WOMEN MADE WHOLE: HOW TORT LAW CAN CHANGE THE LIVES OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT VICTIMS

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INTRODUCTION

There is a familiar saying that “justice is blind,” and thus “the conventional wisdom is that the legal rules, concepts, and structures for liability no longer take account of the race or gender of the parties.”¹ Many find this line of thinking to be a mistake, especially in the realm of tort law, where tort reform has garnered significant renewed interest from legislatures in the past decade. To tort-reform proponents, the main focus of reform has been on imposing caps on noneconomic damages, as opposed to addressing the real area of tort law that needs reforming: the effects that both current legislation and modern tort law have on women’s ability to “find lawyers and gain access to the civil justice system.”² Because women are the overwhelming majority of victims of domestic violence and sexual assault, the emphasis of this piece will be on women and how they have historically fared pursuing gender-linked tort claims, how they are currently faring, and what can be done to ensure civil suits are available to women in pursuing those gender-linked causes of action.

My focus on women stems from facts such as these: 1.) 92% of women surveyed said reducing domestic violence and sexual assaults was their top concern;³ 2.) Less than

half of domestic violence incidents are reported to police;\textsuperscript{4} 3.) Approximately 1,270,000 women are raped each year, while another 6,646,000 are victims of other sexual crime, including sexual coercion, unwanted sexual contact, or unwanted sexual experiences;\textsuperscript{5} 4.) Over 22 million women in the United States have been raped in their lifetime;\textsuperscript{6} 5.) Women aged 15-45 are more likely to be maimed or die from male violence than from cancer, malaria, traffic accidents and war combined;\textsuperscript{7} and lastly, 6.) the cost of intimate partner violence against women exceeds an estimated $5.8 billion; these costs include nearly $4.1 billion in the direct costs of medical care and mental health care and nearly $1.8 billion in the indirect costs of lost productivity and present value of lifetime earnings.\textsuperscript{8} These are disturbing statistics, but they are an integral part of analyzing both intentional tort law and sexual assault causes of action brought in civil courts.

I. A HISTORY OF WOMEN AND TORT LAW: 1860-1930

Women plaintiffs have historically had it pretty rough in the realm of tort law. While tort law emphasizes a person’s physical security and property, it devalues the price of emotional security and personal relationships.\textsuperscript{9} Because men traditionally existed in the public sphere, being the owners and managers of property, while women were traditionally confined to the home as caretakers assigned the “emotional” work, “this apparently gender-neutral hierarchy of values has [historically] privileged men” over

\begin{itemize}
  \item \textsuperscript{5} Id.
  \item \textsuperscript{6} Id.
  \item \textsuperscript{7} Gender-Based Violence, HALFTHESKYMOVEMENT (last updated May 11, 2012), http://www.halftheskymovement.org/issues/gender-based-violence.
  \item \textsuperscript{8} Costs of Intimate Partner Violence Against Women in the United States, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL (March 2003), http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.
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women.\textsuperscript{10} Many feminists scholars\textsuperscript{11} have offered as example the history of tort law’s fright-based physical injury claims, which were usually more frequently brought by women than men, as evidence of this discrimination. Two specific forms of fright-based physical injury cited are the pregnant plaintiff whose fright caused her to miscarry or suffer a stillbirth and the mother who suffers “nervous shock when she witnesses her child’s injury or death.”\textsuperscript{12} These types of claims were classified in the law as emotional harms as opposed to physical harms, despite the fact that these “emotional” harms sometimes compromised a woman’s physical integrity, (as in the cases of miscarriages and stillbirths).

In the 19\textsuperscript{th} century tort claims were governed by the “impact rule,” which stated that a plaintiff could only recover if her fright-based injury was “coupled with a direct physical impact.”\textsuperscript{13} Having no male analogue, “[t]ort law thus marginalized women's injuries by taking them out of the realm of compensable physical harms.”\textsuperscript{14} What this essentially meant was the law often failed to compensate women for these seemingly gender-classified injuries, and numerous doctrinal obstacles were erected to bar recovery for these women.\textsuperscript{15} Although the impact rule was done away with in the 1930s, it would not be until Dillon v. Legg that a woman could recover damages for fright-based injuries incurred while witnessing the negligent injuring of her child, and only in some jurisdictions is this possible.\textsuperscript{16}

\begin{flushright}
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Leslie Bender, An Overview of Feminist Torts Scholarship, 78 CORNELL L. REV. 575, 578 (1993).
\textsuperscript{15} Id.
\textsuperscript{16} Dillon v. Legg, 68 Cal.2d 728, 733 (1968).
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women are so disproportionately impacted by way of bringing more claims, there is clearly a gender-dynamic at work in a field that aims to be completely unbiased.

