negro.”<sup>36</sup> The court rhetorically asked:

[W]hat 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

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30. See WELKE, *supra* note 4, at 276-77.

31. See *id.* at 289-90 (presenting the facts of two cases where black women filed suit against railroad companies after they were removed from white-only ladies’ cars).

32. See *id.* at 280-322 (theorizing how white men and women tried to preserve their status and the racial hierarchy by maintaining socially defined public spaces, such as white and colored sections of the train).

33. See *Luther*, 90 S.W. at 45 (referring to Mrs. Luther throughout the opinion as “Mr. Luther’s wife” or the “plaintiff’s wife”).

34. See Reva B. Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 YALE L.J. 2117, 2161-71 (1996) (determining that the passage of the Married Women’s Property Acts modified the common law prohibitions that included forbidding wives from suing in their own names, and that these prohibitions often were given a narrow construction).

35. See, e.g., *Dickson v. Strickard*, 265 S.W. 1012, 1021 (Tex. 1924) (noting that “the old common-law principles invoked against [a female candidate for governor] have never been in force in Texas, and certainly are not in force at the present time”). The court in *Dickson* also noted that Texas adopted civil law on marriage from Spain when it adopted the common law in 1840. *Id.* at 1022. See also *Barkley v. Dunke*, 87 S.W. 1147, 1147 (Tex. 1905) (holding common law rules defining putative wives not applicable in Texas). See generally Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1081 n.17 (1994) (noting that Louisiana and Texas had community property systems during the antebellum period).

36. See *Luther*, 90 S.W. at 48. See generally Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990) (arguing that the law of torts has often failed to compensate women for harms not commonly alleged by men, such as emotional, fright-based injuries).

owner entitles her to be treated with respect and kindness? Is it any wonder to those who can contemplate the effect of such an outrage that the poor woman for months afterwards, as she testified, could not close her eyes without that angry, threatening negro arising before her and murdering sleep.<sup>37</sup>

The black attendant's actions are described as violent, in explicitly race-based terms: "to be pounced upon, vilified, and traduced by a negro servant in a railway depot."<sup>38</sup> The image of white women as acutely sensitive to emotional upset and pain, common in the late nineteenth and early twentieth century, is on full display in this opinion.<sup>39</sup>

Fourth, the harm is constructed based upon the idea that the race of the servant and the victim combine to make the victim's harm worse. In fact, as the court notes, Mrs. Luther could not "close her eyes without that angry, threatening negro arising before her and murdering sleep."<sup>40</sup> In this last sentence, the gender of the attendant is left out, and the court gives us an image of an "angry, threatening negro,"<sup>41</sup> which, in theory, could refer to a male or female person. However, the term "negro" often referred to black men in particular, so this creates a trope of an "angry, threatening negro" man.<sup>42</sup> The court's description masculinizes the female attendant. And this "angry, threatening negro" is murdering—sleep!<sup>43</sup> The court uses stereotypes of black males as criminals threatening white women to endorse the significant damages that Mr. Luther won.<sup>44</sup> It is more humiliating, more upsetting, to be insulted by a black attendant than a white, the court's language implies. Race and gender determine the injury in this case.<sup>45</sup> The decision imposed on the railroad a duty to

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37. *Luther*, 90 S.W. at 48.

38. *Id.*

39. See, e.g., WELKE, *supra* note 4, at 125-36 (describing the stereotype of a fragile, acutely sensitive white woman).

40. 90 S.W. at 48.

41. *Id.*

42. Courts sometimes used the term "negress" to describe a female black woman. See, e.g., *Bullock v. Tamiami Trail Tours, Inc.*, 266 F.2d 326, 327 (5th Cir. 1959) [hereinafter *Bullock II*] (stating that although the appellant's wife looked white, she was a "Negress").

43. See *Luther*, 90 S.W. at 48.

44. See *id.* (describing the various things a jury can consider when finding damages in the form of mental anguish, such as humiliation, wounded pride, and mental suffering).

45. I am not suggesting that the case is only about race and gender. There was tremendous anger at the railroads during the height of Jim Crow, such that all-white juries sometimes ruled against them in favor of black people's injury claims. See Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 276 (explaining that during the Jim Crow era, there were other factors, such as railroad pricing discrimination and terrible train disasters, that led to

uphold racial hierarchy, since the court held the railroad liable for failing to protect white women from threats to their superior racial status.

