

Call for Authors – **Feminist Judgments: Rewritten Torts Opinions**

DEADLINE: Friday August 25, 2017

The U.S. Feminist Judgments Project seeks contributors of judicial opinions rewritten to reflect a feminist perspective, and commentaries on the cases and rewritten opinions, for an edited book collection tentatively titled *Feminist Judgments: Rewritten Torts Opinions*. This edited volume is part of a collaborative project among law professors and others to rewrite, from a feminist perspective, key judicial decisions in the United States. The initial volume, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, edited by Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford, was published in 2016 by Cambridge University Press. Subsequent volumes in the series will focus on different areas of law and will be under review by Cambridge.

Torts volume editors Lucinda Finley and Martha Chamallas seek prospective authors for fourteen to sixteen torts opinions covering many major topics in tort law. The editors have selected the cases with an eye towards issues and injuries of particular salience to women's lives, and with insights from feminist torts scholarship and input from leading torts scholars. Potential authors are welcome to suggest other opinions that they would like to address, but the overall number of cases finally included in the volume must remain limited.

Interested prospective contributors should submit a proposal to either: 1) rewrite an opinion (subject to a 10,000 word limit), or 2) comment on a rewritten opinion (4,000 word limit). Rewritten opinions may be majority opinions, concurrences, or dissents. Authors of rewritten opinions should abide by the law and precedent and supplemental materials in effect and available at the time of the original decision. Commentators should explain the original court decision and its context, how the feminist judgment differs from the original judgment, and what difference a feminist judgment might have made. The volume editors conceive of feminism broadly and invite applications that seek to advance, complicate, or critique various feminist theories and advocacy.

Those who are interested in rewriting an opinion or providing commentary should apply no later than **Friday August 25, 2017**, by e-mailing the following information to Lucinda Finley, finleylu@buffalo.edu, and Martha Chamallas, chamallas.1@osu.edu :

1. Your CV, your areas of torts interest or expertise, and why you are interested in and well suited to participate in this project.
2. Your top three preferences of cases to write about, and whether you have a preference to do a rewritten opinion or a commentary.
3. Any time constraints and other obligations that may impact your ability to meet the submission deadlines.
4. If you have another case that you feel strongly should be included instead of one of the selected cases and that you would like to write about, provide information about the case and the reasons you think it should be included.

The editors will inform selected authors by the end of September. Draft opinions will be due to the editors by Friday March 2, 2018. Draft commentaries will be due to the editors by Friday April 6, 2018.

This list of cases that the editors have selected for consideration to be included in the volume *Feminist Judgments: Rewritten Torts Opinions*, is as follows:

- A. The “Classics”: Tort cases that appear in almost every U.S. Torts casebook, and thus shape generations of lawyers’ understanding of tort doctrine.
1. *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976): the classic “psychiatrist’s duty to warn” case, with an underappreciated subtext of intimate partner violence.
 2. *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976), establishing a limited affirmative duty to “rescue,” or come to the aid of someone in peril.

Negligence: Is the “Learned Hand” formula for negligence just an economic cost/benefit calculation, or should it include a broader array of social factors (as Hand himself intended)?

3. *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987). In a case involving a woman who was assaulted in her hotel room by a stranger who gained access through a sliding glass door, Judge Posner applied an economic cost/benefit analysis to the question of negligence and upheld a jury verdict for the defendant hotel. This case involves attempted sexual violence against women, and also provides fertile ground for a feminist critique of a law and economics perspective on tort law.

Duty of care: A significant Torts issue, heavily influenced by policy concerns, and often involving women and children plaintiffs who have been assaulted – and thus fertile territory for feminist analysis.

