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B. Wriggins find these rulings especially significant, because some courts, in computing damages, still rely on outdated Bureau of Labor Statistic tables that are divided by race, gender, and age.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