2. *Undermining Sexualized Racism through Duty and Liability:*

*Bullock v. Tamiami Trail Tours, Inc.*

Duty in negligence law depends on foreseeability of risks.<sup>46</sup> As Justice Cardozo wrote in *Palsgraf v. Long Island Railroad Co.*, “[t]he risk reasonably to be perceived defines the duty to be obeyed.”<sup>47</sup> Duty may depend on foreseeability of risk but what a foreseeable risk is can depend on how decisionmakers see the social context. In *Bullock v. Tamiami Trail Tours, Inc.*, the Fifth Circuit, through its analysis of duty and liability, created a challenge to racial and gender hierarchies, albeit an equivocal one.<sup>48</sup>

The events giving rise to the injury and the lawsuit deserve careful attention. In 1957, Reverend and Mrs. Bullock, a married couple from Jamaica, on a bus trip to see the United States, got on a bus in Miami and sat in the front.<sup>49</sup> “The husband was dark or black, while the wife, though a Negress, appeared to be a white woman.”<sup>50</sup> A white passenger near Miami complained about where Reverend Bullock was sitting.<sup>51</sup> The driver told Reverend Bullock of the complaint and asked him to move to the back of the bus, which he did not do.<sup>52</sup> Later, after the Bullocks had traveled north to within ninety miles of Tallahassee, a white man overheard the driver telling someone at a bus stop about the presence of this couple in the front of the bus.<sup>53</sup> He bought a ticket, got on the bus and assaulted the

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a general societal anger at all railroad companies); *see also* Fla. E. Coast Ry. v. Geiger, 64 So. 238, 240 (Fla. 1914) (affirming the reversal of a jury verdict that had been favorable to the black, injured plaintiff). *See generally* WELKE, *supra* note 4, at 99-100 (describing society’s growing disdain of the railroads’ overwhelming concern for profit and not for human cost).

46. *See* THE LAW OF TORTS, *supra* note 3, at 356 (explaining the intersection of duty, obligation, and risk in negligence cases). The editors note “in negligence cases, the duty is always . . . to conform to the legal standard of reasonable conduct in light of the apparent risk.” *Id.*

47. 162 N.E. 99, 99 (N.Y. 1928).

48. *See Bullock II*, 266 F.2d at 332 (holding a common carrier liable for injuries inflicted upon black passengers due to their race).

49. *See id.* at 328.

50. *Id.* Although the Fifth Circuit was clear that Ms. Bullock was a “Negress,” the trial court described her as simply white. *See Bullock v. Tamiami Trail Tours, Inc.*, 162 F. Supp. 203, 204 (N.D. Fla. 1958) (stating the “husband is colored and the wife is white”) [hereinafter *Bullock I*], *rev’d*, 266 F.2d 326 (5th Cir. 1959).

51. *Bullock I*, 162 F. Supp. at 204.

52. *Id.*

53. *Id.* at 205.

Bullocks.<sup>54</sup> They later sued the bus company for their injuries.<sup>55</sup>

Although the plaintiffs lost at trial, the appellate court ruled in the Bullocks' favor, saying:

[T]his court will take judicial notice (as the district court should have done) of the commonly and generally known fact that the folkways prevalent in Taylor County, Florida . . . would cause a reasonable man, familiar with local customs, to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front of an interurban bus.<sup>56</sup>

According to the Fifth Circuit's analysis, the Bullocks had successfully established that the company had a duty to protect them, and that the company had breached the duty.<sup>57</sup> The case was remanded for consideration of damages.<sup>58</sup>

The duty of the carrier, then, was specific to that time and place, and was specifically based on anticipating racist attacks.<sup>59</sup> All of the bus company's witnesses stated that this was the first time they knew of a black man and a white woman sitting together on a bus or train in that region.<sup>60</sup> The attacks should have been anticipated, not simply because a black person was sitting in the front of the bus, but because the combination of a "Negro man and a seemingly white woman" sitting together in the front was obviously incendiary.<sup>61</sup> The Fifth Circuit recognized this as a risk-creating combination of people, space, and circumstances.<sup>62</sup> This recognition is perhaps not surprising given the historical confluence between race, sex, and

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54. *Id.*

55. *Id.* at 204.