Another way in which tort law has barred recovery for women is through “interspousal tort immunity,” a rule that prohibits husbands and wives from pursuing a civil cause of action against each other for personal injuries.\textsuperscript{17} Interspousal tort immunity was first recognized in the 1860s,\textsuperscript{18} and one needn’t be a legal scholar to see what about it is glaringly problematic. In the 19\textsuperscript{th} century and 50+ years on, wife-battering and domestic violence were hush-hush matters to be kept private, advertising depicting men beating their wives was no big deal, and newspapers, like the one below from 1913, actually discussed whether one should be “for” or “against wife beating.” If it is not clear from the photo, Dr. Waugh believes: “"When she awakens your jealousy, beat her; she needs it." In the advertisement below, the text reads: “…if he discovers you’re still taking chances on getting flat, stale coffee…woe be unto you!” as he raises a hand to strike her.

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\includegraphics[width=\textwidth]{advertisements.png}
\caption{Advertisements from 1913 discussing wife beating.}
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Interspousal Tort Immunity & T. O. Clarke, THE LAW OFFICES OF ROBERT L. BOGEN (Feb. 25, 2015), \cite{Bogen} \\
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18 & Disturbing Article From 1913 Debates The Pros And Cons Of Beating Your Wife, \textit{HUFFINGTON POST} (Oct. 6, 2014), \url{http://www.huffingtonpost.co.uk/2014/06/10/pros-and-cons-beating-wife-vintage-article-1913_n_5477954.html}. \\
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What made interspousal tort immunity even more nefarious during this era is the fact that marriage functioned to strip women of the little rights they did have and drastically altered their legal status. As single women they were able to contract, own and sell property, and were entitled to the money that their property (or properties) earned for them. After marriage, however, all these rights disappeared. “Upon wedlock, husbands acquired possessory rights to their wives' property and could use its rents and profits,” and a wife could no longer contract, file claims, or transfer property.\textsuperscript{21} To summarize, in the era of \textit{Commonwealth v. Fogerty}, the first case to recognize a spousal exception to rape, (noting that being married to the victim is a legitimate defense),\textsuperscript{22} and at a time when wife beating was not only legal but jocosely exhibited in advertising,\textsuperscript{23} women possessed neither criminal redress against the violence committed against them by their husbands, nor any type of civil relief for the injuries sustained by the abuse. With no money to call their own and no means of obtaining it, tort law should have been a place a woman could go to seek damages for her injuries. Historically, tort law failed women, both by stereotyping them through doctrines like the impact rule and by putting them in real danger by barring recovery for injuries caused by their husbands.

\textsuperscript{21} Tobias, \textit{supra} note 18, at 361-362
\textsuperscript{22} Janet Hong, \textit{Marital Rape}, AMERICAN CIVIL LIBERTIES, (http://uscivilliberties.org/themes/4098-marital-rape.html).
II. WOMEN AND MODERN TORT LAW

Interspousal tort immunity started crumbling beginning in 1914 and “has been transformed dramatically from a majority to a minority rule since 1970.”\(^{24}\) Given that all American jurisdictions have Emancipation Acts, sometimes called married women’s acts,\(^{25}\) that give a married woman the same legal status as her husband as a separate legal entity and establishes all her rights to contract, acquire property, and so on, the rationale on which interspousal tort immunity was predicated is no more, since a married couple is no longer considered one legal unit.\(^{26}\) In spite of this fact, there are still a few hold-out jurisdictions that continue to implement the interspousal immunity doctrine.\(^{27}\) In his article on the subject, Carl Tobias calls for total abolition of what remains of the interspousal immunity doctrine because he believes it actively harms women:

“Abolition… could alter the perception of married women as weaker beings with fewer rights and cause such activities as wife battering and marital rape to lose some of their social approval.”\(^{28}\) Tobias goes on to conclude that this doctrine of tort law is undeniably a form of gender discrimination because millions of women are raped and beaten by their husbands, (while men harmed by women constitute a massively smaller percentage of intimate partner violence), and tort law in these outdated jurisdictions affords women no compensation for personal injuries sustained by their husbands.\(^{29}\)

Because tort law is mostly common law, it is capable of updating its legal standards at a pace quick enough to address the new challenges women face, and this last example is

\(^{24}\) Tobias, supra note 18, at 359.
\(^{26}\) BOGEN, supra note 17.
\(^{27}\) Id.
\(^{28}\) Tobias, supra note 18, at 476.
\(^{29}\) Id. at 477
hardly enough to say tort law is failing women, rather it is merely one modern illustration of discrimination that only occurs in a minority of jurisdictions. Truly, since the Civil Rights era and in the past two decades in particular, tort law has mostly managed to keep up with changing times and produce more egalitarian cases, but it is possible to broaden the scope of inquiry and point to larger problems within modern tort law that disadvantage women in a way that does not disadvantage men. To see where these problems lie, one has to consult the American Law Institute’s Restatement of Torts (Third).

