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

By Martha Chamallas and Jennifer B. Wriggins

New York University Press, New York, NY, 2010. 228 pages, $40.00.

Reviewed by George W. Gowen

If there is truth to the Japanese proverb, "The saddest thing in life is to be born a woman," it lies in the treatment of women as chattel in much of the world, in female infanticide and circumcision, and in the sex trade in adolescent girls. But, if we flatter ourselves in believing that the United States is approaching gender equality as well as race equality, then *The Measure of Injury* reminds us that in tort law there still exists a disparity of treatment.

There has been progress. In *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y 2008), which involved a claim by an African-American man injured in the 2003 Staten Island Ferry crash, statistical evidence had been introduced suggesting that a spinal cord-injured African-American was likely to survive for fewer years than persons of other races with similar injuries. Judge Jack Weinstein disallowed such evidence, ruling that the use of race to determine tort damages violates the equal protection and the due process guarantees of the Constitution. Judge Weinstein's ruling was foreshadowed by the special master of the September 11 Victim Compensation Fund, who, in 2005, rejected the use of gender-based statistics that could have lowered awards to families of female victims. Martha Chamallas and Jennifer B. Wriggins find these rulings especially significant, because some courts, in computing damages, still rely on outdated Bureau of Labor Statistic tables that are divided by race, gender, and age.

Despite such progress, *The Measure of Injury* alleges that tort law hasn't kept pace with statutory developments in the field of civil rights. Minorities and women are still marginalized in private actions for injuries. For example, female victims of domestic violence still have to overcome traditional conceptions of the unity of husband and wife. The authors point out that courts still embrace marital harmony, protection of privacy, and the prevention of fraud in upholding interspousal immunity. The lack of liability insurance covering domestic violence (what are called "intentional acts" in insurance jargon) makes it hard for victims to retain lawyers, because, as the authors astutely observe, the litigation bar relies on the presence of insurance to fund contingency fees. They state: "In virtually every context, the presence (or absence) of liability insurance plays so crucial a role in determining the volume of litigation that it can be said that 'insurance drives litigation,' rather than vice versa."

The authors are especially critical of caps on non-economic damages, such as pain and suffering, because, among other reasons, such caps are allegedly not gender-neutral. Non-economic damages are more important for women, because women still earn far less than men and their awards for non-economic losses often exceed their economic losses.

According to the authors, courts are skeptical of claims for negligent infliction of mental distress, and this harms female plaintiffs who seek damages for gender-related injuries resulting from sexual exploitation, reproductive injury, and injury to intimate family relationships.

The authors conclude with three prescriptions for change:

- We advocate connecting civil rights and civil wrongs so that violations of civil rights will no longer be approached solely as public law infractions, insulated from tort liability.
- Taking the simple but important step of naming sexual autonomy and reproduction as special interests that trigger a duty of care in negligence law would bring the domain of torts and constitutional law closer together and provide much needed protection for liberty and equality in the private realm.
- [O]ur third prescription for change calls for demarginalizing claims of particular importance to women and minorities and reconceptualizing the core of tort law.

The authors' scholarship and practical suggestions, however, are hampered by their occasionally challenging writing style, as exemplified by this sentence:

> In attempting to intertwine the major themes of race and gender, we share the viewpoint of post-essentialist and critical race feminist writers who have maintained that systems of subordination are interlocking and independent and who have insisted that the specific situation of racialized subgroups of women and men may differ radically from those in the mainstream. **TFL**

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Nonprofit Governance: Law, Practices and Trends

By Bruce R. Hopkins and Virginia C. Gross

John Wiley & Sons, Hoboken, NJ, 2009. 259 pages, $75.00.

Reviewed by Christopher C. Faille

Corporate governance (or, more generally, business-entity governance) is a very hot topic these days. But what is it?

"Governance" is the way in which any commercial entity safeguards the interests of its investors or creditors. Authorities in the field of governance

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argue over questions such as:

- How large can a board of directors (or trustees) become before it becomes too unwieldy?
- How small can it be before it becomes incapable of proper deliberation?
- What is the best procedure for choosing directors?
- How might the threat of conflict of interest on the part of directors be managed?

Often the assumption in such investigations is that the investors are seeking a profit and that the directors have a duty to assist them in that search. Indeed, the profit motive is seen both as part of the problem and as part of the solution, as it was in Jonathan Macey's book, *Corporate Governance*, which I reviewed in *The Federal Lawyer* in January 2009. Accordingly, the question of how nonprofit institutions might best be governed to keep faith with their patrons or contributors deserves separate treatment—treatment it seldom receives.