56. *Bullock II*, 266 F.2d at 332. Taylor County, Florida, is a coastal county Southeast of Tallahassee. The major city, Perry, is fifty-one miles from Tallahassee. The trial court was located in Tallahassee.

57. *See id.* at 331-32 (ruling that the danger to the Bullocks should have been reasonably foreseen by the bus company, giving them time to act to avoid passenger injury).

58. *Id.* at 332.

59. *Id.* at 331 (noting that the bus company had issued bulletins in 1953 and 1956 warning drivers of the possibility of racial disturbances and stating further the strength of this case as an example of a situation where the bus drivers and the bus company should have anticipated the danger to the Bullocks).

60. *See, e.g., id.* at 332 n.1 (describing the situation through the statements of the actual assailant, Milton Poppell, who plainly noted that black people had their own place, which was neither sitting in the front of the bus nor marrying a white woman). During this time, Florida had a statute prohibiting interracial fornication which was in effect until struck down by the Supreme Court in 1964. *See McLaughlin v. Florida*, 379 U.S. 184 (1964).

61. *Id.* at 332.

62. *Id.* at 331-32 (stating that the character and infliction of injury in the circumstances were reasonably expected).

social control that figures so prominently in the context of rape and criminal law.<sup>63</sup>

By contrast, the trial court ignored the volatile gender-race confluence and saw this assault as a fluke, as unforeseeable, and therefore something for which the bus company should not be liable.<sup>64</sup> Bus companies, although common carriers, were not liable for unprovoked and illegal assaults by fellow passengers.<sup>65</sup> The trial court wrote:

Plaintiffs try to take this case out of the law established in the decision of the Supreme Court of Florida cited above by arguing that because of the attitude of the South toward integration carriers of passengers should anticipate assaults and adopt measures to protect passengers therefrom. The evidence in this case completely refutes the contention of plaintiffs in this regard. Integration in transportation has now been in effect in Florida and elsewhere in the South for approximately four years and the undisputed evidence in this case is to the effect that insofar as the carriers, both railway and bus transportation, are concerned, this is the only case in which an unprovoked assault of this nature has occurred. . . . The colored people, by an overwhelming majority, prefer to be segregated and voluntarily segregate themselves on public transportation. The testimony is that it is a rare occasion when a colored person, riding on public transportation, insists upon the right to sit among white passengers, but where such right is asserted, no violence, except in this case, has ever occurred in this state or any of its adjoining states.<sup>66</sup>

To the trial court, the harm was unforeseeable, and thus the company had no duty to prevent it.<sup>67</sup>

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63. See, e.g., Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 103-04 (1983) [hereinafter Wriggins, *Rape*] (arguing that the legal system's treatment of rape has disproportionately targeted black men for punishment and made black women both particularly vulnerable and without redress through the denial of the reality of women's sexual subordination by creating a social meaning of rape, which implies that the only form of illegal rape involves a black offender and a white victim).

64. See *Bullock I*, 162 F. Supp. at 205 (pointing out the rarity of racial violence on buses).

65. See, e.g., *Hall v. Seaboard A.L.R. Co.*, 93 So. 151, 154 (Fla. 1922) (directing a verdict in favor of the railroad in the passenger's claim for damages for injuries sustained while she was riding overnight on the railroad's train).

66. *Bullock I*, 162 F. Supp. at 205; see BARNES, *supra* note 21, at ix, 11, 40, 62, 104 (evidencing that despite the trial court's views, and despite the fact that few blacks sat in the front of the bus immediately after racial segregation of buses was declared illegal, segregated public transportation was one of the most hated forms of segregation for Southern blacks and was resisted well before and throughout the Jim Crow period, with numerous instances of violence against blacks who refused to move to the back of the bus).

67. See *Bullock I*, 162 F. Supp. at 205 (stating that the Supreme Court of Florida has already settled the issue that the bus company is not liable to the passengers for

Both views about duty and foreseeability of risk are dependent on opposing empirical conclusions drawn by courts. The trial judge, physically located much closer to the events than the Fifth Circuit Court of Appeals, stated that black people “voluntarily” segregate themselves on buses (presumably at the back), so that this kind of situation rarely arises, but claimed that when it has arisen it has never led to violence.<sup>68</sup> To the Fifth Circuit, this was a situation where “mischief was hovering about,” so the bus company had a duty to prevent foreseeable harm.<sup>69</sup> Duty here is situated in contrasting views of risk, race, gender, and social reality.