**A. RESTATEMENT OF TORTS (THIRD)**

The argument of feminist legal scholars is not so much that tort law favors male plaintiffs over female plaintiffs, but instead that, “[f]ollowing a pattern characteristic of contemporary forms of bias, the gender-dynamic in [certain types of] cases… plac[es] women at a considerable structural disadvantage.” Similar to the aforementioned issues fleshed out in tort law’s history with women, the latest Restatement is built around “the dual premises that accidental injury lies at the core of tort law and that physical injury, rather than emotional harm or injuries to relationships, is of paramount concern.” This is reminiscent of the “emotional harms” governed by the old impact rule, though the impact rule is mostly gone, and seems to presume that physical harm is of greater importance or significance than emotional harm. It is known that the emotional harm cases are still mostly brought by women, so is the same thing happening here with women’s claims that happened over a hundred years ago? Placing the physical over the emotional has serious implications for a female plaintiff’s prospective recovery. Feminist

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31 Id. at 2.
32 Id. at 64.
legal scholars Martha Chamallas and Jennifer B. Wriggins believe “that the privileging of accidental injury is possible only because massive injuries caused by domestic violence and sexual exploitation have fallen outside the realm of compensable harms.”

On the topic of the physical/emotional dichotomy, the drafters of the Third Restatement of Torts (Third) “initially chose not to update the sections devoted to the traditional intentional torts, such as battery, assault, and false imprisonment, and to treat cases of emotional harm as a special topic, reserving it for separate consideration at a later date.” Contemporary, left-leaning scholar Richard Abel concurred there has been a trend toward accident-oriented tort law, remarking that changes in “industrialization, urbanization, capitalism, and the state” tend to “reduce the salience of intentional torts [and] increase that of negligent injuries.” Although intentional torts constitute but a blip on the radar of tort law, one has to wonder if this is only so because nothing has changed much for women in that area. Despite being but a small portion of all tort claims, intentional tort claims brought by women against offenders do have the power to transform the legal system, as well as women’s ability to seek redress for harms committed against them.

The argument for focusing on intentional torts is simple: battery, assault, and false imprisonment are crimes that many American women will face in their lifetime. Between 2001 and 2012, roughly 18,000 women were murdered by current or ex partners; using that same time frame, that’s more than the number of U.S. troops killed in Iraq.

33 Id.
34 Id. at 63.
Afghanistan, and all who perished on 9/11 combined.\(^{36}\) In a bleak aside, it's important to note that these are just the numbers of women murdered by intimate partners and they do not include women killed by strangers or those who have gone missing and have never been found. In 1995 alone, “[t]he estimated cost of incidents of intimate partner violence perpetrated against women in the U.S. was $5.8 trillion dollars.”\(^{37}\) If roughly 4.8 million women experience physical violence every year, and roughly 1 in 4 women will experience “severe” intimate partner violence in her lifetime,\(^{38}\) intentional tort law could be an extremely important avenue for women to seek damages for the violence or harm enacted upon them.

**B. INTENTIONAL TORTS AND DOMESTIC VIOLENCE**

Many have referred to domestic violence in this country, (and of course internationally), as an epidemic.\(^{39}\) Looking at the numbers, that sounds correct. We know that domestic violence falls disproportionately on women, as they comprise 85-90% of all domestic violence victims in the United States.\(^{40}\) Domestic violence can be emotional, financial, physical, (or a combination of the three), and women are far more likely than men not only to be victims but also to sustain injuries as a result of domestic violence.\(^{41}\) When domestic violence does become physical, it often involves physical battering, “such as striking, beating, shoving, and slapping; sexual assault, rape; restraint, including forcing the victim not to leave the house or to stay away from family and friends…”\(^{42}\)

\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) CHAMALLAS & WRIGGINS, *supra* note 1, at 65.
\(^{42}\) Id. at 66.
It is easy to see how, from a torts perspective, many of the actions associated with domestic violence “are likely to fall under the classic intentional torts of battery, assault, and false imprisonment.” Battery, in tort law, is defined as “an intentional harmful or offensive bodily contact with the plaintiff against her will or wishes.” The term “battered wife” springs to mind in this instance. The definition of “battery” is inextricably linked with the physical abuse female victims of domestic violence suffer. Marital rape also falls under the category of battery, now that statutes have been enacted to do away with the old tort law, which, as previously noted, made being married a defense to rape. We know that women are often threatened by their partners and that these threats are made to make a woman fear for her life. That, too, is an intentional tort, as assault occurs when “the defendant’s action puts the victim in fear of an imminent battery.” Likewise, a tactic used by abusers to keep a woman trapped in the cycle of abuse is that of cutting her off from family and friends, controlling all the finances, and thereby making it impossible if not extremely dangerous to leave. This behavior falls under the intentional tort of false imprisonment, which takes place in cases in which the abuse “restrains the victim’s freedom of movement by means of force or threat of force.”