The importance of this became devastatingly clear in the early 1990s, in the United Way scandal. In late 1991, some journalists began asking questions about the luxurious lifestyle of United Way's chief executive officer, William Aramony, who was receiving a salary of $390,000 a year; $73,000 in other compensation, such as pension contributions; and who was making personal use (even, it appears, romantic use) of the perquisites of his position. In December, United Way's board of governors hired investigators to look over the books. The investigation led to Aramony's departure from his position at United Way in February 1992, and ultimately to his conviction, in 1995, for conspiracy to defraud, wire fraud, mail fraud, and similar crimes.

This experience raised issues of governance. Couldn't the board have been more vigilant before press attention to Aramony forced its hand? In *Nonprofit Governance*, Hopkins and Gross refer to the United Way scandal briefly, noting that "these scandals in the nonprofit realm have increased somewhat in recent years, due in large part to greater focus by the media on charitable organizations and the various investigations conducted by the staff of the Senate Finance Committee."

Ah, there's one question: Why is pressure for improved nonprofit governance led by the staff of the Senate Finance Committee? It is because that committee concerns itself with taxation and other revenue matters in general, and because for several years Sen. Charles Grassley (R-Iowa), who is the chairman of the committee when the Republicans are in the majority and its ranking minority member otherwise, has taken a personal interest in ensuring that tax-exempt institutions conduct their affairs in an impeccable manner. As Sen. Grassley put it in a letter quoted in *Nonprofit Governance*, he is "working to see that tax-exempt hospitals provide benefits to the public commensurate with benefits and subsidies they receive" from federal, state, and local governments.

Lawyers who counsel nonprofit institutions in the post-Aramony climate may well benefit by keeping this book on their office reference shelf. The book covers the necessary points efficiently, discussing, for example, not only what the Internal Revenue Code demands of nonprofits, but also positions that an Internal Revenue Service reviewer might take, rightly or wrongly, in processing an application for the recognition of a tax exemption.

Though the material is of necessity somewhat dry, one finds relief from time to time in the authors' sense of humor. They note, for example, that the IRS has proposed that board members be traded between nonprofits, presumably so that they don't become too cozy. Hopkins and Gross then suggest that such trades might be "replete with their picture on a card accompanied by a slab of bubble gum." **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles *(2000).*

The Death of American Virtue: Clinton vs. Starr

By Ken Gormley

Crown Publishers, New York, N.Y. 2010. 789 pages, $35.00.

Reviewed by Henry S. Cohn

In *The Death of American Virtue*, Duquesne Law Professor Ken Gormley, author of a well-received biography of Archibald Cox, turns his attention to the epic battle of the late 1990s between President Bill Clinton and special prosecutor Kenneth Starr. Gormley, who spent years researching the subject and conducting interviews, has produced a thorough and readable account of a cheerless episode in American political history. The book contains much beyond a dry recitation of the facts, as Gormley writes of lessons learned and fills us in on secondary matters such as Susan McDougal's Whitewater sales campaign, the Lewinsky family's special tour of the Oval Office, and the Clintons' uneasy exit from Washington as they embarked on their 1998 Martha's Vineyard vacation.

Gormley first sets forth the biographies of the two main characters, Bill Clinton and Ken Starr, who were born a month apart from each other in 1946. There were differences between the two men as they grew up—Starr had a stable middle class home, whereas Clinton's father died before Clinton was born and Clinton's determined and outspoken mother raised him—but there were also similarities. Both men came from the South—Clinton from Arkansas and Starr from across the Arkansas border in Vernon, Texas—and both men had enormous ambition; Gormley leaves the impression that their respective ambition was the root cause of the eventual struggles between them.

Clinton was successful from an early age, graduating from Georgetown University and Yale Law School, and being elected Arkansas attorney general at age 30 and governor at age 32. Starr spent his first two undergraduate years at Harding College

in Arkansas and then transferred to the George Washington University. After graduating from Duke University School of Law, Starr clerked for Chief Justice Warren Burger and then, after a few years at a Los Angeles law firm, worked for Ronald Reagan's attorney general, William French Smith. That position led to his becoming, at age 37, the youngest judge ever appointed to U.S. Court of Appeals for the District of Columbia Circuit. Anticipating a Supreme Court nomination, he resigned to become solicitor general under President George H.W. Bush. After Bush's loss to Clinton in 1992, Starr left the government for private practice at the Washington law firm of Kirkland and Ellis. He was poised, however, to return to the public sector.