The court in *Bullock* recognized and tried to compensate for injury by racists. The case challenges sexualized racism because it suggests that a white woman and a black man should be able to safely sit in the front of a bus together. It spreads the risks and costs of racist injury and creates an economic incentive for actors like bus companies to prevent racist injury. On the other hand, the Fifth Circuit’s list of “precautions” the company should have taken to prevent the harm presents a more limited view of the case’s challenge to racism.<sup>70</sup> For example, the company should have told the driver to inform visiting foreign blacks (like the Bullocks) of the South’s segregation traditions, and “should have explained to the Bullocks his reasons for wanting them to move.”<sup>71</sup> The driver also should not have revealed to the assailant “the Bullocks’ position on the bus [or] their apparent color and lack of color.”<sup>72</sup> These statements raise the following question: if the driver had told them his reasons for wanting them to move to the back of the bus, but they had refused and gotten assaulted by a passenger, could the bus company then argue that their stubborn conduct in refusing to move somehow barred recovery on a contributory negligence or assumption of risk type theory? Actually, despite these statements about what the company should have done, the Fifth Circuit does not take them very literally. After all, Mr.

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the illegal and unprovoked assault by another passenger).

68. *Id.*

69. *Bullock II*, 266 F. 2d at 331.

70. *See id.* at 332 (suggesting various ways in which the bus company should have given advice to black passengers wanting to travel in the South).

71. *Id.* It is not clear where exactly the seemingly white Mrs. Bullock “belonged.” The Fifth Circuit suggests the driver should have told the Bullocks why they both should move to the back of the bus. *Id.* If she truly was white, she did not “belong” in the back of the bus. The trial court, by contrast, found that only Rev. Bullock was asked to move to the back of the bus. *Bullock I*, 162 F. Supp. at 204. Mrs. Bullock apparently was treated as white by the driver in that she was not asked to move back. *Id.* The assailant told them both to move to the back of the bus before assaulting both of them. *Id.* at 204.

72. *Bullock II*, 266 F. 2d at 332.

Bullock was informed of a passenger's complaint and was asked to move, but he had refused.<sup>73</sup> He testified that he was aware of segregation customs but understood that they had been abolished.<sup>74</sup> He and his wife may have wanted to sit in the front of the bus for a variety of reasons, and the Fifth Circuit's opinion can be read as saying that they had a right to do so. To use the language of torts, the common carrier had a duty to prevent reasonably foreseeable harm to them while seated together in the front of the bus, and if the carrier failed to do so, the carrier would be liable for ensuing harm.<sup>75</sup>

### 3. Conclusion

"Protecting" white women is central to the decisions in *Luther* and *Bullock*. In *Luther*, the plaintiff's wife was supposed to be protected from men, particularly working class and black men, by being in the ladies' waiting room. The court portrayed the plaintiff's wife as a helpless female who the railroad failed by letting her be verbally attacked by a black person, which caused a traumatic harm to her status as a white woman. In *Bullock*, the Bullocks were attacked because Mrs. Bullock looked white, Mr. Bullock looked black, and they were together in the front of the bus. The Fifth Circuit's belief that "mischief was hovering about" specifically related to the risk that white people would act violently on the belief that a white woman always needed protection from a black man. This risk was seen as so obvious that the bus company was liable for the racist man's attack on the Bullocks. Both cases have to do with how white, racial, gender, and spatial prerogatives are protected or not. The white woman's supposed-to-be-safe zone in the *Luther* train station was protected by the imposition of liability and the award of damages, while the front of the bus as a zone that white women would never have to share with black men was weakened by the imposition of liability in *Bullock*. *Luther* and *Bullock* contain complex, important narratives about race and gender exemplifying ways that tort concepts like foreseeability and injury are embedded in context.<sup>76</sup>

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73. *Bullock I*, 162 F. Supp. at 204.