Many women struggle in abusive relationships that have not become physical, but are nonetheless verbally abusive. In this instance, it’s somewhat harder to prove tortious behavior of the defendant, but a woman’s best shot at liability under these circumstances is to use the relatively new tort of intentional infliction of emotional distress (IIED). An element of IIED is that the defendant caused emotional distress by exhibiting “extreme

43 Id.
45 Id. at § 33, at 63-64.
46 Id. at § 36, at 67-9.
47 CHAMALLAS & W RIGGINS, supra note 1, at 66.
and outrageous” behavior.\(^{48}\) No bright-line rule exists to determine what type of action is “extreme and outrageous,” but the phrase is “used to articulate a standard that marks off behavior that is ‘intolerable in a civilized community.’”\(^{49}\) This specific tort is garnering more attention from courts across the country, and more and more courts have been willing to qualify behavior “extreme and outrageous” when the defendant takes advantage of a vulnerable plaintiff or when an abusive partner “uses his physical and economic advantage to heighten the disparity of power between the parties and to intensify feelings of helplessness on the part of the victim.”\(^{50}\)

Despite the seemingly perfect fit between domestic violence and intentional tort doctrines, very few domestic violence cases ever end up as tort cases,\(^{51}\) which initially seems puzzling until one considers that the major barrier to domestic violence tort claims is “the absence of liability insurance as a fund that victims can tap into to secure compensation.”\(^{52}\) There is no insurance for domestic violence to cover violence-sustained injuries, unlike there is for cars or homes. Additionally, “[a]lthough homeowners’ insurance policies provide broad coverage for torts committed anywhere in the world by the homeowners, they typically exclude coverage for ‘intentional acts.’”\(^{53}\) Some policies also contain a “family member exclusion” clause, reminiscent of interspousal tort immunity, that denies coverage if one member of the family tries to sue another.\(^{54}\) With no liability insurance to tap into, female plaintiffs pursuing domestic violence tort claims may have difficulty in finding a lawyer to take their case, as studies have shown that

\(^{48}\) Id.
\(^{49}\) Id.
\(^{50}\) Id. at 67
\(^{51}\) Id. at 72.
\(^{52}\) Id. at 70
\(^{53}\) Id. at 70-1.
plaintiff’s attorneys far prefer to pursue claims against middle-class, insured defendants, rather than take on cases against wealthy defendants with no insurance.\textsuperscript{55} These are troubling barriers to recovery, as the average cost of emergency care for female victims of domestic violence is $948.00, and battered women seek ER care more frequently than the average woman because victims’ injuries are recurring.\textsuperscript{56}

In summation, the law of intentional torts, despite how perfectly its features align with harms committed as acts of domestic violence, fails women miserably. 1.) There is no liability coverage available for women to recover and “be made whole” again, making it hard to find a lawyer who will even take on a domestic violence tort; 2.) The Restatement of Torts (Third) downplays the relevance of intentional torts, which in the context of domestic violence is a horrible mistake in light of victims’ exclusion from liability coverage; 3.) The “family member exclusion” in homeowners’ liability policies is not only reminiscent of interspousal tort immunity, but was actually added by insurance companies shortly after interspousal tort immunity began to disappear;\textsuperscript{57} 4.) This exclusion was intended to prevent family members from colluding, and it is absurd to think a battered woman pursuing an intentional tort against her husband would be “colluding” with him;\textsuperscript{58} 5.) Classifying domestic violence as an intentional tort makes it nearly impossible to sue because homeowners’ insurance will not cover “intentional acts” committed; and 6.) the law has failed “to require or encourage insurers to provide

\textsuperscript{56} Vagianos, \textit{supra} note 36.
\textsuperscript{57} CHAMALLAS \& WRIFFINS, \textit{supra} note 1, at 70.
\textsuperscript{58} \textit{Id.} at 71.
adequate protection for victims of intentional harms.”

Even where these obstacles are surmountable, there is still the issue of statutes of limitations.

In the United States, the statutes of limitations for intentional torts are typically shorter than those for negligence. Statutes of limitations for battery, assault, and false imprisonment generally range between one to two years, and statutes of limitations for intentional infliction of emotional distress commonly range from two to three years. The statutes of limitations for negligence, on the other hand, usually range between two to six years. The differences in years between statutes of limitations for intentional torts and negligence claims may seem minuscule, but constitute a serious problem in the context of domestic violence. Because of coercion, control, and the cycle of domestic violence, coupled with the very real danger many of these women are in, it is incredibly difficult to file a claim near the time of injury. Some women don’t have access to a car. Some would be “in trouble” with their partner if they came home with no explanation as to where they were. There are a host of factors that make this tiny window of statutes of limitations for intentional torts frustrating and problematic.

From this research it is clear that domestic violence is not truly accounted for in the area of intentional torts. Entwined are a victim’s unique circumstances with the cruel mistake of domestic violence being classified as an intentional tort, while insurance policies exclude liability coverage for “intentional acts.” It would seem that of this class of torts, intentional infliction of emotional stress is a victim’s best shot at recovery, but

\[\text{References}\]

59 Id. at 73.
61 CHAMALLAS & W RIGGINS, supra note 1, at 73.
62 Id.
63 The Cycle of Domestic Violence, DOMESTIC VIOLENCE ROUNDTABLE (last updated 2008), http://www.domesticviolenceroundtable.org/domestic-violence-cycle.html (explaining the three phases of domestic violence within a relationship: tension building phase, acute battering phase, and the honeymoon phase; this chart/cycle is widely disseminated amongst social workers who work with victims).
even that lacks proper insurance and many courts are unwilling to apply it in the marital context. Despite women constituting the overwhelming majority of victims of domestic violence, the barriers to recovery are “couched in gender-neutral terms, making them less recognizable as gender bias,” and as a result “the trickle of cases that make it into the torts domain are far too few to ‘mainstream’ the injury and affect prevailing prototypes of intentional torts.”