After these biographies, Gormley begins his tale of horrors that led to the Clinton-Starr confrontation. Two separate paths later merged. The initial path flowed from the Whitewater project dreamed up by the hustler and friend of Bill Clinton, Jim McDougal. The Clintons invested in McDougal's questionable land and bank schemes. Although the Republicans were unable to make credible charges of illegalities concerning Whitewater during the 1992 election campaign, the GOP was more successful in raising questions about the project after Clinton assumed the presidency. The Whitewater scandal also arose in the context of the death of presidential aide Vincent Foster and the allegations against Hillary Clinton known as "Travelgate." Bill Clinton, much to his later regret, agreed to have a special prosecutor, moderate Republican Robert Fiske, appointed to review these matters for potential criminal conduct.

When Fiske's investigation appeared to be losing steam, the Republicans forced him from his post, and Ken Starr took his place. Just before Bill Clinton was elected to a second term, Clinton was sued by Paula Jones, who claimed that Clinton had made advances toward her while he was governor of Arkansas. Jones' lawsuit, as well as Starr's efforts to invigorate Whitewater, were headed to oblivion when Linda Tripp, a disgruntled employee at the Pentagon, released a bombshell to Jones' attorneys and to Starr: the notes and tapes of her conversations with a fellow Pentagon employee, Monica Lewinsky.

Starr was given permission by a three-judge panel of the District of Columbia Circuit to expand his investigation beyond Whitewater to include the Lewinsky affair. He vigorously investigated the charges by, among other things, holding Lewinsky incommunicado and subjecting her mother to a bruising two-day grand jury appearance. At the same time, Jones' attorneys revived her lawsuit by showing that Clinton, at a deposition, had not testified truthfully about his relationship with Lewinsky.

Finally, Starr compelled Clinton to testify before a grand jury. This culminated in the House of Representatives impeaching Clinton based in part on his statements at the Starr grand jury. The proceedings collapsed at the trial in the Senate, however. Senators refused to allow the 13 House managers under Rep. Henry Hyde (R.-Ohio) to present live witnesses, such as Monica Lewinsky. Sen. Dale Bumpers (D.-Ark.) and Robert Byrd (D.-W.Va.) gave passionate speeches that criticized Clinton's behavior, but opposed Clinton's removal from office.

With the impeachment trial concluded, Clinton settled with Jones for $850,000. To settle with the special prosecutor (by then Starr had resigned and the post was held by Robert Ray), Clinton paid a $25,000 fine and agreed to have his law license suspended for five years. He was also held in civil contempt in the *Jones* case by U.S. district court judge Susan Webber Wright.

Gormley's book raises several important issues. One issue that still lingers in the legal community is whether the Supreme Court ruled correctly in *Clinton v. Jones*, 520 U.S. 681 (1997), that Jones' civil action could proceed against Clinton while he was in office. Vincent Bugliosi, the California lawyer and author, wrote in *No Island of Sanity* (1998) that the Supreme Court erred egregiously in failing to properly balance Jones' right to recovery for her alleged injuries against the right of the President to conduct the public's business without harassing diversions.

Gormley, in gathering information for the book, met with Justice Stevens, who wrote the opinion in *Clinton* v. *Jones*, in which seven other justices joined and Justice Breyer concurred, insisting that Clinton might theoretically have had grounds for delaying the deposition, but had not sufficiently shown that participating in the proceeding would interfere with his constitutional duties. Justice Stevens, discussing the case with Gormley as his service on the Court was approaching its end, strongly supported his 1997 decision. He pointed out that his opinion required Clinton, at most, to submit to a one-time deposition while in office.

Justice Stevens made a further point, which Gormley emphasizes, that Clinton had brought on his difficulties by his own mistakes. The Whitewater investigation, the Foster affair, and the Jones lawsuit were all near to concluding favorably for Clinton when the Monica Lewinsky affair came to light. In addition, Clinton made matters worse with his hairsplitting responses under oath in his civil deposition and his grand jury testimony.

But Gormley also challenges Starr's investigation. Starr, he writes, did not exercise control over his staff, was overly influenced by those seeking a negative outcome for Clinton, prepared his famous report with unnecessarily salacious language, and pushed for impeachment before completing his fact-finding. Gormley also criticizes Starr for attempting to force the U.S. Secret Service into divulging its records of its staff's observations of Clinton and Lewinsky. Finally, Gormley reveals that members of Starr's staff argued that he should drop the Lewinsky track of the investigation to concentrate solely on Whitewater.