74. *Id.*

75. *Id.*

76. See, e.g., JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* 88-90 (1998) (arguing that slave law was important in the development of the "last clear chance" doctrine and in expanding notions of valuing harm to human beings); WELKE, *supra* note 4 (discussing race and gender in the context of tort lawsuits against railroads); Schlanger, *supra* note 4, at 85 (concluding that gender difference was and remains important in determining the standard of care in accident cases). Additional work will continue this exploration. See, e.g., Wriggins, *The Color of Injury*, *supra* note 7 (showing that despite the mechanisms of exclusion from participation in virtually all aspects of the legal system, blacks brought and won tort lawsuits throughout the first

### B. Domestic Violence

#### 1. Tort Law and Scholarship's Omission of Domestic Violence

The feminist practice of “asking the woman question[s]” in the context of torts leads to analysis of domestic violence as a torts issue.<sup>77</sup> Tort law and scholarship have largely ignored domestic violence, despite the fact that domestic violence is obviously tortious, consisting of torts such as assault, battery, false imprisonment, and intentional infliction of emotional distress. These are largely not analyzed as tortious harms in contemporary torts scholarship and law. Acknowledging some theoretical, doctrinal, and economic context helps explain why that is so.

Two main reasons seem to be responsible for the omission. First, since the early twentieth century, the field of torts has been conceptualized as pertaining primarily to accidental injury that causes harm to strangers—the prototypical tort is physical injury caused by a railroad. Second, there are very few reported tort cases concerning domestic violence injuries to even analyze, because of a combination of several factors. I will discuss each in turn.

First, Oliver Wendell Holmes, Roscoe Pound, and others influentially theorized about the grounds of liability for industrial injury in the early twentieth century.<sup>78</sup> They implied that intentional torts were largely a thing of the past and a vestigial remnant of an earlier time.<sup>79</sup> At the time they wrote, interspousal immunity was in full swing and the notion of the white woman as the “angel in the house” was in force.<sup>80</sup> Women were excluded from participation in

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half of the twentieth century); see also Jennifer Wriggins, *Genetics, I.Q., Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025, 1081 (1997) (arguing that court orders subjecting mothers of lead-exposed children to nonconsensual IQ and psychological tests reflected deterministic, racist assumptions).

77. See Bartlett, *supra* note 1, at 837 (describing the method of asking questions to identify the implications for women from certain rules and practices).

78. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) (explaining that the torts of today involve injuries from railroads and factories while the existing law of torts comes from the “old days of isolated, ungeneralized wrongs, assaults, slanders, and the like”); see also ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 85 (1922) (explaining that “civilized men” can assume no one will intentionally harm them, and that a society of civilized men is necessary for division of labor, but that “the savage must move stealthily, avoid the skyline and go armed”).

79. See Holmes, *supra* note 78, at 471-72 (proposing a change in the theory of torts law from the generally accepted view that the plaintiff must show a right for recovery to the view that damage should be actionable through the danger inherent in the act as manifested through common experience).

80. See, e.g., VIRGINIA WOOLF, WOMEN AND WRITING 59 (Michele Barrett ed., 1979) (describing the “angel in the house” as a pure, sympathetic, charming, unselfish, woman who mastered the “difficult arts of family life[,] sacrificed herself



the legal system in all sorts of ways. When ex-wives sued ex-husbands for torts committed during the marriage, courts urged them to “forgive and forget,” no matter how egregious the tort.<sup>81</sup>

Largely in the last third of the twentieth century, interspousal immunity was gradually eviscerated.<sup>82</sup> Spouses or ex-spouses are now free to sue each other for torts committed during marriage.<sup>83</sup> However, the overall focus of torts did not change. Tort law and scholarship have continued to focus on accidental injury, ignoring the important fact that a wide range of injuries that were previously noncompensable, are now compensable. The 1999 introduction to the discussion draft of the Third Restatement of Torts-General Principles, for example, states, “[t]he problem of accidental injury is what many see as the core problem facing modern tort law.”<sup>84</sup> Law and economics scholarship, so influential in torts, sometimes defines “torts” as consisting of negligence and strict liability, leaving out intentional torts entirely, even from the definition of torts.<sup>85</sup> When intentional torts are mentioned, they sometimes are grouped with criminal law or marginalized.<sup>86</sup> Part of my project is to underscore the importance of intentional torts, to examine ways in which the torts system handles them, and to consider whether there might be better ways to handle them.