C. SEXUAL ASSAULT: CLAIMS AGAINST OFFENDERS & THIRD-PARTIES

Victims of domestic violence, unlike victims of other gender-linked harms like rape and sexual assault, “are not able to look to third-party defendants… for compensation based on a failure to prevent the injury from occurring.” Because the main impediment to relief for women who are victims of domestic violence is a lack of “domestic violence insurance,” I want to examine how women fare in civil suits where insurance money is abundant. While the failure of intentional torts to compensate victims of domestic violence is incredibly disheartening, there is another equally insidious harm committed mostly upon women and that is the crime of rape/sexual assault. Sex-crime victims can bring a civil suit against their attackers and third-parties, and many do. Additionally, civil suits are an important vehicle for recovery “against parties unlikely to be subject to criminal charges at all, as in recent cases filed against archdioceses for their failure to adequately respond to child sexual assault by priests.”

Ellen M. Bublick writes, “As judged by state appellate court decisions, the number of civil cases being litigated by sexual assault victims has increased dramatically, 

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64 CHAMALLAS & WRIGGINS, supra note 1, at 75.
65 Id. at 76.
66 Id. 71
67 Ellen M. Bublick, Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies, 59 SMU L. Rev. 55, 56 (2006).
perhaps exponentially, in the last thirty years.” 68 There were ten to fifteen-fold as many cases filed by sexual assault victims just in a five-year period, (2000-2005), than there were thirty years ago. 69 After reading about intentional torts and domestic violence, cynicism toward tort law’s treatment of women is certainly warranted, but during this five-year period, case law illustrates that courts were “concerned with institutional responsibility to affect the conditions that make sexual assault prevalent and largely unsanctioned.” 70 And interestingly, “at the appellate level, the vast majority of tort claims filed by sexual assault victims involve at least some claims against a third-party defendant.” 71 Third-party actors, who would not usually be subject to criminal liability, are now the focus of appellate-level litigation, as courts are increasingly recognizing “third-party duties to use reasonable precaution not only to prevent negligent harms, but also to prevent intentional torts” 72 like sexual assault and rape.

Third-parties, such as schools, hospitals, institutions, bus services, etc., typically appear in cases involving negligence, “which is unlikely to be sanctioned through the criminal-law process,” and many of these cases arise from date or acquaintance rape. 73 Grossly enough, a large number of these cases involve victims who are particularly vulnerable, such as the elderly, minors, handicapped individuals, and the mentally ill. 74

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68 Id. at 59.
69 Id.
70 Id. at 61.
71 Id.
72 Id.
73 Id. at 66
74 Id. at 67; See, e.g., Kodiak Island Borough v. Roe, 63 P.3d 1009, 1011 (Alaska 2003) (claimed multiple assaults on developmentally disabled woman with cerebral palsy); Regions Bank & Trust v. Stone County Skilled Nursing Facility, 49 S.W.3d 107, 110 (Ark. 2001) (showing semi-comatose quadriplegic patient who was assaulted); Doe v. Baum, 72 S.W.3d 476 (Ark. 2002) (assault of a third-grader); Jefferys v. Griffin, 801 N.E.2d 404, 478-79 (N.Y. 2003) (assault of woman under anesthesia).
Remarkably, however, women are winning these third-party suits, and they are doing so even when prosecutors have failed to get them a conviction in a criminal trial.\textsuperscript{75}

Most victims choose to sue their assailant as well as a third-party.\textsuperscript{76} Sometimes women don’t even sue their attackers but instead just go after the institution in which the assault occurred.\textsuperscript{77} Not only are third-party suits wise because they increase a victim’s odds of recovery, but third-party tort litigation also lends itself to the likelihood of an earlier settlement, sparing the victim time and emotional energy, and many victims know this and, as such, proceed by dismissing altogether their attackers from the suit.\textsuperscript{78} Bublick suggests that “[t]he viability of third-party tort litigation [for victims of sexual assault] is evident not only by the large number of cases reaching appellate courts, but also by the wide variety of legal questions presented in the litigation…” and that, unlike domestic violence tort claims, “these tort cases are becoming more fully integrated into the overall patterns of tort litigation.”\textsuperscript{79}

Despite female victims of sexual assault being far more successful in being able to access civil court and secure recovery for injuries sustained, domestic violence victims and sexual assault victims share one very significant barrier to recovery: insurance policies. Just like in instances of domestic violence, the language in insurance policies stipulates that they cannot be held liable for “intentional acts,” meaning victims of sexual

\textsuperscript{75} \textit{See, e.g.}, St. Paul Fire & Marine Insurance Co. v. Engelmann 639 N.W.2d 192 (S.D. 2002) (woman accuses her doctor of rape, three others come forward, doctor is acquitted; on appeal SD Supreme Court held him accountable for malpractice and all women were awarded $450,000 in damages).