In his review of this book in the Spring 2010 issue of *The American Scholar*, Lincoln Caplan notes that, whereas Gormley's biography of Archibald Cox presented an attorney who could be venerated, *The Death of American Virtue* shows the legal profession at its worst. Gormley's tale is of attorney-investigators alleged to have denied constitutional rights to witnesses; a President who was an attorney, as

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well congressmen who were attorneys, confessing to affairs; and litigators trying to dig up dirt on their opponents. Such goings-on furnish great material for a commencement day address at a law school.

The Death of American Virtue is but the latest book about Presidents and sex scandals—from those involving Thomas Jefferson and his slave Sally Hemings into the 20th century with John F. Kennedy and Judith Exner. Such books raise the question of what privacy rights our appointed or elected officials may demand: Should their private conduct be immune from public exposure and censure? Is the failure to observe proper boundaries with a staff member—or to disclose under oath the extent of that involvement—related to their public responsibilities? One must conclude from *The Death of American Virtue* that it is no longer possible for officeholders to compartmentalize their private and public lives. **TFL**

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We Dissent: Talking Back to the Rehnquist Court: Eight Cases that Subverted Civil Liberties and Civil Rights

Edited by Michael Avery

New York University Press, New York, NY, 2009. 231 pages, $29.95.

REVIEWED BY GEORGE W. GOWEN

Covering half the dust jacket of *We Dissent* is the face of the late Chief Justice William Rehnquist. The face is benign, but the first paragraph of Michael Avery's introduction to the book is hardly benign:

> *We Dissent* presents a vision of constitutional law in the United States that differs considerably from recent jurisprudence of the United States Supreme Court. It is a vision that takes seriously a commitment to democratic values, social justice, and racial equality and that insists upon governmental accountability to our citizens and others protected by the Constitution. *We Dissent* was provoked by the distance the Supreme Court traveled from these ideals during the tenure of Chief Justice William H. Rehnquist.

To substantiate the implied charge that the Supreme Court did not have a serious commitment to democratic values, social justice, or racial equality, Avery has enlisted six professors and two civil rights lawyers to dismember eight Rehnquist-era decisions by means of self-styled dissents.

The first dissent is by Erwin Chemerinsky (founding dean of the Donald Bren School of Law at the University of California, Irvine), and it is to the five-to-four decision in *Alden v. Maine*, 527 U.S. 706 (1999), which held that state governments possess sovereign immunity and cannot be sued in state court, even on federal claims, without their consent. Chemerinsky is blunt and forceful:

> The majority opinion invents a constitutional principle, sovereign immunity, that has no basis in the text or history of the Constitution. Even worse, it is inconsistent with one of the Constitution's most important commands: no one, especially not the government, is above the law. … A doctrine derived from the premise "the king can do no wrong" deserves no place in American law.

The next dissent is by James Raskin (professor of constitutional law at American University), and it is to the six-to-three decision in *Arkansan Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), which upheld the exclusion of an independent candidate from a televised debate. Raskin complains that the decision not only allowed the state of Arkansas to violate the rights of independent candidates; it "trample[d] the right of all American citizens living in the state to reconstitute their congressional leadership through free debate and unmanipulated choices in the election process."

Even though *Cuyahoga Falls v. Buckeye*, 538 U.S. 188 (2003), was a unanimous decision, Eva Patterson (a civil rights lawyer) and Susan K. Serrano (a professor at the University of Hawaii Richardson School of Law) dissent from the Court's holding that plaintiffs in federal racial discrimination suits may not rely upon the disproportionate impact of a challenged action, but must prove intent to discriminate. They proclaim:

> [T]he Court's "intent" requirement undermines viable discrimination claims and key remedies for people of color. Under this constricted doctrine, plaintiffs must show the near-impossible: a defendant's subjective intent to discriminate. The doctrine views discrimination as an isolated, individual phenomenon resulting from a decision maker's specific and identifiable "intent," rather than as an institutionalized, historically influenced, and often subconscious process.