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daily[.] . . . never had a mind or wish of her own,” and existed in every house).

81. See *Abbott v. Abbott*, 67 Me. 304, 305-09 (1877) (entering a nonsuit against the former wife where her ex-husband with friends forcibly kidnapped her and had her institutionalized in a mental institution). See generally Siegel, *supra* note 34, at 2119-20 (illustrating a variety of gender, class, and race-based concerns that shaped the regulation of marital violence during the Reconstruction Era, drawing into question the social meaning of chastisement’s demise).

82. See Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101, 101 (1999) (noting that only a few states retain any form of interspousal immunity); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 435 (1989) (postulating that the courts abandoned immunity because of refined public policy arguments and not legal arguments).

83. There continues to be suspicion of interspousal tort claims, especially those that do not involve physical injury. See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 55-64 (2002) [hereinafter PRINCIPLES OF THE LAW] (discussing the difficulties of recognizing interspousal claims for emotional distress damages); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1286-1342 (1996) (outlining reasons why courts should be “leery” of interspousal tort claims, especially those that do not involve physical injury).

84. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 21 (Discussion Draft 1999) (limiting the scope of a project reviewing general theories of torts to accidental personal injury and property damage).

85. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 182 n.370 (comparing the treatment of intentional and accidental torts in a number of torts authorities).

86. See *id.* (describing scholarship that categorizes intentional torts as crimes or otherwise treats intentional torts as somewhat tangential).

A second reason why tort law and scholarship can continue to ignore domestic violence is that there are so few reported tort cases pertaining to recovery for domestic violence injuries. I reviewed thousands of cases on Westlaw in summer 2003 and found only thirty-four tort cases dealing with domestic violence.<sup>87</sup> Given the amount of domestic violence, which, while difficult to estimate is nonetheless substantial, compared with the number of domestic violence tort cases, it is clear that the number of cases is many times less than the amount of domestic violence.<sup>88</sup> In terminology used in other areas of injury, the “claims rate” for domestic violence injury is low.<sup>89</sup>

There are many reasons why the claims rate is so low. First, statutes of limitation are shorter for many intentional torts than for negligence and other claims.<sup>90</sup> Domestic violence tort claims by definition arise from an ongoing relationship so it is completely foreseeable that victims of domestic violence will be unable to satisfy short statutes of limitation.

Second, insurance plays a key role, yet one often overlooked. Money judgments in tort cases generally come from insurance policies rather than the defendants’ pockets.<sup>91</sup> If one is going to understand the way tort litigation works, it is essential to understand insurance. One insurance barrier is the intentional acts exclusion, which is universal in liability homeowners and automobile policies.<sup>92</sup> It provides that if the insured intends an act, there is no coverage for the act or its consequences. Since domestic violence torts are almost always intentional acts, it stands to reason that the intentional acts exclusion will mean that generally there is no coverage for domestic

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87. See Jennifer Wriggins, *Domestic Violence in First Year Torts*, 54 J. LEGAL EDUC. NO. 4 (forthcoming) (manuscript at 6 n.9, on file with author) (cross-indexing the search terms of domestic violence, assault, and battery while conducting Westlaw searches). The results showed a low rate of domestic violence torts claims in proportion to all other torts claims. *Id.*

88. See *id.* at 6 (discussing that most torts claims are unintentional torts, and intentional torts claims are rarely addressed).

89. See *id.* (arguing that although a very small percentage of torts claims are intentional, an even smaller percentage of intentional torts claims arise from domestic violence, therefore little scholarship focuses on domestic violence claims).

90. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 139-40 (stating that the statutes of limitations for assault, battery, and false imprisonment often are one to two years and generally are shorter than for negligence).

91. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275, 275 (2001) (noting that most lawyers assume in their procedures that all money judgments in torts cases will come from insurance policies).

92. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 135-36 (explaining that if a plaintiff were to bring a claim for intentional torts against a homeowner with liability insurance, the insurance company would successfully dodge the claim by arguing that the insurance does not cover intentional torts).

violence torts.

In addition, when interspousal immunity was eroding, liability insurance companies began to insert “family member exclusions” in their policies.<sup>93</sup> These exclusions, now standard in homeowners and automobile policies, provide that the insurance policy will not cover the claim if a family member sues another family member for injury. Initially, tort doctrine and then insurance worked to bar people, mostly women, from recovering in tort.