\textsuperscript{76} \textit{See, e.g.}, Velez v. City of Jersey City, 850 A.2d 1238 (N.J. 2004) (city employee sued both city councilman and the city); Blier v. Greene, 587 S.E.2d 190 (Ga. Ct. App. 2003) (suit filed by counseling patients against both clinic and therapist).

\textsuperscript{77} \textit{See} Ashmore v. Hilton, 834 So. 2d 1131, 1134 (La. Ct. App. 2002) (demonstrating a case brought by girl who was raped by inmate while performing community service for the city – she sued both the city and supervisor but not the inmate who raped her).

\textsuperscript{78} \textit{See} Doe v. Forrest, 853 A.2d 48, 51 (Vt. 2004) (victim was assaulted by deputy and originally sued both deputy as well as sheriff, but “plaintiff voluntarily dismissed him from the case because of his lack of assets”).

\textsuperscript{79} Bublick, supra note 67, at 67.
assault cannot file suits against them unless they are suing for some reason that is not connected with the criminal/intentional act of sexual violence. In *Korhonen v. Allstate Ins. Co.*, a woman was suing on behalf of her minor daughter for the sexual abuse she endured at the hands of a male family member, William, (who had already been criminally convicted), and for the alleged negligence of William’s wife Margaret for intentional infliction of emotional distress, negligently supervising a child, and negligent supervision from a previous incident in which the child accessed alcohol. The plaintiff also tried to sue Allstate Insurance Company, contending that Allstate had a duty to indemnify Margaret under the provisions of the Allstate policy. The court ruled that intentional infliction of emotional distress constitutes intentional conduct by Margaret, “and liability resulting from intentional conduct is excluded from coverage by Allstate's policy.” The court did say, however, that the other counts of negligent supervision were separate from the sexual assault and, “depending upon the actual circumstances, may give rise to a recognized duty.” Finally, the court held that Allstate’s exclusion of coverage for injuries or damages “resulting from intentional or criminal acts or omissions of ‘any insured person’ does not preclude coverage for separate injuries or damages caused by the negligence of a coinsured.” Therefore, Allstate *would* be liable for the negligent actions of Margaret since they are unrelated to the intentional sexual abuse of the child.

Allstate’s policy is like most if not all other insurance policies in this instance. It is standard practice to write into insurance policies a “no liability” clause that prevents

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81 *Id.*
82 *Id.* at 835.
83 *Id.* at 839.
84 *Id.*
85 *Id.*
them from being sued as a third-party for acts committed intentionally, no matter how heinous the harm. What are we to make of the wording of these homeowner policy clauses when we know that, statistically, the most dangerous place for a woman is in her own home? More than 60% of domestic violence occurs in the home, and 2/3 of sexual assaults are committed by someone the victim knows. While homeowners’ insurers still refuse liability coverage for victims of sexual assault, (sexual assault being an intentional act), sexual assault victims nonetheless can still receive compensation from other types of third-parties that have insurance, giving them a far greater chance of settlement, retaining counsel, and receiving substantial compensation. These are merely some of the ways in which civil suits assist women seeking relief for the injuries perpetrated against them, but is civil court really so much greater a forum than criminal court for pursuing gender-linked causes of action?

III. CIVIL VS. CRIMINAL FORA

As the Korhonen case illustrates, a woman can secure a defendant’s criminal conviction and still seek damages in civil court afterward. Furthermore, plaintiffs may lose at a criminal trial and still bring a successful civil suit. Likewise, tort law offers women an alternative when a prosecutor is unwilling or unable to bring criminal charges against a defendant or when a plaintiff doesn’t want to deal with government representatives. But there are many more components of civil trials that level the playing field for women where a criminal proceeding may disadvantage them.

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86 CHAMALLAS & WRIGGINS, supra note 1, at 72.
90 Bublick, supra note 67, at 68.
Nevertheless, domestic violence victims have very little chance of getting into civil
court due to all the legal and insurance-related obstacles women must skirt, so this
section is mainly about the advantages of civil court for victims of sexual assault and,
were the obstacles removed for victims of domestic violence, some of these
advantages could apply to domestic violence victims, too.