4. *Kircher v. City of Jamestown*, 74 N.Y.2d 251 (N.Y. 1989). A case involving the “limited public duty” doctrine, which severely restricts the obligation of police or other protective service workers to affirmatively aid crime victims. This limited duty has serious adverse implications for women and children experiencing family violence. It is the civil tort law analogue to the limited constitutional affirmative duty to protect adopted by the US Supreme Court in infamous cases such as *DeShaney* and *Castle Rock v. Gonzales*. The NY Court of Appeals has been a “leader” in crafting the rules that circumscribe when a victim can sue the police for failure to protect. While there are numerous cases that one could choose to include in this volume, including several that directly involve domestic violence and police failure to enforce protective orders, *Kircher* has been selected for several reasons. It comes after several NY Court of Appeals opinions in this area, and thus provides a good vehicle to explore, critique, and consider expanding the doctrinal limitations. There are two dissenting opinions that call for a relaxation of some of the doctrinal limitations.

And it subtly demonstrates the problem of police callous attitude towards presumed family violence that often underlies their inaction. Kircher was abducted by a stranger from a drug store parking lot, who drove her around and raped her. The eye witnesses to the abduction reported it to a police officer, who dismissively assumed it was probably a domestic dispute, and thus did not follow the abductor's car.

5. Sharon P. v. Arman, Ltd., 21 Cal.4th 1181, 989 P.2d 121 (1999). A woman was raped in late morning in the underground parking garage of the office building where she was a tenant. The California Supreme Court held that the risk of sexual assault in this particular parking garage was not sufficiently foreseeable to impose a duty on the landlord to provide reasonable security, even though the court acknowledged the demonstrated risk of underground parking garages in general. The case highlights the way in which courts can use the duty issue and landlord protective policy concerns to keep cases from juries and erect significant barriers to tort recovery for sexual assault victims – especially the first sexual assault victim on a particular property.

Vicarious Liability

6. Lisa M. v. Henry Mayo Newhall Memorial Hospital, 12 Cal.4th 291, 907 P.2d 358 (1995). A young pregnant patient was digitally sexually molested during her ultrasound exam by the ultrasound technician employed by the hospital. The issue was whether he was acting within the scope of his employment so as to trigger respondeat superior liability for the employer hospital. In notable contrast to cases where they had ruled that employees committing physical assaults on other workers or customers were acting in the scope of employment, the court held that the sexual assault was done for purely personal “lust” reasons, so that the ultrasound technician was not acting within the scope of employment.

Damages: Damages issues have received significant attention from feminist torts scholars, and they remain extremely important for whether there are hidden barriers to equal access to the tort system and fair compensation for women and people of color.

7. Simpkins v. Grace Brethren Church of Delaware, 2016 Ohio 8188, 2016 Ohio Lexis 2961 (December 2016). A teenage girl was sexually assaulted by her pastor. In her suit against the church that employed him and that ignored his history, a jury awarded her a verdict in excess of \$2 million dollars. But Ohio has a general cap on non-economic damages for all tort claims, and the application of this cap significantly reduced the compensation that she could recover. She appealed, contending that the damage cap, as applied to sexual assault victims, was unconstitutional. The Ohio Supreme Court upheld the cap finding that it survived rational basis review.
8. G.M.M. v. Kimpson, 116 F.Supp.3d 126 (E.D.N.Y. 2015). A case involving harm to a young Latino boy from lead based paint. The economists who projected future earnings for the child used earnings tables based on race. The case directly raises the issue of whether courts should permit the use race-based earnings tables (and by extension sex-based

earnings tables) to calculate future lost earnings. It also illustrates the racially disparate impact of many environmental harms.

Compensable harms: Emotional Distress and Reproductive Harm. Tort law's traditional devaluing of emotional, relational and reproductive harm has worked to the detriment of women. Cases involving various aspects of reproductive harm raise important issues about reproductive health and autonomy which are often overlooked by courts.

9. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), the landmark case that first recognized a tort claim for "bystander" emotional distress suffered from watching a family member get gruesomely injured, regardless of whether the plaintiff was in the "zone of danger." Would such claims be better characterized as harms to important relational interests that are deserving of protection?
10. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993). In a case involving the sexual exploitation of a woman by her boyfriend who videotaped their consensual sexual intercourse and showed the tape around the college campus, the Texas Supreme Court declined to permit tort claims for negligent infliction of emotional distress. The case provoked a great deal of outcry by women's advocacy groups, and provoked a dissent by the lone woman Justice on the court, who characterized the result as overtly gender biased.
11. *Broadnax v. Gonzales*, 2 N.Y.3d 148 (2004). Overruling precedent that barred emotional distress claims for pregnancy loss unless the pregnant woman suffered a separate physical injury, the NY Court of Appeals permits a woman to recover for emotional distress against physicians whose negligent prenatal care caused the death of her fetus. This case and its precedents highlight the implications of characterizing a pregnant woman and her fetus as separate beings, so that loss of a pregnancy is not understood as physical harm to the woman.
12. *Greco v. U.S.*, 893 P.2d 345 (Nev. 1995). Physicians negligently failed to diagnose severe fetal defects in time for woman to consider whether to terminate the pregnancy. The parents brought a "wrongful birth" claim, and the disabled child brought a "wrongful life" claim. Surveying case law from many other jurisdictions, the court permitted the wrongful birth claim, while denying the wrongful life claim. While there are many cases from which to choose that explore these issues, *Greco* is selected because it discusses both wrongful birth and wrongful life in a single case, discusses the policies involved and the decisions of many other jurisdictions, represents the evolving majority approach, and like most cases, fails to fully comprehend the reproductive autonomy dimensions of these tort claims.

Intentional Torts

13. *Robinson v. Cutchin*, 140 F. Supp.2d 488 (D. Md. 2001). An African-American woman was involuntarily sterilized by a physician who performed a tubal ligation without her consent

during an emergency C-section to deliver her 6th child. The case discusses the difference between battery claims and informed consent medical malpractice claims, which sound in negligence. The opinion displays remarkable insensitivity to women's reproductive autonomy and to the racially biased attitudes of the doctor, and to the history of forced sterilization of minority women.

14. *Reavis v. Slominski*, 551 N.W.2d 528 (Neb. 1996). This case explores the issue of consent as a defense to intentional torts. Reavis had sex with her employer at an office holiday party; several years earlier, she had also acquiesced to his repeated sexual advances, claiming she could not turn him down because she desperately needed the job, and because her prior history of sexual abuse amounted to an incapacity that made her extremely fearful of not acquiescing. She sues for battery, and the issues involve apparent consent, coercion, duress, and incapacity as vitiating apparent consent. The case resulted in multiple opinions, with a debate between majority, concurrences, and dissent over the relevance of her prior history of sexual abuse, and over whether fear for one's job is sufficient to constitute duress that would vitiate apparent consent.

15. *Guthrie v. Conroy*, 567 S.E.2d 403 (Ct. App. N.C. 2002). A workplace sexual harassment hostile environment case brought as a tort claim for intentional infliction of emotional distress. The opinion, while acknowledging that the conduct would amount to a Title VII hostile environment claim, dismisses it as merely juvenile and boorish behavior that does not meet the stringent tort standard for "outrageousness." The opinion summarizes the factors and types of conduct in the workplace harassment context that would push the behavior into the "outrageous" category. The case highlights the interactions between statutory Title VII civil rights law and common law tort claims, and whether they are intended to vindicate different interests and should be assessed by different standards.

16. *Lyman v. Huber*, 10 A.3d 707 (Me. 2010). An i.i.e.d. case arising out of an emotionally abusive and controlling intimate partner relationship. The court focused on the "severe" emotional distress element of the claim, and overruled a verdict for the plaintiff, concluding that she did not suffer emotional distress more severe than what the "reasonable person" would be expected to tolerate. This case highlights the difficulties facing domestic violence victims who try to bring tort claims against their abusers, with courts often interpreting the elements of the i.i.e.d. tort more strictly than in commercial relationship or stranger relationship contexts. It is also a vehicle for exploring the potential for bias in the supposedly objective notion of the "reasonable person."