Another unanimous decision, *United States v. Whren*, 517 U.S. 806 (1996), upheld the legality of a police "pretext stop" – the use of a traffic offense to conduct a search for drugs. The decision generates a dissent by Tracey Maclin (a professor at Boston University School of Law), who argues:

> Since its ratification, in 1791, "a paramount purpose of the [F]ourth [A]mendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures." History shows that the Framers believed the best way to guard against arbitrary and unjustified governmental intrusions was to control the discretion of law enforcement officers. ... By allowing police officers to use any traffic violation as a subterfuge to conduct an arbitrary and unjustified narcotics investigation, the Court has given

> police officers across the nation virtually unchecked discretion to interfere with the liberty and privacy of any motorist. ... As in this case, African American male motorists will bear the brunt of this arbitrary police power.

A high-speed police chase resulting in the death of the pursued presented the question of whether the deceased had been deprived of life without due process of law. In yet another unanimous decision, the Court ruled in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), that, to prove a violation of substantive due process, it is necessary to show that the official's conduct was shocking to the conscience. The Court stated that a reckless indifference to life is not sufficient. The dissent offered by Michael Avery (a professor at Suffolk University Law School) centers on the facts of the case:

> Crashing into his body with a speeding police cruiser violates that liberty interest unless it is justified by a compelling governmental interest. Apprehension of a motorcyclist for traffic violations does not, without more, constitute a governmental interest sufficiently compelling to race on public roads at speeds approaching 100 miles per hour. Moreover, attempting the apprehension by means of a dangerous high-speed chase is not a "narrowly tailored" approach with no safer options available, such as noting down the license plate and making the arrest at a later time.

Chavez v. Martinez, 538 U.S. 760 (2003), was a due-process challenge to a coercive interrogation with no *Miranda* warnings, in a hospital emergency room, of a critically wounded man who was screaming in pain while lapsing in and out of consciousness. The Court held that this interrogation did not violate the Fifth Amendment because no incriminating statements that were made at the interrogation were introduced into evidence. In her dissent, Majorie Cohn (a professor at the Thomas Jefferson School of Law) quotes from Justice Kennedy's concurring and dissenting opinion in the case:

> Our cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of government, not merely an evidentiary rule governing the work of courts. The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits.

In *Saucier v. Katz,* 533 U.S. 194 (2001), a six-to-three majority held that qualified immunity protected a police officer from a charge of excessive force when he threw a political demonstrator into a police van. Even if excessive force were used, the Court found, the Fourth Amendment was not violated if the officer believed, even mistakenly, that his conduct was reasonable. David Rudovsky (a professor at the University of Pennsylvania Law School) argues:

> Once a jury has determined that the force used was excessive, because the officer acted in an objectively unreasonable manner, allowing a defense of qualified immunity is entirely inconsistent with that determination. The standard for determining whether force was excessive and for deciding qualified immunity issues are identical: was the force objectively reasonable under the circumstances. ... The immunity doctrine erroneously gives the officer a "second bite at the apple" at the expense of the rights of the citizen by allowing a court to conclude that a "reasonable officer" could have acted unreasonably.

In *Strickland v. Washington*, 466 U.S. 668 (1984), Thurgood Marshall was the lone dissenter, but, instead of relying on his dissent, Abbe Smith (Georgetown Law Center) feels compelled to do him better, with a 12-page dissent plus 14 pages of notes and citations. The Court in *Strickland* noted that the Sixth Amendment guarantees the effective assistance of counsel and not merely the presence of a "warm body." However, Smith writes, "the standard for attorney performance actually adopted by the Court was not effective assistance of counsel but '*reasonably effective assistance*.' The Court held that a defendant challenging his counsel's performance must show that the 'representation fell below an objective standard of reasonableness.'" In her dissent, Smith agrees with Justice Marshall that "a showing of incompetence on the part of defense counsel should automatically require reversal of the conviction regardless of injury to the defendant."

The eight decisions that *We Dissent* examines do relate, as its editor is quoted above as saying, to matters of democratic values, social justice, and racial equality. But, to the extent that the decisions strayed from these ideals, it is hard to hold just the conservatives on the Rehnquist Court responsible. This is because the eight decisions were not all infamous five-to-four opinions, but even the more liberal justices went along with some of them. Only one of them was decided by a five-to-four margin, and three of them, in fact, were unanimous opinions. The middle-of-the-road justices, Kennedy and O'Connor, wrote five of the eight, and even Souter wrote one.

We Dissent is valuable because it invites the reader to reflect on the eight decisions from which it dissents, and because a footnote refers the reader to Justice Brennan's *In Defense of Dissents,* 37 HASTINGS L.J. 427 (1986). **TFL**

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