The most obvious distinction between civil and criminal trials is the burden of
proof required. In criminal trials, the prosecution has to prove “beyond a reasonable
doubt the guilt of a defendant,” whereas in civil trials, the plaintiff need only show
she proved her case by a “preponderance of the evidence.” The burden of proof is
lower, then, in civil trials than in criminal trials, making a plaintiff’s case more likely
to succeed. Really, the advantages of a plaintiff’s choosing to file a civil suit are
multitudinous. “In tort cases, the constitutional rights of defendants are rarely at issue.
Consequently, the frequent due process challenges that arise in the criminal context,
make only rare appearances in the tort law.”91 Also, unlike the criminal context, in the
tort context, “a victim can seek to discover and compel the defendant’s testimony, or
draw adverse inferences from the defendant's refusal to provide it.”92 Another
advantage tort law provides victims of sexual assault is that defendants must pay for
counsel should they want it, as they are not guaranteed free counsel in a civil trial.93

Having watched many criminal rape trials personally, I’ve seen the way in which
a lack of damning physical evidence changes the case into a matter of credibility,
constraining the jury to render their verdict on a determination of each party’s

91 Id. at 69.
92 Id.; see also Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (stating “the Fifth Amendment does not
forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative
evidence offered against them”).
93 Bublick, supra note 67, at 65.
truthfulness or credibility, thus making it difficult to secure a conviction when the burden is “guilty beyond a reasonable doubt.” If in a criminal trial, victims could “compel the defendant’s testimony or draw adverse inferences from the defendant’s refusal to provide it,” victim-plaintiffs would be able to use their attacker(s)’ silence against them, and “[s]ilence is often evidence of the most persuasive character.”\textsuperscript{94} Lawyer Max Kennerly agrees, writing, “[P]leading the Fifth in a civil case in federal court is never helpful, is rarely harmless, and is typically very damaging – indeed, it’s often fatal to the party’s claims or defenses.”\textsuperscript{95} While a smart defense attorney in a criminal case usually advises his/her clients not to speak, a defendant in a civil trial may not even have counsel, (as free counsel is not required), and consequently may not know any better and choose to remain silent. This, of course, would be an ideal scenario for a victim of sexual assault, as it is likely the perpetrator(s)’ silence would be interpreted as a tacit admission of wrongdoing.

For victims who have already gone through the criminal process and choose to take their attackers to civil court as well, there are some instances when “tort liability may be established simply by noting a defendant’s prior criminal conviction or guilty plea.”\textsuperscript{96} Even more advantageous to the plaintiff, “[i]n jurisdictions with collateral estoppel rules of this type…” a victim “need only try the question of damages to the jury.”\textsuperscript{97} This would be an excellent situation in which a plaintiff would benefit from adding a third-party to the suit, as the victim is unlikely to get much compensation.

\textsuperscript{94} United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-154 (1923).
\textsuperscript{95} Max Kennerly, \textit{Pleading The Fifth Amendment And Adverse Inferences In Civil Litigation}, \textsc{Litigation & Trial: The Law Blog of Plaintiff’s Attorney Max Kennerly} (April 3, 2013), http://www.litigationandtrial.com/2013/04/articles/attorney/pleading-the-fifth-adverse-inferences/.
\textsuperscript{96} Bublick, supra note 67, at 69; \textit{see also} Clark v. Baines, 84 P.3d 245, 246 (Wash. 2004) (holding that an Alford plea to assault with sexual motivation did not have collateral estoppel effect in subsequent a tort action).
\textsuperscript{97} Bublick, \textit{supra} note 67, at 69.
from the original assailant. With a guilty criminal conviction/plea being fast-tracked
to become a guilty verdict in the civil trial, where all that is left is a determination of
damages to be awarded, the odds of recovering significant damages skyrockets if the
guilt of the original defendant committed his harms somewhere, (other than the
home), where there should have been a duty of care. But these are just the procedural
benefits of victims using civil fora; substantive advantages exist, too.

Although an “occasional state statute creates a civil cause of action for sexual
abuse,” Bublick believes that “the most significant advantage [for victims] is that there is
no tort of rape.”\textsuperscript{98} Initially, this would seem like civil suits would bar recovery for
injuries sustained from sexual violence, but all it actually means is that victims must seek
relief “under more general causes of action that proscribe intentional and negligent harm,
such as battery, assault, false imprisonment…negligent infliction of emotional distress…
malpractice,” and so on.\textsuperscript{99} Because sexual abuse statutes are “very specifically written
and rigidly applied,”\textsuperscript{100} criminal sex-crime cases require the re-telling of such detailed
intricacies about the particulars of what happened during what, for victims, was an
extremely traumatic event. It’s difficult to prove beyond a reasonable doubt every
statutory provision in these laws, and many survivors of sexual violence often describe
the criminal trial as “the second rape,” (referred to as re-victimization), due to the nature
of the questions asked and the attempt to prove the victim is lying.\textsuperscript{101}

A perfect example of this re-victimization can be seen in the criminal case of

\textit{State v. Flynn}. From the opinion: “While there was no direct testimony that anyone