A third barrier to lawsuits for domestic violence torts is that most potential defendants lack available assets.<sup>94</sup> Fourth, in some states, tort claims must be brought at the same time as divorce claims.<sup>95</sup> Additional barriers include a victim/survivor’s reasonable fear of retaliation or a desire to move forward, lawyer ignorance, or various other factors.<sup>96</sup>

In short, tort law and scholarship largely ignore domestic violence for at least the following reasons: 1) there are few reported domestic violence tort cases, and 2) a powerful paradigm defines accidental injury as the central subject of torts, thus ruling out domestic violence cases. Torts’ “primary goals” of “effective and efficient deterrence and compensation” are not being met with respect to domestic violence.<sup>97</sup> This failure hurts all victims of domestic violence but particularly impacts women who comprise most of those who suffer the resulting physical injury.<sup>98</sup>

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93. Jennifer Wriggins, *Interspousal Tort Immunity and Insurance “Family Member Exclusions”*: *Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN’S L.J. 251, 252-54 (2002) (considering these family member exclusions as a new form of interspousal tort immunity); see also Gerald D. Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 239 (1974) (arguing that creating family exclusion clauses in insurance policies while creating legislation disallowing interspousal immunity is inconsistent and undesirable).

94. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 137-39 (providing an example of a house which may be jointly owned, mortgaged, protected by a homestead exemption, located in another state, or encumbered by preexisting involuntary liens by the victim and the perpetrator, thus complicating financial recovery against a defendant).

95. See *id.* at 140-41 (arguing that bringing tort claims together with divorce claims can put the plaintiff’s economic or physical survival, or relationship with children at risk); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 363-64 (1997) (suggesting that the interplay between the tort claim and the divorce claim can strengthen or weaken either or both).

96. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 141-44 (examining other potential needs of the victim as more pressing than a lawsuit, such as caring for the children or escaping the spouse).

97. See Rosenberg, *supra* note 2, at 395.

98. See Dalton, *supra* note 95, at 321-22 n.2 (citing data that ninety percent of heterosexual partner violence reported to law enforcement authorities is committed by men); Wriggins, *Domestic Violence Torts*, *supra* note 9, at 123 n.4 (detailing how

## 2. Feminist Responses

An overall feminist approach is to ask how we might encourage tort litigation to address domestic violence torts. Our goals are several. We want to increase compensation for domestic violence injuries, and we can do that through litigation. We want to deter domestic violence injuries, and we can do that through litigation. Feminists have tried to encourage litigation in other areas, such as by enacting the civil remedy provision of the Violence Against Women Act.<sup>99</sup> Although empirical evidence of tort law's deterrence is hazy, such deterrence is assumed to be an important goal of tort law and there is no reason why this should not be true in this area.<sup>100</sup> There are several concrete strategies that may help reach these feminist goals.

Such strategies include first, lengthening statutes of limitation for intentional torts so that victims/survivors have adequate time to bring claims. Several states have done this already.<sup>101</sup> The second reform is to make it clear that parties seeking a divorce do not have to assert their tort claims at the same time.<sup>102</sup>

The third strategy involves insurance reform. I propose that we have a mandatory system of liability insurance covering domestic violence tort injuries.<sup>103</sup> The insurance would be part of automobile insurance so as to spread the costs of these injuries as broadly as possible. Automobile insurance policies would not have an intentional acts exclusion for injuries caused by domestic violence.

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women are far more likely to be victimized by an intimate partner than men).

99. See Violence Against Women Act of 1994, 42 U.S.C. § 13981(b) (1994) (guaranteeing all women the right to be free from crimes motivated by gender). *But see* United States v. Morrison, 529 U.S. 598, 600-02 (2000) (holding that gender-motivated crimes of violence were not considered economic activity and that Congress lacked the authority to enact § 13981 because the statute did not involve economic activity or interstate commerce under U.S. CONST. amend. XIV, § 5).

100. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381-90 (1994) (reviewing tort law's effect on formal empirical studies, surveys of physicians and corporate managers, reports provided by journalists, and the author's own interview inquiries and arguing that the strong form of the deterrence argument, though erroneous, supports the moderate argument that sector-by-sector tort law provides something significant by way of deterrence).

101. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 176 (describing California's statute of limitations, which allows a case to be filed within three years of the event occurring or from the point upon which the plaintiff should have realized her injury).

102. See *id.* at 176-78 (arguing that victims should not have to litigate their tort claims at the same time as the divorce litigation as it can be perilous to do so, because family courts may not have the expertise to deal with tort claims, tort claims involve jury trials and family cases do not, and the risk of double recovery is minimal).

103. See *id.* at 152-69 (explaining how an insurance policy could cover injuries resulting from incidents of domestic violence, allowing those injured to seek recovery through a torts suit against the tortfeasor).

The policies would not have a family member exclusion. In other words, harm caused by domestic violence would be covered by liability insurance. It would have a provision, similar to uninsured motorist coverage, that would cover a person's domestic violence injuries when inflicted by an uninsured person. The justification for making the insurance mandatory is based on public policy and on data about risk assessment, and also echoes the reason why automobile insurance is mandatory. Namely, the injuries caused by auto accidents are too many and too serious to simply rely on individuals' decisions whether to insure or not; people may estimate their risk inaccurately and so buy insufficient insurance.<sup>104</sup> In the area of intimate relationships, people also estimate the risk of failure with amazing inaccuracy.<sup>105</sup> The reasons for an intentional act exclusion do not withstand close scrutiny, as I have explained.<sup>106</sup> Second, an uninsured domestic violence tortfeasor provision makes sense for the same reason that uninsured motorist insurance makes sense—so that a person can make a tort claim with her own insurance company for injury if she is injured by an uninsured domestic violence tortfeasor. Uninsured motorist coverage was created in the 1930s and 1940s when there was a massive surge in injuries caused by drivers who lacked insurance.<sup>107</sup> Such coverage now is required in automobile policies in most states.<sup>108</sup> Uninsured motorist coverage, notably, lacks an intentional acts exclusion.<sup>109</sup> Courts analyze the application of the coverage from the perspective of the insured.<sup>110</sup> For example, an act by an uninsured motorist ramming the insured motorist's car may be

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104. See *id.* (explicating that, in insurance terms, mandatory insurance lowers the risk of adverse selection, which is the tendency of people who need insurance most to buy it, which can lead to too many claims, extremely expensive insurance, and market failure).

105. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (“[T]he median response of the marriage license applicants was zero percent when assessing the likelihood that they personally would divorce.”).

106. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 161-69 (arguing that justifications for intentional acts exclusion as supposedly necessitated by moral hazard and public policy are not compelling).

107. *E.g.*, ALAN I. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 4, 10 (1969) (describing development of uninsured motorist coverage in response to public outcry over an increase in injuries caused by automobile accidents in New York, where loss from uninsured drivers totaled about seven million dollars a year).

108. See *id.* at 12 (describing the uninsured motorist endorsement as an alternative to compulsory motor insurance).

109. See *id.* (limiting coverage to hit and run drivers or accidents with the uninsured, and lacking coverage for intentional acts committed by the uninsured).

110. See Wriggins, *Domestic Violence Torts*, *supra* note 9, at 153-54 (explaining that intentional damage by an uninsured motorist is covered, because the event is examined from the perspective of the victim, not the perpetrator).

intentional, but from the perspective of the insured, it is decidedly not intentional.<sup>111</sup> Recovery under the injured person's own policy is allowed. This is one reason why uninsured motorist coverage holds promise as a model.

If this plan is adopted, we can expect to see actions by insurance companies trying to reduce the incidence of domestic violence. Domestic violence may be seen as more of a societal issue than an individual issue and there may be more of a collective response than currently prevails. While many may object to this approach, it has the advantage of spreading the costs of domestic violence more broadly and compensating more people for domestic violence injuries. Such an approach should lead to more litigation and thus more deterrence.

#### CONCLUSION

Torts is ripe for gender-conscious and race-conscious revisions such as the one begun here. Race and gender have affected the application of legal concepts such as duty, harm, and injury. Tort cases have at times reinforced race and gender hierarchies and at times have undermined them. Persistent paradigms and directions of inquiry, such as the dominant focus of torts on accidental injury, can be identified and challenged. A rigorous rethinking of existing assumptions and directions may open up new avenues of exploration and possibilities for change.

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111. *See id.*