\textsuperscript{98} \textit{Id.} at 70. \\
\textsuperscript{99} \textit{Id.} at 72. \\
\textsuperscript{100} \textit{Id.} at 71. \\
observed the defendant contact the victim's vagina with his lips or tongue, the State did
present circumstantial evidence of that contact."\textsuperscript{\textit{102}} The victim went on to testify about
the semen in her vagina while the court did an insufferably in depth analysis as to what
constituted cunnilingus, digital penetration, and essentially made the victim relive the
attack all over again.\textsuperscript{\textit{103}} The criminal process of prosecuting a rape or sexual assault case
generates a tremendous amount of pain for victims who want nothing more than to forget
what happened. Luckily, however, “[t]his sort of detailed focus on minute intricacies of
sexual interactions stands in sharp contrast to the more fluid tort law. In battery, for
example, a plaintiff need only show that she was harmed or offended by contact and that
the defendant intended the contact to harm or offend.”\textsuperscript{\textit{104}} Likewise, things like proof of
penetration, force, or whether a defendant received “sexual gratification” from the act,
(all of which are staples of criminal rape/sexual assault statutes), are simply not present in
tort.\textsuperscript{\textit{105}} Thus, civil suits give victims a lower standard of proof, couched in non-sexualized
causes of action, and as such give agency back to the victim to decide what she has to say
to meet this lower standard while allowing her to keep perhaps more painful details to
herself. For all the aforementioned reasons, it’s clear that, while domestic violence
victims are practically barred from bringing civil suits, it is most advantageous for
victims of sexual abuse to seek out tort law to recover damages, whether they have
already gone through a criminal trial or not.

\textsuperscript{102} State v. Flynn, 855 A.2d 1254, 1261 (N.H. 2004) (case used as an example of how plaintiffs can be re-
victimized during a criminal proceeding).
\textsuperscript{103} Id. at 1261-7.
\textsuperscript{104} Bublick, supra note 67, at 72.
\textsuperscript{105} Id. at 73
IV. CONCLUSION

Tort law has a duty of care to women, especially when it is public knowledge that every 9 seconds in the United States a woman is assaulted or beaten.\textsuperscript{106} Unfortunately, women who are victims of domestic violence have no liability insurance to fall back on, “no funds they can tap into to secure compensation.”\textsuperscript{107} These women are mostly being abused by an intimate partner, and mostly in their homes, and yet homeowners’ insurance, which typically offers “broad coverage for torts committed anywhere in the world,” includes in virtually all of its policies an exception to coverage for “intentional acts.” The Restatement of Torts (Third) has classified domestic violence as an intentional tort, which virtually eliminates any chance for an insurance company to cover the injuries women sustain from abuse. Some homeowners’ insurance doesn’t provide coverage if a family member tries to sue another family member, worsening the problem. Victims of domestic violence may not sue third parties for their harms, and lawyers are less likely to take their claims because of this lack of insurance. Even if she were able to make it past all these barriers, a woman is faced with a small window of opportunity to file her claim compared to other torts, a period of time that clearly does not take into account the context of a woman in an abusive relationship and what her hurdles may be to filing her claim within 1-2 or 2-3 years. So, there are two options in order for women to be able to sue their abusers: either domestic violence must be classified as something other than an intentional harm or liability insurance needs to be provided to victims. In addition, statutes of limitations need to be extended to take into consideration the challenges to filing a claim near the time of injury when a woman is in an abusive relationship.

\textsuperscript{106}\url{http://domesticviolencestatistics.org/domestic-violence-statistics/}
\textsuperscript{107} \textsc{Chamallas} & \textsc{Wriggins}, supra note 1, at 70.
Nowhere is the presence of insurance and its value to women more obvious than in the realm of sexual assault cases. Unlike domestic violence victims, victims of sexual assault can sue third parties, and most do. The recent massive wave of sexual assault cases flooding civil courts is indicative of the power of the presence, (or absence), of insurance, perhaps because “insurance drives litigation.” Though domestic violence and sexual assault are both gender-linked harms, victims of sexual assault have the privilege of both access to insurance through third parties as well as the ability to recover damages from a civil suit, even when the plaintiff has been unsuccessful in a criminal trial.

It is essential that all women who are victims of any form of gender-linked violence should have access to civil justice, and right now they do not. Intentional tort laws pertaining to domestic violence still very much mirror the intentional tort laws from a hundred years ago, and to curb violence against women and girls changing this needs to become a priority at every level: through legislation, the newest Restatement, and case law. Domestic violence, still considered a private family matter in many households, and the “trickle of [domestic violence] cases that make it into the torts domain are far too few to ‘mainstream’ the injury and affect prevailing prototypes of intentional torts.” As stated in the introduction, 92% of women surveyed said that domestic violence and sexual assault were their top concerns. It’s time that these women, and all women and men, become aware of the barriers to recovery domestic violence victims face so that we can demand change and encourage more victims to pursue litigation. With the latest proliferation of domestic violence by professional athletes, a national conversation is

108 Id. at 71.
109 Id. at 76.
finally being had about this too-often fatal issue. Alongside this national debate, perhaps
if we can mainstream these tort cases, domestic violence torts, too, will become “more
fully integrated into the overall patterns of tort litigation”\textsuperscript{110} in the way that sexual assault
torts have been, so that one day, battered women can receive the same access to relief that
sexual assault victims have. All women deserve to be made whole.

\textsuperscript{110} Bublick, \textit{supra} note 67, at 67.